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To Rules_Comments@ao.uscourts.gov, Peter_McCabe@ao.uscourts.gov

cc

04-CV-207

Subject Comments on proposed changes to Federal Rules of Civil Procedure pertaining to Electronic Discovery

My name is Peter Kraus. I am writing to you with my comments and concerns regarding the proposed amendments to the Federal Rules of Civil Procedure pertaining to electronic discovery.

I am the managing partner at Waters & Kraus, LLP, a law firm dedicated to protecting the rights of individuals injured by exposure to toxic substances such as asbestos and dangerous drugs. My firm litigates products liability and negligence cases against corporate defendants in state and federal courts throughout the country.

I have personally litigated numerous cases in federal courts around the country during my twenty years as a trial lawyer. I am thoroughly familiar with the Federal Rules of Civil Procedure and the discovery process under those rules, including electronic discovery. I have substantial personal experience trying cases against large corporate defendants, and I am intimately familiar with the discovery tactics employed by corporate defendants as well as the occasional discovery abuses perpetrated by these defendants.

After reviewing the proposed changes to the Federal Rules regarding electronic discovery ("e-discovery"), I have substantial concerns pertaining to the effects of some of the proposed changes.

First, I believe that the proposal pertaining to Rule 26 allowing parties to initially withhold e-information that is purportedly "not reasonably accessible" may lead to significant discovery abuse, as defendants will be provided with an apparent exemption from their obligation to produce information merely by claiming that such information is "not reasonably accessible." The likely effect of this proposal is that plaintiffs will frequently be forced to "call the defendants' bluff." That is, plaintiffs will be required to file motions to compel e-information and litigate the issue of whether certain e-information is "not reasonably accessible," and whether "good cause" exists justifying a court order requiring the production of such information. Such a result will impede the discovery process, lead to even greater litigation costs, and further burden the judiciary with needless discovery disputes. The presumption must remain the way it is - that the requested items must be disclosed unless the party resisting discovery moves for protection and affirmatively demonstrates that the material is not reasonably accessible.

Second, I believe that the proposal pertaining to Rule 37, which provides no sanctions against a party that destroys e-information via the "routine" operation of the party's electronic information system will lead to the "routine" destruction of crucial, case-making evidence. This proposal provides defendants an incentive to organize damaging information in such a way that it is automatically or routinely purged from the defendants' computer systems. The result of this rule is grossly unfair to plaintiffs and provides a mechanism by which defendants can destroy critical evidence with impunity.

The very purpose of the discovery process is to allow the parties to uncover the truth so that cases can be tried on the merits. The proposed rule changes pertaining to e-discovery do nothing to advance this goal. Indeed, the proposed changes promote the very opposite ideal -- that of hiding, withholding or destroying the truth. I therefore strenuously urge you to reconsider and reject the proposed changes to Rules 26 and 37 pertaining to electronic discovery.

Very truly yours,

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