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04-CV-084
Request to Testify
2/11 DC

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VIA FACSIMILE

January 11, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Center Building
Washington, DC 20544

RE: **Testimony on Proposed Amendments to the Federal Rules of Civil Procedure Relating to Electronic Discovery**

Dear Mr. McCabe:

State Farm Mutual Automobile Insurance Company ("SFMAIC") requests the opportunity to provide testimony on the Proposed Amendments to the Federal Rules of Civil Procedure regarding Electronic Discovery at the Public Hearing scheduled for February 11, 2005 in Washington, DC.

Thank you for the opportunity. If you need any additional information, please do not hesitate to contact me.

Yours truly,

Cathy DeGenova-Carter

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VIA FACSIMILE
AND OVERNIGHT MAIL

04-CV-084
Testimony
2/11 DC

January 28, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington D.C. 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure: Electronic Discovery

Dear Mr. McCabe:

I. Introduction

Thank you for allowing State Farm Mutual Automobile Insurance Company ("State Farm") the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery. The Committee should be commended for its work in developing the proposed amendments. The introduction to the Report of the Civil Rules Advisory Committee best expresses the trend in electronic discovery over the past five years. "Electronic discovery has moved from an unusual activity encountered in large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in federal courts". Report of the Civil Rules Advisory Committee (May 7, 2004, Revised, August 3, 2004), page 2.

This commentary is a general outline of our position. We look forward to providing the Advisory Committee with specific, practical illustrations supporting these positions during our testimony on Feb. 11, 2005.

II. State Farm supports a two-tiered approach to electronic discovery in Rule 26.

The two-tiered approach to electronic discovery would reduce the costs and burdens of electronic discovery. Reasonably accessible and inaccessible electronic information should be treated differently. A two-tiered approach will force requesting parties to tailor requests with appropriate specificity and also ensure that responding parties know what electronic information to produce, thereby reducing uncertainty and costs to both parties.

A. First-tier electronic discovery must be limited to electronic information reasonably available in the ordinary course of business.

Limiting the first-tier to electronic information reasonably available in the ordinary course of business would help curtail the excess of overly broad electronic discovery requests. Parties would not be forced to search and restore information that was only saved for purposes of disaster recovery, except for good cause showings.

In order to better clarify what electronic information falls into tier-one, "reasonably accessible" electronic information should be further defined. Perhaps, in another Note, the Committee could give additional examples of what it considers to be "reasonably accessible" information.

B. Second-tier discovery, "not reasonably accessible" electronic information, should only be ordered for good cause and substantial need.

The sheer volume of electronic information that could be produced to an overbroad electronic discovery request dictates there be some restriction on what electronic information parties produce. If the electronic information is not reasonably accessible in the ordinary course of business, then without a good cause presentation, a party should not be forced to produce it.

Proposed Amendment Rule 26(b) (2) should not force parties to "identify" information that is not reasonably accessible. Even though the Note states that the "specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case", the fact that the responding party must identify the information is burdensome and costly.

III. Rule 26 (b) (2) should specifically reference cost allocation. It should include a presumption of cost shifting for costs related to "not reasonably accessible" data.

State Farm supports a presumption of cost shifting when a party requests retrieval, review, and production of "not reasonably accessible" electronic information. The presumption could be overcome by a clear and convincing demonstration of substantial need and relevance. A cost allocation provision would be a deterrent against an extraordinary foray into critical business systems, disrupting key operations. At the same time, it would allow the requesting party to obtain relevant electronic information when it is truly justified.

Large companies face exorbitant costs in searching for "not reasonably accessible" data. A cost shifting presumption would help reduce these costs, especially when overbroad, irrelevant requests are received. A specific word search of a large company's entire back-up or disaster recovery system could cost millions of dollars. Furthermore, it is burdensome to complete these searches because the search may negatively impact normal

business operations. If a requesting party seeks such information and is unable to demonstrate a substantial need or relevance, then the requesting party should be required to pay the costs for such.

IV. The Rule 37(f) Safe Harbor should apply to parties that are operating in the ordinary course of business, in good faith, unless the party intentionally makes the information unavailable in violation of a court order.

The Safe Harbor provision should reflect that parties do not need to suspend their normal operation of business, absent a preservation order based upon a showing of good cause and substantial need. Large companies employing tens of thousands of employees cannot save all electronic information. Most back-up systems are intended to restore computers in case of a disaster. For most companies, back-up tapes only contain the most recent information. As time passes, back-up tapes typically are recycled. Companies should not be forced to halt these typical back-up procedures and create separate back-up procedures for litigation. A Safe Harbor provision would protect large companies from sanctions when they operate in the ordinary course of business, and thus are unable to produce the requested electronic information.

V. Rule 37(f) should require a high degree of culpability (intentional or reckless failure to preserve information) if sanctions are to be awarded.

State Farm supports the alternative approach listed in the footnote on page 13 of the Proposed Rules which protects a party under the Safe Harbor unless the party has intentionally or recklessly failed to preserve the information. The history behind the sanction stems from the fact that courts needed penalties or mechanisms of enforcement to provide incentive for obedience with the laws or the rules or the regulations. (See Blacks Law Dictionary counter 6th Edition) (1990). Typically, a level of fault is required for the imposition of sanctions. These rules should not be any different. They should require a high level of fault before a sanction is imposed.

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In conclusion, State Farm thanks you for the opportunity to submit comments on the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery. We look forward to presenting you with testimony on Friday, Feb. 11, 2005.

Very truly yours,

State Farm Mutual Automobile Insurance Company
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