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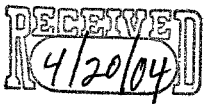

April 20, 2004

LCJ Comments to the Civil Rules Advisory Committee
Regarding E-Discovery Proposals Discussed at the April 15-16, 2004 Meeting

The E-Discovery Group of Lawyers for Civil Justice ("LCJ") a nationwide coalition of corporate and defense trial counsel respectfully submits these comments to the Civil Rules Advisory Committee of the United States Judicial Conference in response to the proposals for "E-Discovery" rule amendments discussed at the Committee's April 15-16, 2004 meeting. The suggestions are limited to "Two Tiered Discovery of Electronically Stored Information" and "Safe Harbor from Rule 37 Sanctions".

Two Tiered Discovery of Electronically Stored Information

As in the "two tiered" discovery provisions of the 2000 amendments, the Committee should continue its efforts to encourage parties first, to make narrowly tailored, "smart" discovery requests targeted at reasonably available information and, second, to require that requests for more expansive discovery be subject to court order on good cause.

Of the alternatives discussed at the meeting that would help reduce the initial burden of retrieving, restoring, and reviewing electronically stored information not readily available, we prefer the language of Alternative 1 B, but we strongly suggest that it appear as Rule 26 (b)(2)(C) (as in Alternative 3 B), not as Rule 34(a)(3), because the provision is a logical progression of earlier amendments to Rule 26 and because it is composed of **two -- tiered** declarative and positive sentences (rather than one indirect, negative sentence), as follows:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(b) Discovery Scope and Limits.

(2) Limitations on Frequency and Extent.

(C) Electronically Stored Information. Parties may obtain discovery of electronically stored information that is routinely maintained by the responding party in the usual course of its regularly conducted activities. For good cause the court may order discovery of electronically stored information that is not routinely [~~accessed by or~~] maintained [~~for~~] **[by]** the responding party in the usual course of its regularly conducted activities, subject to the limitations of Rule 26 (b)(2).

We believe it is very important for the Committee as it did in the 2000 discovery amendments, to specifically and purposefully emphasize, by specific reference to Rule 26(b)(2), the necessary limitations imposed on the breadth and extent of discovery established by adoption in 1983 of Rule 26(b)(2) [then 26(b)(1)] and continued in 1993.

We also suggest that it is NOT appropriate to attempt to describe the burden of proof regarding "accessibility" in the Rule, but agree that the Notes should explain that the Rule would not shift any burdens. In our view, the Rule would prioritize discovery to encourage expedited production of material that is reasonably accessible in the usual course of activities, which may be sufficient for resolution of most cases. (The descriptive phrase "usual course of activities" is necessary to focus searches on more than "technical accessibility").

If parties seek additional information, the burden of proof does not shift, but stays where it has been – on the requesting party to show good cause, relevance and need, and on the producing party to show "inaccessibility", cost, burden, etc. There is no restriction on the scope of electronic information subject to discovery or any shift in the burden of proof; merely an attempt to prioritize and rationalize the production of relevant information.

The only change we suggest in the text of Alternative 1B, other than its placement in Rule 26(b)(2)(C), is to make it clear that a court should only be able to order a party to preserve and produce its own electronically stored information.

Safe Harbor from Rule 37 Sanctions

We much appreciate the Committee's significant progress on a "safe harbor" provision and believe that the proposal below will confirm that sanctions are not intended to be applied where information becomes unavailable as the result of the "routine" operation of business information systems despite a party having taken "reasonable steps" to preserve the information that it maintains in the usual course of its regularly conducted activities.

In our view it is essential that sanctions should be imposed only for willful or reckless violation of a preservation order in the action. Willfulness is not inconsistent with a "reasonable steps" requirement and is necessary to deter sanctions for "negligent spoliation" as in *Residential Funding.*

Moreover, the effect of "a statute or regulation" would best be assessed in the context of deciding if the party took "reasonable steps" rather than making it an absolute bar to parties seeking protection from sanctions. The purpose of Rule 37 is to sanction violations of court orders, not to enforce adherence to myriad statutes and regulations.

In the proposal below, we have combined Alternatives 1 and 2. Material we suggest be deleted is ~~struck through~~ and material added is in **bold.**

Rule 37. Failure to make Disclosures or Cooperate in Discovery; Sanctions

(f) Electronically Stored Information. Unless a person **[willfully or recklessly]** violates a court order in [~~this~~] **[the pending action]** [~~or a statute or regulation,~~] **[that required the person to preserve such information],** a court may not impose sanctions on that person for failure to produce electronically stored information [~~due to failure to preserve such information~~] if:

(1) the failure resulted from the routine, good faith operation of the person's electronic information system; and

(2) the person took reasonable steps to preserve [~~information it knew or should have known would be discoverable in the pending action or when an action is reasonably anticipated.~~] **[discoverable]** electronically stored information [**that it maintains in the usual course of its regularly conducted activities.**] [If a person takes such reasonable steps it may continue to operate its routine electronic information systems.]

Of course, it will be necessary to draft a Note to accompany the amendment. We suggest the following:

ADVISORY COMMITTEE NOTE to AMENDED RULE 37(f).

Rule 37 is revised to clarify that a producing party is not expected to interrupt the routine operations of its computer systems each time that litigation is filed even if it is later shown that the failure to do so may have caused the loss of electronically stored information which would have been subject to a discovery obligation. In order to claim the protection of this "safe harbor" from sanctions, the responding party must show that (1) it undertook reasonable steps to preserve electronically stored information that it maintains in the usual course of its regularly conducted activities and (2) that it routinely and in good faith operated the systems involved. Failure to show either element bars an assertion of "safe harbor." A good faith effort at preservation will capture, from readily accessible sources, information needed to make a full and adequate production consistent with Rule 26. To the extent that a party seeking discovery is nonetheless determined to seek production from sources that are not readily accessible, such as disaster recovery backup tapes, the party seeking such discovery should raise the issue early via a meet and confer conference and if the issue is not resolved, the party seeking the information may seek a Court order justifying deviation from the normal rule. The Committee is concerned that without this explicit "safe harbor," abusive and unnecessary allegations of spoliation may become prevalent in attempts to gain advantages against entities which are proceeding in good faith. If a producing party fails to fully carry out a preservation order regarding such electronic information, that conduct should only be sanctioned if it is non-negligent, despite the contrary inference in the Second Circuit Opinion in *Residential Funding.*

LCJ's E-Discovery Group commends the Committee for producing a comprehensive and necessary package of thoughtful, fair, and balanced proposals for addressing the unique problems presented by discovery of "electronically stored information" in civil litigation. We strongly support the decision to publish for comment proposed rules in each of the areas discussed at the meeting and offer these comments to assist the Committee in agreeing on language that is clear and unambiguous, fair and balanced.

Respectfully submitted,

The Lawyers for Civil Justice
E-Discovery Study Group