"Darren Summerville"
<summerville@bmelaw.com>
01/11/2005 10:54 AM

To <Peter_McCabe@ao.uscourts.gov>
cc "Brenda G. Davis" <davis@bmelaw.com>
Subject January 28, 2005 Testimony

04-CV-089

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:

This will serve as a formal request that I be permitted to testify at the January 28, 2005 civil rules hearing in Dallas, Texas, on certain aspects of the new proposed rules for electronic discovery. My participation would be at the request of the nonprofit organization The Impact Fund. My contact information is as follows:

Darren Summerville, Esq.
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree St., Ste. 3900
Atlanta, GA 30309
Direct Line: (404) 881-4143
Facsimile: (404) 881-4111
Electronic: summerville@bmelaw.com

I also intend to submit written comments to the Advisory Committee. If convenient, please let me know when those comments will be due and the time and location of the hearing.

Thank you in advance, and best regards.

DS/

Darren Summerville
Bondurant, Mixson & Elmore
1201 West Peachtree St., Ste. 3900
Atlanta, GA 30309

TESTIMONY FOR PUBLIC HEARING ON PROPOSED AMENDMENTS TO CIVIL RULES FOR ELECTRONIC DISCOVERY
January 28, 2005
Dallas, Texas

Darren Summerville, Esq.
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree Street, NW, Suite 3900
Atlanta, GA 30309

In association with:
The Impact Fund
125 University Avenue
Berkeley, CA 94708

My practice in the private sector has included both plaintiffs' and defense work, for a variety of corporate clients – both large and small. My experiences largely mirror those of the firm with which I practice. Focusing only on litigation, the firm provides services to both plaintiffs and defendants, with a slightly larger emphasis on defense work. The types of cases we typically take on run the gamut from complex nationwide class actions to more confined business disputes. In many of those cases, discovery regarding electronic information has become an expected component of the litigation.

During the course of that practice, my firm has been privileged to work with, and advise, The Impact Fund, a non-profit organization whose mission is to provide strategic resources for lawyers to bring public interest impact cases throughout the United States. The Impact Fund , in addition to providing direct resources to litigants, also maintains a heavy caseload, often including areas of class-wide civil rights or employment discrimination. It is in that context that I have become familiar with the organization.

Given the experience of both prosecuting on behalf of and defending corporate litigants, and directly participating in several years' worth of litigation concerning electronic discovery, I believe that the proposed Amendments to the Federal Rules are in most cases unnecessary, and in some instances, counterproductive to the purpose underlying both the Rules and the judicial system.

The following is a brief summary of my intended testimony. I expect to expand upon these comments at the hearing, but my viewpoints will not vary materially from this synopsis.

The Importance of Access to Electronic Information

The open availability of electronic information is crucial in many types of cases, some of which involve plaintiffs who lack the financial resources to start or fight protracted discovery battles. Of course, the inexorable trend in business, and almost every other avenue, is toward greater reliance on electronic communications and information sharing, at the expense of traditional "hardcopy" communications.

The candor and informality typifying most electronic communications often creates a treasure trove of candid admissions, evidence of intent, or demonstration of awareness of a factual situation. Electronic evidence now provides, both quantitatively and qualitatively, a critical method of proof in today's litigation framework.

Accompanying the expansion of electronic communication in the corporate world has been an expansion of the technologies and media available to store, retrieve and access such information. In this context, a proposal that would functionally limit discoverability of electronic information is neither pragmatically necessary, nor theoretically sound.

Two-Tiered Discovery Under Proposed Rule 26(b)(2)

The Committee has proposed a two-tiered system for discovery of electronic information, shifting the initial focus from relevance and responsiveness to one of "accessibility." Specifically, the proposed Committee Amendment to Rule 26 provides that "A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. 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."

The amendment would change the current and long-standing presumption that all relevant information is discoverable in the absence of a showing of undue burden. In fact, that presumption – one in place to further the discovery of facts necessary for fair adjudication of disputes – would be stood on its head. The burden-shifting aspects of the proposed rule are particularly problematic. That a responding party can claim "inaccessibility," with little or no showing, is troubling. Also, at the outset of litigation, most plaintiffs simply do not possess the factual information necessary to demonstrate "good cause" and thus overcome a presumption against discovery of purportedly inaccessible electronic data.

That problem is particularly compounded, under the proposed amendment, by a party's unilateral ability to declare such information inaccessible, and actually design an electronic information system to fit those parameters. For example, as a matter of routine, a prospective litigant could easily shift "active" data to archival form on a frequent basis, ensuring that a procedural shield was in place against a likely first wave of discovery requests. The contemplated shift in the burden of proof would do much to frustrate attempts at reaching information both probative and traditionally discoverable.

Additionally, for decades, there has been in place a coexisting presumption that a party responding to discovery should bear the costs involved with retrieving information necessary to that response. The Committee's proposed amendment regarding terms and conditions of discovery, including cost-shifting, is an issue that has already received a fair amount of attention in the case law. Of course, decades of precedent exist on the general issue of cost-shifting, and there is no need to revisit the issue as to the specific issue of electronic discovery. Judges have already demonstrated that the inherent discretion available to the courts, and the experience of

previous courts in adjudicating discovery cost issues, adequately serve as guidance as to the same disputes that take place over electronic information.

There is no efficiency to be gained from the proposed amendment, either. The obvious incentive for any litigant is to declare the bulk of its electronic information as "not reasonably accessible" – and to design an electronic information system around that "automatic" objection. Corporate litigants, in particular, quickly learn where the furthest ramparts might be erected in a discovery strategy designed to limit access to otherwise probative electronic information. As written, the proposed Rule 26 changes will provide more points of contention, another layer of complexity, and an inevitable increase in motions practice, simply to get back to the point in the Rules that we are today.

Distilled, the question is still one of undue burden, which is adequately addressed under existing Rule 26(b)(2). The difference in "paper" discovery and electronic discovery on this particular point is narrow. For decades, trial courts and magistrate judges have decided discovery disputes involving familiar cries of undue burden, expense, and irrelevance. Whether those disputes involve combing through warehouses of material, or using keywords to find responsive information in a restored database, is a difference at the margins. The traditional arguments for and against "undue burden" claims, and the framework for their analysis, are just as suited to electronic discovery disputes as to the predecessor disputes involving "hardcopy" discovery. In other words, the same principles that courts have used for decades to allocate the costs of retrieving records stored on paper are sufficient to govern the allocation of costs for retrieving records stored electronically.

There is another, particularly onerous implication of the proposed Rule 26 changes on plaintiffs bearing the burden on proving notice, fraud, or intent (the latter an issue that always plays a key role in employment discrimination claims). Those burdens almost always require circumstantial, and internal, evidence, as most defendants are reluctant to admit culpable intent. It is the informal and candid nature of e-mail communication, as well as the technological trails left by embedded data and metadata, which often allows a plaintiff to prove a case that might otherwise lost at summary judgment. A defendant could, purposely or inadvertently, delete any incriminating electronic evidence before wrongdoing comes to light, or certainly before a lawsuit is filed. The proposed rule's burden-shifting, impacting on the methods of proof generally available, will negatively impact many otherwise deserving plaintiffs.

Finally, the negative implications of the two-tier discovery proposed under the Rule are not limited to David and Goliath scenarios. In litigation involving only business entities, oftentimes the existence of electronic evidence can be importance in proving or determining knowledge, intent, and other issues of scienter. Bid-rigging, antitrust, and patent cases are only a few types of disputes that would require a more expansive view of electronic discoverability that is envisioned under the proposed Rule.

Safe Harbor Provisions of Proposed Rule 37(f)

The Committee, seeking to insulate litigants against discovery sanctions for destruction of electronic data from "routine" practices, has proposed a "safe harbor" against sanctions. That

provision outlines that sanctions are barred if (1) the party took reasonable steps to preserve electronic information, after it knew or should have known the information was discoverable in the pending action, and (2) the failure resulted from the loss of information because of routine operation of the party's electronic system.

Although limited in impact to actions actually commenced, the proposed amendment will directly affect the pre-litigation behavior of all but the clumsiest of defendants. The proposed safe harbor provision gives a strong incentive for prospective litigants to retool their electronic information retention system to quickly and comprehensively delete or overwrite data. The amendment would push corporate defendants, in particular, to establish the type of "routine" policy that will simultaneously insulate information destruction from sanctions, and eliminate a rich source of data that could one day prove incriminating. Technologically, this provision is questionable, as the capacity of storage media increases almost daily, while simultaneously allowing for easier access and retrieval.

In particular, the conjunction of the proposed amendment to Rule 37, along with the suggested two-tier discovery changes governing accessibility in Rule 26, will signal a need to prospective litigants to reconfigure electronic information systems. Simultaneously, an entity often targeted for litigation will institute a regular and frequent deletion policy, along with a multi-tiered archiving system. The routine deletion policy will eliminate potentially crucial data as a first bulwark against eventual production. The archiving system will then serve as a second shield against discoverability. Both of those layers of protection would be enshrined by the amended Rules, despite an absence of any specific determination of undue burden or the potential relevance of any electronic information that might otherwise be available. That crimped view of discovery flies in the face of the purposes of the Civil Rules, and ill serves the truth-seeking function of the judicial process.

Conferral Requirements Under Proposed Rules

The Committee has further proposed amendments to the Rule 26(f) process to explicitly include electronic discovery issues, including privilege concerns, forms of information production, and preservation policies. Similarly, the proposed amendment to Rule 16(b) includes explicit provisions for scheduling electronic discovery discussions and other related issues.

There is nothing inherently wrong or objectionable about the changes suggested by the Committee as to these Rules. Like the proposed changes to Rule 26(b)(2) and Rule 37(f), however, the changes are unnecessary. Savvy litigants already present such issues in Rule 26(f0 conferences. Given the growing attention to the issue engendered by this review and comment process, it will be difficult to avoid confronting electronic discovery issues in future cases, to say nothing of unwise. Standing alone, then, the proposed changes regarding conferral are unnecessary. If the Committee moves forward, however, and adopts some or all of the proposed amendments, the Rule 26(f) and Rule 16(b) suggestions are the most palatable.

Privilege Waivers Under Proposed Rule 26(b)(5)(B)

The Committee has also proposed amendments establishing protections against inadvertent privilege waivers that might otherwise occur in large-scale production of electronic information.

The proposed Rule 26(b)(5)(B) changes are disadvantageous on numerous levels. First, it is unclear whether or not the Rule, despite an explicit caveat, effectuates a substantive change in evidentiary privilege, thus running afoul of 28 U.S.C. 2074(b). Second, more pragmatically, it is unclear that the impetus for the amendment is nearly as powerful as perceived. The cost of privilege review, cited by the Committee as a primary justification for the amendment, is in any event difficult to segregate from the costs of electronic review for responsiveness. Any reviewer examining electronic sources of information for responsiveness, if efficient, also performs a privilege review simultaneously. Moreover, the searchability of electronic records might very well make privilege review *easier* than a parallel type of review for "hardcopy" records (with attendant questions of who reviewed certain drafts, identification of handwriting, and the like).

Finally, the follow-on litigation that would attend the proposed amendment would likely defeat any advantages in efficiency otherwise inherent in "quick peek" agreements. Issues relating to third-party, or antecedent, claims of waiver are easy to envision, as are endless disputes over what constitutes a "reasonable" time to reclaim otherwise-privileged documents.

Distinguishing Between Documents and Electronic Information

The Committee has proposed amendments to Rule 34 to provide that "electronically stored information" is not a type of "document" otherwise encompassed within the Rules.

The pragmatic need for this amendment is dubious. Practitioners have long treated electronically stored information as a type of document, particularly given Rule 34's explicit reference to "data compilations." That the drafters of the Rules initially might not have contemplated "documents" to include bits and bytes of electronic data has not, in my experience, materially altered the conduct of discovery, documentary or otherwise. Any rule that declares that an electronic document is not a document will quickly prove archaic in a world in which business is increasingly conducted without paper.

Moreover, any explicit line-drawing in this area raises the specter of confused and confusing two-track document requests, differing standards for electronic records and paper records, and other definitional quibbles. A superior approach would be to take an inclusive approach and simply define "documents" to include "electronically stored information. This solution would, although something of a shoehorn resolution, clarify the status of electronic records in the general discovery rules.

Conclusion

In summary, I recommend that the Committee:

(1) Strike the "not reasonably accessible" provisions of proposed Rule 26(b)(2);
(2) Strike the "quick peek"/"claw back" amendments to Rule 26(b)(5)(B);
(3) Include "electronically stored records" as a subset of "documents" in Rule 34; and
(4) Strike proposed Rule 37(f).

Again, let me reiterate my appreciation for the opportunity to comment on the Committee's obviously thorough approach to the issue of electronic discovery.