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Via Email (peter_mccabe@ao.uscourts.gov)
& Regular Mail

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Reply to PA office

Re: E-Discovery Conference
February 20-21, 2004

Dear Mr. McCabe:

I write to congratulate you and the others responsible for the conference at Fordham. I hope you and the committee members received as much of a benefit from the conference as I did. The venue was perfect and I thought that the manner in which the conference was organized allowed for a tremendous amount of learning and sharing ideas. Unfortunately, I was only able to share some of my views at the conference so I now write to provide my other thoughts.

I routinely encounter the problems and complexities of E-Discovery issues in the cases in which I am ordinarily involved (national class action matters and other corporate litigation.) As an aside, my cases are also very different from some of the cases giving rise to noteworthy E-Discovery decisions like *Rowe Entertainment* and *Zubulake*. In my cases, plaintiffs routinely seek vast amounts of paper and electronic records from employees scattered across the United States. These requests seek records from a multitude of corporate entities and affiliated companies and span many years, sometimes decades. Some of these documents reside on computer systems long since abandoned, or they exist on computer systems that have become my clients through some type of merger or acquisition.

Allow me to describe one experience, which will hopefully illustrate some of my concerns. Shortly after receiving a complicated discovery request, one of my clients convened a meeting with me (as outside counsel), a few attorneys from its general counsel's office and employees associated with various information technology departments. The meeting was meant to identify the computer systems involved and to make sure the documents were preserved. Unfortunately, the situation was much more difficult to manage than anyone expected. Among the complexities I had to confront:

- This corporation had over 475 computer systems operating somewhat independently of each other;
- Most of the information technology professionals had to be introduced to each other and had little or no experience dealing with each other;
- In order to map out the interrelationship of the various systems, a 24-inch by 36-inch schematic diagram was created. The size of the diagram did not reflect the number of systems as much as it did the fact that in order to appropriately label the systems, a larger piece of paper was used to make the font readable. This complex diagram was pretty much unusable to a non-technology person;
- Most of the systems had normal backup procedures that routinely destroyed data. The scheduling of the backup process is based largely on the capabilities of the technology and not on a corporate document preservation business practice; and
- While all of the information technology professionals did in theory report in some fashion to a corporate IT Department, these professionals primarily were managed through 20 or so different corporate entities or subsidiary companies. In essence, there was no singular person or IT Department that could grant authority to adopt any of the legal recommendations I could provide.

I came to the conference with concern for the problems associated with E-Discovery. I left the conference even more concerned. I am even more convinced that practitioners, judges and litigants need the guidance that a very simple procedural rule can bring to these issues. Foremost, the rule simply needs to address the burden placed on a producing party. A producing party should only have to produce what is "reasonably available". If the requesting party wants information that is not "reasonably available", the requesting party should have to satisfy "a good cause" requirement and the court should consider cost shifting with respect to the latter group of documents.

The Federal Rules of Civil Procedure should also provide for a "safe harbor" with respect to data destruction. Corporate defendants need a "safe harbor" against spoliation arguments concerning backup/re-write activities conducted in the ordinary course of business. Further, the rule(s) should not require a party to preserve evidence. Even if the Rules Committee were authorized by Congress to enact such a rule, it would not be unworkable under the real world scenarios discussed by some of the corporate representatives who spoke up at the conference.

Likewise, the rules should address a right to re-claim privilege in the event of inadvertent waiver. I would like to point out that I strongly disagree with the position that some of the speakers made about privilege being an evidentiary issue. The Federal Rules of Evidence are not the appropriate locations to clarify the issue. In my experience, when federal courts address the subject of attorney-client privilege issues, courts rely to a great degree, **and as a matter of procedure**, on substantive state law. During discovery, the issue of privilege has to be evaluated both procedurally and substantively. Therefore, the Federal Rules of Civil Procedure are suitable

to address the discovery issue of maintaining privilege during production and address a right to re-claim privilege in the event of inadvertent waiver.

Thank you for your time and consideration. I urge you to reach out to me if you need any further clarification on the points I have raised.

Very truly yours,

NELSON LEVINE de LUCA & HORST, LLC

Michael R. Nelson

MRN/tlc