04-CV-198

February 14, 2005

VIA TELECOPIER AND OVERNIGHT DELIVERY

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure: Electronic Discovery

Dear Mr. McCabe:

Guidance Software, Inc. submits the following comments both as a litigant and as a technology company whose products are often used in electronic discovery.

As an initial matter, we question certain of the assumptions underlying the proposed amendments. The Civil Rules Committee notes that electronic discovery is "more burdensome, costly, and time-consuming" than traditional paper discovery. As Magistrate Judge Hedges noted in his comments submitted to the Committee, at a minimum there is a lack of empirical data on this point.[1] Many experienced litigators who have spent countless hours combing through innumerable boxes of paper documents might fairly question which type of discovery is more burdensome. Indeed, in many instances technology has made searching electronic data far easier than paper documents. In addition, as the Committee notes in the proposed Note to Rule 26(b)(2), technology is continuing to develop. Even if it is true now that electronic discovery is more burdensome, costly, and time-consuming than traditional paper discovery, it is inappropriate to assume that the situation will not be reversed in the future.

Similarly, in the Committee Note to Rule 26(b)(2), it states that "information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts." The Committee appears to assume certain characteristics of deleted information that, even if arguably true in past years, may not be accurate now[2] and likely will be

[1] *See* Comment No. 04-CV-169, at page 2.

[2] Indeed, under existing rules, the expense of a technique must be weighed against the benefit of using it, amongst other factors. *Cf.* Rule 26(b)(2); *Zubulake*(need cite). When it comes to discovery, "expense" does not exist in a vacuum, and the proposed rules should not imply that it does.

even less accurate in the future as technology continues to advance. The Committee nods toward technological progress by asserting that "[t]echnological developments may change what is 'reasonably accessible' by removing obstacles to using some electronically stored information." The rules, however, should unequivocally recognize this essential reality.

Rule 26(b)(2)

The premise of continued technological development should be explicitly acknowledged by the proposed addition to Rule 26(b)(2). For instance, the proposed rule states that "[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible." Allowing the responding party to identify the information as not reasonably accessible is misguided – when the responding party is permitted to make a subjective determination regarding accessibility, it has an incentive not to procure up-to-date technology that would allow the information to be accessible. For example, should deleted but potentially relevant data that resides on the unallocated space of a computer hard drive be considered "inaccessible"? There are commercially available tools that, working across a computer network, can easily preserve that data for review by the responding party. Allowing a party, as an initial matter, to set its own standard with regard to what is or is not reasonably accessible may impede the adoption of technology that would make such data accessible. A better approach would be the restate the proposed rule as follows: "*A party need not provide discovery of electronically stored information that is not reasonably accessible using commercially available tools.*" This formulation of the rule would allow it to evolve with changing technology.

A hypothetical drawn from a well-known electronic discovery case highlights the potential pitfalls of the proposed rule. In *Zubulake*, Judge Schiendlin found that back-up tapes were not reasonably accessible.[3] Presumably, under the proposed addition to Rule 26(b)(2), a litigant in the position of UBS Warburg in the *Zubulake* case would regularly identify back-up tapes as not reasonably accessible. If technology becomes commercially available that would make the restoration of back-up tapes far easier and less expensive, what would be the posture of the litigant that had not purchased that technology? Undoubtedly, it would continue to identify back-up tapes as not reasonably accessible to it. Indeed, the frequent litigant would be well-served not to procure the technology so as to be able to maintain its position regarding the inaccessibility of back-up tapes. Slowing the adoption of new technology might well be an unfortunate side effect of the Committee's well-intentioned attempts to update the rules.

What about the expense? One objection to our proposed restated rule might be: surely a party need not procure every commercially available tool, given the cost of doing so. Fortunately, Rule 26(b)(2) already addresses the cost issue, as follows: discovery may be limited if the "burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues." This is a crucial component of Rule 26(b)(2). Under our proposed restated rule, data would be "reasonably accessible" if there were commercially

[3] *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003).

available tools that could access it. However, the cost of those commercially available tools would then be weighed under the existing Rule 26(b)(2) factors quoted above. In other words the responding party would be able to avoid procuring a commercially available tool to access the data, but only if the burden of doing so outweighed its likely benefit. Thus, the proposed restated rule would not inhibit the adoption of new technologies that are cost-effective in addressing electronic discovery.

Rule 26(f)

With respect to this proposed amendment, we have one comment regarding the discussion in the Note that states: "The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations." The discussion is accurate as far as it goes. The underlying assumption, however, appears to be that "cessation of that activity" is the only way the responding party could preserve the potentially relevant data. As noted by Judge Schiendlin, "[i]t may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit.' Although this sounds burdensome, it need not be."[4] Indeed, as technology continues to develop, such an approach is likely to become even less burdensome in the future.

Rule 37(f)

While explicitly addressing the issue of sanctionable conduct, the proposed rule goes a long way towards defining the scope of the duty to preserve under the Federal Rules. (After all, if failure to meet the duty is not sanctionable under the Federal Rules, does the duty truly exist under the rules?[5]) With respect to proposed Rule 37(f)(1), we believe that the Committee selected the correct culpability standard. The interplay, however, between proposed Rule 37(f)(1) and proposed Rule 37(f)(2) should be addressed in further detail. If Rule 37(f)(1) requires the responding party to take "reasonable steps" in order to benefit from the safe harbor, under what circumstances is it reasonable for the responding party to allow the "routine operation" of its systems to continue to destroy potentially relevant data? The proposed Comment states:

> Preservation steps should include consideration of system design features that may lead to automatic loss of discoverable information . . . In assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending *on the nature of the party's electronic information system* and the nature of the litigation. [Emphasis added]

The Committee must be careful not to establish incentives for behavior that it does not want to encourage. Under the proposed rule, what would be the result for a responding party that had an electronic information system that could not be disabled? Would it be reasonable under proposed

[4] *Zubulake,* 2004 WL 1620866 at *8.
[5] Of course, the court has inherent power to impose sanctions for spoliation, separate and apart from the Federal Rules.

Rule 37(f)(1) to have such a system? A better approach would be for the rule, taking into account factors such as those addressed in current Rule 26(b)(2) (e.g., the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues), to require litigants to have up-to-date systems to preserve electronic data. As with proposed Rule 26(b)(2), the Committee should not establish a rule that may impede the adoption of technological developments that can reduce the fees, burden, and time expended on electronic discovery. Indeed, if anything, the rules should take the opposite approach, and seek to create a system that encourages parties to employ technology that can combat the cost and time difficulties cited by the Committee. The reasonableness of a responding party's electronic information system (including its document preservation capabilities), given the resources available to the responding party, should be a factor that the court weighs in deciding whether such party may avail itself of the protections afforded by the safe harbor.

Thank you for considering the above comments, and for the opportunity to participate in this process. Please contact me if you have any questions.

Sincerely,

Victor T. Limongelli
General Counsel
Guidance Software, Inc.