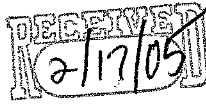

04-CV-213

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February 10, 2005

Mr. 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

Dear Mr. McCabe:

I write you this letter to comment on the recently proposed changes to the Federal Rules of Civil Procedure regarding electric discovery. It is my belief that the current rules of procedure were sufficient, and that the proposed changes would lead to discovery abuse by defendants, frustrate a plaintiff's right to discovery, and thus, force the discovery process in favor of defendants.

The proposed amendment to the Federal Rules of Civil Procedure 26 (b) (2) allows a party to provide discovery of electronically stored information that the party identifies as "not reasonably accessible." This proposal would not serve in the interest of justice because the phrase "reasonably accessible" can be subject to a myriad of interpretations by the defense. This amendment would frustrate all aspects of discovery.

This amendment is unnecessary in that electronically stored information should be more "accessible" than any papers records. There is no explanation why electronically stored information cannot be reasonably accessible. Naturally, documents that are electronically stored are always easily accessible, which is why such documents are electronically stored. Any office with the ability to store large quantities of records electronically will most certainly have an organized system in which to retrieve said records, either by file numbers, index numbers, case names or even key-words.

Next, the proposed amendment of Federal Rules of Civil Procedure 26 (b) (5)(B) allows a party to claim a privilege within a reasonable time after having already produced the information. This also frustrates and delays discovery in granting defendants a second claim of privilege, when it was clearly waived once such information is filed. This proposed

amendment allows a defendant's attorney to haphazardly produce information with the reward of claiming a privilege by merely claiming, "law office failure" or the same. Once a party claims the privilege after having already produced the information, unnecessary motion practice will ensue, and the discovery process will again be prolonged and frustrated.

Defendants should be producing information in a timely and efficient manner and not encouraged to make unnecessary and unprofessional mistakes which this amendment helps to correct. There is no need for the gift of a second strike a claim of privilege because if a document is privileged, it first should be reviewed and then not disclosed.

Lastly, the proposed amendment of Federal Rules of Civil Procedure 37 allows a party an exemption from sanctions in some cases when they destroy electronic files through "routine" use of their document retention system. This invites a party to unscrupulously eliminate damaging evidence so long as it is done in a "routine" manner without the penalty of sanctions. It also promotes the "routine" disposing of documents that at one point should have been discoverable.

In conclusion, the three proposed amendments clearly frustrate the discovery process, which has been advanced and made easier through the use of computers. Electronic filing has allowed parties and the courts to easily access and file information. The proposed changes encourage defendants to disguise information as "not reasonably accessible", to claim a privilege once it has been waived, and to "routinely" destroy electronic files without sanctions which limits the use of electronic filing. The use of computers has advanced society in many ways. In the future, we should look forward to utilizing all of the modern day technologies in the practice of law.

For the foregoing reasons, I respectfully oppose the proposed changes to the Federal Rules of Civil Procedure. If you have any questions regarding my position, please contact me at my office.

Very truly yours,

Michael Rabinowitz