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February 8, 2005

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil Procedure

To the Secretary:

I am writing on behalf of the Connecticut Bar Association to provide our comments on the proposed amendments to the Federal Rules of Civil Procedure. We agree with most of the proposed changes, but we have some comments on the proposed changes to the Federal Rules of Civil Procedure that relate to electronic discovery. Those comments are set forth below:

- Rule 26 (b)(2): The proposed change states “[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible.”

We did not feel that “reasonably accessible” was adequately defined, and that it will launch a tide of litigation. We recognize that the commentary refers to “substantial cost,” but we believe more attention should be paid to the potential costs of electronic discovery. Although parties could define “reasonably accessible” in their Rule 26(f) reports, we felt that this would not be achieved in cases where counsel could not get along and that even where counsel could get along, it might be too early to define “reasonably accessible” at the 26(f) report stage.

- Rules 34 and 45: The proposed changes to these Rules permit a document request or subpoena to “specify the form in which electronically stored information is to be produced.”

While we recognize that Rule 26 will allow the parties to plan in advance the form of electronic discovery, we felt that the requesting party should bear the burden of any extra cost associated with production in a form that was not previously agreed to or that is not how the materials are maintained. Indeed, we question why these rules are silent as to cost shifting.

As for both Rules 34 and 45, we believe that the proposed changes should include the following language:

Whenever a requesting party seeks electronically stored information in a form other than that in which it is maintained or, if the information is sought from a party, than that form which the parties agreed to in their Rule 26(f) report, the requesting party shall bear the additional costs of that alternative form of production and shall seek prior court permission for such request [subpoena], which permission shall be freely granted for a reasonable form of production.

- Rule 37: Proposed new Rule 37 provides a “safe harbor” to protect parties from sanctions for destruction of electronic material.

We felt that the trigger was not well defined. We also felt that the safe harbor should apply to “mistakes” as well as to the “routine operation” of information systems. To address this, we propose the following changes to the proposed new Rule:

(f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

- (1) the party took reasonable steps to preserve the information after it filed a Complaint or was served with a Complaint; and
- (2) the failure resulted from loss of the information because of the routine operation of the party’s electronic information system or mistake.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Ury", written in a cursive style.

Frederic S. Ury
President