04-CV-083
Request To Testify
2/11 DC

LAW OFFICES

KRUPNICK CAMPBELL MALONE
BUSER SLAMA HANCOCK LIBERMAN & McKEE

A PROFESSIONAL ASSOCIATION

JON E. KRUPNICK *
WALTER G. CAMPBELL, JR *†
KEVIN A. MALONE *
THOMAS E. BUSER *
JOSEPH J. SLAMA *
KELLY D. HANCOCK ***†
SCOTT S. LIBERMAN
ROBERT J. MCKEE
LOUIS R. BATTISTA
IVAN F. CABRERA †
ROBERT D. ERBEN †††
KELLEY B. GELB ††
MICHAEL J. RYAN
CARLOS A. ACEVEDO **

700 Southeast Third Avenue
Suite 100
Fort Lauderdale, Florida 33316-1186

Telephone (954) 763-8181
Toll Free (877) 763-8181
Fax (954) 763-8292
www.krupnicklaw.com

NICK S. DAVITIAN
ERIC M. ELLSLEY
JACQUELYN S. HOLDEN ***
HOLLY D. KRULIK
SEAN F. THOMPSON

* BOARD CERTIFIED CIVIL TRIAL LAWYER
** ADMITTED IN NY ONLY
*** ADMITTED IN NY
† ADMITTED IN DISTRICT OF COLUMBIA
†† ADMITTED IN NORTH CAROLINA
††† ADMITTED IN COLORADO

January 11, 2005

Peter G. McCabe
Administrative Office of the U.S. Courts
One Columbia Circle, N.E.
Washington, DC 20544

VIA FAX (202) 502-1766

RE: E-Discovery

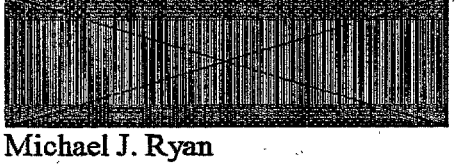
Dear Mr. McCabe:

By this letter, I am requesting to testify on February 11, 2005, in Washington, D.C., before the Federal Rules Committee regarding E-Discovery.

I have been personally involved in the national debate surrounding the issues of obtaining, producing, and managing electronic discovery. Further, as the chair of ATLA's E-Discovery Litigation Group, I communicate regularly with other lawyers who represent consumers and injury victims; my testimony will not be on behalf of ATLA, but rather in my individual capacity. Finally, having discussed many of the issues raised by the proposed Federal Rule changes with defense attorneys, as well as having argued these matters to various courts, I believe I have a perspective on the issues that are also important to the producing corporate defendants and the courts.

Thank you very much for your time and attention to this matter. I will submit written comments under separate cover.

Sincerely,



Michael J. Ryan

MJR/bds

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†† ADMITTED IN NORTH CAROLINA
††† ADMITTED IN COLORADO

January 28, 2005

Peter G. McCabe
Administrative Office of the U.S. Courts
One Columbia Circle, N.E.
Washington, DC 20544

VIA FAX (202) 502-1766

RE: E-Discovery

Dear Mr. McCabe:

My name is Michael Ryan and I am partner in the law firm of Krupnick Campbell Malone et al in Fort Lauderdale, Florida. As a matter of full disclosure, I am also chair of the American Trial Lawyer Association's Electronic Discovery Litigation Group. I do not offer my comments on the proposed rule changes as a representative of ATLA, but rather as an individual lawyer.

For the past few years, I have been heavily involved in addressing Electronic Discovery issues throughout the Country. I have spoken to many lawyers regarding the issues involving electronic discovery that are now presented in the proposed rules. In addition, I have personally briefed and/or argued before courts the issues of preservation, collection, and production of electronic evidence as well as the propriety of cost-shifting.

It is axiomatic that rules changes are a significant event for the courts and the litigants. Such changes must be carefully constructed to endure the test of unforeseen circumstances and advancements brought by time, technology, and ingenuity. As such, any proposed rule changes must be cautiously evaluated. This Committee, in inviting comment from all sectors, certainly recognizes this importance of the process and the solemn duty presented.

Equally important, rule changes involving discovery must be in response to real threats to the administration of justice or legitimate needs of the parties and the courts. Changes should not be the result of perceived threats or single-minded efforts of interested parties particularly where those interests

conflict with the presumption of liberal and fair discovery for the parties.
As we have seen, much of what the Committee seeks to do is controversial. It is my intention in offering these comments to be as objective as possible, understanding that my perspective is guided from my real-world experience.

I must first preface my comments on specific proposed rule changes by commending the Committee in recognizing the valuable nature of electronic information. As a result of confusion and misunderstanding on how electronic evidence should be treated, significant resources of parties and courts have been unnecessarily consumed. It is true, unlike paper separated from a file cabinet, simply producing electronic data in a paper form destroys the integrity and usefulness of the data. The recognition by the Committee of the value of electronic information is welcomed and necessary to address true challenges to the courts and litigants.

RULE 16(B) AND RULE 26(F)

Equally worthy of praise, the Committee has proposed changes that will simplify the courts' work, reduce expenditure of resources by the parties, and which will survive the test of time, no matter what technological changes or legal developments occur. The early attention to the electronic discovery issues that will be presented in the case and the meet and confer provisions, set forth in proposed Rule 16(b) and proposed Rule 26(f), are appropriate and measured to meet the legitimate present needs of the Courts and the litigants. Moreover, the concepts of sampling and inspection set forth in proposed Rule 34 are true advancement towards reducing unnecessary costs associated with predicate discovery. These are welcomed proposals for all except those who wish to continue to resist producing electronic information.

From my personal experience, right now, there is far too much time wasted and money spent and court time dedicated to discovering the existence of available electronic information in the producing parties' possession. The hunt for this information, because producing parties have been able to claim electronic data is some how foreign or difficult to understand, has resulted in unnecessary motion practice and depositions. This is neither efficient nor consistent with the expectation of the Rules that such "hide and seek" efforts should be avoided. Therefore, disclosure is an essential and necessary advancement that properly recognizes the tremendous waste of resources by the litigants and the Courts in simply understanding the scope of available electronic data. Proposed Rule 16(b) and Rule 26(f) changes, if implemented by the Courts aggressively, will stand the test of time and technology.

Similarly, the requirement that the parties engage in a meaningful meet and confer is an essential advancement. I have personally witnessed the great efficiencies achieved by these meetings. When the lawyers along with information technology representatives sit down and talk in a language the technology representatives understand, mounds of paper and lengthy depositions are avoided. There is no work product or attorney client disclosure of information in these meetings. Instead, these meetings recognize the obligations of the parties to disclose information in a truthful, accurate, and forthright manner. This proposed change will most certainly reduce the time of courts and litigants dedicated to predicate matters that are properly the subject of discovery.

Those proposed changes in Rule 16(b) and Rule 26(f), as well as the general recognition that electronic discovery is valuable, are a meaningful response to present and legitimate needs of the courts. That being said, however, I do have grave concerns regarding the implementation, application, and survivability of the rule changes proposed in 26(b)(2) and Rule 37. I believe the implementation of these rules will significantly reduce the gains in efficiency found in proposed changes to 16(b) and 26(f). Ingenuity and technological advances have truly taken us to a place unthinkable 20 years ago. Courts were struggling with the issues of electronic discovery 20 years ago. And, as the issues percolated through a system of precedence and factual inquiry in a case-by- case analysis, the courts progressively addressed these issues over the years. Just 10 years ago, the body of law was evolving further to address technological changes. Just 5 years ago, the scope of these proposed rule changes were barely even being contemplated.

The Committee Notes recognize that the technological advancements will alter how we view available electronic data. However, from the public comments directed to the Committee as well as the Committee Notes appended to the proposed rule changes, some of the more controversial proposed rule changes appear to be motivated, at least in part, by a sense of overwhelming cost differential in electronic discovery. I do not believe this "sky is falling" concern is accurate.

For years, in large document intensive productions, producing parties were sending staff and lawyers into dirty, dingy warehouses to sort through thousands of boxes. The act of simply identifying and retrieving this "data" was costly, inefficient, and led to abuses in production. Requesting parties received a "business record production" where the keys of the warehouse are figuratively transferred. Document "dumps" and over production led to colossal and unnecessary dedication of resources during the predicate act of identifying and retrieving documents. From there, copying and storage costs were often staggering and in the end neither the requesting or producing party had the ability to annotate and organize the documents efficiently.

Yet, those now advocating for rule changes meant to increase restrictions on preserving and obtaining electronic data do not adequately address whether or not there is truly any differential in costs when dealing with electronic production. The costs may be different but is not accurate to state uniformly they are more. Instead of spending lawyers' time and staff time wading through boxes in a storage facility, information technology staff can implement system wide automated searches. Instead of copying millions of pages of documents or having staff dedicated to watching over document inspections at facilities, data can be sorted for both sides and produced so as to be reviewed off-site. Instead of taking years to sort through paper, technological advancements have made meaningful review more efficient for both the producing and requesting parties.

Therefore, in examining whether or not proposed rule changes are necessary or whether or not there is a cost differential sufficient to justify rule changes meant to limit access to discovery, a fair and reasonable comparison to all the cost factors involved in a large paper production is required. When viewed objectively and considering all the cost factors that made up these large document productions, I do not believe it can be stated that there is a system wide threat sufficient to alter the present scheme of access and discovery. The case law viewed as "gold standard", as well as the ability of the courts to address fact intensive issues, are sufficient to address many of the concerns regarding scope and breadth of

electronic production. Instead, the Committee proposes a system that will result in motion practice that will most certainly clog the courts in routine cases if for no other reason because it is an available strategy.

RULE 26(B)(2)

The approach to production as outlined in proposed rule 26(b)(2) will invite unnecessary motion practice and eliminate the gains contemplated by proposed Rule 16(b) and 26(f). The motivation behind proposed rule 26(b)(2) appears to be related to concerns that requesting parties are requesting obsolete data and "back-up" data regularly and wholesale. This is simply not the case. To be sure, there may be anecdotal examples of such requests. However, other than to identify its existence, I for one have never requested the production of such data. Further, to my knowledge, it would be a rare request in a large document production case as often seen in the multi-district litigation. The costs associated with finding and culling through such data sought through a wide net request is truly prohibitive in most circumstances for both sides. Instead, in those cases in which such data is necessary and targeted, the case law evolving is sufficiently flexible to address the factual situations that may be presented throughout the years. In fact, much of the commentary draws upon the universally recognized gold standard analysis from the recent Zubulake case.

To alter the scheme of the rules in response to anecdotal events also suggests that the Courts are not equipped to address this issue. Any survey of published and reported cases will reveal the courts are adequately addressing the issue of back-up tapes. Furthermore, what is difficult and costly to search today may be efficiently produced and searched in just a few years. In the meantime, proposed rule 26(b)(2) will live on and if technology has changed, as it will, the motivations behind the proposed rule change will be superfluous. Interestingly, the comment to proposed Rule 26(b)(2) recognizes this fact ... that the proposed rule may not be necessary in years to come. With that recognition, and with case law evolving without any true threat to producing parties, tinkering with the rules can only lead to unforeseen problems and complications.

Also disturbing is the suggestion that meta-data falls into the category of discovery that requires a showing of "good cause". It is not clear where this proposal came from or why it is seen as necessary, but forcing meta-data into the category of 'good cause' does not adequately recognize the value and accessibility of this electronic information. The Notes, by adopting language from the Manual for Complex Litigation, (4th) Section 11.446, give a stamp of approval to a principle that is simply not accurate. Producing word-processing files and meta-data is not the cost equivalent of back-up tapes and in fact, as has been suggested to the Committee, it may be more costly to strip meta-data in an electronic production. It is concerning that the inclusion of meta-data into the category of back-up tapes may represent, rather than a legitimate matter for the Committee, an effort by interested parties to avoid producing important and easily available data.

An interesting dilemma is also presented by comparing the Notes and the proposed rule on how Rule 26(b)(2) is to be interpreted by the producing parties.

> "The amendment to Rule 26(b)(2) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably

> accessible. The responding party must identify the information it is neither reviewing nor producing on this ground"

From my reading of proposed Rule 26(b)(2), the proposed rule would not excuse a party from producing anything. Instead, the rule invites motion practice on whether certain information must be produced. This is a subtle but important point as courts look to the Notes as authoritative. When the Notes clearly state the parties are excused from producing a category of discovery, that will be how the proposed Rule is interpreted. To be sure, there is later commentary on options including sampling, but the Notes clearly create as presumption that producing parties are excused from producing and this is to be found nowhere in the proposed rule. Moreover, sampling is inconsistent with being excused from producing. Further, nowhere in the proposed Rule 26(b)(2) does the producing party have a specific obligation to identify what the party is not producing or reviewing. While this may hopefully be part of proposed Rule 16(f) disclosure, given the fact that the Notes to proposed Rule 26(b)(2) say a party is excused from producing, there will certainly be producing parties who interpret this unfairly and inaccurately to suggest they need not disclose fully relying on the literal words in the body of proposed Rule 26(b)(2).

In addition, the Note to 26(b)(2) cited above, through its broad and certain language, conflicts with the evolving body of law. That is, the proposed Rule excuses but the case law does not. Instead, the evolving case law addresses this issue through sampling, factual inquiry and cost-shifting (where appropriate) rather than excusing production as a presumption. The proposed Rule is silent on this issue, but the Notes parenthetically recognize this option. Excusing production for a category of discovery is not appropriate or necessary, nor does this provide sufficient flexibility for future technological advances.

More pragmatically, Rule 26(b)(2) invites, if not encourages, producing parties to resist production and forces requesting parties to seek rulings from the Courts. The two-tiered approach invites delay and motion practice without any downside to the producing party. Simply put, no producing party, given the opportunity to resist discovery and invited to do so by the rules, will waive the advantage of available tactical moves to force the issue before the courts. I have personally experienced Defendants claiming active databases are not accessible because they require effort to retrieve ... even in a post Zubulake environment. While such a position would not be intellectually accurate, given the opportunity to find any tactical advantage in the interpretation of the rules, such producing parties will certainly create more work and chaos for the courts.

However, more troubling is the result when we synchronize the changes in proposed Rule 26(b)(2) with those in Rule 37.

RULE 37

As proposed, unless there is an order of the court preserving electronic evidence, there is no obligation for preservation under Rule 37 so long as such destruction operated from "routine" destruction. The proposed rule changes will encourage companies to adopt stringent and expedited routine destruction policies. Permitting such behavior conflicts with the body of law that has evolved in state and federal jurisdictions and to that extent the proposed rule change encroaches upon substantive law. Moreover,

the Rule 37 safe harbor, when combined with the unilateral decision making of what is "reasonably accessible" under proposed Rule 26(b)(2), results in the very real prospect of motion practice for months under proposed Rule 26(b)(2) combined with a loss of data due to routine destruction during that delay.

Further, the lack of a measurement of culpability eliminates the ability of the requesting party to inquire as to the motivation of the producing party in adopting routine destruction policies that may encourage expedited destruction of valuable information. This is the basis of spoliation substantive law. The alternative language in the footnote to proposed Rule 37, particularly in changing the conjunctive to "or", brings the proposed rule more in line with substantive law in those states for which this rule would be important and more adequately serves as the deterrent to inappropriate destruction.

Finally, proposed Rule 37 operates to limit the ability of the Courts to control discovery and sanction the non-complying party's malfeasance. It is unclear what ill or threat the Committee believes this proposed rule change will alleviate. It is not apparent in the Notes or elsewhere that there have been a flood or inappropriate sanctions imposed due to routine destruction of data. To the contrary, the recent popular examples, which have already been cited to the Committee by others, strongly suggest that the Courts remain reticent to impose sanctions.

The Courts are equipped to address the issues presented by proposed Rule 26(b)(2) and proposed Rule 37. For years, requesting parties worked through piles of microfiche and toiled in dank large warehouses with thousands of boxes. There was no perceived need for rule changes by the Committee to counter abuses by producing parties who "data" dumped through "ordinary course of business" productions involving millions of physical pages. Now that technology has leveled the playing field there is a push by large producing parties to limit preservation, permit destruction, increase the costs of obtaining through motion practice, and generally identify categories of discovery that is off-limits.

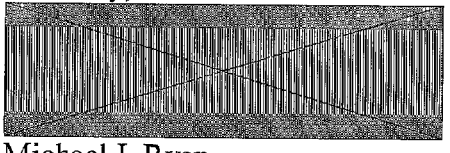
RULE 26(B)(5)(B)

With regard to the provisions of proposed Rule 26(b)(5)(B), seeking to codify a "claw back" process, I would welcome such a process if I thought it were achievable and realistic. But, consistent with my views that the rules should only be amended when there is a legitimate need and where the rule will actually accomplish its goal, this provision is unnecessary and should be left to the parties. This proposed rule change will not accelerate discovery or offer any real gains to the Courts or the requesting parties. In my experience, producing parties guard carefully the production of privilege documents, to the point of line-by-line, document-by-document reviews. This perceived need is simply non-existent. Instead, this rule will invite mischief. Unilateral determinations, without the ability to seek court review at a time that is not defined or restricted only by the term "reasonable", will lead to chaos. There is no requirement in the proposed rule that the document actually be privileged. Further, it may encourage parties on the verge of settlement to mutually agree, for the benefits of their individual clients in the litigation and against the public interest, to permit the "claw back" of thousands of documents that were never really privileged. Finally, how this impacts the substantive law on inadvertent production is a real issue. Simply put, there is no need for this provision as it offers no benefits to the administration of the Courts' business and does nothing but invite mischief.

In summary, the Committee deserves commendation and recognition for addressing a complicated and controversial area. The controversy over some proposed provisions should not prevent recommendation for passage of the proposed provisions, like proposed Rule 16(b) and proposed Rule 26(f), which will immediately reap benefits to the courts and the litigants and will certainly stand the test of time.

Thank you for permitting me to have a role in this important process.

Sincerely,



Michael J. Ryan
Signed in his absence to avoid delay

MJR/bds

04-CV-083 Supplemental Comments

LAW OFFICES

KRUPNICK CAMPBELL MALONE BUSER SLAMA HANCOCK LIBERMAN & McKEE

A PROFESSIONAL ASSOCIATION

JON E. KRUPNICK ‡
WALTER G. CAMPBELL, JR ‡†
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February 15, 2005

Peter G. McCabe
Administrative Office of the U.S. Courts
One Columbia Circle, N.E.
Washington, DC 20544

VIA FAX (202) 502-1766 and E-Mail

RE: Supplemental Written Comments regarding
Proposed Rule Changes Involving E-Discovery

Dear Mr. McCabe:

I testified before the Committee on February 12, 2005. Please accept this as a supplement to my testimony and my written comments.

Problems with Defining "Accessibility" and Why the Committee Should Avoid Doing So.

The difficulty of defining "accessibility" and "inaccessibility" in the context of proposed Rule 26(b)(2) has consumed volumes of commentary. Central to the discussion has been the concept of burden in obtaining the data as a measure of whether or not the electronic information was accessible or inaccessible.

Upon reflection and further consideration, I believe injecting burden into the definition, or making burden a component of the analysis, compounds the difficulty of actually obtaining electronic evidence. Additionally, it provides a producing party an unnecessary opportunity to argue burden repetitively and with differing standards of burden justifying non-production. In essence, by injecting the concept of burden into the definition or as a foundation of accessibility, the Committee is modifying a robust body of law applying existing Rule 26 "unduly burdensome" principles and treating this discovery prejudicially.

As must be clear at this point, all electronic or digital evidence is available and accessible. The question of whether or not the data is more akin to paper such that the producing party must produce such discovery without objecting or seeking protection under Rule 26 is the central issue. The current Rules involving burden and the percolating case law involving electronic discovery necessarily turn on a factual inquiry. The Committee, through both the actual language of proposed Rule 26(b)(2) and the unusually lengthy Notes intended to accompany any new Rule, is struggling to fashion a precise Rule to address incredibly broad and diverse factual scenarios. However, both the existing Rules and the evolving case law adequately provide a paradigm such that a producing party can already argue burden in producing data or electronic/digital evidence under Rule 26.

I was specifically asked, based upon testimony of another individual earlier in the day, if I agreed with Sedona Principle Number 8. The question was asked in the context of defining accessibility. As I testified, I was not, off the top of my head, completely familiar with Sedona Principle Number 8. However, I was in agreement with the definition of "Active Data" as described earlier in the day.

I have since gone back to "The Sedona Principles for Electronic Document Production", available on www.thesedonaconference.ord. Principle Number 8 states:

> The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient search and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

"Active Data" is defined by the Conference as:

> Active Data is information residing on the direct access storage media of computer systems which is readily visible to the operating system and/or application software with which it was created and immediately accessible to users without undeletion, modification or reconstruction.

After further review and consideration of the Committee's questions to me, I do <u>not</u> agree with Principle Number 8 if it is to be used as a line of demarcation for production and for defining accessibility. The Principle was not intended to be a specific statement of accessibility for production under Rule 26, as must be clear from the use of such vague terms as "and other sources of data and documents". Instead, the principle is just that – a principle or general statement as a guideline, and not, from my reading, intended to be a precise definition for limiting scope for discovery. Certainly, given the level of specificity and precision being sought by the Committee, Principle Number 8 language should <u>not</u> serve as the foundation for that scope.

Though it would be better to obtain a variety of comments from technology experts, I generally agree with the definition of "Active Data." However, again, I do not believe that definition can or should be used as a definition for "accessibility" nor was it intended as such. I base this upon the thoughtful commentary and testimony of technology experts who correctly identify realistic factual scenarios where potential discovery would not be considered "active data" but would otherwise be producible with little incremental burden on the producing party. Moreover, like the struggle faced by the Committee on defining a principle of technology that is advancing so quickly, that definition will not comport with the presumptions of production and "unduly burdensome" principles presently guiding production of traditional discovery. In short, to limit presumptive access to discovery with a definition of "active data" would not be technologically appropriate or assist the Courts.

As was discussed by others testifying, there are many examples that can be presented (even without any advancement or prediction of advancement of technology) that such a definition would not be appropriate for even "first tier" production. For instance, active servers recently taken off line with data contained therein. It may not be "living and breathing" in the sense that information continues to flow to the medium, but to call it inaccessible or "not reasonably accessible" would be incorrect. In fact, the burden of obtaining information in that example may be far less than would be necessary to take from an active database that is highly complicated to download or search.

Instead, it is important to remember that this debate for the purposes of rule construction is not really about the technology. The technologist would say everything is accessible. While "accessibility" can be defined from a technological view, the Committee is struggling to define "accessibility" from an entirely different perspective. "Accessibility", as the Committee seeks to define it for rules constricting production, is not a term therefore of scientific certainty, but an attempt to force fit broad technological presentations into a set of rules applied by non-technologists. This clash of definitional perspectives results in an impossible mission: to define for all situations and for some period of time to come, a technological certainty superimposed by Rules of Civil Procedure which must necessarily be flexible and permit some measured level of uncertainty.

The solution I propose to this impossible construct is simple: there is simply no need to define "accessibility" in the Rules themselves. It is far too complicated for the Committee to provide "a one-size fits all" definition since two (2) years from now, the Notes intended to offer guidance may not be applicable. The Rules already provide for a producing party to claim that something is unduly burdensome in production, and adding another layer to the analysis only complicates the process. Much of the struggle the Committee faces is really in the sense of trying to construct Notes to serve as a "position statement" in the evolving area of electronic and digital information. That is simply unnecessary.

I believe that the simplest and most likely method to effectuate the intended goals would to make the Rule 16(b), Rule 26(f), Rule 34 and Rule 33 changes and leave the scope of what is producible to the

parties and the Courts under existing Rules and law.

The Notes to Proposed Rule 26(b)(2) Excuse Production if Producing Unilaterally Determines Not Reasonably Accessible and Rule 37 Will Thereby Permit Destruction Without Sanction of That Material.

I raised a point during my testimony regarding language in the Notes excusing a party from discovery. The point I was attempting to make was regarding the interaction of proposed Rule 26(b)(2) and Rule 37, based upon my concern that the Notes actually create an environment where information thought to be "second tier" can and will be destroyed. Specifically, the Notes to proposed Rule 26(b)(2) state:

> *The amendment to Rule 26(b)(2) excuses a party responding to a discovery request* from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must identify the information it is neither reviewing nor producing on this ground. (emphasis added).

As proposed, unless there is an order of the court preserving electronic evidence, there is no obligation for preservation under Rule 37 so long as such destruction operated from "routine" destruction. The proposed rule changes will encourage companies to adopt stringent and expedited routine destruction policies. Additionally, utilizing the language from the Notes, a producing party may argue because they are excused from producing such discovery there is no need to preserve the information. Certainly, the reviewing court will be without the authority to sanction such behavior.

Those who are traditionally producing parties respond to this obvious concern by suggesting producing parties would be ill-advised to destroy. While it may not be directly advised by a lawyer, because proposed Rule 37 prohibits the court from considering sanctions unless there is a preservation order so long as the producing party claims the destruction was the result of routine destruction, such destruction is not prohibited or sanctionable. This of course seems unjust in light of what we know of spoliation law, but that is the point – proposed Rule 37 conflicts with both the present practice in the federal judiciary and potentially substantive law.

Proposed Changes to Rule 16(b), Rule 26(f), Rule 33 and Rule 34 are Sufficient by Themselves.

Finally, it may be difficult, considering how much time and resources have been dedicated to this process, to simply conclude that the Rule 16(b), Rule 26(f), Rule 33 and Rule 34 proposed changes, would be a sufficient or an adequate result from this process. Moreover, there may be those who are vested in the belief that there must be some definitional assistance provided or all the work would be wasted.

As must now be clear from virtually all the testimony and comments, the proposed changes to Rule 16(b), Rule 26(f), Rule 33 and Rule 34 are a significant advancement and clearly justify the work of the

Committee. The Committee need not feel the obligation to issue the equivalent of a present statement of e-discovery principles or a position paper on the concepts of electronic discovery. I fear that the Notes and the controversial rule changes will represent (not because of a lack of knowledge or dedication by the Committee but as a result of the technological realities) nothing more than a snap-shot in time guideline. By way of example, when those drafting the Manual for Complex Litigation, (4th) Section 11.446, included metadata as an example of costly discovery that need not be produced, that may have been based upon the information or knowledge then available. However, now, that principle is simply incorrect; producing metadata is no more burdensome to produce than the text based upon advancements of technology and often times is beneficial to the producing party to preserve. To issue broad statements now on matters of instant messaging, text messaging, and other technological matters may be obsolete in a very short period of time.

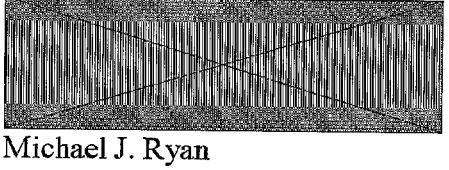
Said another way, if the Rule 26(b)(2) and Rule 37 changes are implemented, it will not be long before a litigant will be standing in the well of a courtroom to argue that the Committee could not have envisioned a particular advancement or attempting to argue by analogy what the Committee would think of an unforeseen technological, not legal, factual scenario. I do not believe this is a fanciful hypothetical. Instead, it is proof that such broad statements and Rule changes are simply not necessary.

When matters are preserved and the parties are engaged in a robust and meaningful discussion, the Courts and the litigants are adequately equipped to address the diverse and factually intensive issues being addressed by the proposed Rule 26(b)(2) and Rule 37 changes. To do more will lead to complications; even after months of testimony, debate and reams of paper filed as commentary, some complications appear to be identified for the first time in the last day of hearings.

If this Committee proposes the Rule 16(b), Rule 26(f), Rule 33 and Rule 34 changes alone, the Committee's work will have been fully justified and litigants and courts will benefit greatly.

Again, thank you for permitting me to have a role in this important process.

Sincerely,



Michael J. Ryan

MJR/bds