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November 23, 2004

04-CV-024

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. Searches of electronic information can be conducted very quickly, unless the company has gone to lengths to encrypt or hide its data. Further, allowing the party to self-designate material as inaccessible will invite even more stone-walling. Also, requiring an extra hearing to obtain the information further burdens the courts.

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.

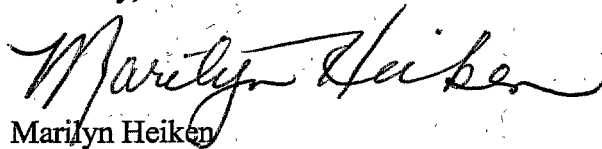
3. Rule 37(f). The proposed amendment would prohibit the court from sanctioning a party that destroys electronically stored information if the party took reasonable steps to preserve it or the loss resulted from routine operation of the party's electronic information system. This proposal would allow the routine destruction of information that would establish liability.

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Giving companies 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 bad policy and technologically unjustified. With modern computer systems, vast amounts of data can be stored indefinitely and searched quickly.

Thank you for considering these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marilyn Heiken". The signature is written in black ink and is positioned above the printed name.

Marilyn Heiken