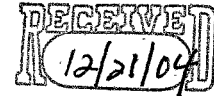




"Vicky Ni" <VNI@TLPJ.ORG>

12/20/2004 09:58 PM

04-CV-056
Request to Testify
1/28 Dallas



To <Peter_McCabe@ao.uscourts.gov>

cc "Paul Bland" <PBLAND@TLPJ.ORG>

Subject Request To Testify at January 28, 2005 Hearing

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

Re: Request To Testify at the January 28, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am writing to request that F. Paul Bland, Jr. be permitted to testify at the January 28, 2005 civil rules hearing in Dallas, Texas as a representative of Trial Lawyers for Public Justice ("TLPJ"). Mr. Bland's contact information is as follows:

F. Paul Bland, Jr.
Staff Attorney
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600
(202) 232-7203 (fax)
pbland@tlpj.org

TLPJ also plans to submit written comments to the Advisory Committee. Please let Mr. Bland know when those comments will be due and the time and location of the hearing.

Thank you.

Victoria Ni
Staff Attorney
Trial Lawyers for Public Justice

04-CV-056

Testimony
1/28 Dallas

**TESTIMONY OF
F. PAUL BLAND, JR., STAFF ATTORNEY
TRIAL LAWYERS FOR PUBLIC JUSTICE
ON PROPOSALS TO AMEND THE FEDERAL RULES
OF CIVIL PROCEDURE RELATING TO
ELECTRONIC DISCOVERY**

January 18, 2005

INTRODUCTION

F. Paul Bland, Jr., of Trial Lawyers for Public Justice and The TLPJ Foundation respectfully submits the following testimony opposing the proposed changes to the Federal Rules of Civil Procedure relating to the discovery of electronic information in advance of the hearing in Dallas, Texas, on January 28, 2005. This document summarizes the principal points that we intend to make at that hearing. We will file more extensive written comments prior to the deadline for final submissions on February 15, 2005.

Trial Lawyers for Public Justice and The TLPJ Foundation believe that the proposed civil rule changes directed at electronic discovery – particularly changes that make it harder to obtain electronic discovery – are neither justified nor necessary. Given the proliferation of electronic information in our society, we believe that liberal discovery of such information is essential to allow plaintiffs with valid claims to obtain justice in federal court. Our experience strongly indicates that most of the complaints that electronic discovery imposes excessive costs on defendants are severely exaggerated. Indeed, a hefty body of empirical evidence supports that view. In fact, based upon empirical evidence gathered in 1997 and before, it is likely that the more common form of discovery abuse in the context of electronic discovery is the practice of responding parties to evade legitimate discovery requests. In any event, current rules give judges ample tools and flexibility to address discovery abuses, even where electronic information is involved, as they should be addressed: on a case-by-case basis. Accordingly, we strongly encourage the Advisory Committee to reject the proposed changes to the civil rules.

**INTEREST OF TRIAL LAWYERS FOR PUBLIC JUSTICE
AND THE TLPJ FOUNDATION**

Trial Lawyers for Public Justice is a national public interest law firm dedicated to using trial lawyers' skills and approaches to advance the public good. Litigating throughout the federal and state courts, Trial Lawyers for Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The TLPJ Foundation is a non-profit charitable and educational membership organization that supports the activities of Trial Lawyers for Public Justice and educates the public, lawyers, and judges about the critical social issues in which we are involved. It currently has over 2,700 members, who are primarily plaintiffs' trial lawyers and law firms. The TLPJ Foundation's members regularly represent plaintiffs in a broad range of personal injury, commercial, civil rights, tort, and other cases in the federal courts. For ease of communication, we will hereafter refer to Trial Lawyers for Public Justice and the TLPJ Foundation collectively as "TLPJ."

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has monitored and commented upon a number of proposed changes to the Federal Rules of Civil Procedure over the years, including proposed amendments to Rules 23, 26, 30, 34, and 37. Because the discovery rules govern a crucial part of our civil justice system, we welcome the opportunity to comment on the new proposed amendments.

TESTIMONY

1. Access to Electronically Stored Information Is Extraordinarily Important to Persons With Claims in the Civil Justice System, and Narrowing that Access Will Harm Victims and Encourage Corporate Wrongdoing.
 - o In the modern corporate world, nearly all information is kept and stored in electronic forms.
 - o Increasingly, important information is only available electronically, and is never reduced to a paper form.
 - o In a series of nationally important lawsuits, electronic information has repeatedly been crucial in exposing egregious and illegal corporate practices.

2. The Proposed Amendments Will Encourage Abuses that Will Make It Harder for Plaintiffs to Obtain Important Electronic Information.
 - o The data establishes that stonewalling – the concealment, refusal to produce or even destruction of evidence – is the greatest problem with the discovery system in the federal courts.
 - o There is already a major problem with the destruction of electronic evidence.
 - o The proposal to amend Rule 26(b)(2) to excuse parties from providing electronically stored information if they decide that this information is not "reasonably accessible" will encourage corporations to make most electronic evidence "inaccessible."

- o The proposal to amend Rule 37 to protect a party from any sanctions for failing to provide electronically stored information lost because of "routine operation of the party's electronic information system" will encourage corporations to regularly destroy electronic information at short intervals.
3. The Proposed Amendments Are Unnecessary.
- o The current rules provide district courts with plenty of discretion to fashion fair and reasonable solutions to discovery issues.
 - o The claims of burden from electronic discovery are often greatly exaggerated.
 - o The proposed rules will quickly become obsolete and outmoded as technologies change.

Respectfully Submitted,

F. Paul Bland, Jr.
Trial Lawyers for Public Justice
The TLPJ Foundation
1717 Massachusetts Avenue, NW
Suite 800
Washington, DC 20036
(202) 797-8600
pbland@tlpj.org
Fax (202) 232-7203