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12/20/2004 02:18 PM

To peter_mccabe@ao.uscourts.gov

cc

Subject Hearing in Dallas, TX -- January 28, 2005

04-CV-055
Request to Testifi
1/28 Dallas

Dear Mr. McCabe:

I request the opportunity to appear before the Judicial Conference Advisory Committee on Civil Rules in Dallas, Texas, on January 28, 2005. If permitted, I would like to speak with regard to the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery. I would appear in my capacity as an individual defense lawyer and as Second Vice President of DRI.

Thank you very much for your consideration of this request.

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04-CV-055
Testimony
1/28 Dallas

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01/10/2005 04:02 PM

To peter_mccabe@ao.uscourts.gov
cc
Subject Electronic Discovery Rules

Mr. McCabe:

I attach my written comments about the proposed amendments to the FRCP regarding electronic discovery. We will send the hard copy by regular mail.

(See attached file: e-discovery - John Martin comments.pdf)

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e-discovery - John Martin comments.pdf

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January 10, 2005

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, D.C. 20544

RE; Proposed Amendments to the Federal Rules of Civil Procedure regarding electronic discovery

Dear Mr. McCabe:

Thank you for the opportunity to address the Civil Rules Advisory Committee on the proposed amendments to the Federal Rules of Civil Procedure governing discovery of electronically-stored information. My comments derive from my experience as defense counsel to numerous civil litigants, and arise from a genuine concern regarding the efficiency and abuse of the federal discovery process. Also, I currently serve as Second Vice President of DRI.

Based on my experience in civil litigation, I believe the rules regarding discovery of electronically stored information require further clarity. In addition, I believe that in their current form the proposed amendments do not sufficiently address the potential for abusive discovery. The rules for electronic discovery should be fair to both plaintiffs and defendants, and should address the significant and burdensome costs that arise when the rules are manipulated by an abusive litigant. My comments to the Committee will fall primarily in three areas: (1) the need to prevent abuse of the discovery system through burden and cost-shifting; (2) the significance of the "safe harbor" provision to protect companies that abide by their own records retention policies; and (3) the importance of requiring a "good cause" showing by the requesting party when electronically stored information is not reasonably accessible.

I. Preventing discovery abuse through cost and burden shifting

As an attorney practicing mainly in Texas, I can vouch for the success of the Texas state rules for electronic discovery. The balance struck in the Texas rule requires a responding party to object when that party cannot retrieve the requested data through reasonable efforts. If, after such an objection, the court orders the responding party to produce the information, the court must also order the requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

While the proposed federal rule gives the judge discretion to allocate costs, I believe that provision does not go far enough to deter abuse of the discovery process. The Texas rule requiring the requesting party to bear the costs of retrieval and production prevents abuse and ensures that the information requested is genuinely relevant to the litigation at hand. It is unfair to require that a responding party bear enormous and burdensome expense to produce information that may or may not be relevant simply because a requesting party has the power to do so. Cost shifting as required by the Texas rule deters overbroad discovery of information of limited relevance yet still provides litigants a mechanism to obtain necessary information. I believe that the federal rule would better serve the interests of fairness if a similar provision regarding cost shifting were integrated into the proposed amendments.

II. The significance of a "safe harbor" provision

As an attorney primarily representing corporate defendants in civil cases, I am familiar with the issues facing a defendant who is constantly subject to litigation. One significant issue involves records retention, and potential liability for the loss of information in routine maintenance of a company's electronic systems. Companies should not be required to continually and indefinitely retain all electronic data produced in the routine operation of their businesses. Such a demand is patently unreasonable, and imposes an extensive burden on a business. The "safe harbor" provided by the new federal rule should protect a company that abides by its own routine records retention policy.

Obviously, a defendant who attempts to circumvent the discovery process by destroying information should be sanctioned, but companies that follow routine procedures for records retention should not be punished because litigation ensues at a later time when information has already been expunged. I would encourage the Committee to clarify the safe harbor provision to protect parties who cannot produce information due to the routine operation of their electronic information systems unless the party is in clear violation of a court order.

III. The need for a showing of "good cause" when electronic information is not reasonably accessible

Abuse of the discovery process can be significant where electronic information is involved due to the sheer volume of data that can be requested and the potential efforts required for its retrieval. The burden associated with producing information must be balanced with the purposes of the discovery process. The "good cause" standard in proposed Rule 26(b)(2) provides a mechanism by which a litigant can gain access to information, but significantly protects a party who cannot reasonably access the information requested. Parties should not be burdened with expansive discovery requests for information that is not reasonably accessible when the information is not likely to be relevant to the action. Requiring a showing of "good cause" is imperative to prevent burdensome discovery requests not justified by the needs of the case. The proposed rule should protect against discovery abuse by clearly demanding a "good cause" showing from a requesting party when information requested is not reasonably accessible.

Generally, I believe that the proposed rule changes address the issues most important to federal discovery practice where electronically-stored information is involved, but that the rules should go a step further in the areas indicated above. I appreciate the opportunity to share these written comments with the Committee, and I look forward to further addressing these issues at the January 28 hearing in Dallas.

Sincerely,

John H. Martin