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Re: The Need for Changes to the Federal Rules of Civil Procedure to Address Electronic Discovery

Dear Professor Marcus:

I write to you to express my view that the Advisory Committee on the Federal Rules of Civil Procedure (the "Committee") should adopt amendments to the Federal Rules of Civil Procedure (the "Rules") designed to address unique issues raised by the discovery of electronic materials. In particular, I believe that the Rules should include language that clearly delineates the scope of the obligation of parties to litigation to preserve electronic information.

I am a litigation partner at Mayer, Brown, Rowe & Maw and head of the firm's Electronic Discovery Group. My practice has included a great deal of work related to electronic discovery for large corporations. I have been invited to speak before a variety of groups on the topic of electronic discovery, including electronic discovery or records management conferences sponsored by the Defense Research Institute, Lawyers for Civil Justice, and Cohasset Associates. In addition, I was the Senior Editor of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, a leading treatise on the discovery of electronic material.

Over the past 18 months, the courts have seen a rapid development in the jurisprudence of electronic discovery. In particular, courts have examined the question of who should pay for burdensome discovery of electronic data and adopted the position that Rule 26(b) permits the shifting of costs to the requesting party under appropriate circumstances. *See, e.g., Zubulake v. UBS Warburg LLC, et al.*, No. 02 Civ. 1243, 2003 WL 21087884, *11-*12 (S.D. N.Y. May 13, 2003); *Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al.*, 205 F.R.D. 421, 429-32 (S.D. N.Y. 2002). While I still urge the Committee to consider amending the Rules to provide a uniform structure to the development of the law of cost-shifting, it appears that the courts have begun to introduce standards in this area which are reasonable and fairly calculated to allocate costs properly in particular disputes.

There is a pressing need for the Rules to address an issue that precedes discovery: the level of preservation efforts required of parties to litigation. It is, of course, settled that "[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to

anticipated litigation." *Silvestri v. General Motors Corp.*, 271 F.3d 584, 591 (4th Cir. 2001). Increasingly, however, I have seen courts and litigants read the word "material" out of the standard and demand that parties act to preserve all electronic documents which might possibly pertain to the litigation, no matter how remotely. In particular, parties have demanded, and courts have ordered, that large organizations suspend recycling of their backup tape systems during the pendency of litigation. These systems are designed to take a "snapshot image" of all the data on a company's computer system at a particular moment. Their nature makes it extremely difficult and extremely expensive to isolate individual documents contained on the backup tapes. Accordingly, they should be recognized as a poor source of documentary evidence in litigation, one for which the undue burden and expense outweighs its likely benefit. Indeed, Judge Scheindlin recently noted that "whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format," and classified backup tapes as relatively inaccessible. *Zubulake*, 2003 WL 21087884 at *6.

Nonetheless, courts have often issued orders commanding companies to save backup tapes existing at the time the litigation commenced, and even to use corporate systems to create and save new backup tapes on an ongoing basis after the litigation is underway. *See, e.g., In re: Baycol Products Litigation*, MDL No. 1431 (D. Minn., Order dated Mar. 4, 2002); *In re: Propulsid Products Liability Litig.*, MDL No. 1355 (E.D. La., Order dated April 19, 2001); *In re: Bridgestone/Firestone, Inc., et al. Products Liability Litigation*, MDL No. 1373 (S.D. Ind., Orders dated Mar. 15, 2001). In addition, I am familiar with organizations embroiled in litigation which have, of their own initiative, halted the recycling of backup tapes not because these organizations thought the tapes contained relevant data, but because they feared the possibility of draconian spoliation sanctions would be imposed upon them if they did not. Cessation of backup tape rotation can cost tens of thousands of dollars per month; over the course of a large litigation, the total cost may exceed a million dollars. Moreover, in most cases, the organization is never asked to produce its backup tapes in discovery. The result is that the organization is forced to spend millions of dollars to preserve data not in the interest of the judicial system's truth-seeking function, but as protection against the possibility of a case-ending spoliation sanction.

Accordingly, I urge consideration of an amendment to the Rules which would address the topic of preservation of electronic materials. One form such an amendment could take is a "safe harbor," as has been proposed by Tom Allman and others. *See, e.g*, Thomas Y. Allman, *The Need For Federal Standards Regarding Electronic Discovery*, 68 Def. Couns. J. 206 (2001). The safe harbor would provide that a party to litigation need not automatically suspend or alter the good-faith operation of electronic backup systems in the absence of a preservation order issued upon good cause shown. In light of the intrusive nature of such an order, it would issue only upon a showing that the standards for injunctive relief have been met. *See In re Potash Antitrust Litig.*, No. 3-93-197, 1994 WL 1108312 (D. Minn. Dec. 5, 1994); *Humble Oil & Ref. Co. v. Harang*, 262 F.Supp. 39 (E.D. La. 1996).

I believe that the creation of the safe harbor would benefit the judicial system by providing organizations with an ascertainable *ex ante* standard against which they can measure their actions. It would ensure that organizations are not penalized with the threat of spoliation sanctions for failing to preserve materials that they, reasonably and in good faith, believe will not serve as a source of discoverable material during the litigation. It would encourage those organizations to ensure that relevant documents are appropriately preserved in an accessible form.

Please let me know if the Committee would like further information.

Sincerely,

Ashish S. Prasad