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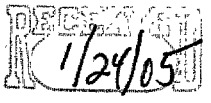


January 24, 2005

04-CV-107

Peter G. McCabe, Esq.
Secretary of the Committee on Rules of Practice
and Procedure
Administrative Offices of the United States
Courts
Washington, D.C. 20054

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

Dear Mr. McCabe:

We write to provide comments on the proposed amendments to the Federal Rules of Civil Procedure as they relate to electronic discovery, and the provisions of Rule 26(b)(2) in particular. King & Spalding LLP commends the Committee's efforts to address the substantial problems faced by litigators and, in particular, large corporate clients engaged in the discovery of electronically stored information. We support the balanced and measured approach adopted in the Amendments for addressing a complex issue that imposes substantial burdens on a producing party.

King & Spalding LLP represents numerous public companies, including more than half of the *Fortune* 100. Representative litigation clients include Sprint Corporation, The Coca-Cola Company, ChevronTexaco Corporation, General Motors Corporation, 3M, Purdue Pharma L.P., The Home Depot, Inc., and Brown & Williamson Tobacco Corporation As a result, King & Spalding attorneys and clients regularly face the challenges presented by large-scale electronic discovery and have invested much time in evaluating and considering possible approaches to the gathering, review, and production of electronic material.

The proposed new rules on electronic discovery will make a sharp distinction between information which is "reasonably accessible" and "not reasonably accessible." The proposed Amendment would add the following language at the end of Rule 26(b)(2):

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

We strongly support the inclusion of reasonable accessibility as a limiting factor, and commend the Committee for that approach. Unfortunately, many litigants seeking material deemed "readily accessible" (e.g., emails maintained on backup tape) frequently argue to state and federal courts that such electronic files are easily and inexpensively searchable. To the uninitiated there is a superficial appeal to that argument. Our extensive experience representing our clients in those endeavors, however, is quite to the contrary. Corporate infrastructure is set up to maintain records needed to support the business; it is not designed as a search engine for all future litigation, and information technology departments are often not staffed for such undertakings. Search efforts frequently require converting files and data to formats other than those in which they are maintained in order to generate search capabilities. The process is quite costly, both in terms of labor and financial outlay, and can often necessitate the use of third-party contractors. Costs frequently reach the hundreds of thousands of dollars, and even millions of dollars in some cases. Such costs can easily be disproportionate to the amount in controversy and to the value of the information that is obtained simply because of the volume and scope of data in the realm of consideration.

It is for those reasons that we wish to focus the Committee's attention on an aspect of the proposed Amendment to Rule 26(b)(2) that may warrant clarification and amplification. Currently Rule 26(b)(2)(iii) states that:

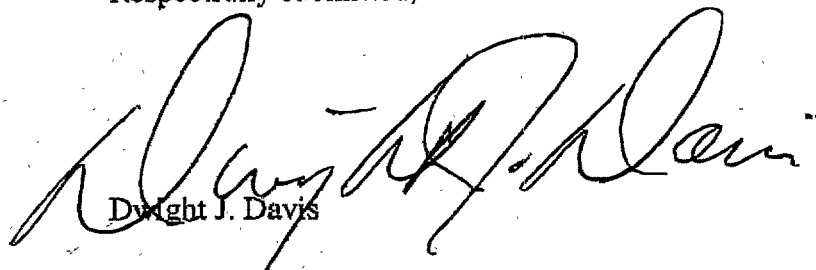
> The frequency and extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

It is our experience that those inquiries can be crucial in determining the appropriate scope of electronic discovery.

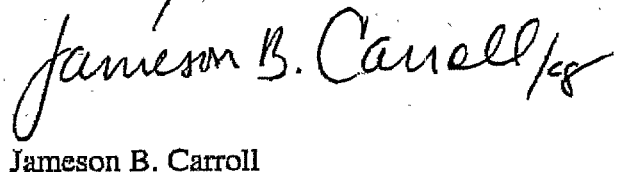
We believe that any determination by a court on reasonable accessibility should also be made expressly subject to the factors outlined in subpart (iii). Otherwise, production of reasonably accessible data without inclusion of those further considerations could still lead to a burdensome, costly production with very limited probative value. In sum, because "reasonably accessible" should not be assumed to equate to quick and inexpensive, the balancing test in Rule 26(b)(2)(iii) should expressly apply.

King & Spalding's Electronic Discovery Committee also respectfully requests that a representative be given the opportunity to present testimony at the February 11, 2005 hearing in Washington, D.C. or, alternatively, at the January 28, 2005 hearing in Dallas, Texas. The undersigned committee members would greatly appreciate the Committee's accommodation of this request in spite of the late date, and request that you advise us as to whether such testimony will be possible.

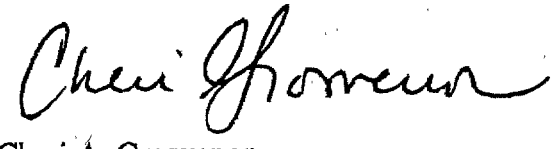
Respectfully submitted,



Dwight J. Davis



Jameson B. Carroll



Cheri A. Grosvenor

King & Spalding LLP Electronic Discovery Committee