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February 8, 2005

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing to comment on the recent proposals to change the Federal Rules of Civil Procedure as they relate to electronic discovery.

My practice involves substantial personal injury cases, including those caused by defective products, and involves consumer class actions and shareholders' class actions.

The object of the Rules of Civil Procedure should be to create a fair level playing field. I am concerned that the proposed change as to electronic discovery has the potential to tilt the playing field in favor of defendants and create further discovery abuse.

To my observations, the present rules, if not ideal, are preferable to the proposed changes.

The Rule 26(b)(2) change to allow for the avoidance of discovery based on the discovery allegedly being "reasonably accessible" is flawed for several reasons:

A. One may wish to establish that the defendant had the particular information in its file. The defendant can avoid having this established by claiming that the information is "reasonably accessible."

B. Unless the information is specifically identified by the defendant and the specific location as to where it can be obtained is identified, then "reasonably accessible" may result in all the material not being known to the plaintiff and/or not obtained by the plaintiff.

C. "Reasonably accessible" is a very elastic term. What may be reasonably accessible to General Motors may not be reasonably accessible to a solo practitioner in a rural area.

The Rule 26(b)(5)(B) change to provide for retroactive claims of privilege as proposed is subject to substantial abuse. The opponent may have spent a great deal of effort and even formulated a case based on certain documents. At the last minute the producing party can then claim privilege thereby requiring the prompt return or destruction of the information. I suggest that if a party is to be allowed to retroactively claim privilege that the party should have the burden of doing so promptly and, absent agreement by the opponent, have the burden of satisfying a court that the documents must be returned or destroyed.

Finally as to Rule 37(f), you can rest assured that this will cause a change in record retention whereby any damaging records will be promptly purged from a defendant's records. The corporations will create a series of positions so that those purging records may not know that the records should be preserved.

In summary, the change to the rule is a violation of the adage, "If it ain't broke, don't fix it."

Thanks to you and the committee for consideration of the views expressed herein.

Sincerely yours,

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