04-CV-113
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"Lee, Bill Lann"
<Blee@lchb.com>
11/29/2004 07:25 PM

To <Rules_Support@ao.uscourts.gov>
cc
bcc
Subject Testimony at February 11, 2005 Civil Rules Hearing

I would like to request to testify on the proposed electronic discovery amendments. Please tell me how to do so.

REC'D 1/28/05

04-CV-113

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

ATTORNEYS AT LAW

EMBARCADERO CENTER WEST
275 BATTERY STREET, 30TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3339
TELEPHONE: (415) 956-1000
FACSIMILE: (415) 956-1008
mail@lchb.com
www.lchb.com

NEW YORK
WASHINGTON, D.C.
BEVERLY HILLS
NASHVILLE

January 28, 2005

Via Federal Express

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Counference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Proposed Civil Rules on Electronic Discovery

Dear Mr. McCabe:

Enclosed is a copy of Comments Regarding The Proposed Rules Regarding Electronic Discovery, by Elizabeth J. Cabraser, Bill Lann Lee and James M. Finberg. Mr. Finberg has also sent a copy to you this date by email.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

Melainie Hedani
Administrative Assistant to
James M. Finberg

:mh
Enclosures

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Comments Regarding The Proposed Rules Regarding Electronic Discovery

by Elizabeth J. Cabraser, Bill Lann Lee, and James M. Finberg[1]

We are partners with Lieff, Cabraser, Heimann & Bernstein. Our practice focuses on representing plaintiffs and plaintiff classes in mass tort, consumer, employment discrimination, wage/hour, and securities fraud actions. Almost all of our cases involve the production of large amounts of electronically-stored information.

SUMMARY

A summary of our recommendations is as follows:

Rule 16

We applaud the Committee's proposal that the original case scheduling order contain provisions regarding the discovery of electronically-stored information. We would also provide that the original case scheduling order should specify the reasonable steps to be taken to preserve electronically stored information relevant to the subject matter of the lawsuit. We would also permit judicial officers to issue rulings regarding privilege even if the parties do not reach agreement.

Rule 26(b)(2)

We suggest making three clarifications to the proposal that "On motion by the requesting party, the responding party must show that the information is not reasonably accessible." First, the party identifying information as not reasonably accessible must establish that the production of the information would be unduly burdensome and costly. Thus, "not reasonably accessible" should be defined as unduly burdensome and costly. Second, the party

[1] Elizabeth J. Cabraser is a member of the American Law Institute and teaches complex litigation at the Columbia University School of Law and the Boalt Hall School of Law. Bill Lann Lee served as Assistant Attorney General for Civil Rights from December 1997 to January 2001. James M. Finberg is the President of the Bar Association of San Francisco.

must submit one or more declarations under penalty of perjury so establishing, and providing sufficient detail for the Court to assess whether the designation is appropriate. Third, the Court should consider whether the party seeking discovery should have the opportunity to depose the declarants to test the conclusion.

Rule 26(f)

We applaud the Committee's requirement that the initial discovery conference include a discussion regarding the disclosure of electronically-stored information, including the form in which it should be produced. We suggest adding another mandatory topic of discussion: "the types of electronic information available, and the cost of producing that information." In addition, we recommend that the proposed language in 26(f) that the parties "discuss any issues relating to preserving discoverable information" be changed to "relating to preserving documents and electronically-stored information relevant to the subject matter of the litigation." This last suggestion (1) makes clear that presentation of electronically-stored information is to be separately discussed, and (2) clarifies ambiguities in the meaning of "discoverable."

Rule 34

We recommend that Rule 34(b)(ii) provide that "if a request for electronically stored information does not specify the form of production, a responding party must produce the information . . . in an electronically searchable form."

Rule 37(f)

Because sanctions are rarely granted, and only after a hearing, we do not believe that a proposed Rule 37(f) is needed. If Rule 37(f) is adopted, we recommend that proposed Rule 37(f)(i) be modified to read if "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject

matter of the action." The phrase "relevant to the subject matter" is more clear than the word "discoverable," particularly in light of the "not reasonably accessible" standard.

DISCUSSION

Electronic Evidence Provides An Unprecedented Opportunity to Achieve Justice

The United States' system of justice is the envy of people around the world. It is a system rooted in the belief that justice depends upon truth. The history of the justice system in this country is one of seeking ever-more reliable and sophisticated methods of discovering the truth.

The Federal Rules of Civil Procedure have been important to that evolutionary process. As Judge Shira Scheindlin noted, the discovery rules in particular reflect "a shift to thinking of trials as a search for truth rather than a battle of wits."[2] The United States Supreme Court made the same point in *Hickman v. Taylor.*[3] Calling Rules 26-37 "one of the most significant innovations of the Federal Rules of Civil Procedure," the Court concluded: " . . . civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain *the fullest possible knowledge* of the issues and facts before trial." [4]

Electronic evidence provides an unprecedented opportunity to obtain the fullest possible knowledge and achieve justice through truth. E-mails, electronic documents, and the data connected to them leave little room for disputes over the essential components of human interactions: what was said, who said it, and when – the building blocks of most civil cases.

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[2] Shira Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Civil Litigation: Is Rule 34 Up To The Task*, 41 B.C. L. Rev. 327, 343 (Mar. 2000).

[3] 329 U.S. 495 (1947).

[4] 329 U.S. at 501.

And the science of discovering fraud in or tampering with electronic data is precise, another plus in the search for truth.

In most cases today, it is not possible to determine truth without e-mail and electronic documents. Paper is becoming a thing of the past as fewer and fewer business communications and transactions reside in paper form. One commentator notes that "95% of all business documents are created digitally and most are never printed."[5] Regardless of the exact percentage, we know from our own experience that the trend is toward eliminating paper and that the principle method of business communication is electronic. Electronic discovery, therefore, can no longer be considered a subset of discovery: it is in the electronic realm that America, and much of the rest of the world, does business. Consequently, limiting access to electronic data would create an unfortunate irony, limiting access just when the ability to discover real truth and thereby achieve more precise justice has never been greater.

Electronic Evidence Is Indispensable To Discovering Truth

The Committee undoubtedly has heard many instances of cases where electronic information was the key to the outcome. Some of the most notable of these also include some of the most important federal cases of recent times: Enron, Microsoft, Worldcom and the stock analyst cases, to name a few. The possibility of evading justice can evaporate in the face of compelling electronic evidence, such as the famous e-mail from New York stock analyst Jack Grubman who put his personal interests ahead of the investing public:

> "You know everyone thinks I upgraded [AT&T stock]. . . . Nope. I used Sandy [Weill] to get my kids in 92nd St. Y preschool (which is harder than Harvard) and Sandy needed Armstrong's vote on our board to nuke Reed in showdown. Once coast was clear for both of us (ie Sandy clear victor and my kids confirmed) I went back to

[5] Glasser LegalWorks, 8th Annual Electronic Discovery & Records Retention (2004) ("GLW"), p. 198.

> my normal negative self [on AT&T] . . . Armstrong never knew that we both (Sandy and I) played him like a fiddle." *Wall Street Journal*, Nov. 15, 2002.

In our own practice, e-mails are a constant source of important evidence. In one case pending right now, one disputed issue is the validity of a performance review ratings used by the defendant company in a race discrimination case. The company has taken the position that the ratings are valid. Among the documents the company produced, however, is an e-mail from its own industrial organizational psychologist stating the following: "[b]asically performance review ratings tend to be unreliable and it may be difficult or meaningless to compare performance reviews from one employee to the next." This is an important piece of evidence that should not be kept from the judge or jury, regardless of the document management regime the company has in place.

As these cases make clear, the term "paper trail" is becoming an anachronism. Referring to the explosive frauds that he has unearthed, Eliot Spitzer summed up the issue in front of this Committee: ***"We couldn't have done any of these cases without e-mails."*** *Newsweek*, Nov. 1, 2004, p. 26. Virtually no one practicing law today in the United States could disagree with that conclusion.

Electronic discovery has long been essential to the resolution of employment discrimination cases. Payroll and human resource computer databases contain information regarding the racial or gender make-up of a workplace by job, as well as salary, promotion, performance, discipline, termination and other work history data. Production of these databases is relatively inexpensive. Statistical analysis of these data is at the core of employment discrimination cases. Production of this information in electronic form is far easier and less time consuming than culling the equivalent information from hard copy personnel files. Moreover, the fact that this data may reside on legacy systems does not alter its relevance or importance to a

case. Companies change their payroll systems and key data can be stored on old systems. Under current discovery rules, the production of such information typically is required. A presumption that legacy data is unavailable except upon a showing of cause could prevent employees damaged by abuses of our civil rights laws from proving their cases, which depend upon analysis of this data. Defining "not readily accessible" as unduly burdensome and costly, and permitting a for cause showing to overcome the non-production presumption would ameliorate that potentially unjust outcome.

Electronic Information Is Cheaper And Easier to Store, Search, And Exchange

Electronic information not only represents progress in the search for truth, it represents progress in storage and transmission of data, thus creating opportunities for faster and less expensive discovery. A single floppy disk can hold 750 pages of documents; a CD Rom can hold 325,000 pages. In the not too distant past, a production of 325,000 pages meant people on both sides of the case would need to sort through boxes of documents in a specific location page by page until the task was completed. This meant some poor person or persons would have to do nothing but review documents, often in an airless warehouse, until the task was done. As more and more documents are created electronically, this same task is vastly simplified: documents can be searched electronically by key words, they can be stored in a manner that requires minimal space, they can be reviewed conveniently from one's office as one has time and energy to do it. All of these are improvements, and require less time, less money, fewer people, and less space than was formerly necessary.

The ability to generate, use, analyze, store, and exchange electronic information has been a boon to commerce. So should it aid the search for truth and justice. While it is true that more data is now generated, it is equally true that electronics has made the creation, storage,

transmission, and use of that data cheaper, easier, and faster. In other words, more data does not necessarily mean more expense or more time. To the contrary:

Production of computer data on disks, CD-ROMs, or by file transfers significantly reduces the costs of copying, transport, storage, and management protocols;

Computerized data are far more easily searched, located, and organized than paper data; and

Computerized data may form the contents for a common document depository.[6]

We know from long experience that parties will take such positions if they believe they will be fruitful. Our concern predates the advent of the electronic age. In *Kozlowski v. S R & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976), the court expressed this same concern regarding paper records:

> The defendant may not excuse itself from compliance with Rule 34 by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery, by creating an inadequate filing system, and then claiming undue burden, would defeat the purpose of the discovery rules.

It has been said time and again that we live in the information age. If our justice system codifies rules that make information *less* available, then we are moving in a direction contrary to progress, contrary to the evolution of our society, and contrary to our goal of achieving justice. Or, as one court has said: "It would be a dangerous development in the law if new techniques for easing the use of information became a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle

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[6] GLW, p. 35.

that information which is stored, used or transmitted in new forms should be available through discovery with the same openness as traditional forms ." *Daewoo Electronics v. U.S.*, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986).

CONCLUSION

We applaud the Committee's work in this area, particularly with respect to Rules 16 and 26(f). As set forth above, however, we recommend that the proposed amendment to Rule 26(b)(2) be clarified to define "not reasonably accessible" as unduly burdensome and costly and to require an evidentiary showing as to the burden and cost. We further suggest that the word "discoverable" in the proposed Rule 37(f)(i) be changed to "relevant to the subject matter of the action."