04-CV-040

Request to Testify 1/12 San Francisco

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"Judd, Jeff"
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12/13/2004 02:36 AM

To peter_mccabe@ao.uscourts.gov

cc 1/12/05

Subject ~~1/15/05~~ Hearing on Proposed E-Discovery Rules in San Francisco

Hearing date corrected by phone JK

Dear Mr. McCabe:

I am a litigation partner of O'Melveny & Myers, LLP, resident in San Francisco, CA. I would like to register for the Advisory Committee on Civil Rules hearing on the proposed e-discovery rules currently scheduled for January 12, 2005, in San Francisco, CA. I intend to submit written comments prior to the hearing. Please call me at 415-984-8798 or send a reply email with any questions or information regarding the hearing. Thank you.

Jeffrey M. Judd
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04-CV-040 Testimony 1/12 San Francise

"Judd, Jeff"
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01/11/2005 08:56 PM

To rules_comments@ao.uscourts.gov

cc dlevi@caed.uscourts.gov, lee_rosenthal@txs.uscourts.gov, Peter_McCabe@ao.uscourts.gov

bcc

Subject Comments on Proposed Amendments to FRCP Regarding E-Discovery

Attached is a .pdf version of my written comments on the proposed amendments to the Federal Rules of Civil Procedure regarding e-discovery, in anticipation of my testimony in the hearing in San Francisco tomorrow. I will bring with me 12 Xerox copies, as well. Thank you.

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January 11, 2005

BY EMAIL AND HAND DELIVERY

Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Washington, D.C. 20544
Attn: Peter G. McCabe, Secretary

Re: ***Comments on Proposed Amendments to the Electronic Discovery Rules***

To Whom It May Concern:

This letter contains my written comments, in anticipation of providing testimony during the January 12, 2005, hearing of the Civil Rules Advisory Committee about the committee's proposed amendments to the rules that govern discovery of information maintained in electronic format. The following comments reflect my personal views, and do not, and are not intended to, represent the views of O'Melveny & Myers LLP, any clients of O'Melveny & Myers LLP, or any organization affiliated with O'Melveny & Myers LLP or that I am a member of.

The following comments are based on my personal experience over the past 15 years representing corporate defendants in complex litigation in state and federal courts throughout the country. Many of my clients have sophisticated computer communications and data processing systems, and the universe of potentially responsive documents is often huge. Much of my practice involves companies that are concurrently the target of criminal and/or regulatory investigations and civil litigation. It is not unusual for a regulatory investigation to give rise to a referral to the Department of Justice and a related citizens' suit, which frequently results in multiple, overlapping class action claims. I have observed over the past six or seven years that litigation adversaries have with greater frequency adopted the tactic of litigating about the adequacy of a client's production, as it can be an effective means of increasing litigation exposure and, therefore, inflating the settlement value of a case. Allegations questioning the adequacy of a client's efforts to identify and preserve potentially responsive electronic information have thus become a litigation weapon of choice.

Accordingly, I have greeted the proposed e-discovery rule amendments with great anticipation in the hope that many of the recurring problems seemingly inherent to the discovery of electronic information will be mitigated, if not resolved. While I generally support the Committee's efforts to address the issues unique to the discovery and production of electronic

information, I am concerned that several proposals do not go far enough to ensure that propounding parties can obtain useful electronic information without causing the responding party to experience undue cost and burden. It is from this perspective that I address two specific rule amendment proposals below:

1. Proposed Amendment to Rule 26(f).

The proposed amendment to Rule 26(f) provides that early in the case the parties meet and confer "to discuss any issues relating to preserving discoverable information," in an effort to avoid unnecessary and extensive litigation about the adequacy of a party's efforts to identify and preserve responsive documents. In my view, the emphasis on ***preserving*** discoverable information misses the mark, and instead the effort should be made early on to attempt to obtain some agreement as to the universe of "documents" that is reasonably likely to contain discoverable information, and to begin to define any issues that are likely to arise in connection with the preservation and production of electronic information. A substantial body of common law has in recent years evolved that defines litigant's obligations to preserve electronic documents, and a strong argument can be made that such preservation obligations are a matter of substantive law, and thus inappropriate for treatment by rule. In contrast, rules pertaining to the identification, disclosure, and discovery of information are clearly within the rulemaking authority. Thus, the amendment to Rule 26(f) should require the parties to meet and confer "to discuss any issues relating to the ***disclosure and discovery*** of electronically stored information."

2. Proposed Amendment to Rule 26(b)(2).

I applaud the Committee's attempt to add clarity to the determination as to what electronic information must be produced and preserved, and the concept of "reasonably accessible" information is somewhat useful in this regard. But the Note that discusses this rule amendment raises almost as many questions as it answers. From the Note, one could reasonably conclude that all "active" data is discoverable, even though it may be extremely costly to perform the privilege and responsiveness reviews necessary to determine what information must be produced in response to specific requests.

For example, a company's email servers may contain many gigabytes, or terabytes of information, which in native format (*i.e.*, .pst files) must presently be reviewed document-by-document. It is possible, although costly, to convert .pst files into documents that are fully searchable electronically, and this is a useful tool for identifying potentially privileged documents. But at some point, what is often millions of pages of potentially privileged documents must be reviewed by attorneys to determine whether a good-faith legal basis exists to withhold production of a document on privilege or work-product grounds. Moreover, for many reasons it is desirable to electronically "brand" each page of electronic documents with a control number, and, if applicable, a notation that the document is confidential and has been produced pursuant to a protective order. This is also costly, as it involves creating a .tiff or .jpg image of the document to be branded, and linking that image to the text-and metadata-searchable version. After expending substantial sums to ensure that the integrity of electronic information, including

metadata, is maintained, and that one can determine the source of the document from a control number, there is no guarantee that such "active" information will be at all relevant to issues in the lawsuit. Thus, there is often a huge waste of resources whenever electronic information must be reviewed.

Accordingly, any statement to the effect that "active" data is reasonably accessible begs the important question of the relative balance between the potential benefit and burden of requiring production. A substantial body of federal case law has in recent years developed fairly sophisticated means of assessing the balance between benefit and burden where e-discovery is involved, and determining how to appropriately allocate the discovery costs among the parties. Accordingly, in my view, the proposed amendments and Note should focus on the question of the relative benefit and burden associated with producing electronic information, rather than on accessibility and the distinction between active and inactive data. Thus, the two-tiered approach to discovery of electronically stored information should require a responding party to identify those data that are unduly burdensome; if the propounding party disagrees, then the burden will be on the responding party to develop evidence to support that assertion. If the responding party is able to establish that production of certain information is unduly burdensome, then an appropriate cost-sharing order may be entered.

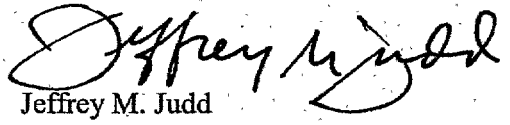
Ideally, the e-discovery rule amendments would create a presumption that the propounding party would pay for electronic discovery and production costs, as this would encourage litigants to focus their discovery demands, and to make reasonable decisions about the whether or not to seek production of certain categories of information. Of course, there would be nothing to preclude a motion by a propounding party to shift costs to the responding party under appropriate circumstances. As it now stands, however, litigants still have the right to propound discovery demands that require a responding party to preserve, search, and review huge amounts of "readily accessible" data, with little likelihood that such efforts will yield any information relevant to the issues in the lawsuit.

* * *

As the Committee has noted throughout the rulemaking process, technological advances may rapidly overtake and render obsolete rules that seek to address only the issues that confront the bench and bar today. That is why, for example, concepts of burden and benefit are, in my opinion, more likely to withstand the test of time than efforts to describe what is, or is not, "reasonably accessible." Moreover, as the cost of litigation – often fueled by excessive discovery burdens – continues to skyrocket unabated, the opportunity for litigation to produce a just result becomes increasingly illusive. With greater frequency corporate litigants with extensive electronic information resources are faced with the Hobson's choice of either incurring substantial litigation costs that have no relation to the merits of a case, or making settlement payments that far exceed a claim's merits. Such conditions merely promote more and more frivolous, costly litigation. A bold approach to these rules amendments could have produce significant improvements in the federal civil litigation.

I encourage the Committee to be bold in its action, and thank it for the opportunity to present my views.

Respectfully submitted,



Jeffrey M. Judd
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cc: Hon. David F. Levi (dlevi@caed.uscourts.gov)
Hon. Lee H. Rosenthal (lee_rosenthal@txs.uscourts.gov)
Peter G. McCabe (peter_mccabe@ao.uscourts.gov)