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cc

Subject Feb 11 Hearing on Proposed Federal Rules Amendments

04-CV-020

Request to Testify 2/11 D.C.

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts

Dear Mr. McCabe:

I am requesting to testify at the February 11, 2005, hearing in Washington, DC, on the proposed amendments to the Federal Rules of Civil Procedure dealing with electronic discovery. Please let me know if I will be able to attend and speak, and if you need any further information. Please also let me know the time and location of the hearing. In addition to oral testimony, I expect to submit written comments. Thanks.

Best Regards,

Pamela Coukos

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Written Comments On Proposed Amendments to the Federal Rules of Civil Procedure Addressing Electronic Discovery

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Of Counsel
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Washington, DC

Submitted to the
Advisory Committee on Federal Rules of Civil Procedure

February 7, 2005

I would like to thank the Committee for providing me an opportunity to comment on proposed amendments to the Federal Rules of Civil Procedure addressing electronic discovery. I am currently Of Counsel to Mehri & Skalet, PLLC, in Washington, DC, where my practice focuses on representing plaintiffs in class action cases, primarily involving employment discrimination claims. As part of that practice, I frequently seek discovery of relevant electronically-based information. This usually includes four major categories of information: (1) human resources databases maintained by employers, containing personnel records in electronic form; (2) e-mail discussing employment policies and practices and diversity and EEO issues; (3) documents the defendant ordinarily keeps in electronic form, such as internal EEO reports or spreadsheets, power point presentations on employment policies, or correspondence and memoranda on diversity; and (4) paper documents converted to electronic form for purposes of production. In all cases, having this material in electronic form can make the discovery process more efficient and cost-effective in complex cases. It becomes easier and faster to identify the most relevant facts and to understand the factual strengths and weaknesses of my clients' claims and the employer's defenses. Given that my clients lack the resources of the powerful corporations on the opposing side, these advantages are extremely significant.

Technology increases our ability to search, analyze and assimilate large amounts of digital information much more quickly than if it is in paper form. Unfortunately, realizing those efficiency gains sometimes requires a high degree of cooperation and information sharing between opposing parties in litigation. The more the rules encourage that approach, the more both sides will realize the benefits technology can bring to class

action discovery. Further, the procedural rules must preserve both parties' incentives to work cooperatively on electronic discovery, by maintaining a neutral posture that does not tilt the playing field in favor of one side or the other. My comments are largely oriented to encouraging that kind of cooperation, and addressing two aspects of the proposed amendments – the "reasonably accessible" requirement and the "safe harbor" provision -- that I believe violate that neutral posture.

Technological Advancements Can Save the Parties and the Court Time and Money. While present systems for the storage and management of electronic information raise certain complexities the Committee has already identified, it is not inherently more expensive, more complicated or more burdensome than paper-based discovery. Indeed, it is frequently far superior. For example, in many of my cases, a key factual issue is whether a statistical analysis of workforce data reveals any pattern or practice of discrimination. In the absence of a personnel database, a large employer defendant would have to review hundreds of thousands or even millions of pages of hard-copy personnel files for privilege and relevance and identify and produce documents showing salary, hire and promotion decisions, and measures of qualification such as education. However, because it is common practice today to keep all of that information in an electronic database, relevant data on selected employees can be identified by searching the database, then converted to a commonly used format and downloaded onto CD's for production.

Similarly, I am currently working on a case involving over 600,000 pages of documents. Some were originally hard-copy, some originally electronic, but all were produced in electronic form. Instead of truckloads of boxes holding paper copies, our

discovery was provided on a series of CD's, and uploaded to a server. Once it is converted a single time to electronic format, copying and distribution costs plummet. We can also search and categorize the information much more easily and rapidly than if it were solely on paper. In other words, while it is true that electronic discovery frequently encompasses a large volume of information, that characteristic is at least as much a virtue as a vice.

Early Attention to Electronic Discovery Issues. The potential burdens of e-discovery can be best addressed when parties work cooperatively to establish parameters at the outset, and one of the primary benefits of the proposed rule changes are the reforms that encourage that. In particular, the proposed changes to Rule 16 and Rule 26(f) that require the parties to address issues related to electronic discovery up front are likely to save time and resources. The Committee has also identified two specific issues – document preservation and format of production – that are likely to be of significance. By placing these topics on the agenda for early discovery planning, it forces the parties to think them through in advance, which should reduce conflicts and inefficiencies down the road. In one recent example, the responding party converted e-mail to a format that is not electronically searchable while preparing it for production. That decision created a dispute later on when it was produced in that format.

In addition, I applaud the Committee's encouragement in the Note that counsel discuss and become informed about the opposing party's electronic systems and practices before the Rule 26(f) conference. In my experience, this kind of early and informal information sharing about the kind of systems at issue, the general types of information maintained on them, and the options for producing that information, is invaluable.

Because our practice works on contingency, efficiency is a paramount concern. If I can learn basic details at the outset about the kind of information the defendant maintains, I can structure my discovery requests to target the information most likely to be relevant to the claims or defenses in the case. Where a large volume is involved, for example an entire company's e-mail system, wading through reams of irrelevant documents simply increases my costs without benefiting my clients. Of course, my view of "relevance" may be different that my opposing counsel, but we should agree on the need to search for and select out a subset of information in the quickest and most cost-effective way.

For example, in one of the employment discrimination class actions I am currently litigating, the defendant company has multiple databases containing employee information. In addressing a dispute over the scope of discovery early in the case, our special master asked the defendant to provide an overview of the various databases. The company then provided a document identifying each database by name, describing in general terms the categories of information it contained and the business purpose of the database, and some sample records from each database that identified the fields. That measurably assisted us at that early stage in understanding which of the databases were most likely to be useful, and we concentrated discovery on those. Similar informal exchanges can reduce the issues in contention by allowing the party seeking discovery to understand any limitations of the systems in question, to assess the likelihood they will contain relevant and useful information, and to tailor discovery accordingly.

Although the Note specifically identifies early depositions, in my view, often the best way to obtain this information is by more informal means, including expert-to-expert

telephone calls and onsite assessments. If I ask a witness a highly technical question about a database or system in a deposition, I frequently receive a response that the witness has to look at the system or data to answer it, requiring further follow up and effort. It is often not feasible to actually make the system or data available in the deposition room to review, or it might be a question that requires some research or querying. More cooperative approaches that allow for this kind of give and take are far superior in actually getting factual information about complex systems or databases.

Indeed, the responding party should have a strong incentive to cooperate in providing that information, as it may reduce discovery disputes, or provide the opportunity for both sides to agree on reasonable parameters. I am much more likely to agree to limit discovery if I understand what, exactly, I am gaining and losing in that approach. However, since in my experience that cooperation is often lacking, I suggest that the Note encourage judges to use their case management authority to facilitate such early information sharing.

In short, the Committee's proposal to include electronic information as a specific topic for early case management discussions and orders is an excellent way to utilize the benefits of e-discovery while limiting the potential intrusion.

"Reasonably Accessible" Requirement. Although the Committee undoubtedly has the best of intentions with respect to this provision, and although certain kinds of electronic information might be more expensive and burdensome to produce than others, I believe that the structure of the rule will unwittingly invite excessive disputes and delays. In particular, I have three major concerns with the Committee's language:

1. The language itself of "reasonably accessible" is too broad;

2. The rule requires only that the information be so designated, not that it actually be inaccessible or that counsel undertake any investigation to determine that prior to designation;
3. The rule improperly requires motions to compel, and will result in many such motions.

In light of these problems, I strongly recommend that the Committee withdraw its proposal regarding a special rule to deal with data accessibility. The parties could continue to proceed under existing rules, which require balancing burdens of production with the relevance of potentially discoverable information, to address any concerns about data accessibility. However, if there is to be any specific rule on data accessibility, I believe that the Committee needs to address the fairness and manageability concerns raised by its proposal. To that end, I propose the following specific changes to the Committee's language on this issue:

> A party need not provide discovery of electronically stored information that ~~the party identifies as~~ is ~~not reasonably~~ inaccessible without undue burden or expense. ~~On motion by the requesting party,~~ The burden is on the responding party to ~~must~~ show that the information is ~~not reasonably~~ inaccessible without undue burden or expense. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

These changes would still provide a basis in the Rules for addressing the inaccessibility of data, but without the broad sweep of the current proposal, which risks increasing discovery disputes and making it unnecessarily burdensome for plaintiffs in these cases. It would make the proposal more balanced, although it would not eliminate the potential risks that well-resourced opponents will use this exception to delay or deny discovery, thereby increasing costs to all parties and the court.

1. Overly broad terminology. Unfortunately, in my experience, responding parties in these complex cases strenuously resist producing electronically-maintained information, particular electronic databases. The term "reasonably accessible" is susceptible on its face to a variety of interpretations. I am concerned that opposing counsel, in their zealous advocacy on behalf of their clients, will take that opportunity to define "accessible" very narrowly, particularly with the modifier of "reasonableness" that is attached to it. Although drawing a distinction between "accessible" and "inaccessible" data is one potential framework for resolving disputes about electronically-stored information, without further parameters it risks becoming a basis for withholding perfectly accessible and active data, or relevant inactive data that can be retrieved at reasonable cost.

For example, in the databases that frequently are at issue in my cases, the databases may contain information that is not relevant. Companies are reluctant to provide any more personnel information than required to comply with discovery due to privacy or other concerns. Thus, production often requires segregating categories of information prior to download. Alternatively, the database structure may be proprietary or unique to that company, and will have to be converted into a commonly used format in order to be readable and useable. Either of those situations may in turn require writing a specific program for the production. If that is viewed as a data "manipulation," even though it is quite straightforward, I expect opposing counsel to argue it makes the data "not reasonably accessible."

I urge the Committee to consider two modifications to the language: changing the default framework from "accessibility" to "inaccessibility" and replacing the standard of

"reasonableness" with "undue burden or expense." The standard then becomes whether the data is "inaccessible without undue burden or expense." The first change shifts the default from determining accessibility to determining inaccessibility, which properly presumes that data is accessible unless demonstrated otherwise. This is consistent with the overall framework of the Federal Rules, which favors disclosure of all relevant information absent specific and narrowly drawn justifications for withholding it. Because I assume the Committee similarly intends this exception to apply narrowly, shifting the default will encourage the parties to view it as such. Secondly, the modifier of reasonableness also cuts against viewing this as a narrow exception. Substituting the more traditional "undue burden or expense" language would be more appropriate.

In addition to these specific language changes, I strongly encourage the Committee to use the Notes to further refine the applicable standards. The Notes should specify that active data is presumed accessible, and that assessments of accessibility should also involve weighing the potential relevance of the information against the cost or burden involved in production. Finally, the requesting party should have a fair chance to test the claim of inaccessibility and obtain details about how the data is stored that could permit effective assessment of retrieval options. Similarly, the requesting party should be able to review inventories, directories, maps, or other information about the IT architecture that may assist in determining the likelihood the disputed system or data contains relevant information. Again, effective early case management can short-circuit some conflicts over inaccessibility by mandating these kind of disclosures at the outset.

2. Designation problem. A second problem with the proposed language is that it states that a party "may designate" information as not reasonably accessible. This

designation provision is contrary to the construction of Rule 26. Parties are not permitted to simply "designate" information as, for example, "cumulative or expensive." Instead, the Rule inquires whether it actually is or is not so. The "designation" framework may invite excess, particularly if parties believe they can make these designations without having to first investigate or establish the data's inaccessibility. The language should simply regulate discovery on the basis of whether the data is inaccessible, and avoid the "designation" framework. In addition, the Notes should explain that a party making recourse to this exception must first undertake a good faith investigation or assessment into exactly what production would entail before making an inaccessibility claim. As many other commentators have noted, technology is constantly evolving, and items that are inaccessible today may be easily accessible tomorrow.

3. *Motion to Compel Requirement.* The current language appears to permit a responding party to simply make a designation, and then requires the requesting party to move to compel. If this rule is adopted, I except to be filing many more motions to compel than I do at present – all one side has to do is designate, without any requirement of a good faith investigation or a reasonable basis, and then sit back and see if the other side moves to compel or not. The burden should be on the producing party to demonstrate that the data is inaccessible without undue burden or expense, as it would be in any normal protective order framework seeking relief from discovery. There should be no requirement that the requesting party move to compel. The rest of Rule 26 is not structured that way, and there is no reason to import such a novel requirement here. The Committee's current proposal invites frivolous assertions of inaccessibility and will undoubtedly generate excessive satellite litigation.

Identification obligation. Finally, I wish to address the identification obligation discussed in the Note – namely, that parties are to identify the systems, data or other electronic information they are not reviewing or producing on this ground. This requirement is critical to keeping the process honest, and to ensure that this provision is not abused. Clearly, in order to determine what is inaccessible, a responding party will have to identify anywhere responsive information may be, and a reason why certain sources of that information are not discoverable. Therefore, there is no additional burden to providing that information to the other side.

Rules 33 and 34 Changes. In general, I agree with the other commentators who have stated that it is unnecessary to create two categories of information – documents and electronic information – and that this structure creates potential for confusion. If the change is made, I urge the Committee to keep the comment in the Note that a request for "documents" should be understood to encompass both in the absence of a clear delineation otherwise. The discussion of format and the requirement of a default format are helpful. However, in addition to specifying the default format, the rules or comments should also specify that production of electronic information be in "complete, readable and useable" form. Just because something is electronically searchable does not mean that the other side will be able to read or work with it. Further, there should be an obligation on the part of the producing party, particularly where format is unspecified, to provide information necessary to read and understand the production.

Safe Harbor Provision. As for the proposed amendment to Rule 37 providing a "safe harbor" for spoliation, I believe that it is unnecessary to address the scenario it was designed for and risks sweeping in many other scenarios it was not designed for. Clearly,

the common practice of recycling backup tapes should not under ordinary circumstances give rise to sanctions for document destruction. Indeed, such a proposition is so self-evident I cannot imagine a federal judge issuing such sanctions. And I am unaware of a single example of that happening. The current rule is more than sufficient to address that problem and, in the absence of a documented deficiency, I question the wisdom of creating a special rule. This is particularly so given that by creating this rule, the Committee will undoubtedly encourage end runs around document preservation duties. Certainly, raising the standard to recklessness makes even less sense. Finally, given that the parties, under revised Rule 26(f), are going to be required to discuss document preservation issues at the outset of the case, the need for a provision such as this becomes even less pressing.

Conclusion. Business today depends on electronic records, and that will become increasingly so over time. The legal system has frequently lagged behind business practice in effective use of technology. Rules adopted today need to be flexible enough to respond to technical evolutions, and to provide fairness to all parties both now and in the future. Excessive constraints on discovery encourage parties to hide information and game the system. The ultimate goal of discovery is to get at the truth, and effectively managed e-discovery can be a critical partner in that endeavor.