04-CV-218

February 2, 2005

Civil Rules Advisory Committee
Secretary of the Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: *State Bar of Michigan, United States Courts Committee Comments on Certain Proposed Amendments to the Federal Rules of Civil Procedure*

Dear Sir:

I am the current Chairman of the Standing Committee on United States Courts of the State Bar of Michigan. On the Committee's behalf, I am submitting the following comments to certain proposed amendments to the Federal Rules of Civil Procedure. According to its charter, the United States Courts Committee of the State Bar of Michigan "concerns itself with the administration, organization and operation of the United States Courts for the purpose of securing the effective administration of justice." The Committee is comprised of practitioners and judicial officers from both federal judicial districts in the State of Michigan. The Committee adopted the following comments by unanimous vote at a regular meeting held on January 11, 2005. The views expressed herein are those of the Committee only and do not necessarily represent the position of the State Bar of Michigan, its Representative Assembly or Board of Commissioners. In general, the Committee believes that the proposed amendments, as reflected in the May 17, 2004 Report, as revised on August 3, 2004 (the "Report"), are beneficial and provide meaningful guidance to both practitioners and courts in conforming the Rules to adapt to changes in technology. The committee presents the following specific comments:

Rule 26(b)(2)

The Report indicates that the Rules Committee seeks comment on whether further explanation of the term "reasonably accessible" would be helpful. Our Committee believes that further explanation is neither necessary nor advisable. What is "reasonably accessible" will likely be an issue of dispute, but should be resolved on a case specific basis. What is reasonably accessible in one case may not be reasonably accessible in another. Moreover, with the rapid rate at which technology changes, a current explication of what is "reasonably accessible" could likely become outdated with changes in technology. For these reasons, the Committee recommends that no explanation of the term "reasonably accessible" be set forth in the Note.

Rule 26(b)(5)(B)

The Rules Committee seeks comment on whether this rule relating to inadvertent disclosure of privileged material should additionally require a recipient of allegedly privileged information to certify that the material has been sequestered or destroyed after receiving a request by the producing party for such action. We recommend that the rule require written confirmation of sequestration or destruction by the recipient of privileged information. Such an obligation would not impose any meaningful burden, and would provide a straightforward means for confirming compliance with the rule. The Committee does not, however, believe that a "certification" is necessary. Accordingly, the Committee recommends that language be added requiring a party to "confirm in writing that information that has not been returned has been sequestered or destroyed."

Rule 34

Our review of the proposed amendment to Rule 34 and the related comment revealed an ambiguity regarding a party's requirement to produce electronically stored information in the absence of a specific request. The comment to Rule 34 provides:

> Although discovery of electronically stored information has been handled under the term "document," this change [using the term "electronically stored information"] avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of "documents" should be understood to include electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

The Rule, however, distinguishes between the production and inspection of "documents" and "electronically stored information." Our Committee recommends that the Rule clearly provide either that (1) all requests include electronically stored information or (2) requests do not include electronically stored information unless they specifically so provide. We recommend the former. This end could be accomplished in Rule 34(a)(1) through deletion of the phrase "any designated electronically stored information or" and including "electronically stored information" in the parenthetical defining "documents." Through this revision, the language of Rule 34 will be consistent with the comment suggesting that production of "documents" should in all cases be understood to include electronically stored information. The comment should also be modified to make clear that a request for documents includes electronically stored information unless the request clearly indicates otherwise.

For this same reason, the Committee recommends deleting the term "designated" in Rule 45(c)(2)(A). We believe that, ultimately, the goal of the discovery rules should be to convey the understanding that the term "documents" should universally include electronically stored information.

Rule 37(f)

The Rules Committee seeks comment on whether the "culpability or fault that takes a party outside [the Rule 37(f)] safe harbor should be something higher than negligence." The Report offers a modified version of Rule 37(f) that is framed in terms of intentional or reckless failure. Our Committee endorses the Rule as proposed, rather than the alternative. Absent an affirmative obligation to preserve discoverable electronically stored information, routine deletion operations (such as automatic deletion of aged emails or automatically cycling of periodic backup media) can unintentionally destroy relevant information. The burden imposed by the requirement to take "reasonable steps to preserve the information" is not great in relation to the benefit of preserving relevant information.

Rule 50.

The Committee endorses the proposed amendments to Rule 50 for the reasons set forth in the Report.

We hope that these observations may be of assistance to the Committee on Rules of Practice and Procedure in its consideration of these proposed amendments. Thank you for your assistance in passing along our comments.

Very truly yours,

Francis R. Ortiz
Chairman, U.S. Courts Committee
State Bar of Michigan

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