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January 21, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Federal Rule Changes Regarding Electronic Discovery

Dear Rulemakers:

As a daily federal practitioner I have examined the rule changes regarding electronic discovery and feel compelled to submit this dissent of the proposal. The proposed rules invite additional discovery abuse, give corporate litigants additional procedural and substantive advantages, and continue the erosion of the right to discovery-and, ultimately, of the distinct American system of notice pleading itself. In their effect on state practice, and in their diminution of litigants present rights, they may also violate the federal courts' statutory rulemaking authority, and even step beyond federal Constitutional limits. The current rules are more than adequate to handle the issues that are the proposed rules aim to modify. Neither the bar or the judiciary is leading the charge to change the rules of electronic discovery. It is the self interest of the insurance industry and corporate defense counsel that are pushing the hardest for the changes. Below are cited the proposed rule change and my explanation of my position against the rule change.

"Rule 26(b)(2). 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 reasonable accessible. If that showing is made, the court may order discovery of the information for good cause."

Under the present rules, relevant requested information must be produced even if its custodian claims that it is difficult to access. No exemption like the one this amendment would create is available for paper discovery-and electronic information is usually more accessible than are paper records. As a consumer oriented lawyer, I believe that this change would even more stonewalling than I already encounter. I am also concerned that requiring the requesting party to obtain the information through an extra hearing before an already-overburdened federal judge is oppressive-and that it could be

an intermediate step toward establishing similar requirements for all discovery requests, not just e-discovery.

"Rule 26(b)(5)(B). When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return or destroy the specified information and any copies. 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."

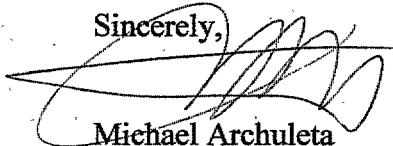
If adopted, this amendment would apply to all discovery, not just e-discovery. It would create a new substantive right with regard to privileged material. If the claim of privilege is contested, it would set a high standard for a requesting party to meet: proving that the information was not privileged, or that the party "intended" to waive its privilege. It would preempt some existing state law that declares privilege non-existent once disclosure is made, even inadvertently, or that requires lawyers to use all information that will advance their clients' interests. And, like other proposed amendments, it would require extra hearings, with the inevitable expenditure of lawyers' time and judicial resources, to overcome the privilege claim.

"Rule 37. (f) Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system."

Under the present rules, entities that may become parties to litigation are deterred by the potential for charges of spoliation-from destruction of discoverable electronically stored information. I believe that giving them a "safe harbor" when they destroy information through the "routine" operation of their document retention system will invite them to set up systems in which data are "routinely" purged at very short intervals. This is the same strategy that appears to have been used by a tobacco company that set up a system that purged its email messages frequently, making them unavailable for production.

Please do not adopt the proposed new rules for electronic discovery as the rule changes set up a system that is ripe for abuse. The current rules are more than adequate to handle the issues that are the proposed rules aim to modify.

Sincerely,



Michael Archuleta

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