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Subject Comments on Proposed Rules on Electronic Discovery

Thank you for the opportunity to submit the attached comments on the proposed electronic discovery amendments to the Federal Rules of Civil Procedure. Please let me know if there is a problem with transmission or if I can be of any further assistance to the Committee.

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February 15, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice
& Procedure
Administrative Office of the
United States Courts
One Columbus Circle NE
Washington, D.C. 20544

Re:Proposed Electronic Discovery Amendments to
The Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am on the faculty of St. John's University School of Law and teach Federal Civil Procedure and other federal litigation-related subjects. I respectfully submit these comments on the proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information.

My comments focus generally on the wisdom of adopting the proposed changes and specifically on the proposed amendments which address:

(1) early attention to issues relating to electronic discovery [Rules 16, Rule 26(f), and Form 35]
(2) discovery of electronically stored information that is "not reasonably accessible" [Rule 26(b)(2)]; and
(3) the application of Rules 33 and 34 to electronically stored information.

I generally endorse the substance of the comments previously submitted by the Federal Bar Council and the Association of the Bar of the City of New York on the proposed amendments relating to agreements on waiver of privilege and the limitation of sanctions under Rule 37 and, thus, will not reiterate those comments in this letter.

1. General Comments with Respect to Proposed Amendments to Federal Rules of Civil Procedure on Electronic Discovery

a. The proposed changes are largely unnecessary and premature. The proposed amendments addressing discovery of electronic information arise from a sense that such discovery is sufficiently distinctive from conventional document discovery as to require special rules. The Report of the Civil Advisory Committee (pp. 2-3) points primarily to two factors that differentiate electronically stored information: (1) an exponentially greater volume that makes electronic discovery more burdensome, costly, and time-consuming, and (2) the storage of such information as dynamic databases in a variety of formats, and the continuous alteration, destruction, or modification of electronically stored material, intentionally or through ordinary usage of systems.

By and large the current rules are adequate to address the issues raised by electronic discovery. The increased volume and new formats are not significantly different in scope from the concerns raised as use of photocopy machines and tape-recorded information became widespread.

Although rules must change to both reflect and direct practice, premature modification focused on existing technology is likely to be outdated before any adopted changes can be posted on the internet. Language must be flexible enough to accommodate evolving technology, without providing an excuse for satellite litigation with its concomitant expense and delay. The current language in the rules has not proved to be a barrier to the exchange of discoverable information in electronic formats.

Further, concerns about local variations and experimentation should not drive a premature or ill-advised change.

b. Directives to parties should not be buried in the Advisory Committee Notes but should be included within the text of the Rules.

Such use of the Advisory Notes is ill-advised and creates a trap for the unwary and inexperienced who might reasonably expect to rely on explicit language in the Rules, rather than explanatory notes.

2. Early Attention to Issues Relating to Electronic Discovery [Proposed Rule 16, Rule 26(f), and Form 35]

The proposed amendments to Rule 16, Rule 26(f), and Form 35 are unobjectionable. These changes appropriately clarify that issues arising with respect to the disclosure or discovery of electronic information, including the format for production and any arguments on privilege, should be addressed early in the discovery process and included in the parties' discovery plan and the court's case management order.

3. Discovery of Electronically Stored Information "Not Reasonably Accessible"
[Proposed amendment to Rule 26(b)(2)

The proposed amendment to Rule 26(b)(2) provides for a two-tiered approach to discovery of electronically stored information. Electronically-stored information that is "reasonably accessible" must be produced when requested, but such information that a party identifies as "not reasonably accessible" need not be produced. On motion by the requesting party, however, the responding party must show that the information is not reasonably accessible and, if that showing is made, the court may order discovery of the information for "good cause" and may specify terms and conditions for such discovery.

This proposal unnecessarily complicates the discovery process and will inevitably lead routinely to applications requiring judicial intervention to determine whether the information sought is "not reasonably accessible," whether the requesting party has demonstrated sufficient "good cause" to warrant production, and what terms and conditions should govern any discovery ordered by the court.

The draft Advisory Committee Note to the proposed amendment identifies so-called "distinctive features" of electronically stored information, "including the volume of the information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information." These features raise concerns that differ only in scale from problems previously addressed successfully in earlier amendments to Rule 26(b)(2) that take into account the burden and expense of any discovery.

Further, claiming electronically stored information is "not reasonably accessible" will not establish workable guidelines for courts and litigants. The Advisory Committee Notes add to the confusion by giving examples of information considered "not reasonably accessible" because retrieval would be time-consuming and costly. Unless "not reasonably accessible" means something more than "time-consuming and costly," it does not seem to add to the protections afforded parties under the current version of Rule 26(b)(2).

Furthermore, routine access or lack of routine access to electronically stored information is not an appropriate determinant of whether information is "reasonably accessible" for production in a litigation context. The burden and cost of restoring, reviewing, and producing information is unrelated to a party's own use of the information.

The proposed two-tiered standard based upon whether information is "not reasonably accessible" will add layers of satellite litigation and delay discovery. There is no clear indication of factors other than cost and burdensomeness which might be used to assess whether information is "not reasonable accessible."

The proposed amendment to Rule 26(b)(2) requires that the responding party identify electronically stored information it claims is "not reasonably accessible." The

draft Advisory Committee Notes purport to clarify the specificity of the identification required by giving some examples. To the extent the equivalent of a "privilege log" is required to support a claim that information is "not reasonably accessible," the rule itself should more clearly delineate the content of such a log.

In sum, the proposed amendment to Rule 26(b)(2) appears to be a solution in search of a problem. There is no indication that the goals of the proposed amendment could not be achieved without modifying the current version of Rule 26(b)(2). The Advisory Committee Notes might instead be modified to clarify that the Rule is intended to apply to electronically stored information.

4. Specific Inclusion of Electronically Stored Information [Proposed amendment to Rules 33 and 34]

The clarification that documents, including electronically stored information, may be tested or sampled like tangible things is helpful. It is, however, unnecessary to distinguish between documents and electronically stored information. Attorneys, litigators, and courts have not heretofore had any difficulty in understanding the obligation to produce electronically stored information upon receiving a Rule 34 request for documents.

The proposed change creates a distinction between "documents" and "electronically stored information," but does not clarify the distinction. For example, how is electronically stored information different from "data or data compilations in any medium"?

The Advisory Committee indicated that it is particularly interested in receiving comments on whether Rule 34 itself or the Note should state specifically that the "responding party should not avoid reviewing and producing electronically stored information because a production request did not separately seek it." If there is an obligation to review such information, what is the point of requiring those making production requests to specify whether they seek discovery of documents, electronically stored information, or both? Creating a distinction between documents and electronically stored information will foster confusion and unnecessary satellite litigation. In any event, if there is an affirmative obligation, it should be clearly stated in the Rule and not just in the Advisory Committee Notes.

Thank you very much for the opportunity to comment on these proposed amendments.

Sincerely,

Ettie Ward
Professor of Law