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Peter J. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle N.E.
Washington, D.C. 20544

Re: Proposed changes to F.R.C.P. relating to electronic discovery

Dear Mr. McCabe:

I want to comment on the proposed changes to the Federal Rules of Civil Procedure relating to electronic discovery. First, let me tell you a little bit about my practice.

I represent almost exclusively plaintiffs in employee benefits litigation. The great majority of my work is in federal court and arises under the Employee Retirement Income Security Act of 1974 ("ERISA"). Consequently, the Federal Rules of Civil Procedure impact almost all of my work.

The first concern I have is about the proposed rule change to Fed.R.Civ.P. 26(b)(2). That proposed amendment will provide an incentive for defendants to claim that documents or data or information that are stored electronically are not "reasonably accessible." My experience in dealing with many cases, including many that involve voluminous documents, is that the ease of recovery of electronically stored documents or information is actually significantly easier than the recovery of paper records. It is difficult for me to understand why there would need to be any provision inserted into the rules to limit discovery on documents and information that, as a general rule, are more readily accessible than paper documents. Placing this provision in the rules will routinely require that plaintiffs jump through an extra hoop to get relevant documents that should be produced anyway. For defendants who are interested in delaying a resolution of a case, this amendment provides new ways to throw up additional roadblocks and make it more difficult for plaintiffs to prosecute quickly and efficiently a claim,. Such a tactic is especially attractive and common because defendants recognize that plaintiffs and their attorneys who handle cases on a contingent fee basis are less likely to start a fight in the first place if they know that doing so will involve extensive discovery disputes. Placing yet another procedural hurdle in

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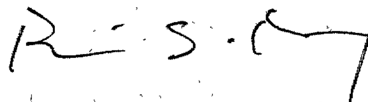
the rules won't deter a well-financed plaintiff or plaintiff's counsel from pursuing a large case. But it may very well deter less well off plaintiffs and/or their counsel from pursuing a case with smaller potential upside, even though such a case has merit.

There is also a proposed amendment to Rule 26(b)(5)(B). My reading of this new proposal is that it will apply to more than just electronic discovery. As I read the rule, I think it is quite easy to see that defendants and plaintiffs will more likely be involved in satellite litigation regarding inadvertent production of privileged information. While this certainly happens on occasion under the current rule, my experience is that the matter is generally resolved relatively quickly and informally. Again, under the proposed change, there would be additional hearings with additional expenditure of lawyers' time and judicial resources to have the court make a determination of a claim of privilege. In addition, I am concerned that state laws which are already in place regarding disclosure of privileged information will be unnecessarily disturbed or preempted.

Finally, the proposed amendment to Rule 37(f) creates real problems in my mind with unscrupulous parties who destroy evidence and then claim that the loss is a result of routine operation of the party's electronic information system. This significant loophole in sanctions that would otherwise be applicable for spoliation of evidence is almost exclusively going to benefit corporate, business and insurance interests. Very few individuals or other plaintiffs of the type I represent are going to have situations where information is lost because of the "routine operation" of their "electronic information system." In addition to providing a significant barrier to recovery of electronic information by corporate or business defendants, the provisions of the rule would actually put in place an incentive for hardware and software programmers to establish "routine operation" of the defendants' "electronic information system" which happens to destroy information or purge it at very short intervals. This proposed rule simply opens up too wide a door to abuse by unscrupulous parties.

I appreciate you taking the time and effort to consider these comments.

Sincerely,



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