UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BENSON EVERETT LEGG
Chief Judge

101 West Lombard Street
Baltimore, Maryland 21201
410-962-0723

04-CV-114

January 24, 2005

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on the Proposed Changes to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

On behalf of the United States District Court for the District of Maryland, I would like to provide comments on the August, 2004 preliminary draft of the proposed amendments to the Federal Rules of Civil Procedure.

It is the view of our court that the proposed amendments to the Rules of Civil Procedure provide helpful and much needed guidance for the proper conduct of discovery relating to electronically stored information. Overall, we believe that the proposed amendments strike the proper balance between promoting fair discovery while at the same time guarding against excessive cost and burden to the producing party. We respectfully recommend, however, reconsideration of the proposed change to Rule 26(b)(2). As currently proposed, the rule would be amended to add the following language:

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. 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.

It is the concern of this court that, as phrased, the proposal will make it too easy for a party that declines to produce electronically stored information to justify it with conclusory, boilerplate statements, which then can be expected to prompt nearly automatic motions to compel, the resolution of which may become burdensome to the court where the action is pending. Our chief concern lies in the failure of the proposed rule change to require that the basis for the assertion be stated with particularity. In this respect, we note that, elsewhere in the Rules, when a party objects to producing requested discovery it must provide a particularized explanation of the reason. *See, e.g.*, Rules

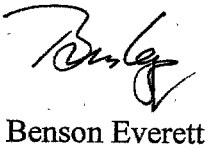
33(b)(4) ("All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.") and Rule 26(b)(5) (requiring that claims of privilege or work product must be made "expressly" and provide certain basic information to assist the requesting party in evaluating the merits of the claim).

It is the view of this court that the requirement to provide a more detailed factual basis for the refusal to produce, coupled with the obligations imposed on counsel and parties by Rule 26(g), will guard against reflexive but unjustified refusals to provide electronically stored information. In our view, it would be improper to refuse to provide the discovery absent articulable facts why it is not reasonably accessible. And, if such facts exist, we perceive no undue hardship on the party refusing production to state them. Once provided, the requesting party then is in a position to more objectively evaluate the merits of the claim of unavailability, as well as the scope of the discovery request that prompted the objection, and engage in meaningful dialogue with the producing party in an effort to resolve or narrow the dispute without the need to involve the court. Further, we believe that if the party declining to produce the electronic information does particularize the factual basis for the refusal, it will assist the court in resolving any disputes the parties cannot work out by making it easier for the court to employ the cost-benefit factors in Rule 26(b)(2).

We do not object to placing the burden on the party that requested the electronically stored information to file the motion to compel, following good faith efforts to resolve the dispute without involving the court. We simply believe that requiring the refusing party to particularize the basis for non-production will improve the entire process.

Thank you for considering these comments.

Very truly yours,



Benson Everett Legg