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04-CV-119

January 25, 2005

Peter McCabe, Secretary
Administrative Office of the United States
Advisory Committee on Civil Rules
Federal Judiciary Building
1 Columbus Circle N.E.
Washington, D.C. 20544

Re: Comments on Proposed Changes to FRCP 26

Dear Members of the Advisory Committee:

I teach Civil Procedure, serve as a Trustee in Bankruptcy for the U.S. Department of Justice, and engage in some civil rights and employment discrimination litigation. I offer these comments from that perspective.

I have generally disfavored the overall "disclosure" approach of current FRCP26-37, in that they have, I believe, unfairly put the obligation of my thinking about my case in the hands of my opponent's counsel. The defendant's counsel has to disclose information that seems to fit into my suit's claims. Nonetheless, it appears that that basic structure will be maintained.

Since the Rule will be disclosure, I would oppose the proposed amendment to FRCP 26(b)(2), which provides for a defense to disclosure of the information if it is "not reasonably accessible". Once a rule is framed along these lines, my experience suggests that the "exception" becomes the rule...

Why change the rule with regard to improperly disclosed privileged information? Has there been a problem? Have defense counsel turned over more than they intended? In general, claims of privilege should be limited and well-founded. I oppose the change. This same comment applies to the Rule 37(f) amendment.

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As a plaintiff's counsel (and a solo one at that), I have discovered that discovery abuse is generally not from my side, but the other – said as a true partisan. In one case in District Court, I represented an employee in a sex discrimination case against a major American corporation, represented by counsel with a large law firm. In response to a detailed question with regard to personnel records, several documents (critical, I might add) which my client had in his possession were not produced. (The same attorney had been chastised by the court of appeals in a very similar matter involving discovery nondisclosure with the same defendant). The trial judge's reaction was that since I had the document, no sanction was necessary. My inquiry of "what about other documents of which I am unaware" went no where.

If the trial court is unwilling to sanction misconduct under the current rules, let us not provide additional loopholes.

Yours cordially,

Bruce Comly French
Professor of Law

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