"John Carroll"
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02/15/2005 07:31 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Comment from John L. Carroll

04-CV-187

Please accept this comment which is attached as a wordperfect document and which relates to the proposed changes to the Federal Rules of Civil Procedure which deal with the discovery of electronically stored information. I appreciate the opportunity to comment.

A hard copy of the comments will be send to Peter McCabe in the morning.

Judge John L. Carroll
Dean and Ethel P. Malugen Professor of Law
Cumberland School of Law

Samford University McCabe 2.15.05.wpd

February 15, 2005

Peter McCabe
Secretary
Committee on Rules of Practice & Procedure
Administrative Office of United States Courts
Washington, D. C. 20544

RE: *Proposed Amendments - Federal Rules of Civil Procedure*

Dear Peter:

Thank you for the opportunity to comment on the proposed changes to the Federal Rules of Civil Procedure dealing with the discovery of electronically stored information. I would like to begin by thanking the Rules Committee for the transparency of the process which led to the development of these Rules. The Committee has made every effort to have input from the various constituencies interested in this subject .

Most of the proposed Rules changes are excellent and provide important additions to the tools which judges have to manage electronic discovery. Particularly noteworthy are the changes which focus early attention on electronic discovery issues and the changes involving form of production. I write to discuss the interaction between two changes, however, which I believe are cause for concern - the interaction between the changes in the Rule 26(b)(2) to create a two-tier system for discovering electronically stored information and the change in Rule 37 which would create a so-called safe harbor.

The creation of the two-tier system for electronic discovery bears some similarity to the 2000 Amendments which created the two-tier relevance system. Under the 2000 Amendments, parties are entitled to conduct lawyer managed discovery on the core discovery information - information which is relevant to a claim or defense. To obtain information beyond that core discovery information, a party must show good cause. The proposed amendments to Rule 26(b)(2) make a fundamental change in the notion of core discovery. Information which is relevant to a claim or defense but which is electronically stored is now discoverable only if it is "reasonably accessible". It is this tension between relevance and accessibility which is problematic.

My main concerns about these Rule changes relate to the duty of preservation . What is unclear about the changes to Rule 26(b)(2) which make accessibility the touchstone of discovery and Rule 37(f) which creates a safe harbor is how these proposed rule changes impact the duty to preserve information which a responding party knows or reasonably should know is relevant to the claim or defense but which is "inaccessible". The proposed rules could be read to authorize a responding party to destroy inaccessible information which it knows or reasonably should know was relevant because the rule change makes that information presumptively undiscoverable.

Such destruction would be protected by the so-called safe harbor provision of Rule 37(f) which defines the preservation duty in terms of "discoverable" information. It would permit the destruction of information which a party knows or should reasonably know is relevant but which is not "reasonably accessible" because that information is presumptively not discoverable. This is the problem which Ken Withers identified in his piece *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-discovery*[1]. In describing the potentially harmful interaction between the new notion of discoverability and the safe harbor, Withers writes

> ...absent a court order to preserve such information, or notice that "inaccessible" electronically stored information will be requested and that the requesting party will be able to show good cause, "inaccessible data may routinely be destroyed while litigation is pending without incurring sanctions under Rule 37.

This problem is exacerbated by the difficulty in defining the term "reasonably accessible" which is now the gate through which the discovery of electronically stored information must pass. This lack of an adequate definition magnifies the mischief that the interaction between proposed Rule 26(b)(2) and Rule 37(f) may cause because it ties discoverability and thus preservation under the safe harbor to a term which is an ill-defined and manipulable concept.

The Civil Rules Committee has done an exceptional job in proposing amendments which will facilitate the discovery of electronic materials. The changes to Rule 26(b)(2) and Rule 37, however, bear further study and should not be sent forward to the Standing Committee.

Thank you and the Rules Committee for all the hard work you do on behalf of our system of justice.

A hard copy of this letter will follow in the morning.

Sincerely,

John L. Carroll
Dean and Ethel P. Malugen Professor of Law
Cumberland School of Law
Samford University

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[1] The Federal Lawyer, September 2004