"Laura Schlichtmann" <lschlichtmann@cpsmlaw.com>
12/13/2004 01:26 PM

To <Peter_McCabe@ao.uscourts.gov>
cc
Subject 1/12/05 public hearing in San Francisco on proposed amendments to FRCP

04-CV-042
Request to Testify
1/12 San Francisco

12/13/04

Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the
United States Couts
Washington, D.C. 20544

Dear Mr. McCabe:

This is to request that you include Frank M. Pitre as a witness at the January 12, 2005, public hearing in San Francisco before the Advisory Committee on Civil Rules, concerning proposed amendments to the Federal Rules of Civil Procedure relating to discovery of electronic evidence.

Mr. Pitre is a name partner at Cotchett, Pitre, Simon & McCarthy ("CPSM") in Burlingame, California, and is the President-Elect of Consumer Attorneys of California.

Mr. Pitre is currently scheduled to begin trial on January 10, 2005. If that trial proceeds as calendared (50/50 at this point), Mr. Pitre's testimony would be delivered by either Steven N. Williams, another CPSM partner, or Elizabeth C. Pritzker, a senior associate who worked with Mr. Pitre on a recent case that will feature prominently in the testimony, where electronic evidence proved key to a major settlement in the public interest.

Mr. Pitre is interested in using a brief Power Point presentation in support of his testimony. Will the hearing room accommodate such visual aids? If so, would witnesses be expected to supply their own screen as well as the projecting equipment, and would it be possible to get into the hearing room early for set-up?

We would appreciate confirmation of your receipt of this request. I look forward to hearing from you.

Very truly yours,
Laura Schlichtmann
Cotchett, Pitre, Simon & McCarthy
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Tel.: (650) 697-6000
Fax: (650) 697-0577
my e-mail: lschlichtmann@cpsmlaw.com

CONSUMER ATTORNEYS OF CALIFORNIA

04-CV-042

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

January 31, 2005

Dear Mr. McCabe:

Consumer Attorneys of California writes to comment on the recently proposed changes to the Federal Rules of Civil Procedure as they relate to electronic discovery. Consumer Attorneys of California (CAOC) is a non-profit association representing more than 6,000 plaintiff's attorneys in California and their clients. CAOC members are at the forefront of protection of consumers' rights against corporate and insurance fraud and unfair practices. CAOC firmly believes that the proposed changes to the Federal Rules of Civil Procedure would lead to additional discovery abuses by the defense bar, continue a general erosion of the right to discovery and wrongfully tip discovery's procedural scale solidly in the favor of defendants.

We have an example from our own members' trial experience to show the potential harm of these proposed changes. In regard to mass tort pharmaceutical MDL litigation (i.e. Rezulin) the current rules of procedure were sufficiently flexible and adaptable and allowed our members to get not only e-mails, but also database information that demonstrated that the reports of liver injuries given to the Federal Food and Drug Administration (FDA) were inaccurate. The plaintiffs' attorneys were provided with the database and the software to access it and were able to prove that were more reports in addition to the ones disclosed by the company. This was key to settling many of the cases across the country. If the proposed changes had been in place the defense could have put up many more blockades and it might have resulted in the destruction of documents that were integral to the successful prosecution of these cases. The destruction of documents that these proposed changes would sanction could lead to the deliberate and purposeful destruction of documents demonstrating liability and will unjustifiably undermine the ability of plaintiffs to obtain the evidence necessary to meet their burden of proof for recovery. At the very least, these proposed changes would have seriously delayed resolution of these cases.

Legislative Department
770 L Street, Suite 1200, Sacramento, CA 95814-3396 • (916) 442-6902 • FAX (916) 442-7734
info@caoc.org • www.caoc.com

First, the proposed amendment to FRCP 26 (b) (2) allowing a party to not provide discovery of electronically stored information that the party identifies as "not reasonably accessible" is an unnecessary expansion. "Reasonably accessible" will be subject to elaborate and creative interpretations by the defense that would make Charles Dickens proud. By its inherent nature electronically stored information should be more "accessible" than any paper records. Any office with the capacity to store vast amounts of records electronically will most certainly have in place logical, well-coded, indexed retrieval systems flagged by key-words and case number references. A timely resolution to litigation will be at best significantly delayed if not completely frustrated by this amendment.

Second, the proposed amendment of FRCP 26 adding 26 (b) (5)(B) would allow a party to claim a privilege within a reasonable time *after* having already produced the information, is an outright invitation for the defense to simply claim that they "forgot" that what they were turning over was privileged. There is no clear need for this generous second strike at a claim of privilege. In combination with the withholding of electronic information that is not "reasonably accessible" this addition to FRCP 26 creates potentially significant obstructions within a currently workable discovery procedure.

Finally, the proposed amendment to FRCP 37 that would exempt parties from sanctions in some cases when they destroy electronic files through "routine" use of their document retention systems is the final piece in this unnecessary, potentially damaging change to Federal procedural law. These three changes expand potential excuses from complying with electronic discovery requests by reference to "reasonable accessibility", "routine use", and second thoughts about a claim of privilege. In 2005 when we increasingly demand heightened degrees of electronic compliance and computer literacy these proposed changes go too far in accommodating non-compliance with electronic discovery. Consumer Attorneys of California firmly believes that these proposed changes will work to cynically undermine compliance with discovery requests.

For these reasons, CAOC must respectfully oppose the proposed changes to the Federal Rules of Civil Procedure. If you or a member of your staff have any questions, please contact one of our legislative advocates in our Sacramento office.

Sincerely,

Sharon Arkin
President

Frank Pitre
President - Elect