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SAFE HARBORS AND PRESERVATION: A RESPONSE

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My colleague Richard Middleton has graciously suggested that I might wish to respond to his criticism of an answer I gave at Fordham as to how my[1] proposed "safe harbor" rule might work where certain executives "deleted thousands of e-mail messages they should have kept …" For starters, if those were the only facts – that is to say that if executives, knowing of their preservation obligations, nonetheless deliberately deleted material information relevant to discovery, one would expect the opposing parties to seek and secure sanctions. Nothing in the several versions of the "safe harbor" in Rule 37 that I have advocated would apply to that conduct nor should it.[2] However, the full quote from the *Legal Times* cited by Richard can also be read to imply that the deletions occurred solely because the active e-mail accounts of employees were "purged" every three weeks. That case might invoke a "safe harbor." If the deletion of e-mails took place before the executives were aware of the dispute (or otherwise had notice of the duty to preserve) and were the result of a normal procedure which the corporation uniformly followed, it seems appropriate to me that no sanctions should be applied to them or their employer. If the court concludes that in that particular case the automatic purging system was "adopted and maintained in good faith," it seems fair to allow the process to continue until a "litigation hold"is entered. Producing parties should have the right to continue to operate their businesses processes where it is accomplished in a reasonable manner and in good faith.

I also responded to a related question about the costs of retrieval of the e-mails in question from less accessible sources than the active e-mail accounts. One of the unique characteristics of electronic information that helps justify providing a "safe harbor" is that multiple sources of the same information almost always exist. Presumably, the hard drives of PCs used by the individuals or the backup tapes for the e-mail servers (if they still exist) could be searched for the deleted information. The information would not be considered to be readily available and the requesting party might have to pay for its reconstruction and production. The necessity to make the effort required and the potential outcome of such a cost-shifting request would be determined by the familiar factors listed by Judge Scheindlin and others in recent cases. This might require the requesting party to share some of the costs.

The key point to me, however, is that a "safe harbor" provisions cannot be "gamed" or "designed" to cover up or prevent preservation or production of information. As in the examples cited of the abuse of document retention policies, Courts and parties are well equipped to see through misuse of otherwise neutral policies and practices.

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1 While my proposals for a "safe harbor" in the Federal Rules were formulated while serving as the BASF Corporation General Counsel, the suggestions are mine alone, not those of BASF or of Mayer Brown Rowe & Maw.

2 My current formulation (March 11, 2004) applies only to failures which "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 not specifically covered by a prior order entered after a showing of good cause." I also suggest that sanctions for failures of preservation or production should not be imposed unless the party sought to be charged acted "willfully or recklessly."