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October 29, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the U.S.
Thurgood Marshall Federal Judiciary Bldg.
Washington, DC 20544

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

Dear Mr. McCabe:

Please find enclosed my Comments to the above-referenced Preliminary Draft.

Very truly yours,

RIEDERS, TRAVIS, HUMPHREY, HARRIS, WATERS & WAFFENSCHMIDT

Clifford A. Rieders, Esquire

CAR/jss
Enclosure

10.28.04

Comments To

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

The concerns of this writer are Civil Rules 16, 26, 33, 34, 37, 45, 50 and Form 35.

The Rules address a number of technical issues, but also address problems which have arisen concerning electronic discovery.

Proposed Rule 26(b)(2) shifts the burden for discovery by providing that "A party need not provide discovery of electronically stored information that the party identifies is not reasonably accessible." This places a burden on the requesting party to show the information is not reasonably accessible. The "reasonably accessible" nomenclature is extremely vague, and parties upon whom the requests are made will routinely indicate the inaccessibility. The self-executing nature of the Rules, which was the original intent of the 1938 framers, has been eroded in the past, and this particular change will further put parties at loggerheads.

The proper bounds should be that all information relevant to the case or which may reasonably lead to discoverable information is producible except upon a reasonable showing that the data is not reasonably accessible. The reality of electronic storage is that many, if not most, entities store much, if not all, of their information electronically. The phraseology of the Rule will create a barrier in almost every case where electronic storage is an issue, thus placing the burden of motions practice on the party seeking the data, and hence invoking the involvement of the court.

It is respectfully suggested that the burden of the objection should be on the party asked to produce the information, as has traditionally been the case.

Equally objectionable is Rule 26(b)(5)(B), which states that after a party is notified of a claim of privilege, that party must "promptly return, sequester or destroy the specified information and any copies." The wording of the Rule is such that there is no opportunity pre-notification to claim that the privilege is inappropriate, frivolous, or otherwise inapplicable. The Rule then inexplicably states that the "producing party" must comply with Rule 26(b)(5)(A) with regard to the information and "preserve it" pending a ruling by the court. What does this mean? A party presumably will produce information, notify the party to whom it has produced the information of a claim of privilege, and the party

who has received information must then return, sequester or destroy the information, but the producing party must keep the information pending a ruling by the court. To restate the Rule is to amply demonstrate the disjunctive nature of the procedure to be followed by the parties. Clearly, the party producing the information is in the best position to know if they want to claim a privilege. The privilege should be claimed at the time the information is produced or it is waived. If the Rules are intending to set up some sort of procedure or an unintentional disclosure of privilege, then the burden certainly should be on the party who made the error when it produced the information to begin with. However, to create this new procedure is one fraught with ambiguity and complication which does not seem to address the problem that currently exists.

Consistent with this Rule is the new and somewhat difficult language contained in Rule 26(f)(4), which deals with conference of the parties in planning for discovery. The new provision suggests that, upon agreement of the parties, the court should enter an order protecting the right to assert a privilege after production of the privileged information. While "agreement of the parties" appears to mitigate against potential unfairness of the Rule, it does seem to address a problem that ought more properly to rest upon the party making the error rather than creating yet another issue for parties to dispute. Absent some known difficulty and problem in this area of the Rules of Civil Procedure, it is recommended that the provision be removed.

Rule 37 addresses the situation where sanctions are imposed. A new exemption is created so the court may not impose sanctions under the Rules to provide electronic information if reasonable steps to preserve the information were taken and "the failure resulted from loss of the information because of the routine operation of the party's electronic information system." The meaning of the exception is difficult to decipher, and creates an exception wide enough to swallow the general rule. It would be difficult, if not impossible, to litigate whether loss of information has occurred because of "routine operation" of the party's electronic information system. Further, information, as a matter of logic, does not become lost through "routine operation." If anything, "routine operation" should result in the proper accumulation and distribution of data rather than the loss thereof. At the very least, it appears that the court ought not to be denied the power to impose a sanction absent wording that is clear and understandable.

Rule 45 concerning subpoenas in Section (d)(1)(C) provides that a party responding to a subpoena need not provide discovery of electronically stored information "that the party identifies as not reasonably accessible." This places the complete power to obstruct discovery in the hands of the party producing information during litigation. The burden is then shifted to the party seeking production to show what that party is least able to demonstrate. It is going to be the requesting party that has the minimal ability to demonstrate whether

the producing party may find data "reasonably accessible." Therefore, consistent with prior comments, the wording of this section should be reversed and the information should be producible unless a party is able to demonstrate to the satisfaction of the court that the data is not reasonably accessible. This is consistent with the burdens otherwise established in the Rules, and traditionally available to the parties in litigation in federal court.

With respect to Rule 45(d)(2)(B), once again the Rule addresses those of privilege requiring the part to whom the information was produced to return, sequester, or destroy the information, and the party who produced the information to comply with Rule 45(d)(2)(A) with regard to the information "and preserve it pending a ruling by the court." As suggested previously, this wording imposes an oblique, confusing scheme, which appears to place an undue amount of leverage on the party producing the information.

Of great concern is that the import of the Rules places a clear advantage on a large entity with electronic means of storage as opposed to a less sophisticated litigant who will be required to have a great deal of information concerning the electronic storage capabilities of its opponent even though that information would not ordinarily be available to the party seeking production. The shifting of burdens inherent in these Rules clearly favors the large, sophisticated entity experienced in electronic storage as opposed to its more modest opponent in litigation. Upsetting the balance in this manner does not serve the public interest or the efficient administration of litigation.