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Subject E-DISCOVERY US CHAMBER & LCJ COMMENTS 021505

It is my pleasure to submit the attached comments on the proposed amendments to the FRCP governing discovery of electronically stored information on behalf of the U. S. Chamber Institute for Legal Reform and Lawyers for Civil Justice. Thank you for the opportunity to participate.

Respectfully submitted,

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U.S. Chamber Institute for Legal Reform
and
Lawyers for Civil Justice

Comments to the
Committee on Rules of Practice and Procedure
of the
Judicial Conference of the United States

Proposed Amendments to the Federal Rules of Civil Procedure Governing the Discovery of Electronically Stored Information

February 15, 2005

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U.S. Chamber Institute for Legal Reform
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Regarding Proposed Amendments to the Federal Rules of Civil Procedure Governing the Discovery of Electronically Stored Information

I. Introduction

The U. S Chamber Institute for Legal Reform ("ILR") and Lawyers for Civil Justice ("LCJ") respectfully submit these comments regarding proposed amendments to the Federal Rules of Civil Procedure ("FRCP") governing the discovery of electronically stored information. ILR is an affiliate of the U.S. Chamber of Commerce, working with the Chamber's more than 3 million businesses to improve the civil justice system. LCJ is a nationwide coalition of counsel for major American corporations and the Defense Research Institute, Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel, which collectively represent over 20,000 civil defense trial lawyers.

ILR and LCJ applaud both the Standing Committee on Rules of Practice and Procedure and the Civil Rules Advisory Committee for their excellent efforts now and in years past to improve procedure and practice in the federal courts to make the pursuit of justice fairer, less costly and more efficient. The present proposals extend those efforts to amend the FRCP to address the distinctive challenges presented by electronic discovery.

ILR and LCJ strongly support rule amendments in each of the areas addressed by the proposals, because they each will help solve a problem unique to e-discovery. The sophisticated and informed discussion in the several conferences organized by the Advisory Committee and in the hearings and comments to date demonstrates a real need to amend the Federal Rules to establish clear and concise guidelines for discovery of electronic information in each of those areas.

The Committees have produced a well balanced amendment package that we strongly support as a substantial step toward clarifying the standards applicable to e-discovery. There are, however, a few areas in which we suggest some modifications and clarifications to the proposed Rules and Notes in order to advance the essential purposes underlying the proposals. Paramount among these purposes is the need to carefully balance the benefits arising from electronic

discovery against the substantial burden of preserving and producing such discovery to better fit the command of Rule 1 and the concept of proportionality of discovery.

We hope that the suggestions below will assist the Committee in refining the proposed amendments to address the realities of discovery in the electronic age. We begin our discussion with the amendments that we consider most important.

II. Executive Summary

A. Discovery into Electronically Stored Information that is not Reasonably Accessible.

By creating a "two-tier" approach that stimulates early production of accessible electronically stored information while limiting discovery of "not reasonably accessible" information, the rule mirrors the two-tier approach of the 2000 amendment to Rule 26(b), which in turn specifically implemented the 1983 "proportionality" amendment to the same rule.

1) The phrase "not reasonably accessible" should be clarified.

The Note should be revised to provide a fuller explanation of the term "not reasonably accessible" by giving more examples, including but not limited to metadata, embedded data, fragmented data, backup files, cached data, and dynamic data bases. And, the Note should also specifically reference the balancing test of Rule 26(b)(2) that is the underlying purpose for the amendment, whether or not the information fits within a particular category of storage medium or system.

2) The Note to Proposed Rule 26(b)(2) should be clarified to confirm that electronically stored information which is "not reasonably accessible" need not be preserved absent a voluntary agreement of the parties or a specific court order.

Perhaps the most important clarification the Committee could make in the Note to proposed Rule 26(b)(2) would be to recognize that electronically stored information that a party identifies as "not reasonably accessible" may be lost because of the normal operation of computer systems but still fall under the safe harbor unless the parties agree or the court orders otherwise. Such clarification already is implicit in the relationship between the "two tier" and "safe harbor" provisions and is fully supported in the comments and testimony to date.

3) The proposed amendment to Rule 26(b)(2) should include presumptive cost allocation.

We suggest that the rule should incentivize targeted and reasonable discovery by specific reference to cost allocation. Presently, the incentive is in the other direction. In order to reduce the costs and burdens and increase the effectiveness of electronic discovery, the

amendment to Rule 26(b)(2) should include a presumption that the requesting party share the reasonable costs of any extraordinary steps required to preserve, retrieve, review and produce electronically stored information that is "not reasonably accessible."

4) The proposed amendment should not create a new, burdensome obligation to identify information that is "not reasonably accessible."

The use of the word "identifies" in the provision creates a potential ambiguity that could prove problematic. However, if the Committee believes that it is helpful to require some identification of inaccessible data, the Note should clarify the scope of the obligation to ensure that a generalized description of broad categories of information *(e.g.,* "disaster recovery backup tapes") will suffice as opposed to creation of a specific log.

B. Safe Harbor: The Need for Protection from Sanctions for Loss of Information Resulting from Routine Operations of Computer Systems.

1) A "safe harbor" provision is integral to redressing the current problem of over -preservation.

The proposed amendment to Rule 37 seeks to establish an explicit, but narrow, "safe harbor" from sanctions when information is lost due to routine computer operations. Clearly, the uncertainty regarding the actions that will be subject to sanctions and the scope of the duty to preserve electronic information has compelled many to unnecessarily err on the side of extreme caution, resulting in excessive burden and expense, disproportionate to the value of the information and the litigation.

2) Sanctions for routine destruction of electronically stored information should be imposed only for violation of a court order requiring preservation of specified information.

While we support adoption of proposed Rule 37(f), we also suggest that the following more direct and straightforward alternative would offer more guidance:

"A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation in good faith of the party's electronic information system unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information."

We respectfully submit that it is unrealistic to expect that litigants will be able to capture every possible or remotely relevant piece of information in advance of litigation. An effective, though limited safe harbor would support the goal of reducing the "Sanctions Tort" practice without reducing the ability to produce discoverable information. It would reinforce the distinction between information which is reasonably accessible and that which is not; it would promote early discussion of preservation options regarding predictable losses from business systems; and it would emphasize the need for an element of culpability which should exist before sanctions will be imposed.

3) A high degree of culpability should be required to preclude eligibility for the very narrow "safe harbor" from sanctions in amended Rule 37(f) for destruction of electronically stored information as the result of the routine operation of computer systems.

In our view, an "intentional or reckless" standard is required because of the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of the masses of potentially discoverable electronically stored information. The complexity and multiplicity of computer systems often make it impossible to prevent the loss of some inaccessible data, despite good faith efforts to do so, as the Committee frequently has heard.

C. Early attention to E-Discovery issues.

While we believe that the focus of the amendment should be on all issues pertaining to disclosure or discovery, we understand the purpose to be served by suggesting discussion of preservation issues in particular. Hopefully, the suggestion will not stimulate or encourage the entry of unnecessary or overly broad preservation orders, including blanket preservation orders that are disfavored. We suggest that the Note clearly state that when entered, preservation orders generally should be directed to preserving reasonably accessible information and should be carefully tailored to the specific matters in dispute. We also suggest that the Note state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause shown.

D. Procedure for Asserting Privilege after Production.

We support the amendment to Rule 26(b)(5) because of the magnitude of even a relatively limited production of electronically stored information. Requiring a producing party to perform a detailed and thorough review of this data in order to avoid an inadvertent waiver of privilege is often impracticable, and, at minimum, can impose a substantial burden and expense on the producing party.

E. Proposed Amendments to Rules 33 and 34 (Definition of Document, Form of Production, and Options for Production of Electronic Information).

1) The production option under proposed Rule 34(b)(ii) should continue to be the existing option of producing electronic information in "reasonably usable form".

It seems to us that "reasonably usable" better reflects the requirement that the requesting party receive information in a format that is useful to the party, without mandating specific formats.

2) The options to produce e-information in Rule 34(b) as "ordinarily maintained" or in "electronically searchable form " unfortunately could be interpreted to mandate production in "native format" or to require accompanying specialized software.

The Committee may wish to consider designating a "reasonably usable form" as the sole default standard for the production of electronic data, because of the problematic proposed options for production.

3) The Note to the proposed amendment to Rule 33 (d) inappropriately suggests direct access to confidential proprietary databases.

While we support this amendment, we suggest deleting the statement in the Note that a party who wishes to answer an interrogatory in this manner may be required to provide "access to the pertinent computer system."

* * * * *

The proposed amendments represent a necessary and desirable step forward in ensuring fairness, proportionality, balance, and certainty in the field of electronic discovery. We hope that our suggestions will resolve some ambiguities that could be exploited in an effort to weaken the positive impact of the new amendments and that they will contribute toward improving an already well integrated rules package that will reduce the costs and burdens and improve the effectiveness of electronic discovery.

III. Comments on the Proposed Amendments.

A. Presumptive Limits on Discovery into Electronically Stored Information that is Not Reasonably Accessible.

The proposed amendment to Federal Rule of Civil Procedure 26(b)(2) provides that a producing party "need not provide discovery of electronically stored information that the party identifies as not reasonably accessible" without a court order based on a showing of good cause. By creating a "two-tier" approach that will stimulate early production of accessible electronically stored information while limiting discovery of "not reasonably accessible" information, the rule mirrors the two-tier approach of the 2000 amendment to Rule 26(b), which in turn specifically implemented the 1983 "proportionality" amendment to the same rule.

By expressly requiring the application of the "cost-benefit" balancing test to electronic discovery, the proposed amendment will supply necessary "guidance to litigants, lawyers, and judges on determining the proper limits of electronic discovery...." *Report of the Civil Rules Advisory Committee,* August 3, 2004 at 12. The distinction between "not reasonably accessible" and "reasonably accessible" electronic information should also reduce costly and burdensome production that cannot be justified by the needs of the case. ILR and LCJ enthusiastically support the proposed two-tier amendment, together with many other organizations and individuals that have submitted comments, including: American College of Trial Lawyers, fifty members of the American Bar Association Council of the Section of Litigation and the Section's Federal Practice Task Force, Association of Corporate

Counsel, Philadelphia Bar Association, and New York State Bar Association Commercial and Federal Litigation Section. However, as pointed out in earlier comments, the current language of the amendment and Note contain certain ambiguities that warrant the Committee's attention.

1) The phrase "not reasonably accessible" should be clarified.

The Note should be revised to provide a fuller explanation of the term "not reasonably accessible." In its current form, the Note suggests that data will not be "reasonably accessible" if it "can be located, retrieved and reviewed only with substantial effort and expense." The Note lists several examples of the type of information that may be considered "not reasonably accessible," including information stored solely for disaster recovery purposes, "legacy" data that is retained in obsolete computer systems, and other information that may have been deleted in a manner that makes it inaccessible without resort to expensive forensic techniques. More examples could be given, including but not limited to metadata, embedded data, fragmented data, backup files, cached data, and dynamic data bases. The Note also properly identifies "whether the party itself routinely uses or accesses the information" as a relevant consideration.

The Note should also specifically reference the balancing test of Rule 26(b)(2) that is the underlying purpose for the amendment, whether or not the information fits within a particular category of storage medium or system. *See, e.g., Crawford-El v. Britton,* 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.") In that connection, one of the electronic discovery principles adopted by the Sedona Conference Working Group on Electronic Discovery is instructive. It provides that "[t]he 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 searching and retrieval," and that "[r]esort 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." *The Sedona Principles* at 31 (available at http://www.thesedonaprinciples.org/publications html.)

2) The Note to Proposed Rule 26(b)(2) should be clarified to confirm that electronically stored information which is "not reasonably accessible" need not be preserved absent a voluntary agreement of the parties or a specific court order.

Perhaps the most important clarification the Committee could make in the Note to proposed Rule 26(b)(2) would be to recognize that electronically stored information that a party identifies as "not reasonably accessible" may be lost because of the normal operation of computer systems but still fall under the safe harbor unless the parties agree or the court orders otherwise. Such clarification already is implicit in the relationship between the "two tier" and "safe harbor" provisions and is fully supported in the comments and testimony to date.

The notion that litigants must undertake the significant burden and expense of interrupting routine computer operations to preserve vast quantities of inaccessible information of no use to them on the mere happenstance that the opposing party may eventually seek production of the data is inconsistent with the realities of modern society – and – modern litigation. *See, e.g., Zubulake v. UBS Warburg,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *Thompson v. U.S. Dep't of Housing and Urban Development,* 219 F.R.D. 93, 100 (D. Md. 2003); *The Sedona Principles at 14-15.*

The two-tier presumptive limitation on preservation and production of electronically stored information that is "not reasonably accessible," reflects practical experience with hard copy discovery. The ability to retrieve and review discarded information has long been attributed great weight in determining whether or not it must be preserved or produced. Importantly, adoption of the two tier provision would substantially assist producing parties in planning for preservation, because reasonably accessible information generally satisfies the production requirements of most cases. Allowing self management of the determination on "accessibility" in individual cases is fair and consistent with current discovery practice.

Some have expressed concern that if litigants were allowed to designate information as not reasonably accessible, organizations might design systems to thwart legitimate discovery efforts. Many other witnesses noted that producing parties, as users of the information, are motivated to make information needed for regulatory and business purposes accessible and that anyone who deliberately seeks to render such information unavailable due to pending or threatened litigation is subject to myriad sanctions, including criminal penalties. Our members assure the Committee that the legal consequences and practical constraints litigants face if they do not meet their preservation responsibilities are sufficient to prevent parties from using the new two tier amendment to hide or bury critical evidence. Moreover, the likelihood that the vast quantities of reasonably accessible information will not contain sufficient relevant information to resolve cases justly is extremely remote.

3) The proposed amendment to Rule 26(b)(2) should include presumptive cost allocation.

The proposed amendment to Rule 26(b)(2) suggests that if a court finds "good cause" to direct production of electronic information that is "not reasonably accessible," the proposed amendment to Rule 26(b)(2) contains only a suggestion that the court "may specify terms and conditions for such discovery." We suggest that the rule should incentivize targeted and reasonable discovery by specific reference to cost allocation. Presently, the incentive is in the other direction.

As Professor Martin Redish has observed, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger expense to be borne by the opponent, the bigger the incentive to make the request." Martin H. Redish, *Electronic Discovery and the Litigation Matrix,* 51 DUKE L.J. 561, 603 (2001). Accordingly, "it is all but inevitable that ... the current cost allocation system will result in excessive and therefore insufficient

discovery even where the discovering party does not consciously intend the discovery to be abusive." *Id. See also,* 8 Fed. Prac. & Proc.: Civil 2d Sec. 2008.1 at fn. 16 (pocket part)("One method for regulating discovery requests that infringe on the limitations of Rule 26(b)(2) is to condition orders that such discovery go forward on the payment by the party seeking discovery of part or all of the resulting expenses incurred by the responding party.")

In order to reduce the costs and burdens and increase the effectiveness of electronic discovery, the amendment to Rule 26(b)(2) should include a presumption that the requesting party share the reasonable costs of any extraordinary steps required to preserve, retrieve, review and produce electronically stored information that is "not reasonably accessible." The presumption may be overcome by a clear and convincing demonstration of relevance and need for such information and a showing that under all the circumstances of the particular case, cost sharing would be unjust.

The Note might provide examples of what courts should typically deem to constitute "extraordinary steps" in the production of electronic information. The Note might also incorporate the earlier explanation of information that is "not reasonably accessible" perhaps with reference to the Sedona principles. *See e.g., The Sedona Principles* at 33.

Including presumptive cost sharing in the amendment to Rule 26(b)(2) would enforce the notion of proportionality in the Federal Rules recognized even before adoption of the 1983 amendment to Rule 26(b): *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978) (court may "condition discovery on the requesting party's payment of discovery" when the burden of producing the discovery outweighs the benefit). Ample support for such a rule already has been expressed in the comments and testimony to date recounting experience with Texas Rule 196.4 and in California and New York.

Although "cost bearing" ultimately was not included in the 2000 discovery amendments, the circumstances are very different now and the need for such a provision is much greater. An explicit presumption of cost sharing in the Rule will signal the bar that the discovery world has truly changed and that courts are serious about the need to focus discovery on the requirements of the case. In time, the rule would likely become self executing.

4) The proposed amendment should not create a new, burdensome obligation to identify information that is "not reasonably accessible."

The use of the word "identifies" in the provision quoted above creates a potential ambiguity that could prove problematic. Although the use of this word could be interpreted as simply referring to the producing party's self-identification of inaccessible data sources, parties could argue that it requires a producing party to identify inaccessible information to the requesting party, in a manner analogous to a privilege log or by other onerous means. Such a requirement would defeat the purpose of Rule 26(b)(2) by imposing burdensome obligations on the producing party. It could also lead to cumbersome motion practice

regarding individual inquiries as to whether the material identified is actually inaccessible.

One solution to the potential ambiguity would be to eliminate the identification obligation by revising the sentence as follows: "[e]lectronically stored information that is not reasonably accessible need not be produced except on a showing of good cause." However, if the Committee believes that it is helpful to require some identification of inaccessible data, the Note should clarify the scope of the obligation to ensure that a generalized description of broad categories of information *(e.g.,* "disaster recovery backup tapes") will suffice as opposed to creation of a specific log.

B. Safe Harbor: The Need for Protection from Sanctions for Loss of Information Resulting from Routine Operations of Computer Systems.

1) A "safe harbor" provision is integral to redressing the current problem of over-preservation.

The proposed amendment to Rule 37 seeks to establish an explicit, but narrow, "safe harbor" from sanctions when information is lost due to routine computer operations. Clearly, the uncertainty regarding the actions that will be subject to sanctions and the scope of the duty to preserve electronic information has compelled many to unnecessarily err on the side of extreme caution, resulting in excessive burden and expense, disproportionate to the value of the information and the litigation. Given the uncertainty, those wishing to avoid sanctions often are forced to resort to "saving everything."

The cost and disruption of interrupting the regular operation of computer systems are not justified when there exist other means such as an effective "litigation hold" process for preserving the needed information. In appropriate cases, early discussion of the need for more extreme measures and entry of preservation orders tailored to the specific case and specified information can alleviate any unique concerns.

Preservation of discoverable information in anticipation of or at the outset of litigation is not an absolute value, undiluted by the demands of business reality or personal affairs. Practical experience demonstrates that discoverable information can be preserved and produced from active information retained for business purposes through "litigation holds" which renders unnecessary the routine preservation of massive amounts of electronic information that is "not reasonably accessible."

2) Sanctions for routine destruction of electronically stored information should be imposed only for violation of a court order requiring preservation of specified information.

As proposed by the Committee, the safe harbor amendment would allow sanctions in the absence of an agreement or court order prohibiting the destruction of electronically stored information. It provides that parties will not be sanctioned for the loss of electronic data if

(1) "the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action," and (2) "the failure resulted from the loss of information because of the routine operation of the party's electronic information system," unless the party violated an express order mandating the preservation of such information. Proposed FED. R. CIV. P. 37(f).

While we support adoption of such an amendment to Rule 37, we also suggest that the following more direct and straightforward alternative would offer more guidance:

"A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation in good faith of the party's electronic information system unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information. "

Any rule providing "safe harbor" protection for the loss of information resulting from routine computer operations should take into account the fact that most or all of this data is "not reasonably accessible." Such a rule should also be consistent with the proposed amendment to Rule 26(b)(2), which requires a good cause order for production of electronic information that is not reasonably accessible. Therefore, it follows that litigants should not be sanctioned for failing to undertake the significant burden of preserving inaccessible data that they are rarely required to produce, unless there is an agreement among the parties or an order requiring preservation of specified information tailored to the case at issue.

As discussed above, we submit that it is unrealistic to expect that litigants will be able to capture every possible or remotely relevant piece of information in advance of litigation. And the Rules, at least since 1983, do not require such actions. The Committee has heard ample evidence that the current situation encourages what some have described as the "Sanctions Tort" – where some litigants seek to try the case on discovery, not the merits.

We respectfully submit that an effective, though limited safe harbor would support the goal of reducing the "Sanctions Tort" practice without reducing the ability to produce discoverable information. It would reinforce the distinction between information which is reasonably accessible and that which is not; it would promote early discussion of preservation options regarding predictable losses from business systems; and it would emphasize the need for an element of culpability which should exist before sanctions will be imposed.

3) A high degree of culpability should be required to preclude eligibility for the very narrow "safe harbor" from sanctions in amended Rule 37(f) for destruction of electronically stored information as the result of the routine operation of computer systems.

The Committee is particularly interested in receiving comments "from the bench and bar on whether the culpability or fault that takes a party outside any safe harbor should be something higher than negligence" and has suggested an alternative safe harbor "framed in terms of intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system." *See* Proposed Rule 37(f), text and note at 32-34. A Comment by Microsoft Corporation sums up the need for a higher culpability standard as follows: "Intentional or reckless disregard for discovery obligations should be punished but a safe harbor is not very safe and not much of a harbor if it does not protect a good faith actor from sanctions based on mere negligence." 04-CIV-001 at 15.

In our view, an "intentional or reckless" standard is required because of the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of the masses of potentially discoverable electronically stored information. The complexity and multiplicity of computer systems often make it impossible to prevent the loss of some inaccessible data, despite good faith efforts to do so, as the Committee frequently has heard. *See, e.g. The Sedona Principles* at 47 ("[d]ue to the complexity of modern computer systems, the large volumes of electronic data, and the continuing changes in information technology, there exists a potential for good faith errors or omissions in the process of preserving and producing electronic information").

Our members quite clearly understand the need to protect a judge's discretion to impose sanctions for negligent conduct in appropriate circumstances. However, requiring an element of culpability that is higher than mere negligence in the particular circumstances covered by the safe harbor is consistent with the inherent power of the court to punish otherwise sanctionable conduct. The Committee Notes provide ample opportunity to address this point.

Litigants who operate their computer systems in good faith and otherwise comply with their discovery obligations should not be sanctioned because in hindsight they might be found negligent in failing to suspend the normal operation of systems that may or may not contain information later argued to be relevant in a future lawsuit. Rather, the Rule should give clear guidance that sanctions will not be imposed for loss of information due to normal operation of computer systems unless the party intended the destruction of specified information covered by a preservation order.

C. Early attention to E-Discovery issues.

The proposed amendment to Rule 26(f) would require litigants to "discuss" issues relating to "preserving discoverable information" as part of the initial discovery planning meeting. The proposed Note suggests that parties could voluntarily agree to "specific provisions" which balance the need to "preserve relevant evidence with the need to continue routine activities critical to ongoing business [since] [w]holesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted." Complementary amendments are proposed to Rule 16 and Form 35.

Our members support the goals of these amendments to: "present a framework for the parties and court to give early attention to issues relating to the disclosure or discovery of electronically stored information." *Report of the Civil Rules Advisory Committee,* August 3, 2004 at 6. Experience has shown that early discussion among court and counsel can have a very desirable impact on increasingly abusive sanctions practices. By enabling parties to discuss reasonable steps that can be taken to preserve this information, the amendment should assist in discouraging parties from seeking sanctions for the destruction of evidence.[1]

National standards contained in the Federal Rules are far preferable to the diversity and inconsistency we are beginning to see as the courts begin to adopt local rules and orders pertaining to electronic discovery that impose substantial burdens on litigants, are inconsistent with recognized "e-discovery best practices", and threaten to balkanize the practice. *See, e.g.,* United States District Court for the District of Delaware Default Standard for Discovery of Electronic Documents (available at http://www.ded.uscourts.gov/Announce/Policies/Policy01.htm) at ¶ 2 (requiring appointment of a "retention coordinator" to implement procedures to preserve discoverable information).

While we believe that the focus of the amendment should be on all issues pertaining to disclosure or discovery, we understand the purpose to be served by suggesting discussion of preservation issues in particular. Hopefully, the suggestion will not stimulate or encourage the entry of unnecessary or overly broad preservation orders, including blanket preservation orders that are disfavored. Such orders are often "prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations." MANUAL FOR COMPLEX LITIGATION (4th) § 11.422.

Therefore, we commend to the Committee the practical and common sense comments on this issue by certain officers and members of the ABA Section of Litigation, . *See,* 04-CV-062 at 4-6. In sum, they suggest, and we agree, that the Note clearly state that the Court should not routinely enter preservation orders absent agreement and that when entered, preservation orders generally should be directed to preserving reasonably accessible information and should be carefully tailored to the specific matters in dispute. *Id.* at 1. They also suggest, and we again agree, that while not asking the Committee to define the scope of the parties' preservation obligations, "the Note could clearly state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause shown." *Id.* at 5.

D. Procedure for Asserting Privilege after Production.

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[1] As suggested *supra,* such a goal would be further served by the incorporation of language in the Note to Proposed Rule 26(b)(2) expressly stipulating that electronically stored information that is "not reasonably accessible" would be protected by the safe harbor, and parties would not have to interrupt the routine operation of their computer systems to preserve such information absent an agreement between the parties or the entry of a court order.

Even relatively limited production of electronic data may be equivalent to thousands of pages of information. *See, e.g.,* MANUAL FOR COMPLEX LITIGATION (4th) § 11.446 (noting that a single CD-ROM can store the equivalent of 325,000 pages of typewritten documents); *The Sedona Principles* at 3. Requiring a producing party to perform a detailed and thorough review of this data in order to avoid an inadvertent waiver of privilege is often impracticable, and, at minimum, can impose a substantial burden and expense on the producing party.

The proposed amendment to Federal Rule of Civil Procedure 26(b)(5) sets out a procedure to resolve whether the production waived or forfeited a privilege, but it does not set out standards for determining the question. Instead, the Note comments that the courts have developed principles to resolve these issues. While the proposed amendment as written provides litigants with some protection, the Committee might consider suggesting in the Note that all relevant circumstances be considered in determining whether or not the waiver of any applicable privilege is fair, reasonable and in the interests of justice together with a more detailed explanation of the factors most courts apply in determining these issues.

The Committee has inquired whether or not a party who receives notice that privileged material has been produced should certify that the material has been sequestered or destroyed if it is not returned. Because it is so easy to circulate electronic information with adverse consequences to the assertion of privilege, certification probably should be required.

E. Proposed Amendments to Rules 33 and 34 (Definition of Document, Form of Production, and Options for Production of Electronic Information).

1) The production option under proposed Rule 34(b)(ii) should continue to be the existing option of producing electronic information in "reasonably usable form."

As currently written, proposed Federal Rule of Civil Procedure 34(b) provides that if the requesting party does not designate a specific form of production, the responding party may produce responsive electronic data in either "a form in which it is ordinarily maintained, or in an electronically searchable form." This may be interpreted in a manner that places unnecessary limitations on the form of production. Specifically, the proposed rule appears to require parties to either produce information in "native format" (the format in which the information was initially generated), or in a format that allows the requesting party to search TIF or PDF images. There are a number of formats that do not offer a search tool but may be reasonably usable by the responding party. This is particularly true in the case of graphic or audio data that is not "searchable" under current technology. As a litigant's responsibility is to produce discovery in a format that is reasonably usable by requesting

party,[2] a more flexible approach would be to provide the responding party with the option to provide electronic discovery in a "reasonably usable form," rather than an "electronically searchable form."

It seems to us that "reasonably usable" better reflects the requirement that the requesting party receive information in a format that is useful to the party, without mandating specific formats. A "reasonably usable" standard would also accommodate the large number of parties that still prefer producing and receiving information in the traditional hard copy format. Such an approach would also keep the decision on permitting "direct access" to confidential proprietary data bases where it belongs -- with the producing party. These points might be included in an amended Note to the proposed rule.

We also suggest adding a sentence to the Note accompanying the amendment to Rule 34(a) perhaps as follows: "Information temporarily residing in Random Access Memory but not retained once the device is powered down – such as Instant Messenger – is not "stored" within the meaning of the Rule."

2) The options to produce e-information in Rule 34(b) as "ordinarily maintained" or in "electronically searchable form" unfortunately could be interpreted to mandate production in "native format" or to require accompanying specialized software.

The Committee may wish to consider designating a "reasonably usable form" as the sole default standard for the production of electronic data. The reference in the proposed amendment to the production of data in the format in which it is "ordinarily maintained" may be interpreted to create a presumption that production in native format is favored. In many cases, production in native format may not be practical or appropriate because of the risk of intentional or accidental alteration or destruction, when the native format is proprietary or otherwise confidential, when specialized software is necessary to search it, or when the native format is not otherwise reasonably usable. At minimum, the Note to the proposed amendment should reflect that production of electronic discovery in native format is not preferred in such circumstances.

3) The Note to the proposed amendment to Rule 33 (d) inappropriately suggests direct access to confidential proprietary databases.

The proposed amendment to Federal Rule of Civil Procedure 33(d) appropriately includes "electronically stored information" in the "option to produce business records" already provided by the Rule. While we support this amendment, we are concerned that the proposed Note's statement that a party who wishes to answer an interrogatory in this manner may be required to provide "access to the pertinent computer system" goes too far. We suggest deleting the phrase from the Note as shown in the footnote below.[3] The phrase

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2 *See, e.g.,* FED. R. CIV. P. 34(a) (documents include any format "from which information can be obtained, translated, if necessary, by the respondent through detection devices into a reasonably usable form").

3 "Depending on the circumstances of the case, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support.

could be interpreted to encourage direct access to proprietary data bases, a practice fraught with privacy and confidentiality risks. Access to proprietary databases should be rarely, if ever, granted and the Rules and Notes should not even suggest the possibility. The choice as to whether to grant such access should remain exclusively with the producing party.

IV. Conclusion

The proposed amendments set forth by the Committee represent a necessary and desirable step forward in ensuring fairness, balance, and certainty in the field of electronic discovery. ILR and LCJ applaud and support the Committee's excellent efforts in this most important and complex area and submit these comments to suggest ways in which the amendments will provide greater clarity and guidance for our members in particular and the bench and bar in general.

At present our members feel strongly that the costs and burdens of electronic discovery far outweigh its benefits and that often it is being used as a weapon to achieve advantage rather than as a tool in the search for truth. As discovery continues to drive litigation costs ever upward, more claimants are driven out of the judicial system and the system moves further and further beyond the command of Rule 1 that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Similar concerns drove the trend toward proportionality and balance in the 1983, 1993, and 2000 discovery amendments and are the foundation of the present e-discovery package. We hope that our suggestions will resolve some ambiguities that could be exploited in an effort to weaken the positive impact of the new amendments and that they will contribute toward improving an already well integrated rules package that will reduce the costs and burdens and improve the effectiveness of electronic discovery.

Respectfully submitted,

Alfred W. Cortese, Jr. on behalf of:

U.S. Chamber Institute for Legal Reform

Lawyers for Civil Justice

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information or application software, access to the pertinent computer system, or other assistance." *Note to Rule 33 at 24.*

04-CV-192 Supplement

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Subject E-DISCOVERY US CHAMBER & LCJ COMMENTS O215O5

It is my pleasure to submit the attached Supplemental Comments on the revised proposed e-discovery amendments for your consideration prior to the April 14-15 meeting on behalf of the U. S. Chamber Institute for Legal Reform and Lawyers for Civil Justice. Thank you for the opportunity to submit these Supplemental Comments.

Respectfully submitted,

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E-Discovery ILR & LCJ Supplemental Comment 041105.doc

April 11, 2005

U.S. Chamber Institute for Legal Reform
and
Lawyers for Civil Justice

Supplemental Comments
to the
Civil Rules Advisory Committee

Regarding Proposed E-Discovery Amendments
to the
Federal Rules of Civil Procedure

Introduction

The U.S Chamber Institute for Legal Reform ("ILR") and Lawyers for Civil Justice ("LCJ") respectfully submit these supplemental comments regarding the proposed amendments to the Federal Rules of Civil Procedure ("FRCP") governing the discovery of electronically stored information to be considered at the Committee's April 14-15, 2005 meeting.

ILR and LCJ continue to strongly support rule amendments in each of the areas addressed by the proposals and to commend the Committee for producing them, because they will help to solve problems unique to discovery of electronic information and to establish clear and concise guidelines in each of those areas. See, *ILR & LCJ Comments, February 15, 2005, 04 CV 192.*

However, there remain a few areas in which we suggest further modifications and clarifications to the proposed Rules and Notes concerning Rules 26(b)(2)(B) and 37(f) in order to advance the essential purposes underlying the proposals -- the need to carefully balance the benefits arising from electronic discovery against the substantial burden of preserving and producing such discovery to better fit the command of Rule 1 and the concept of proportionality of discovery.

Rule 26(b)(2)

ILR and LCJ strongly support adoption of the revised Rule 26(b)(2)(B). The Rule and the Note are much improved and we much prefer them to the "substantial barriers" Alternative Draft, which we cannot support.

1. THE SUBSTANTIAL BARRIERS ALTERNATIVE

While we understand that in concept the alternative is intended to be consistent with the principal proposal, we believe that the revised principal proposal is a clearer description of the concept that would supply better guidance to litigants and practitioners. It is not at all clear what the phrase "substantial barriers" means: is it a matter of software design, deficiency in the software that does not facilitate easy retrieval, or practical and cost-related impediments. The word 'barrier' does not seem to connote a practical limitation, but rather indicates an absolute roadblock. The revisions to the original Note to Rule 26(b)(2)(B) clarify the amendment's purposes, but the Alternative introduces uncertainty and new obligations.

2. GOOD CAUSE WHEN CONSISTENT WITH RULE 26(B)(2)(C)

We agree that the two tier provision should be a stand alone subsection of 26(b)(2) to give it warranted prominence in the Rule. And, we strongly urge the Committee to include the phrase "for good cause when consistent with Rule 26(b)(2)(C)" in the Rule text.[1]

Specific reference to the balancing test of Rule 26(b)(2)(C) will reinforce the underlying objectives of the amendment -- stimulating early production of accessible electronically stored information and focusing discovery on the needs of the case. See, *e.g., Crawford-El v. Britton,* 523 U.S. 574, 598 (1998); *The Sedona Principles* at 31 (available at http://www.thesedonaprinciples.org/publications html).

Moreover, in implementing these concepts, the revised Note will give much useful guidance to litigants and practitioners. One area that usefully can be reinforced is the discussion of litigation holds at Tab 5-E, p.15. The addition of footnote 7 would be a very helpful clarification and is entirely consistent with the need to balance the benefits arising from electronic discovery against the substantial burden of preserving and producing such discovery. Footnote 7 would add the following important guidance in describing a reasonable litigation hold:

> "If the responding party has placed a litigation hold on reasonably accessible electronically stored information that may be discoverable in the action, information stored on inaccessible sources generally would not need to be preserved. A responding party would need to include in the litigation hold information that is not reasonably accessible if that party had a reasonable basis to believe that it may be discoverable in the action and was not available on accessible sources."

[1] The proposed revision to the relevant portion of Rule 26(b)(2)(B) is: "...If that showing is made, the court may order discovery of the information {for good cause}[when consistent with Rule 26(b)(2)(C)][4] and may specify terms and conditions for such discovery, [including payment by the requesting party of part or all of the reasonable costs of accessing the information]" (Tab 5-E, p. 9.)

We suggest that the risk perceived by some of adding such guidance is greatly exaggerated.

3. COST ALLOCATION SHOULD BE REFERENCED IN THE RULE

ILR and LCJ, along with many others, previously suggested that in order to reduce the costs and burdens and increase the effectiveness of electronic discovery, the amendment to Rule 26(b)(2) should include a presumption that the requesting party share the reasonable costs of any extraordinary steps required to preserve, retrieve, review and produce electronically stored information that is "not reasonably accessible." The materials for the meeting do not go so far, but do suggest consideration of a specific reference to cost allocation in the text of the rule (See fn. 1).

We strongly support the inclusion of language in the text and Committee Note of Rule 26(b)(2) that encourages courts to order requesting parties to bear the costs of retrieving electronic discovery from "inaccessible" sources and suggest that such reference not be limited only to "costs of accessing the information." We suggest that the Committee consider a more general phrase, such as "may specify terms and conditions for such discovery, including allocation of costs." That phrase is more reflective of the factors considered by the court under Rule 26(b)(2)(C), to which we hope reference will also be made in the Rule.

Specific reference to cost allocation will incentivize targeted and reasonable discovery, whereas presently, the incentive is in the other direction. See, 8 Fed. Prac. & Proc.: Civil 2d Sec. 2008.1 at fn. 16 (pocket part) ("One method for regulating discovery requests that infringe on the limitations of Rule 26(b)(2) is to condition orders that such discovery go forward on the payment by the party seeking discovery of part or all of the resulting expenses incurred by the responding party."); Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L.J. 561, 603 (2001).

Although "cost bearing" ultimately was not included in the 2000 discovery amendments, the circumstances are very different now and the need for such a provision is much greater. An explicit reference to cost sharing in the Rule will signal the bar that the discovery world has truly changed and that courts are serious about the requirement that discovery be proportional to the needs of the case. In time, the rule would likely become self executing.

Rule 37(f)

The Committee will be considering making two small, but significant revisions to the text of its original Rule 37(f) proposal. The first, the addition of the word "specific" to the rule is an important and necessary revision and is dealt with in section 1, below. The second, which we oppose in section 2 below, suggests consideration be given to substituting "would be" or "likely would be" for the word "was" discoverable in the action. In addition, a number of revisions to the published Committee Note to Rule 37(f)

are suggested. Many of the suggested revisions to the Note are improvements and we hope that they will be made. The following sections 3 through 7 deal with those revisions to the note that we believe would be problematic.

1. SPECIFICITY IN PRESERVATION ORDERS

It is proposed to add the modifier "specific" to the types of electronic information which must be listed in a preservation order for its violation to cause the loss of the safe harbor protection under Rule 37(f), as follows:

> **"(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve **[specific]** electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:..." (Footnotes in original omitted.)

Adding "specific" would be a very positive change. It reminds Courts considering whether or not to issue such orders that they should avoid simply restating generalities -- the common law of preservation already has plenty of them -- and should focus on the key matters of contention among the parties so as to give guidance and prevent later disputes. Footnote 1 of the proposal (Tab 5-F, pp. 4-5) expresses concern that Courts cannot "determine" how to be more specific, presumably because much is unknown or unknowable at the outset of litigation.[2] But the short answer is that courts ought not to

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[2] In attempting to explain the addition of "specific", footnote 1 of the proposal states:

> "[1] This possible addition responds to concerns expressed during the comment process about overbroad retention orders. The consequence of such orders can be "gotcha" litigation. Preventing all overwriting, etc., is not only disruptive but impossible. Unless an order is reasonably specific, therefore, it might effectively abrogate the protection the safe harbor is designed to provide.
>
> Whether this addition to the rule would be helpful can be debated, however. It bears noting that the rule only applies to orders entered in the action (or possibly related actions as described in the Note), so the question would usually be addressed in the first instance to the judge who entered the order. If the goal is to get the judge to be more particular in preservation orders, this may not be the best way to achieve that goal. It seems awkward to tell a judge he or she is not allowed to sanction a violation of his or her own order because it was not specific enough. And how is the judge (or the other side) to know enough so as to frame a specific order? Would this cut against an incentive for parties to be clear on how their information systems work? In any event, it is not clear that many federal judges are entering overbroad preservation orders.
>
> Adding the word might prompt considerable litigation about the specificity of the original order. Since that issue might well bear on the decision whether to impose a sanction at all,

enter orders which seek to bar conduct for which there is no demonstrated basis of concern -- if the party seeking discovery cannot articulate the specific information that should be preserved, the order should not issue. The concerns expressed in the footnote will be lessened by the functioning of the early discussion process and the willingness of the requesting party to clearly articulate its focus in discovery.

2. LIMITATIONS BASED ON MEETING PRESERVATION OBLIGATIONS

As originally proposed, the Rule 37(f) safe harbor would be available only if a party took reasonable steps to preserve "the" information [ultimately not produced, but for whose loss the "safe harbor" is sought] if "it knew or should have known the information was discoverable in the action. Rule 37(f)(1).

The materials suggest consideration be given to substituting "would be" or "likely would be" for the word "was." (Tab 5-F, p. 6).[3] The suggestion apparently attempts to respond to complaints that a party designating information as "inaccessible" may subsequently allow its loss to occur under "the routine operation" of information systems and later claim that it had no duty to preserve it, since it did not know it "was" discoverable at that time. The two-tier proposal, one will recall, requires a court order for information which is properly self- identified as inaccessible.

The proposed change is not helpful. It is an attempt to shift the burden of uncertainty to the producing party. At most, a preservation obligation attaches only in the rare and unique case where a producing party has so much information about the inaccessible material -- for example, that a backup tape with a specific former employee's e-mail is the only place where that e-mail can be found and that it has been demanded by the other side -- that a duty to preserve it can be said to exist because of the high certainty that its production would be ordered. Ample room already exists under the proposed formulation (should the party have known that it was discoverable) to second-guess producing parties not to interfere with the routine operations of their information systems.

3. LIMITATION TO RULE BASED SANCTIONS

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and if so what sanction to impose, making specificity a prerequisite to any consideration of the order could be counterproductive because it might prompt highly detailed, but nevertheless "boilerplate" orders. But if the order has to be more specific to provide a basis for sanctions, how is the court to determine how to fashion such an order?"

[3] "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was [would be] {likely would be} discoverable in the action; and..."

Rule 37(f) explicitly applies only to sanctions issued "under these rules," a limitation "added by the Standing Committee" (See, fn. 2, Tab 5-F, p. 5).[4] This self-imposed limitation could negate a party's effort to meet preservation obligations by allowing the court to withdraw the safe harbor by citing its inherent authority. For example, the District Judge in the much discussed recent case of *Mosaid Technologies v. Samsung*, 348 F.Supp.2d 332 (DNJ Dec. 7, 2004), citing *Zubulake*, *Prudential Insurance* and *Phillip Morris*, stated that it was acting "pursuant to the Federal Rules of Civil Procedure and this Court's inherent authority." This suggests that Rule 37(f) could be ignored by courts by citing their inherent authority as the sole or partial authority for their actions. The footnote seeks to minimize this risk by citing a recent article stating that 57% of reported cases rely on rule based sanctions. Obviously, this statistic does not take into account either unreported decisions or threats of sanctions - both of which should be considered before fairly asserting, as Footnote 2 does, that "most" sanctions are solely rule-based. However, it would be more helpful if the Committee would suggest a preference in the Note that rule-based sanctions be the norm in assessing claims of spoliation for electronically stored information that is not reasonably accessible.

The helpful general comments in the Note about preservation obligations and litigation holds are equally applicable to all situations where the courts seek to review failures to make production of information during litigation. Perhaps the Committee might consider a general statement in the Note that its comments are intended to reflect its understanding of the situation that applies regardless of the authority utilized by the Courts.

4. PRE-LITIGATION PRESERVATION CONDUCT

The existing Committee Note language apparently implied (to some) that the Committee contemplated a lack of pre-litigation preservation obligations. Accordingly, the meeting materials suggest modifying the Note (at Tab 5-F, p.10) by adding that "common law and other preservation obligations" apply to losses which occur before an action is commenced. This makes a confusing reference even worse. The focus on the timing of the actions which make it impossible to produce information is simply wrong: Courts routinely review pre-litigation conduct which has that impact and the Committee Notes repeatedly discuss that situation. A better way of wording the limitations [to replace the language as proposed in the Note] is as follows:

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[4] Footnote 2 in the proposal reads:

> "[2] The phrase "under these rules" was added by the Standing Committee. Some commentators have argued that it robs Rule 37(f) of needed force because it leaves untouched the court's inherent authority. See, e.g., Gregory Joseph, 04-CV-066. The Note already says that violation of a retention requirement imposed by another source of law bears on whether a party acted reasonably within the meaning of Rule 37(f)(1), and that the rule does not purport to limit sanctions against a party for violating such a legal requirement to preserve in any other setting. And it appears that most cases imposing the sort of sanctions addressed here are based on the rules. See Scheindlin & Wangkeo, Electronic Discovery Sanctions in the Twenty-First Century, 11 Mich. Tel. & Tech. L. Rev. 71, 78 (2005) (available at www.mttlr.org) (in 57% of the federal-court cases the courts based their authority to impose sanctions on Rule 37)."

Rule 37(f) only applies to bar sanctions issued under the Civil Rules. No attempt is made to restrict the power of courts to issue sanctions deemed necessary to protect their inherent jurisdiction.

The Rule applies to the failure to produce information whose loss results from the routine operation of the party's electronic information system. The reference to preservation of information in Rule 37(f) refers to obligations based on the common law to act reasonably to preserve discoverable information so that it may be produced in litigation. In general, those obligations require that a party take reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in an action that may be brought. Such steps often include a process referred to as a litigation hold, although there are many ways to accomplish the goal. If those obligations are met with respect to information that is nonetheless lost due to routine operations of information systems, in the absence of a violation of a specific preservation order no sanctions can be issued under the Federal Rules.[5]

5. SCOPE OF THE SAFE HARBOR: "AUTOMATIC" DELETION

Rule 37(f) provides a safe harbor for the failure to produce information which is lost "because of the routine operation of the party's electronic information system." Paragraph one of the Note appropriately describes this as the "routine deletion of information that attends ordinary use." However, it is suggested that this description be modified by the insertion of the phrase "automatic," so that the reference is to the "routine and automatic" deletion of such information. Similar changes are proposed in footnote 6 and in the text associated with footnote 7.

The introduction of the phrase "automatic" should not be used in the Note to describe the general scope of the Safe Harbor.

The phrase "automatic" is not one that should be usefully applied to describe the operations of all of the routine systems contemplated by Rule 37(f). For example, the safe harbor is intended to apply to deletions (including partial over writings) which are

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[5] The proposed paragraph in the Note now reads:

"Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. It does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced; common law and other preservation obligations continue to apply. Rule 37(f) does not, however, require that there be an actual discovery request. It requires that a party take reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a litigation hold."

related to the recycling of inaccessible information, the loss of readily available information on hard drives due to human deletions pursuant to policies restricting the access of transient information and the routine disposition of legacy information no longer needed. None of those losses can be fairly described as "automatic." While the safe harbor also includes the impact of some systems which may be set to "automatically" delete information, it by no means broadly describes all of them. The phrase "routine" better describes the intent of the Committee, as expressed elsewhere, that deletions which are part of the ordinary and routine operation of business systems, not those intended to destroy information after knowledge of actual or threatened litigation. Indeed, the Note already contains such an explanation in its third paragraph.

6. SYSTEMS WHICH ARE DESIGNED TO DESTROY INFORMATION

As originally drafted, the Note endorsed the application of the safe harbor to information lost as a result of routine computer operations and stated that "different considerations would apply if a system were deliberately designed to destroy litigation related material." An unnecessarily confusing insert is now proposed by way of substitute. (See text associated with footnote 8.)[6] The insert deals with "case specific" systems designed to destroy information, perhaps reminiscent of the "document purging system" mentioned in *Rambus v. Infineon,* 220 F.R.D. 264, 2004 U.S. Dist. LEXIS 4577 (EDVA. 2004). As Judge Payne explained in that case, one who institutes a purging program when it anticipates litigation is susceptible to a charge of spoliation.

The proposed substituted language as shown in bold in footnote 5 below should be deleted. Instead, adding a citation to *Rambus v. Infineon* after "litigation–related material" would suffice.

7. CONDITIONING SAFE HARBORS ON DISCUSSIONS OF DESIGN FEATURES

The original Note cautioned producing parties evaluating their preservation obligations that they should consider design features which might lead to "automatic loss of discoverable information." It is now proposed (See text associated with footnote 14) to expand this text to by adding the following two sentences:

> "Courts evaluating the adequacy of a party's preservation efforts may consider whether the party advised other parties of the nature and operation of its

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[6] By protecting against sanctions for the routine operation of a computer system, the Rule ~~The purpose is to~~ recognizes that it is proper to design efficient electronic information storage systems that serve ~~the user's~~ needs unrelated to litigation. These routine and automatic features are wholly different from deliberate efforts to design or apply an information system intended. ~~Different considerations would apply if a system were deliberately designed~~ to destroy litigation-related material. **"Routine operation" contemplates an information system designed to serve business or technical purposes. A system deliberately designed to destroy litigation-related information without case-specific human intervention—a system that has a "routine operation" thwarting discovery—would not satisfy this requirement.**[8]

information systems, and particularly about design features that could lead to the automatic loss of information. This advice might be provided during the Rule 26(f) conference."

This suggestion, to make compliance turn on whether a party "advised other parties of the nature and operations of its information systems" that might involve automatic loss of information, is based on unwarranted assumptions and is inconsistent with the purpose of the safe harbor provision. It should not be included.

First, the assumption that a party must or can quickly provide detailed information about all of its information systems without undue burden is wrong. The source of this suggestion is said to be ARMA, an organization of non-lawyer records professionals whose roots in the hard copy world give them a distorted view of the likelihood that electronic information is always covered by records retention policies. While ARMA is free to advocate their professional, self interested preferences, no statutory, regulatory or industry consensus exists on the topic (other models exist) and the Committee should not enter this discussion by implicitly taking sides. Here, Sedona Principle 6 is most instructive: it provides that "responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents."

Second, and most importantly, as also noted in Footnote 14, the availability of a safe harbor should focus on what the party did or did not do at the time and place the preservation obligations attach, not whether, at some other point in time, it adequately advised the precise technical logic which went into those decisions.

Conclusion.

ILR and LCJ applaud and support the Committee's excellent efforts in this most important and complex area and appreciate this opportunity to comment on the proposals to be considered at the April 14–15 meeting. We hope that our suggestions will resolve some ambiguities that could be exploited in an effort to weaken the positive impact of the new amendments and that they will contribute toward improving an already well integrated rules package that will reduce the costs and burdens and improve the effectiveness of electronic discovery.

Respectfully submitted,

Alfred W. Cortese, Jr. on behalf of:

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