Report Regarding Changes to Discovery Rules Regarding Electronic Discovery

This memo will set forth an overview of the changes to the discovery rules regarding electronic discovery approved by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") on June 16, 2005. They will be presented to the Judicial Conference on September 20, 2005, then to the Supreme Court and Congress. If approved as presented, they will become effective December 1, 2006. Along with this report, I also call your attention to the excellent article by Greg Joseph published in the June 20, 2005 issue of the *National Law Journal* on this subject.

Members of the ABA Section of Litigation's Council and the Federal Practice Task Force presented written comments to the Advisory Committee on Civil Rules on a draft of the proposed rule changes published in August 2004 and I had the opportunity to present oral testimony before the Advisory Committee on February 11, 2005. Further changes were made by the Advisory Committee to the proposed rules from the previously published draft. Our comments were cited by the chair of the Advisory Committee in her report to the Standing Committee and I am pleased to report that certain of our comments were reflected in changes made to the text of the Rules and Committee Notes. Set forth below is a brief summary of the Rule changes as well as an identification of certain of the changes made from the published draft.

I. Early Attention to Electronic Discovery Issues – Rule 16(b), Rule 26(a), Rule 26(f) and Form 35

The Rule changes require parties to discuss electronic discovery issues early in a case as part of their initial Rule 26(f) conference. The agreements reached between counsel should be reported to the court at the initial Rule 16 Conference and reflected in the court's initial scheduling order. The subjects to be discussed include the form of production of electronically stored information (a definitional term adopted by the Advisory Committee, hereinafter "ESI"), the preservation of documents and whether the parties wish to reach any agreement regarding the assertion of privilege or work product protection for documents inadvertently produced or produced prior to a complete privilege review ("claw back" or "quick peak" arrangements).

One of our concerns, addressed by the Advisory Committee, was that the discussion of preservation issues would inevitably lead to disputes and requests for the court to issue early preservation orders, which if broadly issued, could lead to excessive focus on jockeying for later sanctions applications. The Note was revised to state that preservation orders should not be routinely entered, that those entered over objection should be narrowly tailored and that they should be rarely entered upon *ex parte* application. The rules were also changed to make clear that ESI had to be produced as part of initial disclosures. Also, the discussion of privilege issues was expanded to include work product under the Rule 26 designation of "trial preparation materials." The language regarding the court incorporating the parties' agreement on inadvertent production of privileged information in the initial Rule 16 order was softened over a concern, expressed in our comments and others, that parties might be misled over the effectiveness of such orders with respect to claims of waiver by third parties, which

claims would be governed by the substantive law regarding waiver in the relevant jurisdiction.

II. Two Tiered Discovery: Discovery Into Electronically Stored Information That Is Not Reasonably Accessible – Rule 26(b)(2)

The year 2000 amendments to Rule 26 reflect an effort to limit the scope and burdens of discovery by adopting two tiers for the scope of discovery: tier 1 managed by the parties (documents relevant to the claims and defenses of the parties) and a tier 2 broader scope of discovery accessible only by court order. Because of the extraordinary burden and expense of searching inaccessible back-up tapes, and motion practice that has focused on these burdens, the Advisory Committee proposed a rule for two-tiered discovery of ESI. Under revised Rule 26(b)(2), a responding party need not provide discover of ESI from sources that it identifies as not reasonably accessible because of undue burden of cost. On a motion to compel or for a protective order, the responding party has the burden to show that the sources are not reasonably accessible. Even if such a showing is made, the court could still order discovery of those materials for good cause shown and could specify conditions for that discovery, including reallocating the costs of that discovery.

A number of comments focused on the identification requirement. Our comments raised the concern that the identification requirement should not be viewed like the preparation of a privilege log because of the cost of reviewing the inaccessible information. The Rule was amended to address the issue by indicating that the responding party merely had to identify the sources of information by category or type, rather than a more detailed identification that might require a review of the information itself. In response to our comments and that of others seeking more clarification on when ESI was not reasonably accessible, the Rule and Note responded by making it clear that ESI becomes not reasonably accessible because of undue burden or cost. The Note also reflects a practical approach to these issues in which parties would normally first look to ESI produced from readily available sources and then decide whether further access was needed to information that was claimed to be not reasonably accessible. Further, in response to our comment, the Note now makes clear that discovery may be needed by the requesting party to see whether in fact identified sources were not reasonably accessible.

III. Procedure for Asserting Claims of Privilege And Work Product Protection After Production – Rule 26(b)(5)

This rule sets forth a procedure to present to the court claims that parties inadvertently produced information protected by the attorney-client privilege or work product doctrine. As drafted, the Rule provides that if a party discovers it produced information protected by privilege or work product, it must notify the receiving party and set forth in writing the basis for the belief that the information is privileged. After receiving notification, the receiving party must either return, sequester or destroy the information and may not disclose the information to third parties until the claim is resolved. It may also submit the issue to the court along with the producing party's notice to get a prompt ruling on whether the information is protected and whether any privilege has been waived.

Several changes have been made to the Rule from the version previously published. First, work product has been added explicitly to the reference to privilege. Second, the prior requirement that the notice to the receiving party be made "within a reasonable time" was deleted. The prior draft seemed to suggest the notice had to be given within a reasonable time of the production. We pointed out that many times a party may not realize it made an error until it prepared for a deposition some time later. In deciding to eliminate the requirement in its entirety, the Committee noted that the prior requirement of "a reasonable time" was unclear as to whether it ran from the date of production or from the date of discovery of the inadvertent production and was nevertheless subject to a court determination of reasonableness in any event. Since the purpose of the procedure was to freeze the status quo so the issue could be presented to the court, and since reasonableness would still be examined in determining whether there was waiver, the Committee eliminated the "reasonable time" requirement from the procedural Rule.

The Rule as revised also requires the party giving notice to set forth the basis for the claim of privilege in writing so that the matter can be presented to the court. The new Rule also states explicitly that the receiving party cannot disseminate or use the information until the claim is resolved and the new Rule also addresses the obligation regarding information already disclosed to third parties: the receiving party must take reasonable steps to retrieve the information. In exploring whether it should impose a requirement that the receiving party certify it has complied with its obligations under this Rule upon receiving a notice, the Committee, consistent with our comment, declined to impose such a requirement, noting, as we reasoned, that it was improper to impose an added burden on the party who did not cause the problem in the first place.

IV. Interrogatories And Requests For Production Involving ESI – Rule 33 and Rule 34 (a) and (b)

A. Definition of ESI Separate from Documents – Rule 34(a)

The Advisory Committee decided to stay with its previously published version of the new title for Rule 34, which treats ESI as separate from documents and is titled "Production of documents, electronically stored information and things . . .". Many commentators focused on the question of whether ESI was a subset of "documents" or something separate from them. We sought to have ESI defined as a subset of documents, noting that litigators considered ESI to be producible pursuant to requests for the production of documents for many years. The technology experts spoke of significant and growing differences between the terms resulting from the dynamic nature of databases. While the Advisory Committee felt there were good arguments on both sides, it determined to be technologically progressive and treat ESI as something separate and apart from "document." The fact that we and others pointed out that parties would be required to now change their standard requests for the production of documents to now ask specifically for the production of both was not persuasive to the Advisory Committee. Nevertheless, in a Note, it pointed out that if responsive information resided in ESI, that information normally would be required to be produced in response to a request for the production of documents, unless the request clearly indicated it was seeking only traditional "documents."

B. Form Of Production – Rule 34(b)

As approved, the new Rule permits but does not require a requesting party to specify the form or forms of production in which it seeks to have ESI produced. The responding party can object to the form or forms and must specify the form it tends to use in its written response. The Rule also provides a default form of production if no form is specified or not agreement is reached. The parties would be required to produce the information sought only in one form.

Changes from the published draft make clear that the responding party can object to the form or forms of production requested and must specify the form it intends to use in its written response. The default of form of production was changed from a choice between the form in which the information is "ordinarily maintained" or in an "electronically searchable form," to a choice between the form in which it is "ordinarily maintained" or a "reasonably usable" form. The "reasonably usable" formulation provides greater flexibility to meet different types of information needs and the Note provides that a party might be required to translate information into a reasonably usable form. The amendments also adds "form or forms of production" to make clear that all information requested or produced need not be produced in the same form.

V. Safe Harbor: Sanctions For Certain Types of Loss of ESI – Rule 37(f)

This proposed rule was completely rewritten from the previously published draft. It addresses the loss of information due to the routine operation of electronic information systems and provides what is described as a limited protection against sanctions when ESI cannot be produced because the information is lost as a result of the routine operation of an ESI system, as long as the operation is in good faith. As revised, the language reads as follows:

> **(f) Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The final Note was altered from that presented to the Standing Committee and has not been circulated in final form. The following themes, however, emerge. Prior comments focused on the level of culpability that should be shown for the imposition of sanctions. The prior draft contained a negligence standard and there was also set forth in a footnote a version requiring willful conduct. Our comments proposed an intermediate sliding scale standard in which the most severe sanctions would be reserved for willful and intentional conduct. The Note states that the Advisory Committee adopted an intermediate culpability standard of good faith. Good faith may require that a party impose a litigation hold, that it comply with agreements it reaches between parties on preservation, and that it comply with any court orders entered addressing preservation. As a result of the adoption of the good-faith standard, the Advisory Committee eliminated the previously drafted exception to the safe harbor when a court order was violated, reasoning that a failure to comply with a court order would, of course, be taken into account by the court in determining the parties' good faith. In response to our comment, the Note now provides that severe sanctions ordinarily would be appropriate only when a party acted intentionally or recklessly. The Note also provides that a safety valve from the safe harbor exists by the opening language of the Rule which allows for sanctions in exceptional circumstances.

These Rule changes will receive much attention as they work their way through the final approval process toward enactment on December 1, 2006. It now appears that they are likely to be approved in their present form.

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