04-CV-005
Request to Testify
2/11 DC

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09/02/2004 02:16 PM

To <Peter_McCabe@ao.uscourts.gov>
cc
Subject E-Discovery -- Request to Testify

Dear Mr. McCabe:

This e-mail will serve as my formal request to testify on proposed e-discovery rules in Washington, DC on February 11, 2005.

If you require additional information from me regarding the above, please contact me via e-mail.

Thank you,
Michael Nelson

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December 14, 2004

Reply to:
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Peter G. McCabe, Secretary of the
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil Procedure Regarding Discovery of Electronically Stored Information

Dear Mr. McCabe:

As an attorney whose practice focuses upon the defense of complex litigation, I am well aware of the challenges presented by the emergence of electronic discovery. As the business world has embraced the use of computer technology in its day-to-day operations, the amount of material potentially discoverable in the context of civil litigation has increased exponentially. For example, corporate employees utilize electronic mail for even the most routine communications. Corporate defendants are frequently faced with the need to perform extensive searches of electronic data in response to discovery requests even when there is little likelihood that relevant data will be discovered. In addition to the expense and burden imposed by the breadth of such searches, the manner in which data is stored often leads to burden, expense and significant uncertainty for the corporate defendant. To provide just one of many examples, electronic data is frequently copied to back-up tapes. These back-up tapes serve no other purpose than to allow for the restoration of a computer system in the event of a disaster. The back-up tapes are normally preserved for a short period of time, and are not intended as a document repository. Accordingly, information on these tapes cannot be restored absent significant burden and expense. Furthermore, corporate defendants who delete these tapes in accord with standard business practices could face sanctions for spoliation of evidence, even though the tapes are not being destroyed with the intent to delete relevant evidence.

The current Federal Rules of Civil Procedure are simply insufficient to address the obligations of litigants to preserve and produce electronic discovery. In their current form, the proposed amendments to the Federal Rules of Civil Procedure go a long way towards clarifying these important issues. However, I believe that some minor modifications will further the essential purposes underlying the amendments. I plan to address these suggested revisions in detail at the Civil Rules Committee hearing in Washington, DC at February 11, 2005.

First, I suggest that the proposed amendment to Federal Rule of Civil Procedure 26(b)(2) limiting discovery of electronic information that is not "reasonably accessible" (absent good cause) should provide litigants with a precise but flexible standard for determining whether electronic data is "reasonably accessible." Such a standard could be set forth in the Committee

Note to the Amendments. I recommend that the standard reflect an electronic discovery principle adopted by the Sedona Conference Working Group on Electronic Discovery, which provides that "[t]he primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval," and that "[r]esort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources." *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 4 SEDONA CONF. JOURNAL 197, 223 (2003). Incorporating similar language in the Committee Note would greatly assist in clarifying the precise scope of electronic discovery.

In addition, the Committee may wish to modify current language in the proposed amendment to Rule 26(b)(2) which provides that a party need not produce information which it "*identifies* as not reasonably accessible" (emphasis added). The use of the term "identifies" creates an ambiguity that may be interpreted to require production of a log specifically identifying documents that are not accessible. Requiring parties to prepare such a log would result in virtually the same burden and expense as production of the documents themselves. One solution would be to eliminate the identification obligation by revising the sentence as follows: "[e]lectronically stored information that is not reasonably accessible need not be produced except on a showing of good cause."

Furthermore, in the event that a court determines that "good cause" exists to order the discovery of inaccessible electronic data, the proposed amendments to Rule 26(b)(2) should incorporate a presumption that the requesting party "pay the reasonable costs of any extraordinary steps required to store, retrieve, review and produce electronically stored information." The presumption may be overcome by "a clear and convincing demonstration of relevance and need." The Note should define "extraordinary steps" as any steps taken to retrieve and review electronic discovery that would impose an unreasonable burden on the producing party that is disproportionate to the benefit to the party seeking production. This should include any steps to retrieve and review information from inaccessible sources, such as back-up tapes. Adopting such a rule would encourage litigants to carefully weigh the burden of a discovery request against the potential benefits, while also recognizing the basic principle that the a court may "condition[] discovery on the requesting party's payment of discovery" when burden outweighs the benefit. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

The Note to Rule 26(b)(2) should also clarify that inaccessible electronic data need not be preserved absent an agreement between the parties or a court order. As the proposed amendment to Rule 26(f) would require parties to discuss the preservation of electronic evidence at the outset of litigation, the incorporation of such language would confirm that litigants are not required to undertake the significant burden of preserving vast quantities of inaccessible data on the potential that the opposing party may eventually seek production of the data.

Furthermore, the current language of the proposed amendment to Rule 26(f) requiring parties "to discuss any issues relating to preserving discoverable information" may be interpreted by litigants as implying an obligation to enter into preservation orders at the outset of a case. In many instances, the common law of spoliation of evidence provides ample protection for parties, and there is no need to enter into a preservation order. To eliminate the perception that parties must enter into preservation orders pertaining to electronic discovery while ensuring that litigants establish open communication regarding electronic discovery issues, the proposed amendment to Rule 26(f) should be revised to direct litigants to "discuss any issues relating to disclosure or discovery of electronically stored information."

I also suggest that the proposed amendment to Rule 26(b)(5) incorporate uniform standards to determine the circumstances under which the inadvertent production of privileged electronic information will constitute waiver of the privilege. Such language could require "consideration of all relevant circumstances in determining whether the waiver of any applicable privilege is fair, reasonable and in the interests of justice." These standards could reflect (1) "the reasonableness of the efforts to avoid disclosure," (2) "the [producing party's] delay in rectifying the error," (3) "the extent of the disclosure," (4) "overriding issues of fairness," and perhaps the most significant factor for the purposes of electronic discovery, (5) "the scope of discovery, particularly as it relates to the burden of preparing for the discovery." *See* 8 FED. CIV. PRAC. & PRO. CIV. 2D § 2016.2. Furthermore, in addition to the language in the current form of the proposed amendment requiring parties who have inadvertently received privileged electronic data to return, destroy or sequester the data once it has been identified as privileged, the amendment to Rule 26(b)(5) should also require parties to provide written certification that the data has in fact been returned, destroyed or sequestered.

The proposed amendment to Federal Rule of Civil Procedure 33(d) provides that if an answer to interrogatories may be ascertained through access to electronic data, "and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," the responding party has the option to answer the interrogatory by providing the requesting party with access to the data. This language may be interpreted to require that the requesting party be provided with direct access to a proprietary database. Such access is rarely, if ever, required, and the Note to Rule 33(d) should clarify that requesting parties ordinarily do not have such a right of access.

The proposed amendment to Federal Rule of Civil Procedure 34(b) provides that if the requesting party does not designate a specific form of production, the responding party may produce responsive electronic data either "a form in which it is ordinarily maintained, or in an electronically searchable form." This appears to place unnecessary limitations on the form of production by precluding parties from producing data in a form that is reasonably usable but is not searchable (such as graphic or audio files). As a litigant's responsibility is to produce discovery in a format that is reasonably usable by the requesting party, a more flexible approach

would be to provide the responding party with the option to provide electronic discovery in a "reasonably usable form," rather than an "electronically searchable form."

Finally, revisions should be made to proposed Federal Rule of Civil Procedure 37(f), which creates a "safe harbor" protection from sanctions for the loss of electronic data if (1) "the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action," and (2) "the failure resulted from the loss of information because of the routine operation of the party's electronic information system," unless the party violated an express order mandating the preservation of such information. Proposed FED. R. CIV. P. 37(f). The requirement that a party take "reasonable steps" to preserve potentially discoverable information could be interpreted to require litigants to preserve inaccessible data, even though the proposed amendment to Rule 26(b)(2) would largely preclude discovery of this information. In order to ensure a more consistent approach, proposed Rule 37(f) should provide that there is no duty to preserve inaccessible electronic data absent a preservation order granted by the trial court (presumably in tandem with an order allowing discovery of the data in question upon a showing of good cause).

Furthermore, the proposed rule in its current form appears to apply a negligence standard for the loss of electronic data resulting from the routine operation of an electronic information system. Such an approach is inconsistent with the majority of jurisdictions that have limited the imposition of an "adverse inference" spoliation sanction to cases in which the loss of evidence was the result of intentional or bad faith conduct.

Therefore, I propose the following language for Federal Rule of Civil Procedure 37(f):

> "A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information."

As noted above, I plan to address these issues in further detail at the Civil Rules Committee hearing in Washington, DC at February 11, 2005. Thank you for the opportunity to share my thoughts regarding these important amendments.

Very truly yours,

NELSON LEVINE de LUCA & HORST, LLC

Michael R. Nelson