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MEMORANDUM

March 11, 2004

TO: Hon. Lee Rosenthal
FROM: Thomas Y. Allman
RE: Possible Amendment re Safe Harbor

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As a supplement to my remarks at Fordham Law School, I would like to suggest a form of "safe harbor" from sanctions relating to the failure to preserve electronic information at the outset of litigation. My concern is that sanctions are currently being advocated in some cases where they should not, as a matter of policy, be applicable. Litigants who become aware of disputes are generally conscious of the need to preserve and produce relevant active electronic information. The typical approach is to freeze the manipulation of electronic information which is readily available on key issues (and to depend upon notice to key individuals for implementation). This is analogous to the approach traditionally used in the paper world and is normally sufficient to preserve the relevant electronic information needed for discovery. Where the parties differ on such an approach, the issues should be discussed early and, if necessary, the party seeking extraordinary efforts (such as sequestering of disaster backup materials) can seek to justify such a position by inclusion in a proposed preservation order.

However, this approach is not satisfactory to many influential observers, who seem to have an unrealistic view of what can or must be done at the outset of litigation. As we heard at Fordham (and see, e.g., Para. 3 (d) of Form 40.25, Fourth Edition, Manual of Complex Litigation), some argue that a litigant must immediately seek out and disable all features of business systems which would otherwise continue to routinely delete or discard electronic information, regardless of the type of information or its purpose for existing. This gap between reality and theory is unhealthy and counterproductive. There are sound reasons why it is not usually necessary to interfere with established business systems which are not designed to store and maintain information for retrieval. Business processes are designed to produce efficiencies and not to support litigation. Most information that is material to disputes can be captured by timely resort to active systems. To allow the possibility of sanctions for doing what is essential to maintain ordinary good business practice breeds contempt and disrespect for the legal process and encourages a "roulette" approach to compliance (since it encourages "gotcha" settlements).

For these reasons, and to help reduce an uncertainty of major concern to both producing parties and the courts, I recommend that the Committee amend the rules to provide a "safe harbor."

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I believe that the best way to do so is to amend Rule 37 so as to focus on sanctions. I do not support suggestions to amend Rules 26 or 34 to articulate preservation obligations. As Professor Redish has correctly pointed out, the scope of preservation extends beyond the rulemaking power both as to time and as to its sliding scale nature. It would be of more practical use to the bench and bar to specify when sanctions should not be applicable, regardless of the theoretical scope of the underlying obligation. Three key elements in any such a formulation should be:

First, the limitation should apply not just to sanctions issued under Rule 37(b) but to all sanctions sought to be imposed for a failure to preserve or produce electronic information;

Second, any rule should clearly express a preference to form a safe harbor either in a positive statement (as suggested below) or as a disclaimer of intent ("Nothing in these rules shall require a party to alter or suspend the operation"); and,

Third, the rule should apply to all electronic information, not just "unavailable" information since the technological debates over "availability" introduce an unnecessary issue in this policy-driven amendment.

Thus, one such formulation could be:

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(f) Failure to Preserve or Produce Electronic Information. A Court may not impose sanctions on a party for a failure to preserve or produce electronic information if the failure resulted from the normal operation of a disaster recovery or other routine business system, adopted and maintained in good faith, which deletes or discards electronic information incidental to its operation and is not specifically covered by a prior order entered after a showing of good cause. No sanctions for failure to preserve or produce electronic information shall be imposed absent a finding that the party sought to be charged willfully or recklessly deleted, discarded, destroyed or otherwise made unavailable electronic information which is a proper subject of discovery.

Please let me know if I can be of further assistance in addressing this important topic.

cc. P. McCabe (via e-mail)