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To peter_mccabe@ao.uscourts.gov

cc

Subject Request to testify at February 11, 2005 Civil Rules Hearing on E-Discovery

04-CV-047
Request to Testify
2/11 DC

Dear Mr. McCabe,

I am writing to request the opportunity to testify at the public hearing on the proposed amendments to the Federal Rules of Civil Procedure scheduled for February 11, 2005, in Washington, D.C.

I am one of a group of Yale Law School students who will be submitting written comments on the proposed rules regarding electronic discovery, and I wish to testify on the incentives the proposed rules for e-discovery will create for investment in technology that facilitates access to evidence.

I appreciate the opportunity to be a part of this process. Please let me know if you need any further information. Thank you.

Sincerely,

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February 1, 2005

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Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
Washington, DC 20544

Dear Mr. McCabe:

I appreciate the opportunity to submit these comments to the advisory committee. My comments, like others submitted by my colleagues at the Yale Law School, were inspired by the Honorable Judge Lee Rosenthal's presentation at Yale in the winter of 2004, and I feel honored to be a part of this discussion. My suggestions and analysis are based largely on my experience as an advocate for intellectual property reform that increases access to knowledge by facilitating the use of information technology.[1]

Any new rules governing electronic discovery should strive to encourage litigants to use cost-saving technology, and at the very least should avoid discouraging them from doing so. The proposed Rules 37(f) and 26(b)(2) provide disincentives to use technology that facilitates broad discovery and should be rewritten to maintain neutrality. To ensure that new rules do not inhibit the market for technology that reduces discovery costs, the committee should proceed with as much empirical data as possible and should continue to solicit advice from a broad range of technology experts. The current Federal Rules of Civil Procedure strike a delicate balance between disclosure and efficiency, and the committee should proceed cautiously so as not to not tip the scales of justice in favor of responding or requesting parties.

[1] As Coordinator of Union for the Public Domain I advised United Nations member states during negotiations in Geneva over a broadcasting treaty addressing the challenges of broadcasting in the digital age. I also worked to encourage the development of a publicly accessible Internet archive of digitized BBC material.

I. The rules should encourage parties to take advantage of the cost savings from technology

The revolution in information technology over the last three decades has lowered the costs of storing, retrieving and searching information. Using technology to reduce the costs of accessing and processing information advances the justice system's goal of securing "the just, speedy, and inexpensive determination of every action."[2] It is therefore striking that the proposed rule amendments relating to the discovery of electronic information have largely been motivated by the perceived *costs* of technology. While it is necessary to address the challenges of new costs, any rules regarding electronic discovery should also strive to take advantage of the efficiencies and opportunities presented by information technology.

The most recent "Report of the Civil Rules Advisory Committee" notes that one of the most distinctive features of electronic discovery is "the exponentially greater volume that characterizes electronic data."[3] However, the conclusion that the volume of information "makes this form of discovery more burdensome, costly and time-consuming,"[4] is counterintuitive. Users of personal computers utilize freely available internet search tools on a daily basis to search untold volumes of data in multiple formats. We use similar tools to search personal files and documents, restore backed up data, and browse through old archives of electronic mail. One of the paradoxes of the information age is that in most instances the growth in the volume of data preserved in electronic form is not correlated to the costs of accessing this data. As the volume of preserved data has skyrocketed, technologies for retrieving and searching this data have advanced to the point where searching through tens of thousands of personal e-mails is far less costly than searching through a single file cabinet.

It is therefore surprising that discussion of the proposed rules has not fully indicated an appreciation for the cost savings that can come from technology.[5] Although a strong argument can be made that "in a computerized environment, the relative burdens and expense shift

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[2] Fed. Rules of Civ. P. 1.
[3] "Report of the Civil Rules Advisory Committee," May 17, 2004, revised, August 3, 2004, p. 2.
[4] *Ibid.*
[5] For example, while the *Manual for Complex Litigation* (4th) details the "sheer volume of such data," other sections of the *Manual* recognize the growing cost benefits of utilizing technology, including the reduced cost of copying, transport, storage, and management; "computerized data are far more easily searched, located, and organized than paper data"; and computerized data can be used to create a common document repository. *Manual for Complex Litigation* (4th) § 11.446.

dramatically to the responding party,"[6] the technologies that facilitate cheaper storage, retrieval and search of information can also lower the costs of discovery for responding parties:

> Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.[7]

Despite potential cost savings from technology, the proposed amendments are motivated largely by the perceived burdens that may be faced by responding parties. Although the costs of electronic discovery may be more salient because of a few highly visible cases, potential savings from technology should constrain any amendments:

1) *The rules should encourage requesting and responding parties to take advantage of the "low hanging" fruit of technology when it already exists.* When the technology currently used by parties makes information cheaply and readily retrievable, accessible, and searchable, the rules should encourage parties to take advantage of this technology, despite the volume of data that might be produced.

2) *The rules should provide positive incentives for parties to utilize technology during discovery that can make information more readily accessible. At the very least, the rules should not provide negative incentives to use such technologies.*

3) *The rules should not encourage parties that may anticipate having to produce evidence to make ex ante decisions that make data more expensive to retrieve in discovery ex post.*

The proposed amendments to Rules 37(f) and 26(b)(2) should be modified to satisfy these constraints and ensure that potential cost savings from technology are fully utilized by litigants.

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[6] *Ibid.*
[7] *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309, 318 (S.D.N.Y.,2003).

a) The "safe harbor" in Rule 37(f) provides incentives to routinely destroy data

To the extent that litigants think strategically, the Federal Rules of Civil Procedure provide incentives that make some strategic behaviors more or less likely. The second prong of the safe harbor provision proposed for Rule 37(f) (responding parties are not subject to sanctions when information is lost "because of the routine operation of the party's electronic information system") gives parties that expect to be future litigants too much room to "game the system." The proposed rule would allow and encourage strategic actors to routinely destroy data they would otherwise save, even when the costs of preservation are lower than the costs of destruction, save for potential litigation costs.

The Committee Notes accompanying the rule further invite destruction by advising that a determination of whether a party took reasonable steps to preserve information "would vary widely depending on the nature of the party's electronic information system and the nature of the litigation."[8] Referring to the "nature" of a system is misleading and vague because there is no such thing as an intrinsic or necessary feature of a system. Information technology can be intentionally designed to routinely save or destroy data. This function can be embedded in software in a way that gives the user no control over its use, or designed as a "toggle" that users can switch on and off with minimal effort and on short notice. Since the rule holds parties accountable only for decisions made *after* notice and *after* their technology systems have already been installed, a potential litigant could anticipate that using a system which routinely deleted potentially incriminating data and made it prohibitively expensive to disable the destruction would allow them to later argue that the "nature" of their system was such that it was reasonable to take minimal steps to preserve data. A sophisticated version of such a system could routinely delete potentially incriminating data from reasonably accessible storage devices, and save it to not reasonably accessible devices or formats that allowed emergency access to data, but facilitated an ex post argument for limiting discovery under the proposed Rule 26(b)(2).

The Committee Notes anticipate this possibility and indicate that, "Different considerations would apply if a system were deliberately designed to destroy litigation-related material." However, it would be difficult for a judge or an expert to conclude that

[8] "Report of the Civil Rules Advisory Committee," p.35.

a system was deliberately designed to subvert the intent of the rules. There are plausible justifications for the system described above, including confidentiality concerns and the desire to maintain a certain amount of easily accessible storage space. The proposed rules make it tempting for responding parties to amplify the importance of these considerations, even when they would not be sufficient to motivate the routine destruction of data, but for the proposed safe harbor provision. "But for" counterfactuals in such cases would be very hard for requesting parties to prove and for judges to evaluate.

Since parties can respond to new rules by redesigning their systems, the Committee's intention to identify "circumstances in which automatic computer functions *that are generally applied* result in the loss of information,"[9] will not prevent the inefficient and unjust destruction of data. Judging actors against "general" practice encourages routine destruction to come into general use, especially in industries where actors are routinely subject to discovery requests. The general use of such a practice should not be a valid reason for courts to permit it. To address this issue, the Committee should consider adding a Note encouraging courts to look beyond practices in a particular industry. In some cases, courts may need to consider currently available technologies that a producing party could have reasonably used. If a reasonably available technology exists that would serve the responding party's technology needs without routinely destroying data, this should count as a consideration against the reasonableness of the party's actions.

Given the likely inability of the "routine operation" standard to hold producing parties responsible for the inappropriate destruction of data, it is difficult to countenance the "intentional or reckless failure" standard proposed by the committee as a way to focus comments and suggestions.[10]

[9] *Ibid.*, p.20 (emphasis added).
[10] *Ibid.*, pp. 32-33.

b) The proposed "reasonably accessible" standard in Rule 26(b)(2) should take account of responders' ex ante decisions and requestors' willingness to bear costs

The proposed amendment to Rule 26(b)(2) permits responding parties to embargo "discovery of electronically stored information that the party identifies as not reasonably accessible." One of the benefits of this formulation is that it allows courts to exercise discretion based on the costs of discovery. However, the "reasonably accessible" standard relies too heavily on producing parties' assessment and report of the costs, and does not clearly allow requesting parties to choose to bear the costs of retrieving data that producing parties have reported as not reasonably accessible. A related problem is that the proposed rule does not clearly permit courts to account for advances in technology that producing parties have failed to adopt, even when the parties have eschewed the innovations for the specific purpose of making data inaccessible. The proposed rule could be improved by adding language that lets the court look to the availability of alternative technology and explicitly takes account of requestors' willingness to bear the costs of discovery.

The proposed rule creates no ex ante incentives for potential responding parties to use cost-saving technology because it focuses only on the costs of retrieving data as reported by the producing party, and not on the *reasons* for why recovery is purportedly so costly. This problem is similar to the negative incentives discussed above with regard to the "routine destruction" provisions. As with the proposed Rule 37(f), the proposed 26(b)(2) gives too much weight to producing parties' description of the "nature" of their systems. The non-electronic analog of this provision would allow producing parties to hold-up discovery by intentionally placing their file cabinets in a vault and throwing away the key. While the files could be accessed in a business emergency, they might not be considered reasonably accessible for the purposes of routine discovery. In these kinds of cases it seems unfair to shift the burden of justifying the costs of discovery to requesting parties. The proposed rule's lack of consideration for ex ante decisions affecting the accessibility of data is particularly significant in the electronic context, since the costs of storage, retrieval and search are largely affected by decisions about the

storage format and media chosen by potential parties to a lawsuit long before the lawsuit begins.

One way to prevent "gaming" would be to require that claims of inaccessibility be accompanied by a showing of why the responding party did not store its data in easier-to-access formats that were available at the time of initial storage. A less stringent formulation would compare the producing party's proposed methods of data restoration to other methods available at the time of discovery. Responding parties that wanted to embargo data would have to show that "the information is not reasonably accessible *using currently available methods of technology.*"[11]

Another difficulty with the "reasonably accessible" standard is that it relies too heavily on producing parties' assessment and report of the costs of retrieving data, and does not clearly allow requesting parties to bear the costs of retrieving data that producing parties have reported as not reasonably accessible. In conventional paper discovery, requesting parties have a fair amount of discretion to determine what costs are worth bearing, since judges can condition discovery on the requesting party's payment of the costs.[12] Even if the anticipated costs of search or production are high, the requesting party still has the ability to take on these costs and move forward if she predicts a sufficiently high benefits from the discovery. This is an efficient approach in both a paper-based and a digital world, since it is likely that requesting parties will often be in the best position to assess the benefits of accessing and searching difficult-to-read documents. Although the responding party may be more intimately familiar with requested documents and the value of their contents, they are less likely to have better information than requestors when the documents are difficult to access. Even when the producing party is more familiar with the value of the information in the documents, it has a strong incentive to underestimate their value.

Despite the strong rationale for giving discretion to requesting parties who are willing to bear the costs of discovery, the proposed amendments to Rule 26(b)(2) shift much of this discretion to the producing parties. Some reasons for this are the potential complexity of technology involved in discovery and concerns about maintaining trade

[11] The downsides of this latter formulation are similar to those described with regard to proposed Rule 37(f)'s "generally applied' standard.
[12] *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978).

secrets associated with data storage systems. These factors have sometimes led judges to rely on responding parties' in-house experts for an assessment of the costs.[13] However, the efficiency and fairness of the conventional cost-shifting system suggest that without a clear option for requesting parties to bear the costs of electronic discovery no matter what the responding party's assessment of the costs, relying heavily on information from responding parties does not provide sufficient safeguards against intentional or unintentional bias.

One solution is to explicitly provide, either in the Committee Notes or in the text of the rule, that judges may allow requestors to bear the costs of discovering documents that are determined by responding parties to be not "reasonably accessible." Sophisticated multi-factor tests to guide courts in this determination have been developed by United States Magistrate Judge James C. Francis IV, and by United States District Judge Shira Scheindlin.[14]

c) Implementing new rules of civil procedure that limit the scope of electronic discovery may inhibit the market for inexpensive data recovery tools and services

Much of the motivation behind the proposed rules comes from the perceived costs of electronic discovery, even though the cost of electronic discovery is still in flux: information technology is improving,[15] and the data forensics and recovery industry is still young and growing at a rapid pace.[16] In other words, the rules may be addressing a

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[13] See, for example, *Zubulake v. UBS Warburg, LLC,* 2003 U.S. Dist. LEXIS 7940, *5-6, in which the court relied on UBS' Manager of Global Messaging for testimony on the feasibility and cost of restoring data requested by Zubulake. Judge Scheindlin wrote, "In this case, UBS has designated the Behny deposition as confidential because it 'contains information concerning UBS's technological capabilities and practices that, if released, would create a competitive disadvantage for the firm.' Although this claim seems dubious -- the Behny deposition merely outlines UBS's electronic document retention protocol -- I do not know what is or is not proprietary in the world of investment banking. Having fully reviewed the Behny deposition, I cannot say with certainty that its contents are not proprietary. If UBS claims that secrecy is necessary to maintain its competitive advantage, I have no basis on which to disagree."

[14] For Judge Francis' eight-factor test, see *Rowe Entm't, Inc. v. William Morris Agency, Inc.,* 205 F.R.D. 421. For Judge Scheindlin's seven-factor variation on this test, see *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309.

[15] "Evolving procedures use document-management technologies to minimize cost and exposure and, with time, parties and technology will likely continue to become more and more sophisticated." *Manual for Complex Litigation* (4th) § 11.446.

[16] Conversation with Carole Longendyke, Director of Forensics, P.G. Lewis &Associates, LLC, January 19, 2005. Longendyke estimates that only 5% of New Jersey lawyers currently use data forensics techniques. A recent survey found that the Electronic Data Discovery market started at approximately $40m in revenue in 1999, grew to $70m in 2000, $150m in 2001, and at least $270m in 2002, George Socha, "Survey Indicates Short-Term Growth Likely for

perceived problem that will soon be moot. However, the rules as proposed could lock in the current state of technology and thereby exacerbate the problems they seek to address. For example, the negative incentives presented by the proposed Rules 37(f) and 26(b)(2) give potential responding parties less reason to purchase products that facilitate cheaper access to information in discovery. Although the trajectory of technological innovation has always been towards cheaper storage, recovery, and search, the path of development is not insensitive to market demands.

The Committee deserves praise for considering the costs of new technology, but there is a tradeoff between acting quickly and giving the market a chance to deal with anticipated difficulties. Before implementing new rules for electronic discovery, the committee should seek further input on the current costs of electronic discovery across all relevant sectors (*e.g.,* large and small litigants, old and young firms, etc.), the anticipated impact of future innovation, and the ways in which the proposed rules will affect the behavior of potential litigants and the market for technological solutions. The committee should seriously consider commissioning a formal report on these issues conducted by an independent third party.

II. The committee should guard against biasing the rules in favor of producing parties

The process of making new electronic discovery rules is similar in many ways to the process leading to recent revisions to intellectual property law. In that arena, a powerful lobby representing a narrow sector of constituents successfully changed the law to further its interests, despite persuasive arguments that the revisions undermined socially beneficial innovation. Their success was due largely to a lack of empirical data and their ability to overcome collective action problems.

The process of revising the rules to deal with electronic discovery seems vulnerable to a similar problem, since parties that are likely to face discovery requests have a strong incentive to push for an "update" of the rules in their favor, and because empirical data on the actual and potential costs of data storage, recovery and search is not widely available. There is evidence that some parties explicitly view the updating process as an opportunity to limit discovery. One participant at a Fordham Law School Panel discussion on the rules explained, "the whole

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Electronic Data Discovery Market, Followed by Consolidation," *Digital Discovery and e-Evidence,* May 2003, v. 3, no. 5. Available at http://www.kenwithers.com/links/DDEE0503.pdf.

purpose of our rule was to curtail discovery, to limit discovery, and that is why we put these caveats in the Rule."[17]

For this reason, the Committee deserves praise for opening up the proposed rules to public discussion. To ensure that it has all of the information necessary for maintaining balanced rules for discovery, the committee should seriously consider extending its public comment period and actively soliciting comments from a broad range of technology experts on the actual costs of electronic discovery, the pace of technological change, and anticipated innovations that are likely to change the costs of electronic discovery.

Thank you again for the opportunity to provide comments on the proposed amendments.

Yours truly,

David Tannenbaum

[17] "Panel Discussion: Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure: Conference on Electronic Discovery: Panel Five: E-discovery Under State Court Rules and United States District Court Rules," 73 Fordham L. Rev. 85, 96.