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January 10, 2005

Peter McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rules of Civil Procedure

Dear Mr. McCabe:

Please accept these comments regarding the proposed amendments to the Federal Rules of Civil Procedure.

1. **Rule 26(b)(2)**. The proposed amendment provides that a party need not provide electronically stored information that the party identifies as not reasonably accessible. This amendment would establish an unprecedented two tier system of document production that would invite abuse. First, allowing a party to self-designate material as inaccessible would invite stone-walling and subsequent motions to compel involving the court. Also, requiring an extra hearing to merely obtain the information claimed as not reasonably accessible would further burden the court. The Federal Rules should instead presume that electronic data is "reasonably accessible" based on its very nature. As a general rule, a search of electronic information may be conducted more quickly and more efficiently than a search of paper data, especially where a large volume of data is involved.

2. **Rule 26 (b)(5)**. The proposed amendment allows a party to retrieve documents already produced if the party believes the documents are privileged. This would allow a party to make a late claim of privilege if it believes the opposing party may find a use for the documents. Where the plaintiff has already provided the information to experts or other attorneys, plaintiff would have to locate the material she sent to others and request that it be returned or destroyed. This amendment invites secondary litigation.

3. **Rule 37(f)**. The proposed amendment would prohibit the court from sanctioning a party that destroys electronically stored information if the party took reasonable steps to preserve it or the loss resulted from routine operation of the party's electronic information system. This proposal would not only allow but would encourage routine destruction of evidence that would

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establish liability. Giving parties a safe harbor when they destroy information through "routine" operation of their document retention system will invite them to set up "routine" data purges at short intervals. This is both extremely bad policy and technologically unjustified. With modern computer systems, vast amounts of data can be stored indefinitely and searched quickly. That is one of the greatest benefits of electronic data. There is no practical justification for allowing and promoting the destruction of electronic evidence.

Thank you for your consideration and time in reviewing these comments.

Sincerely,

A handwritten signature in cursive script that reads "Michele C. Smith". The signature is written in black ink and is positioned above the printed name.

Michele C. Smith