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Request To Testify
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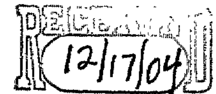

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12/17/2004 03:27 PM

To <Rules_Comments@ao.uscourts.gov>
cc "Peter G. McCabe" <peter_mccabe@ao.uscourts.gov>
bcc
Subject E-Discovery, Request to testify, Washington, DC

I respectfully request the opportunity to testify on the proposed amendments to the rules governing discovery of electronically stored information at the hearing in Washington DC on February 11, 2005 and I will attend the other hearings in San Francisco and Dallas as well.

Thank you,

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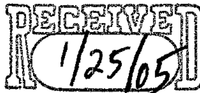

04-CV-054
Testimony
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MEMORANDUM

JANUARY 25, 2005

TO:

Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
(Rules_Comments@ao.uscourts.gov)

FROM: Alfred W. Cortese, Jr.

RE: COMMENTS ON PROPOSED E-DISCOVERY RULE AMENDMENTS

I would like to express my gratitude to the Committee for developing and publishing the proposed amendments and for the opportunity to present these comments. The Committee is to be commended for setting a new standard for informed discourse in its effort to help solve the unique problems presented by discovery of "electronically stored information". Overall, the proposals address increasingly frequent concerns expressed by many academics, judges, lawyers, litigants, and technical experts about the excessive costs, burdens, and ineffectiveness associated with e-discovery and represent positive progress toward amending the Federal Civil Rules to establish clear and concise e-discovery guidelines.

Although indicating initial skepticism about the need for e-discovery rule amendments, the Advisory Committee has recommended a well integrated amendment package. Recognizing that existing rules do not fit well with current practice, the Committee recommends national rules that are needed now, specifically to address the differences in e-discovery that have spawned increased discovery costs, burdens and difficulties, and that threaten a proliferation of differing local and state rules. See, *Standing Committee, Draft Minutes, Meeting of June 17-18, 2004 at 22-23*. As a long time advocate of the need for meaningful e-discovery amendments, I could not agree more. See, *e.g.*, Cortese & Wolfe, *Electronic Discovery: Problems and Solutions*, The Metropolitan Corporate Counsel (Vol. 8, No. 4, April 2000)

My concern is that discovery (and particularly e-discovery) remains too costly, too slow, too burdensome, and produces too little of benefit to any party, notwithstanding attempted directional corrections in the 1983, 1993, and 2000 FRCP discovery amendments.

These comments are arranged according to the five areas of the Advisory Committee's Report, although I emphasize the significance of the proposals which focus on the scope

and means of production of electronic information and that provide procedural reforms to reduce the risk of abusive sanctions (See sections B., D., and E., below).

A. Early attention to E-Discovery issues.

The proposed amendment to Rule 26 (f) would require that parties "discuss" issues relating to "preserving discoverable information" at the outset of litigation, in order to reduce abusive "sanction practice" by promoting early resolution of issues before information is lost. The Proposed Note suggests that parties could voluntarily agree to "specific provisions" which balance the need to "preserve relevant evidence with the need to continue routine activities critical to ongoing business [since] [w]holesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted." Proposed Rule 26(f), p. 8; Proposed Note, p. 19.

These amendments seek to implement the very desirable impact that early discussion should have on increasingly abusive sanctions practice and I support these goals. However, I suggest that the Committee consider revising the phrase at lines 64-65 of page 8 of the Proposed Amendments as follows: "to discuss any issues relating to ~~preserving discoverable~~ [disclosure or discovery of electronically stored] information" and move the suggestion that parties discuss preservation issues in appropriate cases to the Note. Use of the broader, more inclusive phrase, as in current rule 26 and in proposed Rule 26(f)(3), could avoid undue focus on the proposed first time reference in the Rules to a preservation obligation and the parties' responsibilities under substantive law.

Discussion of "preservation of discoverable information" should occur only in appropriate cases. The mandate to discuss preservation in all cases is likely to stimulate or encourage the entry of unnecessary or overly broad preservation orders in inappropriate cases. However, in some instances it will be appropriate to have an early discussion in order to resolve the scope of the common law preservation obligation as it applies to particular cases in the event that a meaningful "safe harbor" amendment is adopted. If so, the Notes should emphasize the care that should be taken in crafting and issuing preservation orders.

B. Two-tier discovery of electronic information that is "not reasonably accessible".

A very important amendment would limit the obligation to preserve and produce electronically stored information that is "not reasonably accessible" without a court order. See Proposed Rule 26(b)(2), pp. 4-5 ("A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible."). The proposal traces its lineage back to the 1983 amendments that first empowered judges to limit or forbid discovery if its costs and burdens outweighed its benefits, made more explicit in the 2000 amendments.

While discovery of electronic information that is "not reasonably accessible" could still be ordered for "good cause," the two-tiered approach has the practical benefit of confirming that such information need not ordinarily be preserved at the outset of litigation. This would help rebut the argument that all potentially discoverable material

must be preserved, regardless of its status, current use, or accessibility, and thereby could reduce the risk of sanctions during litigation. Moreover, by creating the distinction between "not reasonably accessible" and "accessible" electronic information, burdensome production that cannot be justified by the needs of the case also could be reduced.

1) The phrase "reasonably accessible" should be clarified.

"Reasonably accessible" is an appropriate phrase in the Rule, but it appears to warrant further explanation in the Note. The proposed Committee Note contrasts "active data" that is routinely accessed or used, with information that is costly and time consuming to restore. The latter includes information that is stored solely for disaster-recovery purposes (and not actually accessed), "legacy" data retained in obsolete systems, and deleted information which can be restored only through extraordinary efforts.

The Note to the Rule might cite practical examples of why it is necessary to deal differently with information that is "not reasonably accessible" under current practice. Production should initially focus on active electronic information purposely stored in a manner that anticipates future use and permits efficient searching and retrieval. Production of backup tapes and similar sources of information should require the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving, reviewing, and processing such information.

2) The proposed amendment to Rule 26(b)(2) should include specific reference to cost allocation.

As proposed, the amendment to Rule 26(b)(2) contains only an oblique reference to cost allocation: "...the court may order discovery of the information for good cause and may specify terms and conditions for such discovery." The Note to the Rule includes as one of the examples of an appropriate term or condition: "provisions regarding the cost of production." Although the Advisory Committee initially rejected the approach adopted in Texas Rule 196.4 (and by decisions in other states such as California and New York), where mandatory cost-shifting has been successful in reducing unreasonable demands for production of electronic information, the Standing Committee concluded that there should be reference to costs in the Note. There are very good reasons to go further.

Allocation of costs is a most effective deterrent against overbroad, marginally relevant discovery and is not a bar to litigants obtaining all the information they need. Therefore, I suggest that the Committee amend proposed Rule 26(b)(2) to add at the end of the "terms and conditions" phrase, language that would impose a presumption of cost sharing for the extraordinary costs related to the storage, retrieval, review, and production of electronic information that is "not reasonably accessible." The Note should explain that the presumption could be overcome by a clear and convincing demonstration of relevance and need for the "not reasonably accessible" information.

3) The Note to Proposed Rule 26(b)(2) should be clarified to confirm that electronically stored information which is not "reasonably accessible" need not be preserved absent a voluntary agreement of the parties or a specific court order.

Given the Committee's conclusion that inaccessible information should be treated differently if it is in electronic format, if proposed Rule 26(f) is intended to mandate an early discussion of preservation of information, any requesting party that fails to obtain an agreed order or fails to seek a preservation order should be deemed to waive any objection when, in good faith, the producing party does not preserve inaccessible information. Existing language in the Note describing the effect of the two-tier system could be amended to clarify this principle by specific reference to the relationship between "two tier" and "safe harbor". One way to accomplish that would be to expand on statements in the "safe harbor" Note explaining that wholesale suspension of the ordinary operation of computer systems is rarely warranted, because in most instances a party's obligations are satisfied by preserving reasonably accessible electronically stored information.

4) The proposed amendment should not create a new obligation to identify information that is not reasonably accessible.

Under amended Rule 26(b)(2) "A party need not provide discovery of electronically stored information that the party *identifies* as not reasonably accessible." The ambiguity regarding the scope of the obligation to identify the information not produced is addressed in part by the Note at p.13, but is still likely to create confusion about the scope and extent of the obligation and stimulate contentious motion practice.

One solution would be to eliminate the identification obligation by revising the sentence on the following lines: "Electronically stored information that is not reasonably accessible need not be produced except on a showing of good cause." The creation of an obligation to identify all information that is inaccessible is unnecessary, unhelpful, and in some cases could be very burdensome depending on the specificity required in identifying the inaccessible information, while contributing very little toward focusing discovery on the merits of the action.

Therefore, I suggest that the Committee should not impose a new "identification" obligation on the producing party, but should rewrite the rule as suggested above to stimulate early production of reasonably accessible information, while tracking the traditional method of the responding party moving for further production for good cause. The interest in early identification of potentially discoverable information could be accomplished by a Note that suggests early identification of generalized categories of e-information, such as disaster recovery tapes, legacy data, and fragmented or deleted e-mail files. Moreover, I suggest that references to the respective burdens of proof of the parties should be confined to the Note.

C. Procedure for Asserting Privilege after Production.

The proposed amendment sets out a procedure to resolve whether the production waived or forfeited a privilege, but does not set out standards for determining the question, while the Note comments that the courts have developed principles to resolve these issues. Some say that the Rules should be further revised to require consideration of all relevant circumstances in determining whether the waiver of any applicable privilege is fair, reasonable and in the interests of justice together with a more detailed explanation in the Note of the factors most courts apply in determining these issues. However, such an approach might test the limits of the rulemaking power and the proposed amendment appears to give some measure of protection.

The Committee has inquired whether or not a party who receives notice that privileged material has been produced should certify that the material has been sequestered or destroyed if it is not returned. Because it is so easy to circulate electronic information with adverse consequences to the assertion of privilege, certification probably should be required.

D. Proposed amendments to Rules 33 and 34 – definition of document, form of production, and options for production of electronic information.

1) The production option under proposed Rule 34(b)(ii) should be analogous to the existing option to produce in "reasonably usable form".

Under proposed Rule 34(b)(ii) the default production standard for electronically stored information would be "a form in which it is ordinarily maintained, or in an electronically searchable form." A better standard would require production in a "reasonably usable form", the existing standard in Rule 34. "Reasonably usable" better reflects the requirement that the requesting party receive information in a format that is useful to the party, without mandating specific formats. A "reasonably usable" standard would also accommodate the large number of parties that still prefer producing and receiving information in the traditional hard copy format. Such an approach would also keep the decision on permitting "direct access" to confidential proprietary data bases where it belongs -- with the producing party. Direct access should be rarely granted. The rules and the Note should not even suggest the possibility of direct access. These points could be included in an amended Note to the proposed rule.

2) The options to produce e-information in Rule 34(b) as "ordinarily maintained" or in "electronically searchable form" unfortunately could be interpreted to mandate production in "native format" or to require accompanying specialized software.

"Ordinarily maintained" seems to mandate "native format" and "electronically searchable form" appears to mandate software required to search TIFF or PDF images. There already are formats that are not meaningfully "electronically searchable" -- e.g., mpg, jpg, wav, etc., and more may be on the way. For these, the only other option presented

would be to produce in the "form in which it is ordinarily maintained" – i.e., native format, but if "reasonably usable" were substituted the non searchable files could be produced and would be useful, such as a photograph in jpg format. Thus, I suggest that the best approach would be to allow the producing party to produce in any "reasonably usable form", where no form is specified or the requesting party states no preference.

E. Safe Harbor: Rule 37 Sanctions

Another very important Committee proposal is to establish an explicit "safe harbor" from sanctions in Rule 37(f) that recognizes the need to avoid the repeated necessity to shut down portions of ongoing extensive computer systems and processes that serve purposes other than managing, storing, retrieving, and producing information for use in litigation.

1) There is real need for a "safe harbor" provision in the discovery rules.

The Committee proposal recognizes the need for protection against sanctions where information is deleted or overwritten as a result of the routine operation of computer systems. The logic behind the safe harbor proposal is that the cost and disruption of interrupting the regular operation of computer systems are not justified when there exist other means such as an effective "litigation hold" process for preserving the needed information. In appropriate cases, ample means are available to preserve necessary and relevant information, including early discussion of the need for such extreme measures and entry of preservation orders tailored to the specific case and specified information.

2) Sanctions for routine destruction of electronically stored information should be imposed only for violation of a court order requiring preservation of specified information.

As currently drafted, the proposed safe harbor amendments would allow sanctions in the absence of an agreement or court order prohibiting the destruction of e-information. Perhaps a better alternative would be the following: *"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 specified information."*

Practical experience demonstrates that discoverable information can be preserved and produced from active information retained for business purposes through "litigation holds" which renders unnecessary the routine preservation of massive amounts of disaster recovery backup information, deleted data, or information stored on legacy systems.

3) A high degree of culpability should be required to preclude eligibility for a the very narrow "safe harbor" from sanctions in amended Rule 37(f) for destruction of electronically stored information as the result of the routine operation of computer systems.

The Committee's "footnote" version of a Rule 37(f) safe harbor is "framed in terms of intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system." *See* Proposed Rule 37(f), text and note at 32-34. In my view, an "intentional or reckless" standard is required because of the extremely narrow scope of the proposed safe harbor and the better protection it would provide against abusive sanctions practices. Such a standard is fully justified by the increase in unreasonable and abusive sanctions practices, the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of the masses of potentially discoverable electronically stored information. In fact, the scope of the safe harbor is so narrow that a "reasonableness standard" could be interpreted to offer less protection than exists under present law.

Conclusion.

Adoption of amendments as suggested above would be a major step towards a more realistic approach to electronic discovery. Hopefully the Committee will agree that these few amendments are necessary to guide bench, bar, and litigants through the extremely unfair, slow, and expensive procedure that discovery of electronic information has become for most parties. Thank you for the opportunity to submit these comments.

Respectfully submitted,

Alfred W. Cortese, Jr.

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