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To <peter_mccabe@ao.uscourts.gov>
cc
Subject Electronic Discovery rules

04-CV-028
Request to Testify
1/12 San Francisco

December 6, 2004

Peter McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

I would like the opportunity to testify concerning the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery on January 12, 2005 in San Francisco. I also plan to submit written comments to the Committee. Please let me know the time and the location of the hearing.

Thank you for your assistance.

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THE IMPACT FUND

04-CV-028
Testimony
1/12 San Francisco

December 21, 2004

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Peter G. McCabe
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington D.C. 20544

Re: Civil Rules Committee Testimony – January 12, 2005

Dear Mr. McCabe:

I am pleased to have the opportunity to testify before the Civil Rules Committee on January 12, 2005 in San Francisco. As requested, enclosed please find a copy of my written statement on behalf of The Impact Fund.

Please let me know if there is anything further that you will need from me.

Yours very truly,

Jocelyn D. Larkin
Litigation Counsel

Encl.

TESTIMONY FOR PUBLIC HEARING ON PROPOSED AMENDMENTS TO CIVIL RULES FOR ELECTRONIC DISCOVERY
January 12, 2004
San Francisco

Jocelyn D. Larkin, Litigation Counsel
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I want to thank the Advisory Committee for this opportunity to speak to the proposed amendments to the federal rules concerning electronic discovery.

My name is Jocelyn Larkin and I serve as Litigation Counsel to an organization known as The Impact Fund. Founded in 1992, The Impact Fund is a California-based legal non-profit with a unique mission – we provide strategic resources for lawyers to bring public interest impact cases throughout the United States. The Impact Fund provides grants to pay litigation costs, and also provides training programs and consultation for lawyers involved in such impact cases. Through the California State Bar Trust Fund program, we also serve as a Support Center on complex litigation issues for over 120 legal services programs in California.

In addition to providing support to others, The Impact Fund has its own caseload, generally in the areas of class-wide employment discrimination. The Impact Fund currently serves as lead counsel in the *Dukes v. Wal-Mart Stores* litigation, a gender discrimination class action on behalf of 1.5 million female employees, which is the largest case of its kind in history. Before joining the Impact Fund, I spent fifteen years in private practice doing almost exclusively civil rights class actions on the plaintiffs' side.

I want to commend the Rules Committee for taking on this difficult subject and doing so with such depth and thoroughness. I also appreciate the Committee's affirmative efforts to solicit the views of a broad range of constituencies – and particularly those who do not have the benefit of well-paid lobbyists to advance their views. It is, as the Committee had recognized, practitioners who must live day-to-day with the rule changes that the Committee ultimately recommends.

Because of our work, we spend a lot of time talking to private firms and legal services groups around the country about the practical side of civil rights practice. It will come as no surprise that the struggle to obtain discovery is a frequent topic among civil rights litigators and, indeed, the source of extraordinary frustration for them. Ask a former civil rights lawyer why he or she gave it up and they will invariably cite the time-consuming, rancorous and often pointless battles to obtain information as one factor.

Civil Rights Litigation and Electronic Discovery: Lessons

For those of us who have been doing employment discrimination class litigation for the past two decades, electronic discovery is nothing new. As the Supreme Court recognized in 1978, statistics are often the heart of the evidence, which establishes the existence of a pattern and practice of discrimination under Title VII. *International Brotherhood of Teamsters v. United States,* 434 U.S. 324 (1977). To create and analyze those statistics, lawyers representing civil rights plaintiffs have been seeking through discovery electronic personnel and payroll databases from employers for many, many years. Some important lessons grow out of that experience.

First, the availability of electronic data has made discovery vastly easier, less expensive and more accurate. I can -- not so fondly – recall days as a young lawyer spent

in warehouses reviewing and hand copying personnel files. Such labor intensive and mind-numbing work is now rarely necessary since companies have moved virtually all of this data into an electronic format.

Second, payroll and personnel records often contain an enormous amount of irrelevant data, as well as data that implicates third-party privacy. In an electronic format, irrelevant or private fields of data are eliminated from production with a few simple programming instructions. This ability to segregate unnecessary data was not available with hard-copy records.

Third, electronic data, its storage and retrieval will continue to be easier and cheaper over time, rather than the opposite. The sophistication of the human resources databases has evolved dramatically in twenty years, greatly reducing the time and cost associated with processing this data. Lost pay calculations for an entire class of plaintiffs can be determined in a matter of hours.

Fourth – and this is very important -- we frequently use informal means for the resolution of the myriad of technical questions that arise with electronic data. In what I call "tech-to-tech" conversations, the individual actually responsible within a company for the day-to-day operation of a database will speak by telephone directly with our technology expert to resolve the host of small issues that inevitably arise about how to read and interpret data. While lawyers for the parties will be on the phone line, they rarely participate beyond placing the phone call. This is a far more efficient means of resolving these technology issues than the cumbersome process of depositions or interrogatories, conducted by lawyers with little understanding of the technical details. So, my first suggestion -- I urge the Committee to include in the Advisory Notes an

admonition that the parties and the Court use just such informal and effective means to resolve electronic data issues.

The Committee must recognize that the rule changes that are adopted will affect all cases – and will potentially displace the existing and workable informal practices that have evolved among practitioners in my field. And, such changes have particular significance if – as I discuss later – they increase the cost of litigation for non-profit organizations which play a critical role in the private enforcement of the country's civil rights laws.

I cannot emphasize strongly enough that the availability of electronic data relates directly to the ability of plaintiffs to meet their burden of proof in discrimination cases. In its 1989 decision, *Wards Cove Packing v. Atonio,* 490 U.S. 642, 657 (1989), the Supreme Court addressed the kind of statistical evidence necessary to prove disparate impact under Title VII. It mandated that this evidence must meet more exacting standards than had previously been required. While the plaintiffs argued that the requirements were too burdensome, the Court noted that "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." If, as a practical matter, the civil discovery rules fail to fulfill this promise, or make it simply too expensive to obtain electronic discovery, then civil rights enforcement will be invariably compromised.

Electronic Discovery: What's Different and What's Not

I begin by addressing what is – and what is not – unique about electronic discovery from the perspective of a practitioner. At the outset of the discovery process, the essential dynamic is always the same. Plaintiffs do not know what relevant

information the defendant has; the defendant generally knows exactly what it has – or at least has a substantially better understanding. While this disparity in information always exists at the outset of litigation, the information gap is greater for electronic discovery. My client with a position in the marketing department will rarely have any idea what database systems exist in the human resources department, particularly when the computers may well be maintained in a facility in another state by employees that my client will never meet. While I may be able to learn the names of company officials from the company's website, they do not post a list of their database systems.

While it used to be that I could I take one 30(b)(6) deposition of the IT person for the employer, it may now take five or six depositions to cover separate personnel, payroll and electronic mail systems. Large companies often don't use off-the-shelf software products but will design and implement their own – each one must be separately learned.

Still, other aspects of the discovery dance *are* the same with electronic information. To take into account their lack of information about electronic sources, plaintiffs will frame discovery requests broadly. There are few things that haunt a plaintiff's lawyer quite like the fear that the key piece of evidence in a case never gets produced because you didn't ask for it – or ask for it in just the right way. From the defense perspective – and I'm sure the Committee has heard this from my colleagues in the defense bar --- these discovery requests are wildly overbroad.

Defendant will claim that responding to discovery will cause extraordinary expense and burden. While most disputes get resolved informally, motions to compel are sometimes needed. Defendant's declaration in opposition to the motion to compel – and we've all read them – will predict weeks or months of work by teams of individuals to

comply with the outrageous demands of the plaintiff. These claims of burden by defendant from electronic discovery are pretty similar to those they made in the pre-electronic age. In the old days, judges – who were familiar and quite comfortable with paper documents – would cut through both sides' hyperbole, apply a dose of common sense, and reach a workable compromise.

With electronic data, judges today may well feel less comfortable using their own common sense to evaluate the defendant's claims of burden, even though electronic discovery is, in many ways, far *less* labor intensive than hard-copy discovery. I worry that some of the impetus behind these rule changes is the lack of familiarity and, frankly, angst that many of us have about the mysteries of technology rather than the genuine problems that electronic discovery create. The result may be that, unless plaintiffs are prepared to and can afford to bring in expensive electronic discovery experts to rebut the defendant's dire predications of burden, plaintiffs may simply not get the information they need. This result is plainly inconsistent with the search for truth, which the discovery rules were designed to serve.

Specific Comments on the Proposed Amendments

We commend the Committee for proposing to require the parties to address issues of the preservation and production of electronic discovery at the earliest possible opportunity. Proposed Amendments to Rule 16 and Rule 26(f).

Again, real life experience is instructive, here. It has been our practice for more than ten years to raise the matter of preservation of documents with opposing counsel within days of filing a complaint, by forwarding a proposed Stipulation and Order addressing preservation, including electronic discovery. This gives us a chance to notify the

defendant of the documents and data we believe will be relevant and open up negotiations, useful for both sides. We took this idea from the Manual for Complex Litigation 2d, which at the time recommended a preservation order in every case. This summer, we filed another class action and followed our usual practice of sending a proposed preservation stipulation. Defense counsel balked, demanding that we provide legal authority for the proposition that a preservation order could be entered, absent actual proof of on-going spoliation. Not helpful but, then again, not an unusual posture in the context of litigation. The rule amendments will thankfully put the issues on the table as a matter of course, without such needless posturing.

Similarly, the early discussion of the *form* in which the data will be produced, together with the provision that specifically authorizes the plaintiffs to select the form, will be a welcome addition. Proposed Changes to Rules 16(b), Rule 26(f) and Rule 34(b). There is nothing more wasteful and aggravating then when an employer, with a simple Excel database, prints out the database in hard-copy and produces it, leaving me to re-input the data by hand so that it can be analyzed electronically.

I want to point out to the Committee, however, that the premise underlying the early discussion of electronic discovery is that the responding party will informally provide plaintiffs with information about what kind of electronic discovery actually exists and the form in which it is maintained in the ordinary course of business. In my experience, defendants are not eager to do so, preferring to have us wait several months and take 30(b)(6) depositions. We can call this the "that's for me to know and you to find out" approach. So, if the parties are to have the early discussion about electronic discovery issues that the Committee envisions, there needs to be some informal disclosure about

these systems. My second suggestion -- the rules, or at least the Committee notes, should specifically address this point for these new additions to work. That early disclosure obligation should also include information about other existing agreements or orders to preserve electronic data arising from other litigation.

We are, however, very troubled by one of the Committee's other proposals – to allow a party to self-designate relevant electronically stored information as "not reasonably accessible." Rule 26(b)(2). We believe this impossibly vague provision will create a dangerous loophole in the existing discovery regime and will greatly increase the likelihood of litigated discovery disputes. Rather than enhancing the discoverability of electronic data, to correspond with its increasing ubiquity, the rules will be moving backwards, insulating such data from discovery.

Most fundamentally, the phrase "not reasonably accessible" is not defined in the rule. Did the Committee intend to limit this designation to only the rare exception or to be routinely invoked to limit electronic discovery? The only guidance provided are the two examples included in the notes, disaster recovery back-up tapes and legacy systems. In 2004, the example of disaster recovery back-up tapes seems pretty sensible and designed to convey the message that inaccessible data sources are quite limited. The problem is that this example – and the message it conveys -- is based on the state of technology in 2004. In five to seven years, the disaster recovery tape example may well look antiquated when back-up technology has undergone the swift and predictable evolution of other technology. In 2010, the example will no longer convey the same sense of technological difficulty and expense that it does in 2004. Without more fixed guideposts

as to its meaning, the "reasonably inaccessible" designation creates great opportunity for mischief.

What can we anticipate will happen in real life with this vaguely worded exception? Faced with a discovery request for electronic data, counsel for the responding party will routinely designate data systems as "not reasonable accessible." So long as there is a colorable argument, facilitated by the vagueness of the rule, defense counsel has a duty to his or her client to assert the objection. The benefit of removing a large swath of relevant and potentially damaging data out of the discovery mix at the outset is simply too valuable not to try.

How does the plaintiff respond? If the requesting party believes the discovery really is necessary, it will have little choice but to hire one of the proliferating cadre of electronic discovery experts to investigate and rebut the claim that the data is not reasonable accessible. The requesting party must also try to meet the "good cause" requirement, which will often be difficult to do precisely because discovery has not yet occurred. Either way, it is a complicated and expensive discovery dispute – the kind that magistrate and district court judges make very plain to litigants that they do not like.

Is this scenario really worse than what judges are dealing with right now? Yes. Under the current discovery rules – where all relevant evidence is presumed discoverable – there exists a fairly strong incentive for both parties to resolve discovery disputes informally. Plaintiffs want electronic data but they will make compromises so as to get the data sooner and without the risk and expense of a motion to compel. Defendants will similarly compromise because the strong presumption in favor of discoverability will

ordinarily mean that relevant data will ultimately be subject to some degree of production.

With this new special exception to the ordinary presumption of discoverability, the defendant will have every incentive to invoke this loophole and will face very little downside for doing so improperly. In contrast, the plaintiff is put to a far higher burden, which it may well be unable to meet without incurring the expense of an electronic discovery expert. With limited time and even more limited resources, all plaintiffs – but particularly civil rights plaintiffs -- must make judgments about what fights to take on. They may simply not contest the defendant's designation of data as reasonably inaccessible when the transaction costs are so greatly increased and the likelihood of success diminished. At the same time, given that statistical proof is all but indispensable for proving class-wide employment discrimination, erecting new and costly barriers to the discovery of electronic data will directly deter the bringing of such actions at the front end. If you cannot afford the lengthy battle to get the data, you cannot ethically bring the case.

Where a responding party has a legitimate concern about the cost and difficulty of producing genuinely inaccessible electronic data, the existing rules provide an adequate means by which the district court can address and limit discovery where appropriate, including cost shifting, without disturbing the existing presumption in favor of discoverability. The responding party may also seek a protective order. These questions will invariably be fact-intensive, best suited to the case-by-case evaluation that district courts are in the best position to undertake. There is simply no need to upset the existing balance with a heavy thumb to weight one side of the scale, particularly when it

encourages the shielding of relevant evidence from discovery. Thus, my third suggestion is that the "not reasonably accessible" provision be dropped from the proposed changes.

Finally, the "safe harbor" provision against sanctions is unnecessary and inconsistent with the goal of ensuring that relevant evidence is produced. Sanctions are never imposed without a noticed motion and hearing, in which the party's conduct and culpability are fully examined. District courts are in the best position to evaluate – in a particular case -- whether sanctions are necessary based on the individual facts. One factor that can be taken into account – and the Committee Notes could make this clear -- is whether the deletion occurred as a result of the ordinary operation of a computer system. No special exemption is necessary for electronic data and it sends the wrong message.

The "safe harbor" provision is also problematic because it is inconsistent with substantive obligations that employers have to maintain payroll and personnel data, separate and apart from any obligation triggered by prospective litigation. Title VII, the Equal Pay Act, the Americans with Disabilities Act and ADEA have different and detailed record-keeping requirements for employers. *See e.g.* 42 U.S. C. § 2000e-8(c). Where an employer destroys records that it was required to maintain, courts have permitted an adverse inference to be drawn even without a showing of bad faith or gross negligence. See *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2nd Cir. 2001). The proposed rule has the potential to undermine substantive law by protecting violators from sanctions. This presents an additional reason that the "safe harbor" provision should be dropped.

Conclusion

Electronic discovery has already revolutionized our system of justice and has greatly facilitated the search for truth. Its continuing evolution holds the promise for ever easier and efficient means for exchanging information in the context of litigation. In endeavoring to address the challenges created by electronic discovery, the Committee has created special exceptions for electronic discovery that will certainly increase the likelihood of expensive discovery disputes and will ultimately interfere with the ability of plaintiffs with limited resources to obtain the information they need. I urge the Committee to drop these unnecessary and counter-productive proposals.

My specific recommendations are:

1) Include a specific admonition in the Committee Notes encouraging the use of informal, cost-effective methods of communication for addressing the technical questions that arise when the requesting party receives electronic data from the responding party;

2) Require the responding party to provide adequate informal disclosure to facilitate the early discussions provided for in the Proposed Amendments to Rule 16 and Rule 26(f).

3) Strike the "not reasonably accessible" exception in Rule 26(b)(2).

4) Strike the Safe Harbor provision in Rule 37.