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cc Peter_McCabe@ao.uscourts.gov
bcc
Subject Comments on the proposed Amendments to the Rules of Civil Procedure

I write to express concerns with several aspects of the proposed amendment to the civil procedures rules concerning electronic discovery.

By way of background, let me explain that I have been licensed to practice law since 1977. After graduation from law school, I clerk for the Chief Judge of the U.S. District Court for the Middle District of North Carolina for two years. Since 1979 I have been in the private practice of law. For the last 15 years or so, my practice has been almost entirely complex litigation. The bulk of my practice is products liability, professional negligence and environmental contamination litigation. About a third of my practice is in federal court. I am currently serving as Chair of the Civil Practice and Procedure subcommittee of the Litigation Section of the North Carolina Bar Association. I write however in a private capacity to express my views on the proposed rule changes.

While the proposed rule changes to Rule 16 correctly recognize that discovery of electronic communications is becoming more and more important in litigation, the emphasis of the other rule change is misplaced in part. In my experience, electronic information is generally more easily retrieved and more easily preserved than conventional documentary evidence. The cost of producing information in electronic form is usually a small fraction of providing it. As a result of this, more and more document production is occurring by providing it to opposing counsel in electronic format even if it originally was produced in non-electronic format.

My specific comments:

Rule 26(b)(2) should not single out electronic information for special protection. The rules provide existing provisions to protect a party who contends that producing information, electronic or other information, would be unduly burdensome.

Rule 26(b)(2) should not be amended to require the requesting party to file a motion to compel upon a mere assertion of unreasonable availability. The requesting party will usually lack sufficient information to make a intelligent argument about the responding party's assertions. This also sets up a requirement for motion practice that will overburden the trial courts and magistrate judges who deal with these issues.

A better approach would be to require the objecting party to provide detailed information to the requesting party about the format in which the records exist and detailed information on the reasons used by the objecting party to contends the information is not reasonably available. This would then create the possibility that counsel could resolve the discovery issue without court intervention. The proposed amendment requires the requesting party resort to a motion to compel

to get the reasons and in practice will lead to less cooperation between counsel and more court involvement in discovery.

The proposed revisions to Rule 45 do not deal with the privacy issues that arise with requests to examine computer systems. A number of cases in which I have been involved seek information that may be contained on personal computers. Requests for inspection that seek to examine the contents of hard drives on these computers are becoming more common. In these situations, simply copying a hard drive will reproduce all information contained on the drive, including sensitive financial and other personal information contained on the drive. This information may be wholly irrelevant to the issues in litigation. Some thought should given to requiring a search protocol to be worked out if the entity responding to such an inspection request raises an objection.

Thank you for your attention to these comments.

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