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04-CV-236

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Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20533

Re: Comments on Proposed Civil Rules on Electronic Discovery

Dear Mr. McCabe:

Our firm, Bernstein Litowitz Berger & Grossmann LLP, is a national law firm specializing in the prosecution of securities class actions, as well as corporate-governance litigation, consumer and employment discrimination actions. Based on our experience handling electronic discovery in complex litigation, we are providing our views on the advisability of the proposed amendments to the civil rules concerning electronic discovery. Please convey this letter with our comments to the members of the Advisory Committee on Civil Rules.

As explained below, this letter focuses on three provisions:

(1) The proposed amendment to Fed. R. Civ. P. 26(b)(2), which presumptively limits discovery just to "reasonably accessible" sources, absent a showing of "good cause" by the requesting party;

(2) The proposed amendment to Fed. R. Civ. P. 26(b)(5)(B), which affords the producing party both an opportunity to delay discovery by conducting a lengthy privilege review and then later, even if the review is careless, to "claw back" purportedly privileged documents; and

(3) The proposed Fed. R. Civ. P. 37(f), which creates a "safe harbor" against discovery sanctions when a producing party fails to preserve evidence and it is lost due to "routine" destruction policies.

These proposed changes to the rules, if enacted, will increase the cost of litigation, further burden the courts with needless motion practice, and allow litigation counsel to delay discovery and withhold important evidence.

(1) Narrowing Discovery to "Reasonably Accessible" Sources

The revised Fed. R. Civ. P. 26(b)(2) would allow the producing party to resist discovery by labeling electronically-stored information as "not reasonably accessible." Ambiguity in the term "reasonably accessible" and constantly changing technology will lead to more discovery disputes than arise already under the present rules. Given the ambiguity and changing technology, a defendant company can easily delay disclosure of inculpatory evidence, or hide it completely, by contending that a variety of electronic sources is "not reasonably accessible."

Inevitably, in each case, discovery involving electronically-stored information will include motion practice with supporting affidavits from dueling experts over the meaning of "reasonably accessible," increasing the cost of litigation and burdening the courts.

Further, given the defendant's unfettered access to its computer systems, the party seeking discovery will be severely disadvantaged during such motion practice. To avoid placing too much control in the hands of the producing party, the party seeking discovery and its consultant will require access to the producing party's computer system just to contest meaningfully the assertion that evidence is "not reasonably accessible." In this respect, we agree with the proposed revision to Rule 34(a) allowing for testing and sampling. We suggest further that Fed. R. Civ. P. 26(b)(2) specifically authorize such access if the producing party attempts to claim "inaccessibility."

In addition to increasing the number and type of discovery disputes, the proposed amendment to Rule 26(b)(2) apparently shifts to the party seeking discovery the burden of establishing "good cause." There is, however, no valid reason to reverse the presumption, and doing so will serve only to discourage disclosure and encourage precisely the sort of gamesmanship and "hide the ball" litigation tactics that the Civil Rules seek to eliminate.

Based on our experience applying the existing Rule 26 to electronic-discovery disputes, the proposed revisions will not be helpful to the courts or the parties. For example, in a recent case being prosecuted by our firm in the Southern District of New York, the opposing side claimed all electronic discovery was "inaccessible" because the company was defunct, all hard drives and other media had been lost, and the sole remaining source was a collection of back-up tapes. Over the defendant's objection, we received the indices generated automatically by the back-up tapes, describing the files and directories. From that, we were able to cheaply and easily identify file directories, file names, and dates that would yield probative evidence. The special master then employed the existing analysis of Rule 26

and, guided by *Zubalake*, weighed the probative value of the evidence against the claimed burden to determine which tapes should be searched first and in what manner, while preserving the issue of whether any part of the costs should be shifted under existing case law. The proposed revisions to Rule 26(b)(2) would add nothing of value to similar disputes.

(2) Amendments Concerning Privilege Waiver

The proposed amendment to Rule 26(b)(5)(B) addresses the production of purportedly privileged material after the producing party has already taken the time to conduct a review for privilege. The proposed amendment would allow the producing party to deem a previously-reviewed document as "inadvertently produced" within an undefined "reasonable" amount of time after production, and thus compel the requesting party to return "promptly" the document and "any copies." This provision would replace decades of existing law concerning "inadvertent production" with a rule unfairly favoring the producing party.

We approach issues of privilege and inadvertent waiver on a case-by-case basis, mindful of the existing substantive law. In some cases involving the review of electronic documents for privilege, the opposing side employs electronic "key word" searches (such as the lawyer's name or the name of the law firm) to identify potentially-privileged documents for review. To gain a litigation advantage, however, others sometimes insist on a page-by-page review that consumes time and delays prosecution. In certain cases, therefore, we will agree with the producing party to a "claw back" arrangement in exchange for an expedited production. Such an arrangement relieves the producing party of the need for any privilege review, while allowing it to retrieve later-discovered privileged documents without court intervention. This often makes sense, benefits the party seeking discovery by avoiding delay, and is the sort of case-by-case arrangement that logically can be incorporated into case management orders under the proposed amendments to Rule 16(b) and 26(f).

The proposed amendment to Fed. R. Civ. P. 26(b)(5)(B), however, eliminates flexibility and unfairly favors the producing party. Under the proposed rule, the producing party will delay discovery by conducting a lengthy privilege review in order to obtain a litigation advantage – consuming weeks or even months. There is, moreover, no consequence under the proposed rule for a shoddy or careless review because the proposed rule provides for an automatic "claw back."

In addition, the proposed rule allows the producing party to demand the return of purportedly privileged documents for an indefinite span of time, so long as that time is "reasonable." This open-ended approach will promote laxity, prejudice the party with the burden of proof and lead to further motion practice. At minimum, a fixed deadline of no more than 30 days after production should be imposed for the producing party to identify purportedly privileged documents.

(3) The "Safe Harbor" For Failing To Preserve Evidence

The proposed new Fed. R. Civ. P. 37(f) would shield a party from discovery sanctions for failing to provide electronically-stored evidence, if the party has taken "reasonable steps to preserve the information after it knew or should have known the information was discoverable . . . and the failure resulted because of the routine operations of the party's electronic system." Increasingly, in the wake of highly-publicized cases in which electronic documents provided "smoking gun" evidence, corporate attorneys advise their clients to employ company-wide destruction policies and technologies that regularly purge electronically-stored information. See, e.g., Nicholas Varchaver, The Perils of E-Mail, Fortune, February 17, 2003, at 96 ("Many corporate managers have concluded that the best solution to [inculpatory e-mail] is the mass purge."). Unless defendants are obligated to take necessary steps at the commencement of litigation to suspend such routine procedures, critical evidence will needlessly and inevitably be lost.

Not only is the existing Fed. R. Civ. P. 37 sufficient to protect against the unwarranted imposition of sanctions, but the proposed Fed. R. Civ. P. 37(f) suffers from additional flaws. In particular, as drafted, it suggests to the defendant, an interested party, that it can safely wait to take "reasonable steps" to preserve evidence until it concludes, or should conclude, that "discoverable" material is stored on vulnerable sources. In this regard, the proposed rule is uncertain as to the point for halting or modifying routine purging. Rather than leave open for argument the time for vigilance, all necessary steps to suspend routine purging should be taken no later than upon notice of the commencement of litigation.

Based on our experience prosecuting violations of the federal securities laws, such an approach to preserving electronic evidence removes uncertainty that otherwise may exist under the proposed amendments to the rules. In 1995, Congress mandated that parties to securities litigation preserve electronic evidence at the commencement of the case. See Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(b)(3)(C) (requiring preservation of "electronically recorded or stored data" that are relevant to the allegations of the complaint). In our view, incorporating a similar approach into the Civil Rules is advisable.

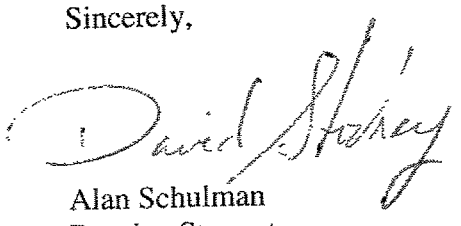
Conclusion

Electronic discovery can be, and frequently is, more revealing and more powerful evidence than paper discovery. Electronic mail reflects the spontaneous comments and chatty reactions of parties and percipient witnesses. And unlike paper documents, electronic documents are encoded with "metadata" indicating when the document was created, modified or accessed and by whom. Such evidence can help to prove critical facts in the litigation. Consequently, the use of electronic evidence promotes the truth-finding function of the system. As explained above, proposed amendments that substantially interfere with

this function, by creating disincentives to preserve and produce electronic evidence, are flawed and, in our view, should not be adopted.

Thank you for your attention, and please do not hesitate to contact us with any questions.

Sincerely,



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