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04-CV-064

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Peter G. McCabe
Secretary, Committee on Rules of Practice & Procedure
Administration Office of the U.S. Courts
1 Columbus Circle N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing as a member of the federal bar admitted to practice both in Minnesota and the Eighth Circuit Court to comment on recent proposals to change the Federal Rules of Civil Procedure relating to electronic media discovery.

I believe these changes, as they are presently proposed, should not be adopted.

I have had extensive experience in undertaking discovery in products and other cases in which electronic discovery has been at issue. As an initial matter, I have found no difficulties with the rules as they are currently constituted.

Allow me to address the proposed changes to some specific rules.

I note that the Committee requested specific input regarding Rule 26(f)(4). In my view, had this provision been in place during recent discovery in a case I handled here in Minnesota, it would have significantly altered the disclosure. The corporate defense in this products case was aggressive in its assertion of privilege. I have no doubt that, had this provision been in place, there would have been further discovery disputes and that the manufacturer would have sought to go back and designate documents already produced without a claim of privilege, necessitating further discovery issues and disputes.

With respect to Rule 26(b)(2), it is my belief that, again as my recent experience in Minnesota demonstrates, the question of accessibility is

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one which, if enacted into the Rules in its present form, would have greatly increased our burden of attempting to obtain documents. As noted above, the corporate defendant in our case was already aggressive in refusing to produce documents. I am quite confident that, had the reasonable accessibility rule been in place, we would have suddenly found that virtually all of the documents were not "reasonably accessible". With the assistance of the magistrate, we were able to craft a production plan with a minimum of difficulty that allowed us access to the documents we needed, including electronic discovery. There is no need for this rule provision.

Rule 26(b)(5) has similar difficulties with respect to allowing a party to designate privilege after production.

Finally, the "safe harbor" provision regarding sanctions under Rule 37 is entirely ill advised. In my recent experience here in Minnesota, had such provisions been in place, I'm absolutely certain that the defendants would have utilized this to greatly impede additional discovery, knowing that they could invoke the "safe harbor" provisions.

Once again, this would greatly increase the involvement of the courts in these discovery matters while at the same time preventing litigants from obtaining properly discoverable documents in electronic form.

Thank you very much for the opportunity to comment on these rules changes.

Sincerely,

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