SOCIAL SECURITY
Office of the General Counsel

04-CV-232

February 15, 2005

Peter G. McCabe
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
One Columbus Circle, N.E., Suite 4-170
Washington, D.C. 20544

Dear Mr. McCabe :

As the General Counsel of the Social Security Administration, I would like to comment on the August 2004 preliminary draft of the proposed amendments to the Federal Rules of Civil Procedure. I share the Committee's concern that both procedures and guidelines are needed in the area of electronic discovery. I agree with the approach outlined in proposed rules 16 and 26(f), which provides that, prior to the scheduling conference, parties should confer regarding the discovery of electronic information, and that any scheduling order may contain requirements related to the discovery of electronically-stored information. However, I am concerned about the situation where a party may produce electronic information that may inadvertently contain privileged material. In this situation, I believe that the Federal Rules should make clear that courts will be very unwilling to find that a party has waived or forfeited the privilege pertaining to that material. I recommend that proposed Rule 26(b)(5) be amended to reflect that a responding party who inadvertently produces privileged information in electronic discovery does not waive or forfeit the privilege solely on that basis, unless the requesting party establishes that the waiver was intentional. I agree that a responding party should be required to list the information in a privilege log, and that the requesting party should have the opportunity to contest whether the document is privileged.

I also agree with the recommendations of the United States District Court for the District of Maryland regarding proposed Rule 26(b)(2), *i.e.*, if a party objects to the production of electronically stored information on the ground that it is not reasonably accessible, that party should be required to provide detailed reasons why the information is not reasonably accessible. I also recommend that, when a responding party shows that requested information is not reasonably accessible, but the requesting party meets the requirements for discovery despite this showing, a court may order the responding party to produce the material. However, in such cases, absent extraordinary circumstances, the requesting party will be required to pay the costs associated with the party's producing the information.

I further believe that the proposed Rules must clearly articulate that different standards ought to apply to the discovery of electronically stored information than those that apply to information

stored as hard copy. This is because the method used in searching through electronic files is different than the one that would be used to search through files that are in hard copy. For example, companies with internal email systems may have a database of the emails sent and received by each of its employees. In response to a request for documents related to a particular topic, an attorney could diligently search the emails sent/received by specific individuals who would be likely to have sent emails related to the topic during a specific period of time. Even using keywords that would be likely to uncover information on this topic, for a variety of reasons, the attorney might not uncover emails within the scope of the request: *e.g.*, the employees did not happen to use any of those keywords; the emails were sent by another employee; the emails were sent during a different time period. However, if the attorney had individually gone through the emails of every company employee, over an extended period of time, the attorney would have uncovered the document. In its notes regarding the screening that must be done for a privilege review, the Committee recognizes that this kind of search would be extremely onerous. It therefore suggests a procedure where the parties can stipulate to a nonwaiver provision in connection with the production of electronic files.

I also believe that the Rules should set a standard to which parties will be held in connection with searches of an electronic database. Sanctions should not be imposed on a responding party who fails to produce information contained in the party's electronic database, if the party made a reasonable search of the database. Absent unusual circumstances, sanctions should not be imposed simply because the party failed to conduct an individual review of each document in the database.

I thank you for the opportunity to submit these comments.

Sincerely,

Lisa de Soto
General Counsel