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To: peter_mccabe@ao.uscourts.gov
cc:
Subject: E-discovery: Proposed Amendments to FRCP



02-ED-067

Mr. McCabe,

Following up on Judge Rosenthal's suggestion at the Fordham Conference on E-discovery on January 20-21, I am submitting the following comments for the Advisory Committee's consideration.

1. My overall concern is that pretrial discovery in the federal courts has subverted the mandate set forth in Rule 1 of the Federal Rules--that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every case." Discovery, as currently practiced, frequently impedes, rather than facilitates, the just, speedy, and inexpensive resolution of cases. The burden and expense of discovery have driven litigants from the federal courts. Cases that remain in the federal courts are seldom resolved by trial on the merits. "Resolution" comes in settlements forced on the parties by the delays and burdens of discovery, or worse yet, by the risk of damaging publicity or sanctions brought on by discovery disputes that change the focus of the litigation from the merits of the case to questions of spoliation of evidence. Application of the current Federal Rules to electronic discovery has made a bad situation worse. The volume of electronically stored information and the nature of the systems used to store and back up that information have made full compliance with the Federal Rules a practical impossibility for parties that are trying to act with integrity and good faith. The Federal Rules need to be revised to take into account the unprecedented volume of information stored electronically and to reflect the realities of how electronic information systems work. Revisions need not be extensive, but clarification and flexibility have to be added in key areas.

2. The Federal Rules should acknowledge that some electronic information is available and used in the ordinary course of business and other electronic information is not. Information falling within the former category should be subject to routine discovery. Information falling in the latter category should not be subject to discovery without a showing of good cause and substantial need. If a court orders preservation or production of information in the latter category, it should shift the costs of preservation, retrieval, and production of the information to the party

demanding it. Texas Rule of Civil Procedure 196.4 is a good example of a rule that establishes this two-tier approach to electronic discovery. In virtually every case, the information that is available and used in the ordinary course of business will be voluminous, and that information along with deposition testimony and information gained from other discovery devices will provide adequate evidence to reach a just resolution. The two-tier approach will give courts adequate tools to order extraordinary discovery in the rare cases in which such discovery is warranted.

3. The Federal Rules should acknowledge that the essential nature of some electronic systems requires them to delete and overwrite information automatically and that to interrupt the operation of such systems inflicts extreme expense and disruption on the company using the systems. The Rules should include a "safe harbor" provision that would permit such systems to continue running unless a party obtains a court order requiring that the system(s) be stopped. The "good cause and substantial need" standard should apply to the granting of the order, and the court should shift the cost for preservation, retrieval, and production to the requesting party. The prime example of an electronic system that the safe harbor should cover is a disaster recovery system. The purpose of a disaster recovery system is to restore part or all of a company's computing network in case of a disaster. Companies do not use such a system to store information that they anticipate will have to be retrieved and used in the future. Companies keep vast amounts of information to meet legal requirements or future business needs. Much of that material is in electronic form, but it is stored separate from the back-up system or from any other system that automatically deletes and overwrites the information. Such information would be subject to routine discovery and would not be covered by the safe harbor. The disaster recovery system for the company I represent generates approximately 121,000 back-up tapes a month. An order requiring the company to stop recycling all back-up tapes would cost the company approximately $1.9 million per month just to purchase extra tapes. The figure does not cover labor, storage, or other costs that would also be incurred. When cases go on for years, the cost becomes enormous. In addition, the number of tapes that accumulate is more than any party could search. Under the current rules we do not know if a court is going to require us to stop recycling some or all of our back-up tapes. At any one time, we have over 14,500 active cases. We get about 400 new cases a month--about 11 each day. If, when the company gets notice of a new lawsuit, it has to stop recycling tapes in its back-up system and in other systems that automatically delete and overwrite information, the company would never be able to recycle tapes. Under the current rules, we have to guess whether a court will order us to stop recycling, and we have to guess the scope of any such order. We constantly run the risk of sanctions and negative publicity for failure to guess correctly. The predicament that I have described is not just a "big-business" predicament. The government faces the same uncertainty, and, as small businesses become computerized, they will face the same risks when they are sued. The safe harbor provision should protect a party from the time it gets notice of a lawsuit until the court rules on any discovery request that would require interuption of tape recycling.

4. The Federal Rules should instruct courts to consider all relevant circumstances to determine if a party has forfeited or waived a privilege during discovery. The Rules should not mandate or suggest a "quick peek" procedure, which would allow parties to look at each other's documents and fight about privilege later. A federal rule cannot protect a party from a state court that might determine that a "quick peek" effects a waiver. That discussion of a "quick peek" procedure is occurring at all is recognition of the damage unlimited discovery is doing to our system of justice. The discussion is an admission that the demands of discovery have

become so great that attorneys are unable adequately to review documents for privilege. The solution is not to weaken the privilege protection, but to eliminate excessive discovery.

I have not included suggested wording for specific amendments to the Federal Rules, but I am working with the Lawyers for Civil Justice (LCJ) to draft proposed language. I anticipate that LCJ will be submitting specific wording in the next few days.

I thank you and the Committee for the work you are doing to resolve the issues raised by e-discovery and for giving me the chance to participate in that work. Thank you.

Regards,
Chuck

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