04-CV-220

THE CITY OF NEW YORK
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Peter G. McCabe
Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

On behalf of the New York City Law Department, I respectfully submit the following comments on certain proposed amendments to the Federal Rules of Civil Procedure. The New York City Law Department is one of the oldest, largest and most dynamic law offices in the world, ranking among the top three largest law offices in New York City and the top three largest public law offices in the country. Tracing its roots back to the 1600's, the Department's 650-plus lawyers handle more than 90,000 cases and transactions each year in 17 separate legal divisions, which includes significant practice before the federal courts.

It is urged that the Advisory Committee take the following action:

- decline to incorporate the proposed amendments to Rules 16(b)(6) and 26(f)(4) as the amendments would encourage some Judges to coerce

litigants to enter agreements requiring the litigants to produce privileged documents subject to agreements providing for the return of such documents upon timely demand;

- adopt the proposed amendment to Rule 26(b)(5)(B), which codifies current case law;
- adopt the two-tiered approach for electronic discovery proposed for Rule 26(b)(2), while reiterating the current provisions of Rule 26(b)(2) and including in the accompanying Committee Note criteria for determining whether information is "reasonably accessible" or "not reasonably accessible;" and
- adopt the "safe harbor" proposal for Rule 37(f); however, make the harbor more equitable by proscribing only intentional or reckless acts, not mere negligence.

1. Proposed Amendments - Rules 16 (b)(6) and 26(f)(4)

These proposed changes concern the pre-trial conference of the parties and the scheduling order and provide in pertinent part that the scheduling order may include "adoption of the parties' agreement for protection against waiving privilege" [16(b)(6)] and the parties should discuss "whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information." [26(f)(4)] The Law Department believes that while seemingly helpful, such language will prove to be harmful to all litigants, particularly, institutional litigants like the City of New York. In an effort to expeditiously move court calendars, litigants may be coerced during an initial pre-trial conference to affirmatively enter into an agreement for protection against waiving privileges. Federal Rule of Civil

Procedure 26(b)(1) provides in pertinent part that, "Parties may obtain discovery regarding any matter, not privileged...." Agreements for the protection against waiving privileges would require litigants to provide their adversaries with documents and information not discoverable under the Federal Rules. The adversaries would be expected to ignore the contents of privileged documents and information once a request is received for their return. Practically speaking, no adversary will forget the contents of privileged material. Moreover, an agreement for the protection against waiving privileges will not protect against waiver as to third persons not parties to the agreement. Thus, it is suggested that these two proposed changes not be incorporated into the Federal Rules.

2. Proposed Amendment - Rule 26 (b)(5)(B)

The amendment adds the following language:

> Privileged information produced. When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

The Law Department supports this provision which essentially codifies current case law concerning the inadvertent production of privileged information.

3. Proposed Amendment - Rule 26(b)(2)

The proposed amendment adds the following language:

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information

> for good cause and may specify terms and conditions for such discovery.

The Law Department supports this two-tiered approach to the discovery of electronic evidence. However, the Law Department urges the Advisory Committee to note the continuing applicability to electronic discovery of the current provisions of Federal Rule of Civil Procedure 26(b)(2), which state:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) 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 Law Department also suggests that the Note accompanying Rule 26(b)(2) identify factors to be considered in determining that documents are "reasonably accessible" and /or "not reasonably accessible" under the provisions of the Rule.

4. Proposed Amendment – Rule 37(f)

> The proposed amendment adds the following language:
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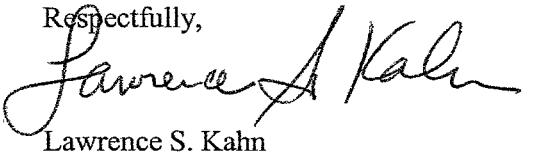
> "Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of routine operation of the party's electronic information system.

The Law Department supports a safe harbor provision. However, the "harbor" as currently proposed would subject a party to sanctions for mere negligent conduct, not solely for an

intentional or reckless act. The City of New York has hundreds of thousands of employees, many with direct access to some form of electronic information. The City should not be subject to sanctions for the acts of a low level employee who may negligently delete electronic information despite reasonable preservation efforts by City attorneys and management personnel. We encourage a safer and more equitable harbor, with a higher threshold for the imposition of sanctions.

Thank you for your consideration.

Respectfully,



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