UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
4001 United States Courthouse
Independence Mall West
Sixth and Market Streets
PHILADELPHIA, PENNSYLVANIA 19106-1741

Chambers of
Michael M. Baylson
United States District Judge

(267) 299 - 7520

January 19, 2005

04-CV-106

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedures
Of the Judicial Conference of the United States
Thurman Marshall Judiciary Building
Washington, DC 20544

Dear Mr. McCabe:

I wish to offer the following comments on the proposed amendments to the Federal Rules of Civil Procedure.

1. My judicial experience with problems relating to electronic discovery arose in a complex criminal case, I did have extensive experience dealing with electronic discovery in civil litigation as a commercial litigator.

2. A constant objective of litigators, particularly in complex federal litigation, is that they must, in representing their client, "dig up and turn over every leaf" because of the fear of otherwise missing the "dynamite" document(s). Similarly, the attorney representing a party that must produce documents has a natural inclination to research its own documents thoroughly so that, if there is even one "dynamite" document in the collection to be produced, the client and its lawyers will know about it in advance. Discovery is frequently the most expensive part of litigation, not necessarily because of the obligations to produce documents in the ordinary course, or review documents produced by the opposing party, but rather because of the tremendous expense that lawyers and their clients are willing to go through to ascertain the existence or non-existence of "dynamite" documents.

3. Just as electronic discovery has increased the size of the producible universe of information, it is also increased the appetite of many litigants – such that huge burdens and expense can be placed on the producing party to ascertain the existence of, and produce, in electronic format, a much greater volume of documents than most lawyers or litigants would consider appropriate in cases with no electronically stored information. Stated differently, I believe that courts are now more tolerant of large scale productions of material in electronic format, which, if in hard copy would have been considered "unduly burdensome" (to use a famously overworked phrase).

4. However, because of electronic searching capabilities, the burden of producing or reviewing large collections is made less onerous because of the speed, efficiency and relative low

expense level of searching information produced in electronic form, compared to "normal" searching of a similar collection of hard-copy documents.

5. In this connection, should the civil rules contain an obligation, similar to the Brady rule in criminal cases, that a producing party must produce to the other side materials of which it is aware and which clearly support the position of the opposing party – even if the document is not specifically requested, and perhaps even further, to call attention to such document(s) – without considering what means would be available to a court to supervise the discharge of such an obligation, and/or sanctions for non-performance of the obligation.

6. In the absence of such a "Brady rule," should rules contain a self-executing obligation on the producing party to certify to the opposing party, and if necessary to the court, that the producing party has appropriately searched for and produced the documents requested – and perhaps further, performed an independent search of documents relevant to the "claims and defenses" in the case. Such a certification could be followed as a matter of right to the deposition of a party, if an individual, or pursuant to Rule 30(b)(6), of an appropriate managing director or other official of the producing party. I recognize that present Rule 26(g) concerns this topic, but it could be made more specific as to a party's actual production, following the response to the discovery request. In most cases, such a certification would be made at or near the close of discovery.

7. In considering the unique issues presented by electronic discovery, the Advisory Committee has, in my opinion, reached very laudable and practical standards for the conduct of electronic discovery in most federal cases. Although the proposed rules could go into much greater detail on some matters, such as the maintenance and production of "back-up" electronic storage tapes of documents and other factual materials, I firmly believe that this is an area in which responsible counsel will act responsibly, or is otherwise best left to active supervision by the trial judge.

8. Notwithstanding the facility and speed of electronic discovery, the expense can still be tremendous – and I think that the Advisory Committee has wisely noted the need of a court to consider the expense factor, on both the producing and requesting party, in striking a balance on how much electronic discovery is truly necessary for the issues at hand in a particular case.

9. Although the proposed amendments to the rules are written with applicability to all types of federal litigation, it is a well known reality that electronic discovery is most often, if not exclusively, employed in commercial litigation between two private parties. However, e-mail is also widely employed within police departments and prisons as it is within large corporations and other business entities. However, to my knowledge, there has been little discovery requested by pro se litigants suing a prison, or by plaintiffs in civil rights cases suing a police department e.g., for violation of civil rights – and the plaintiffs in such cases requesting discovery of electronically stored information from the defendant will present some real

problems of manageability and the need for trial court supervision in those cases. If a prisoner requested electronic data as part of discovery, what facilities does the prison have to allow review of the produced data?

Although I do not recommend that the proposed rules be changed to accommodate specific types of federal litigation, I do believe that some comments may be appropriately drafted to give pro se and civil rights litigants and courts some guidance in the need for regulation of discovery of electronically stored information in cases where the expense of undertaking it tremendously outweighs the likelihood of production of valuable material. Indeed, if there was to be a "Brady rule" for any kind of civil discovery, this might be the one area where it would have some positive societal benefits, and at the same time cut down on the expenses of electronic discovery and the impracticality of a pro se plaintiff seeking it and/or having the ability to search the material that could be made available by the defendant.

9. Although I recognize that the proposed amendment to Rule 37, concerning a "safe harbor" is considered controversial by some, I think it is a sensible proposal. The comment might be expanded to discuss the difficult practicalities facing a large corporation in maintaining what are frequently referred to as "back-up" tapes, which are often destroyed and/or "written over" in the normal course of business because otherwise the maintenance of huge volumes of back-up data for many years creates a huge expense. Very often a corporation with a large collection of back-up data has no idea it may be facing litigation on a specific topic as to which there is some material on the back-up tapes.

Thank you very much for considering the above comments. Please do not hesitate to contact me if there are any questions.

Sincerely yours,

Michael M. Baylson

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