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To: peter_mccabe@ao.uscourts.gov

cc:

Subject: Electronic Discovery

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I practice complex mass tort litigation in state and federal courts throughout Texas, and occasionally in other jurisdictions as well. There are mounting problems in federal court with regard to the discovery of electronic or magnetic data, and I urge the Advisory Committee to adopt a rule to protect parties from abusive discovery, unintended consequences, and unfair results. As you may know, Rule 196.4 of the Texas Rules of Civil Procedure addresses this subject, and I have seen fewer problems in my state court practice than in federal court. I believe it is essential for the Federal Rules of Civil Procedure to contain a rule addressing this subject. Particular attention should be given to the cost and burden of responding to requests for electronically stored data, and the establishment of a safe harbor regarding retention. Privilege waiver is also of special concern when it comes to inadvertent production of electronic or magnetic data. With regard to this latter issue, I also commend for your consideration Texas Rule of Civil Procedure 193.3(d), commonly referred to as the "snap back rule." That rule provides that a party who produces material without intending to waive a privilege claim does not waive that claim if within ten days after the party discovers the inadvertent production, the producing party identifies the material and asserts the privilege. The requesting party is required to return the material promptly pending any ruling by the court.

Thank you for your consideration of these comments.

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