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Federal Bar Council

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February 14, 2005

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on the Proposed Amendments to the Federal Rules of Civil Procedure Regarding Discovery of Electronically Stored Information

Dear Mr. McCabe:

I am the President of the Federal Bar Council, a non-profit organization of over 2,000 federal court practitioners and judges in the Second Circuit. On behalf of the Council, I submit the following comments to the proposed amendments to the Federal Rules of Civil Procedure concerning the discovery of electronically stored information. [1]

As a general matter, the Council supports the implementation of rules governing electronic discovery. We believe that the guidance provided by these rules is essential for this rapidly expanding area of federal civil practice. The specific focus of our comments is on four aspects of the proposed rule amendments:

- The two-tiered approach to the discovery of electronically stored information, and in particular the "reasonably accessible" standard in the proposed amendment to Rule 26(b)(2);
- The proposed "claw-back" amendment to Rule 26(b)(5)(B) relating to the production of privileged information, and the potential need for certification of sequestration, destruction or return;
- The "safe-harbor" provision in the proposed amendment to Rule 37, which would shield litigants from sanctions when electronically stored information is inadvertently destroyed.
- The potential applicability of the proposed amendments to "voice-mails," and whether voice-mails raise issues different from other electronically stored media.

[1] This letter does not necessarily represent the views of our judicial members.

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We address each of these issues in turn.

A. *Two-Tier Approach to Discovery of Electronically Stored Information*

The proposed amendment to Rule 26(b)(2) would permit the producing party to object to a discovery request that calls for electronically stored information that is not "reasonably accessible," thereby requiring the requesting party to file a motion and establish "good cause" before compelling the production of the disputed data. The Committee's proposal to limit discovery, in the first instance, to electronically stored information that is "reasonably accessible" is a sensible recognition of the potentially enormous burden and expense presented by electronic discovery requests under the current Rules. In general, the proposed two-tiered approach to electronic discovery is a welcome clarification of the parties' respective burdens in discovery.

We understand that the Committee is particularly interested in comments as to whether further explanation of the term "reasonably accessible" would be useful. In our view, further clarification is needed to explain the difference, if any, between the "reasonably accessible" standard and the current proportionality limitations that are already encompassed within Rule 26(b)(2). To the extent that the "reasonably accessible" standard is substantially similar to the "undue burden" standard contained in Rule 26(b)(2), it must be considered whether this new standard may result in unnecessary confusion and litigation and whether it would be preferable to simply incorporate the existing standard into the new language of the amendment.

The Committee Note accompanying the proposed amendment gives concrete examples of electronically stored information that is "ordinarily" not considered to be "reasonably accessible," including back-up tapes for disaster recovery, legacy data and deleted data. Interestingly, when the proposed Committee Note attempts to explain why these specific categories of electronically stored information are not "reasonably accessible," the Committee uses terminology commonly associated with objections based on "undue burden" and "expense." For example, the Committee Note states that "legacy data" which is retained in obsolete systems "may be costly and burdensome to restore and retrieve." Likewise, the proposed Committee Note provides that deleted data may be "inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts." By describing the substantial effort, expense and time-consuming nature of responding to certain electronic discovery requests, it becomes difficult to distinguish between the "reasonably accessible" standard and the current proportionality standards in Rule 26(b)(2) that address "burden" and "expense."

The proportionality rules set forth in Rule 26(b)(2) appear to respond, at least in part, to the same concerns that the Committee Note identifies under the proposed "reasonably accessible" standard. Specifically, Rule 26(b)(2)(iii) currently permits the court to limit discovery where "the burden or expense of the proposed discovery

outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

The exclusive focus on "accessibility" in the proposed amendment may subordinate the merits of objections to the "burdens" and "expenses" associated with electronic discovery requests. As the Committee recognizes, "accessibility" is not the sole cost and burden associated with electronic discovery. Indeed, the proposed Committee Note expressly recognizes that "[i]n many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial."

The Committee's proposed Note does not resolve the issue that confronts a producing party faced with a request for voluminous and expensive — but accessible — electronically stored information. In such a circumstance, it is unclear whether a producing party may stand on its objection to the burden presented by the sheer volume of responsive electronically stored information and thereby force a requesting party to establish "good cause" to compel production of this "accessible" information. If not, it is not clear why a requesting party should be required to show "good cause" to discover legacy data that may be costly and burdensome to restore and retrieve, but not to discover "accessible" data that will be extremely costly and burdensome for the producing party to review and produce.

The Committee Note acknowledges that Rule 26(b)(2)(i), (ii) and (iii) "may apply" to limit electronic discovery requests. However, by making "accessibility" the touchstone for the first tier of electronic discovery, a requesting party may argue that objections based on "burden" and "expense" are trumped by the "accessibility" of the requested data and do not require a showing of "good cause" to compel production. If the Committee believes that current Rule 26(b)(2) is adequate to address the issues concerning the burden and expense of electronic discovery, then the obvious question is why a new standard based on accessibility is necessary.

The Committee may be concerned that under the "two-tiered" approach, relying on the existing proportionality standard instead of the potentially narrower "reasonably accessible" standard could set a higher burden for obtaining electronic discovery by requiring a requesting party to establish "good cause" to obtain electronically stored information. However, the proposed "two-tier" approach for electronic discovery is not demonstrably different than existing practice for paper discovery. Under the existing rules, a producing party can object to a document request on burden grounds without moving for a protective order and thereby force the requesting party to move to compel production. In practice, in order to prevail on a motion to compel, the requesting party is generally well-advised to demonstrate "good cause" for the request in dispute.

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As the proposed Committee Note indicates, case law is currently developing principles - without the nominally different standard - for responding to requests for electronically stored information. The basic guideposts of "undue burden" and "expense" are already in the rules and appear to provide all of the protection contemplated by the "accessibility" standard. If this is correct, then it is not clear why a new standard needs to be introduced which recasts the proportionality provisions of the Rules in the context of electronically stored information. This is particularly the case since introduction of this new standard will inevitably spawn a new category of litigation over what the standard means and whether it has, or has not, been satisfied in any given case--and whether it trumps or renders a nullity the undue burden and expense objection.

In sum, the two-tier structure of the proposed amendment to Rule 26(b)(2) may reduce some of the burdens presented by electronic discovery requests. However, before introducing a new standard based on accessibility, we believe that more guidance would be useful in identifying what factors should be considered in determining what is "reasonably accessible" to make clear any distinction between the proposed amendment and the proportionality standards already present in Rule 26(b)(2). The alternative would be to withdraw the new accessibility standard.

**B.** *The Proposed "Claw-Back" Amendment to Rule 26(b)(5)(B)*

The proposed amendment to Rule 26(b)(5)(B) provides for the use of "claw-back" procedures or agreements amongst parties to a litigation with respect to the inadvertent production of privileged information. The Council supports the use of these agreements and believes that such procedures may help to curtail the costs of discovery and to streamline the discovery process. Indeed, the Committee Report specifically takes into consideration that "privilege waiver, and the review required to avoid it, adds to the costs and delay of discovery." Report of the Civil Rules Advisory Committee (dated May 17, 2004, revised August 3, 2004) ("Committee Report") at 15. Based on the language of the proposed amendment, as well as the notes, it is clear that the amendment would apply equally to traditional hard copy documents as well as electronically stored information.

While the Committee Report notes that "courts have developed principles for determining whether waiver results from inadvertent production of privileged information," it is important to note that jurisdictions have differing standards with respect to what constitutes a "waiver." Committee Report, at 15. In some jurisdictions, the waiver standard is more stringent than in other jurisdictions; for example, courts in the D.C. Circuit may be more apt to find a waiver, even in the context of an inadvertent waiver. Compare In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (inadvertent disclosure of privileged information still constitutes waiver) with Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 954 (N.D. Ill. 1982) (negligent but inadvertent production of privileged documents does not constitute waiver). Although the proposed amendment would seem to imply that such a stringent legal standard should not apply, it will be critical to see how jurisdictions, like the D.C. Circuit, will react to and decide issues relating to the "claw- Mr.

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back" provision. It also is not clear to what extent "claw-back" agreements will insulate a producing party from a waiver claim advanced by a third party who is not part of the agreement or litigation. We believe that the Committee Notes should notify parties of the possibly different interpretations of the waiver doctrine throughout the country and provide parties some advance warning of potential risks involved in entering into these "claw-back" arrangements at the inception of a case.

In addition, the Committee has specifically requested comment as to whether a party that receives notice that privileged material has been inadvertently produced must certify that the material has been sequestered or destroyed if it is not returned. The Council supports the certification requirement in the event that the material is not returned to the producing party. The certification would eliminate any uncertainty or confusion as to the steps taken by the party sequestering or destroying the documents. Moreover, should the issue of whether the steps to sequester are sufficient, the Court would have a written, contemporaneous memorialization of the steps taken by the sequestering party, and therefore more likely have a sufficient record upon which to decide whether sequestration is appropriate or whether additional protections are required.

Additionally, the Council understands that, given the nature of certain electronic information, it may be difficult if not impossible to separate or destroy stored privileged electronic media which is produced together with responsive, non-privileged information. We believe that this weighs in favor of having the certification state the steps taken to sequester or protect the produced privileged materials. Indeed, because the privileged materials will remain in the possession of the non-producing party, such a certification would give the producing party additional assurance that the privileged materials will not be misused or mishandled. This is in marked contrast to the inadvertent production of hard copy privileged documents, where the documents must be returned to the producing party and will no longer be in the possession of the non-producing party.

As to the form of the certification, the Council recommends a simple, plain-language certification, which could be in the form of a letter from one party to the other. Unless made part of the record on any motion concerning the sufficiency of the sequestration, we do not see the need to have the certification filed with the Court, so long as it has been properly served on each party to the litigation.

C. *The Safe Harbor Provision in Rule 37*

A safe harbor protecting litigants from sanctions when electronic documents are inadvertently destroyed due to automatic deletion mechanisms of electronic information systems is a welcome addition to the Federal Rules of Civil Procedure. As the Committee's Note accompanying proposed Rule 37(f) recognizes, "the uncertainty and prospect of sanctions may undermine rational consideration of preservation obligations; particularly for parties that are frequently sued." Committee Report, at 17-18. Further, in our complex technological world, all litigants — even, and perhaps particularly, individuals

— face the reality that relevant electronic documents inadvertently may be destroyed by automatic deletion mechanisms. Therefore, a safe harbor protecting litigants against sanctions when the destruction of electronic material is inadvertent and due to automatic electronic deletion systems should be codified in the Rules.

While we strongly support a safe harbor, we offer some constructive comments about proposed Rule 37(f), both in response to specific requests by the Committee to comment on certain issues and to address some other issues we noted.

1. ***Violation of an Order***

The lead-in to proposed Rule 37(f) excludes from its protection situations where "a party violated an order in an action requiring it to preserve electronically stored information". We believe it would be desirable to provide clarification as to what kind of orders are covered by this language. As written, this language appears to exclude from the safe harbor violations not only an order to preserve documents issued after motion practice regarding specific discovery issues, but also a blanket document preservation order of the type that is sometimes entered at the outset of a case, prior to the commencement of discovery. We believe that for purposes of the safe harbor, a distinction should be drawn between these two kinds of document preservation orders.

Blanket document preservation orders that are entered at the outset of a case do not address specific alleged discovery abuses. Instead, they are meant to notify the parties of broad document retention obligations. If such orders are sufficient to remove parties from the protection of the safe harbor, then one of the automatic first steps during a litigation would become obtaining a blanket document preservation order against all opponents. That would, in effect, eliminate the safe harbor and prevent it from addressing the complex issues raised by automatic deletion mechanisms.

Thus, we believe it is appropriate to exclude from the protection of the safe harbor violations of an order to preserve documents that is issued after motion practice regarding specific discovery issues. However, a violation of a blanket document preservation order that is entered at the outset of a case should be protected by the safe harbor if its other requirements are met.

2. ***Standard of Culpability***

We understand that the Committee is interested in comments regarding the degree of culpability that would preclude eligibility for a safe harbor from sanctions. The language of proposed Rule 37(f) provides a safe harbor to those who, inter alia, take "reasonable steps to preserve electronically stored information." The proposal does not define or set any parameters as to what constitutes a "reasonable step," so current case law would presumably continue to guide the interpretation of this Rule. The Second Circuit finds negligence sufficient to impose sanctions for destruction of relevant

documents. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 108, 113 (2d Cir. 2002). Whether negligence occurred is a fact-specific inquiry that is determined on a case-by-case basis. Id.

It may be difficult to identify situations that would benefit from the proposed safe harbor which would not also avoid sanctions under the current standards. For example, suppose at the beginning of a litigation a corporation properly determines that its Division 1 may have relevant documents, but it has no reason to believe that Division 2 may also have relevant documents. It therefore properly instructs Division 1 to put in place a "litigation hold" but does not so instruct Division 2. The relevance of Division 2's documents then becomes clear during discovery or following amendment of the pleadings. Further, assume that whatever relevant electronic documents Division 2 may have had at the time Division 1's litigation hold was instituted were destroyed by the automatic deletion mechanisms of the corporation's computer system before their relevance became clear. It is unlikely that the corporation would be sanctioned under the current legal standard because negligence would be difficult to prove: the corporation had no reason to know that documents of Division 2 would be relevant to the litigation, so it reasonably did not place a litigation hold on Division 2's documents. The proposed safe harbor therefore might well be unnecessary to protect the corporation in this situation. Indeed, it could be argued that most, if not all, situations in which sanctions would be precluded under the safe harbor are also situations in which sanctions would be unlikely to be imposed under existing law. Thus, for the safe harbor to have true utility in addressing the difficulties posed by automatic deletion mechanisms of modern electronic storage systems, it may be desirable for the Committee to comment further on the perspective with which questions of culpability under the safe harbor provision should be viewed.

The safe harbor provision reflects a perception — which we believe to be valid and eminently well-founded — that electronic information systems are complex and dynamic, and that automatic deletion features are necessary in order to have systems that are "efficient" and "serve the user's needs" (Committee Report at 7), notwithstanding the recognized potential of such systems to destroy potentially discoverable information. Because such destruction can occur "without a conscious human direction to destroy that specific information" (id.), we believe that if negligence is to be the standard, then the standard of care under which the conduct of litigants is to be evaluated should be broad and flexible. In an area that is new, relatively complex and rapidly evolving, it may be difficult to determine whether particular conduct is or is not negligent. Because electronically stored information is relatively more prone to unintentional deletion than paper records, it would be desirable for the Committee to specify in its comments that negligence should not lightly be found if a party has made good faith efforts to preserve potentially relevant information. Put another way, it would be desirable for the Committee to make clear that whether particular preservation steps are "reasonable" is to be interpreted broadly and flexibly in light of the legitimate reasons for automatic deletion functions and the complexity and dynamic nature of electronic information storage Mr.

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systems. The Committee also could explain that reasonableness of a party's preservation efforts should be determined with reference to the relative complexity of the particular case and the factual issues it raises, since these factors may bear on a litigant's ability to identify electronically stored information as potentially discoverable.

Alternatively, the Committee may wish to give serious thought to employing a culpability standard that is closer to one of recklessness or intentional conduct. Even though a showing of such misconduct is not required for imposition of sanctions in other circumstances, such a heightened standard could be appropriate in the context of the operation of automatic deletion mechanisms. As the Committee has noted, potentially relevant information may be deleted by such mechanisms without any "conscious human direction to destroy that specific information." Given the complex and dynamic nature of electronic storage systems and the desirable functions they perform, it may be appropriate to focus the imposition of sanctions on situations that reflect reckless or intentional misconduct.

Whether the Committee chooses to highlight the flexible nature of a negligence standard or to adopt a standard closer to one of reckless or intentional misconduct, it is likely that both defendants and plaintiffs will benefit from the safe harbor provision. Both may be affected by automatic electronic deletion mechanisms. Indeed, a small corporate or individual plaintiff may have fewer means than a large corporate defendant of ensuring that automatic deletion mechanisms are disengaged, and may receive even greater benefit than a large corporate defendant from adoption of the suggestions we have made. For example, a small corporation or individual may use an e-mail program offered by an internet service provider ("ISP"). Such e-mail programs may automatically delete e-mail after a set number of days on a system-wide basis, and may not offer subscribers any means of suspending the operation of that function. While small corporate or individual plaintiffs may do their best to address such electronic deletion issues, their conduct may be tested under Rule 37(f). They would find greater protection if it is clear that their conduct is to be judged under a flexible negligence standard, or under one which looks for an element of conscious misconduct.

We believe that clarifications of the sort we have recommended would well serve the stated goal of the Rule: to alleviate situations in which "the uncertainty and prospect of sanctions may undermine rational consideration of preservation obligations; particularly for parties that are frequently sued." Committee Report at 17-18.

### 3. *Routine Operation of a Party's Electronic System*

The Committee has requested comments regarding whether the language "the routine operation of the party's electronic information system" adequately and accurately describes the kind of automatic computer operations expected to be at issue. We believe that the term "electronic information system" adequately describes the technology that we

expect to be covered by the safe harbor. We believe, however, that the concept of "routine" operation may need further consideration and clarification.

Electronic deletion systems are instituted based upon, among other things, an organization's needs in serving its customers, any responsibilities it may have under the law to preserve documents, and its technological constraints. Providing a safe harbor for "routine" operations of electronic information systems may discourage organizations from upgrading their technology systems during the pendency of a litigation, notwithstanding their legitimate business needs, customer interests or technological constraints unrelated to the litigation. Using the example we discussed earlier, assume that a corporation established a litigation hold for its Division 1 and disengaged all automatic delete mechanisms for that Division. Assume further that during the pendency of the litigation, and before the relevance of Division 2's documents becomes clear, the corporation implements a change to its automatic delete mechanism (for Divisions other than Division 1) so that e-mails are automatically deleted after 45 days instead of 100 days. It makes this change for valid business reasons, such as a significant increase in the amount of data being retained or an emerging need to free up storage capacity for new applications or purposes. Shortly after this change is implemented, the relevance of Division 2's documents to the pending litigation becomes clear. Due to the change in policy, it may be questionable whether Division 2's 45-day document deletion mechanism is "routine." To avoid discouraging legitimate changes to electronic systems, we believe that the rules should afford the company the opportunity to demonstrate that Division 2's 45-day document deletion mechanism was motivated by valid business reasons unrelated to the litigation and thus was "routine." It would be helpful, therefore, to clarify that the reference to "routine" operations encompasses changes from one consistently applied ("routine") practice to another, so long as the change serves a valid business purpose.

**D.** *Voice-Mails*

During our discussions relating to the proposed amendments, as well as in the practice of many of our members, we have considered whether "voice-mails" constitute documents which must be produced. In particular, voice-mails' ephemeral nature, and the fact that individuals often leave voice-mails specifically because they understand that they will be deleted shortly after receipt, raised issues as to whether they should be treated similarly to e-mails and other types of electronically stored information.

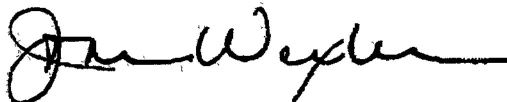
Case law prior to the proposed amendments supports the conclusion that voice-mails constitute "sound recordings" or other "electronically-recorded information." See Fed. R. Civ. P. 26 (Advisory Committee notes). For example, one court has recognized that the Advisory Committee has made clear that "computerized data and other electronically recorded information" includes "but is not limited to: voice-mail messages and files [and] back-up voice mail files . . ." Kleiner v. Burns, 2000 WL 1909470 (D. Kan. Dec. 15, 2000).

The Council sees no reason why voice-mails should not continue to be included within the scope of information governed by the proposed rules on electronic discovery. To the extent that voice-mails present unique issues relating to storage, retention and retrieval, the proposed amendments — in particular, the "reasonably accessible" and safe harbor provisions —should provide sufficient means to address these issues.

* * *

We appreciate the opportunity to comment on these important issues. If the Federal Bar Council can be of any further assistance to the Committee, please do not hesitate to contact me.

Very truly yours,



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