04-CV-003
Request to Testify
2/11 DC

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08/25/2004 06:12 PM

To <Peter_McCabe@ao.uscourts.gov>
cc
Subject Proposed Amendments to the Federal Rules of Civil Procedure

To: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of tthe U.S. Courts

Mr. McCabe:

I am writing to request to testify at the public hearing on the proposed amendments to the Federal Rules of Civil Procedure in Washington, D.C. on February 11, 2005. Please send me the details of the time and place of the hearing.

Many thanks,

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04-CV-003
Testimony
2/11 DC

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01/20/2005 01:57 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject E-Discovery Comments

Attached please find my comments on the proposed e-discovery rules. I have requested to testify at the hearing on the proposed rules scheduled for February 11, 2005 in Washington, D.C.

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<<E-Discovery Comments (Version 1).pdf>> E-Discovery Comments (Version 1).pdf

To: Committee on Rules of Practice and Procedure
U.S. Judicial Conference
c/o Peter G. McCabe, Secretary
Administrative Office of the U.S. Courts

I am writing to provide my comments on the amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information, which were recently published by the Committee on Rules of Practice and Procedure. I want to first commend the Committee on developing a balanced package of amendments. I support the amendments and wish only to offer suggestions that the Committee go further in some respects to make the amendments easier for lawyers and litigants to apply. I offer comment from the perspective of a trial attorney practicing primarily in the areas of product liability and intellectual property, representing clients who cover a broad spectrum of sophistication in the use of electronically stored information and a wide range in terms of the frequency of their involvement in litigation.

I. Introduction

In my experience most litigants are not regularly involved in litigation that requires extensive discovery and so do not have established procedures to preserve, recover and produce electronically stored information outside the context of their normal business operations. Thus, for those litigants, the production of electronically stored information is more expensive and disruptive to their business than it is to entities that are regularly involved in large-scale litigation. Similarly, as the Committee points out, the issues involved in the discovery of electronically stored information are technically complex and generally unfamiliar to the average judge or lawyer. While requests for production of electronically stored information are becoming more common, they are still comparably rare in my practice. Consequently, most judges have little experience resolving disputes over discovery of electronically stored

information, and those judges do not have the depth of understanding of the relevant technical issues that the Committee has gained in the process of developing the proposed rules.

Moreover, in my experience, judges strongly discourage parties from bringing discovery disputes to the court and do not wish to get enmeshed in the details of factual disputes over the proper scope of discovery. As a result, judges often begin from the presumption that all information should be produced, and the relevance of such information can be determined at a later time. Given the potentially astronomical costs of retrieving, reviewing and producing electronically stored information, such a presumption can impose significant burden on producing parties. For these reasons, it is important that the rules as adopted set forth clear guidelines regarding the scope of discovery of electronically stored information that will apply to most situations and straightforward procedures to follow and criteria to apply to resolve disputes when the parties cannot agree.

II. Two-Tiered Discovery

With regard to Rule 26(b)(2), I support the "two-tiered" discovery of electronic information as set forth in the amendments. The two-tiered system provides important direction to judges unfamiliar with the many types of electronically stored information, gives needed protection to producing parties whose computer systems have changed radically over the course of a relatively short period of time, and dramatically reduces the potential for abusive discovery tactics. Moreover, a two-tiered system does not interfere with the production of the information or data most likely to be of greatest relevance and provides a logical mechanism for resolving disputes over the production of information that is not reasonably accessible.

It is important that the rules recognize that not all electronically stored information must be produced in the first instance and that the rules set forth a standard that parties can easily

apply without court intervention. To better accomplish these goals, I suggest modifying the amendments to Rule 26(b)(2) as follows:

> A party shall provide discovery of any reasonably accessible electronically stored information without a court order. On motion by a requesting party, the court may order discovery of other electronically stored information for good cause.

The above language also eliminates the requirement that a producing party identify electronically stored information that is not reasonably accessible. The current proposed language is unnecessary and difficult to apply. For litigants, it is nearly impossible to identify the universe of data that may exist but which a party is not producing. In order to avoid an inadvertent failure to identify reasonably inaccessible information, litigants will quickly develop a default response that will include a laundry list of potential data that it is not providing, which is of little value to a requesting party. Further, the obligation to identify reasonably inaccessible information raises the possibility that data that is *not* identified but comes to light at a later time is discoverable, regardless of how inaccessible or costly it is to retrieve and produce. If the current language remains, the Note to the Rule should be clarified to make clear that the requirement can be satisfied by a generalized description such as "disaster recovery back-up tapes." Rather than requiring boiler-plate recitations of data that is not reasonable accessible, however, the better course is to adopt language such as suggested above.

In addition, the potential for discovery abuse is particularly important in the context of electronic information because of the high cost associated with retrieving and producing data that is not routinely accessed or used, such as data preserved on back-up tapes. Accordingly, I believe that the the proposed amendments should require cost sharing for the production of electronically stored information that is not reasonably accessible as an effective deterrent against overbroad requests for information that at best, is likely to be only marginally relevant. Mandatory cost sharing, or even a presumption in favor of cost sharing, would give clearer

direction to the courts and properly balances the interests of requesting parties who wish to access disaster-recovery or legacy data and producing parties, who have no reason to access such data in the ordinary course of their business operations. Cost sharing allows the parties to balance the potential benefit of additional discovery against the costs and will dramatically both the cost and frequency of disputes over such information. A presumption of cost sharing for data that is not reasonably accessible could be overcome by a demonstration, by clear and convincing evidence, of relevance and need.

III. Safe Harbor

One of the most significant concerns of producing parties is the potential for sanctions as the result of the destruction of data in the normal course of operation of their computer systems, such as the over-writing of disaster recovery tapes. Currently, it is very difficult to provide clients with reliable advice on what they should preserve. A "safe harbor" that makes clear that a party should take "reasonable steps to preserve reasonably accessible information" is necessary protection for producing parties. Such a standard provides clear guidance to parties and recognizes that there is only a very small chance that such data will contain additional relevant information beyond information contained in active data. A safe harbor provision also gives helpful direction to courts considering the scope of discovery, removes much of the uncertainty litigants will face and provides important protection against abusive discovery practice seeking only to increase the costs of discovery.

A safe harbor provision is especially appropriate because in my experience more information is produced in litigation than is ever used. Under these circumstances, the Rule should not exaggerate the perception that massive amounts of data must be preserved to protect against sanctions in the very unlikely chance that some additional relevant information may

possibly be located in disaster-recovery tapes. As an example, most litigants preserve more than enough information for purposes of litigation through normal litigation procedures, such as litigation holds and document retention policies. In short, the information that is important to the litigation is also necessary to operation of a party's business, and so it is ordinarily maintained in that fashion.

While I support the Committee's proposal, I suggest that the better approach would be to adopt the Committee's alternative proposal requiring intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system before sanctions may be imposed. I do so because of the narrow scope of the proposed safe harbor, the significant costs in preserving disaster recovery tapes and the limited potential benefit in preserving such data. It should not be necessary to resort to disaster recover tapes unless a party recklessly fails to implement other measures, such as litigation holds, or intentionally destroys back-up data that it knows is the only source of certain information.

The Committee's alternative language better addresses preservation of disaster-recovery tapes while not subjecting producing parties to a "knew or should have known" standard that is subject to abuse. For example, under the current proposal, a requesting party can arguably preclude application of the safe harbor provision simply by notifying the producing party that it believes disaster recovery tapes are discoverable. Such a notice becomes a basis for claiming that the producing party "knew or should have known" the information was discoverable. Regardless of whether the requesting party's claim of discoverability is valid, the producing party is thus forced to incur the cost of preserving disaster recovery tapes to avoid the possibility of sanctions. An intentional or reckless standard helps prevent such abusive discovery tactics by

forcing a requesting party to provide a valid basis for a claim that disaster recover tapes are discoverable.

Finally, the proposed safe harbor can be greatly improved by adding an explicit reference to the "reasonably accessible information" standard in Rule 26(b)(2). Thus, the Notes to the proposed rule should make clear that a party need not take steps to prevent the deletion of electronically stored information which is "not reasonably accessible" unless the parties agree to preserve such information or the court rules that inaccessible information is subject to discovery.

IV. Other Issues

Finally, I suggest a few additional improvements in other areas of the amendments in order to clarify the application of the rules for judges and litigants. First, with respect to the amendments to Rule 26(f), I suggest replacing the proposed language directing the parties "to discuss preserving discoverable information" with the broader phrase "to discuss any issues relating to disclosure or discovery of electronically stored information." The revised language adequately addresses the issue and avoids undue focus on preservation of electronically stored information, a subject not heretofore dealt with in the rules.

Second, I believe that proposed Rule 34(b)(ii) would be more flexible and easier for litigants and courts to apply if it required production in a "reasonably usable form," which a standard that is more familiar to lawyers and judges. "Reasonably usable" allows the parties greater discretion to tailor the form of production to the needs of a particular case and the particular data being produced. A "reasonably usable" standard also precludes any argument that a party must choose between allowing access to its proprietary data bases or producing data in native format, which may open the door to manipulation or alteration of the data. If a party does not wish to produce data in native format, it may be forced to incur significant costs to make its

data "reasonably searchable," regardless of whether the data is ordinarily maintained in a searchable format. Thus, the proposed language appears to impose duties on a producing party that are greater than the duties in producing hard copy data. By contrast, the "reasonably usable" standard allows parties to determine the format for production that best fits the circumstances of the case and gives courts the discretion to direct production in a particular format in the event that the parties cannot agree.

Again, I would like to commend the Committee for both the proposals themselves and for the effort it has put into understanding a technically complex subject and developing amendments that are balanced and reasonable. I hope that the Committee will consider my comments, which I intend to be constructive suggestions that may hopefully improve the amendments.

Sincerely,

Dabney Carr