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To Peter_McCabe@ao.uscourts.gov
cc
Subject January 12, 2005 hearing

04-CV-039
Request to Testify
1/12 San Francisco

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts

Re: January 12, 2005 Hearing on Proposed Federal Rules Amendments
Request To Testify

Dear Mr. McCabe:

I am requesting to testify at the January 12, 2005 hearing is San Francisco, California, on the proposed amendments to the Federal Rules of Civil Procedure dealing with the electronic discovery. Please let me know if I will be able to attend and speak, and if you need any further information. Please also let me know the time and location of the hearing. In addition to oral testimony, I expect to submit written comments. Please let me know when they are due and where I should send them.

Thank you.

Kathryn Burkett Dickson
Board Member, California Employment Lawyers Association

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TESTIMONY ON BEHALF OF
THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Public Hearing on Proposed Amendments to Civil Rules for Electronic Discovery
January 12, 2005
San Francisco, California

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I am a Member of the Board of Directors of the California Employment Lawyers Association (CELA), and have been authorized to present testimony and comment on CELA's behalf in response to the proposed amendments to the Federal Rules of Civil Procedure dealing with electronic discovery. CELA appreciates the Advisory Committee's commitment to obtaining testimony and comment from a broad range of constituencies on the proposed rules, and thanks the Committee for the opportunity to present testimony at the hearing and written comments for the record.

CELA is a statewide organization of California attorneys who primarily represent plaintiffs in employment discrimination, wrongful termination, wage and hour, and other labor and employment cases. CELA is also active in legislative matters and has appeared as amicus curiae in numerous cases involving important employment rights before federal and state courts.

CELA has approximately 550 members, the vast majority of whom are sole practitioners, or attorneys who practice in small firms. While most of our members represent individuals in employment cases, a small percentage handle representative and class actions, primarily in

discrimination and wage and hour matters. Through the cases we handle, CELA members represent thousands of working men and women in cases throughout California, in both state and federal court.

In addition to serving on the CELA Board, I also recently served for three years as Plaintiff Co-Chair of the ABA Labor and Employment Section's EEO Committee. In the past five years, I have spoken at several conferences on the use and effect of electronic discovery and evidence in employment litigation, including conferences of the American Bar Association, the National Employment Lawyers Association, the California Employment Lawyers Association, and the West Coast Labor and Employment Law Conference.

I have personally practiced employment law for twenty-five years, and as a partner in the firm of Dickson - Ross, have handled hundreds of individual, multiple plaintiff, and class action cases. Electronic discovery has been essential in many of those cases in the past, and has become critical in today's litigation.

I am a very strong proponent of the pursuit of electronic discovery and evidence in employment cases, and have urged employment lawyers to become more familiar with technology and its evidentiary benefits.

Electronic Discovery and Evidence in Employment Litigation

While the importance and benefits of electronic discovery in class action employment cases have been recognized for some time, practitioners are becoming aware that electronic discovery is now just as critical in much smaller, individual cases.

I am often asked by my colleagues, why they should focus on electronic discovery. As I explain, except for the smallest and most unsophisticated of employers, almost every company

keeps at least some of its most important records and communication in electronic form.

The following records are routinely maintained electronically these days: timesheets; payroll and other compensation records; benefits data; entry and exit badge access records or other kinds of attendance and security records; productivity data such as sales, billable hours, customers contacted, or other forms of measurable output; employee rosters; and organization charts. In addition, many companies now encourage employees to communicate via e-mail, particularly on intranet (i.e., within the company) systems. Instant Messaging is rapidly emerging as an even more instantaneous form of communication among employees or managers.

Many companies maintain personnel data and files, and develop performance reviews electronically through vendored software like PeopleSoft, or through "home-grown" systems developed by the Information Technology department within the company itself. Employee handbooks and information about benefits are also provided on-line at many companies. Job openings are posted on the company web-site and both internal and external candidates may be instructed to submit an on-line application. Finally, numerous companies conduct HR and job-related training on-line, and maintain electronic training records for each employee, showing the date, length, and type of training.

While a decade ago, plaintiffs' counsel would have requested and reviewed paper correspondence, memos, reports, hand-written phone messages and other paper data, he or she now needs to obtain and review e-mail and computerized documents maintained in computer directories and files. There are some major benefits to obtaining electronic discovery, rather than paper discovery. Electronic data can be searched, analyzed, re-organized, and turned into trial evidence and graphics with far greater ease than paper discovery. Searching through thousands

of records or paper documents for a particular piece of data can truly amount to looking for a needle in a haystack, while an electronic search could find relevant data in a split-second.

But, there is a downside as well. It is an axiom in employment litigation that the plaintiff generally possesses only a small portion of the relevant evidence – the necessary information to prove the case is almost always in the hands of the defendant employer. As noted, much of that information is in electronic form, in electronic databases and other systems about which the plaintiff (and her lawyer) may know precious little. Another axiom in current employment litigation is that defendants will almost never part with electronic discovery without a vigorous and often expensive fight. Thus, the promise that electronic discovery would help "level the playing field" remains an aspiration rather than a reality.

In this circumstance, the Advisory Committee's in-depth review of electronic discovery is particularly apropos and welcome. The following are specific comments on some of the proposed rule changes, particularly as they would affect employment litigation.

Comments on the Proposed Amendments

1. **Early discussion of preservation and production of electronic discovery and inclusion of those topics in scheduling orders (Rules 16 and 26(f).**

CELA supports the changes to Rule 16 and Rule 26(f) requiring parties to address issues of preservation and production of electronic discovery at the earliest possible stage. The Committee should make clear that the party maintaining such data should provide enough basic information about the relevant electronic systems it maintains to help in framing discovery and to reduce or narrow the need for extensive 30(b)(6) depositions of multiple employees familiar with these systems. As electronic systems have proliferated in companies, so have the staff who

understand and maintain such systems.

It is becoming all too common to have to depose numerous "persons most knowledgeable" about these different systems. This becomes an even more vexing problem when combined with the presumptive limits placed on that earlier rules amendments placed on the number of depositions and interrogatories in a case. It would not be difficult at all to use the ten allotted depositions simply to depose knowledgeable individuals in order to decipher the employer's electronic systems. For example, in one of my current cases, it will be necessary to take a number of different depositions of different individuals simply to learn about the company's separate electronic systems in the following areas: 1) human resources data; 2) compensation and payroll data; 3) recruitment, applicant, and initial hire data; 4) badge access data for entry to the facility; 5) training data; 6) performance review and management data; 7) the company's intranet web-site; 8) dial-up access to the company's computers for employees working off-site; 9) the company's e-mail system; and 10) labeling, back-up, archiving, and storage of electronic data. This amounts to ten depositions, without even considering the substantive and percipient witness depositions that are necessary to prove the underlying claims.

Requiring counsel (accompanied or supported by knowledgeable individuals from the employer defendant) to share much of this foundational information informally would go a long way to reducing the cost, time, and rancor associated with litigation.

The proposed rule's recommendation of an early preservation agreement and court order to prevent spoliation of electronic evidence is also highly desirable.

Similarly, CELA supports the proposed rule change in 16(b), specifically referring to inclusion in judicial scheduling orders of provisions for disclosure or discovery of electronically

stored information. This has the benefit of alerting the Court at an early stage that electronic discovery will be occurring in the case, and may prompt helpful judicial guidance regarding such discovery.

2. **Authorizing the receiving party to specify the format for production (Rule 34(b)(ii).**

CELA supports the proposed rule changes which would authorize the receiving party to specify the format for production. Generally, the producing party will have the ability to copy or save the data in a number of different formats, some of which will be easier for the receiving party to read and use. This is a welcome addition, since plaintiffs employment lawyers often find that a request for production of electronic data is met with a response that is wholly unreadable or unusable without acquiring new expensive hardware and software. The proposed rule is reasonable in allowing the producing party to object to the requested format if there is a reasonable basis for doing so.

The other proposed change, that in the event the requesting party says nothing about the format, the producing party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form, is also a sound proposal clearly designed to place the parties on a equal footing.

CELA supports these proposed changes.

3. **Discovery and the "reasonably accessible" standard (Rule 26(b)(2))**

This is a more vexing proposed rule change. There is great merit in making clear that parties should produce "reasonably accessible" relevant data without the typical but expensive motion practice that is currently necessary to obtain such data.

At least in the arena of employment litigation – particularly in individual cases – a request for such data is almost always met with stonewalling. Yet, such data is often highly relevant. For example, comparator data frequently provides crucial circumstantial evidence in discrimination actions. Let's say the employer claims the plaintiff was fired for low sales or failing to meet a sales quota. Most companies keep meticulous electronic records on sales. The plaintiff contends her sales were equal to or better than her male comparators and she claims she was fired because of her gender. Obviously the sales data is highly critical.

The Plaintiff in our example may be met with two kinds of problematic responses to a discovery request for the electronic sales data. One is that defendant simply refuses to produce the data at all. The second is that when the defendant is finally cajoled or ordered into producing it, the defendant then provides the data in hard-copy only, even though the data is maintained in electronic format. This is inherently unfair and unreasonable. The defendant has the data in a form which can be automatically searched, and calculations and analyses can readily be performed on such data – probably in a format such as an Excel spreadsheet, which could be produced to Plaintiff in electronic form with a few mouse clicks. To re-key or re-input the data from the hard-copy that was produced is often very costly and time-consuming, but defendants in employment cases will frequently insist that the Plaintiff should simply be required to shoulder that burden. That is simply an unnecessary waste of the precious time and resources.

The difficulty with the proposed rule change is that it goes further, and permits a party to self-designate relevant electronically stored data as "not reasonably accessible," requiring the propounding party to bring a motion, presumably in each instance in which the responding party makes such a claim. This is a very disturbing proposition, particularly combined with the lack of

any definition of "not reasonably accessible." The temptation, of course, will be for responding parties to over-invoke this gaping loophole, with resulting expense and delay in discovery.

If the real problem with "inaccessible data" – that is data stored in disaster recovery or archival systems, or perhaps on outmoded back-up tapes or other antiquated storage media – is the cost and expense of searching such media for responsive relevant evidence, then the current Rule 26(b)(2)(iii) and the existing "undue burden" standard are adequate to deal with such claims. This standard has been successfully implemented by courts for many years. Introducing the new relatively undefined concept of "inaccessible data" with its presumption against discovery of such evidence, will result in additional potential roadblocks to discovery.

In any event, the "accessible" versus "inaccessible" categories are likely to change quite rapidly. Because the need for easily searchable storage of vast quantities of electronic data is so obvious (and perhaps spurred on by legislation such as the Sarbanes-Oxley Act), a number of major companies have been vigorously developing and marketing the software and hardware necessary to manage the searchable storage of vast quantities of data – companies such as Veritas,, EMC, Cisco, IBM, Hitachi, and others come to mind. Today's ostensibly "inaccessible" data will be tomorrow's "reasonably accessible" data. In that respect, the Committee's proposed change will be a kind of moving target, subject to endless argument over the "state of the art" of storage technology.

CELA urges the Committee to omit from the proposed rule changes the "not reasonably accessible" language and accompanying presumption against discovery.

4. **"Claw-Back" of Privileged Information (Rule 26(b)(5))**

The impetus for this proposed rule change is understandable, but the proposal goes too

far. Obviously, to produce voluminous quantities of electronic data in a timely fashion may impair the ability of counsel to adequately review the production for privileged communications. But, the proposed rule change would require the receiving party to immediately return, sequester, or destroy the specified information and any copies whenever the producing party claims a privilege with respect to information it produced either intentionally or inadvertently. The receiving party is not permitted to present the document to the court for decision on the privilege issue, but, instead has to return it to the producing party. As is often the case, however, it is the information on the face of the document itself which is critical to establishing whether a document is privileged. Instead of seeking a direct court ruling, the receiving party must return the document and then bring a motion to compel to attempt to obtain the document again – without the benefit of ensuring that the Court will be able to review the document.

Another problem is that the proposed rule does not specify the period of time during which the producing party must exercise this "claw back" right, stating only that it must be done within a "reasonable period."

The significant changes to "privilege" law, including the possible collision of this rule with differing state privilege statutes and ethics standards, will ensure that this new provision will increase the number of discovery hearings for years to come.

5. <u>The proposed "safe harbor" (Rule 37(f))</u>

CELA opposes the proposed "safe harbor" rule, particularly the language of subsection (2) providing safe harbor if the "failure [to provide information] resulted from loss of the information because of the routine operation of the party's electronic information system." We have great concern that this safe harbor provision will simply encourage corporations to

accelerate what are often already fairly frequent "purging programs" that delete important sources of data and evidence for cases.

The current system, which encompasses concepts of spoliation which may lead to adverse inference jury instructions or other sanctions, is preferable because it will lead corporations to act more cautiously. Lawsuits involve a search for the truth. Relevant evidence should not wind up in shredders or "Evidence Eliminator" programs that are claimed to be simply a part of the company's routine deletion programs. As noted above, great strides are being made by technology companies in the development of mass, searchable data storage systems. There is no justification for a rule which encourages data destruction because of a perceived short-term "storage space" concern.

CELA again thanks the Committee for offering the opportunity for this input. We urge the Committee to adopt rules which will facilitate the search for truth and which will help to "level the playing field," a concept that technology should foster rather than frustrate.

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