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To "'peter_mccabe@ao.uscourts.gov'" <peter_mccabe@ao.uscourts.gov>

cc

Subject Request to Testify Before the Rules Committee on the Proposed Ame ndments Involving Electronic Discovery

04-CV-034
Request to Testify
1/12 San Francisco

Dear Mr. McCabe:

Please accept this as my request to testify before the Rules Committee on January 12, 2005, in San Francisco, CA, regarding the proposed amendments involving electronic discovery.

My comments will be based on my experience as an attorney primarily representing defendants in civil litigation, as well as my position as President-Elect of DRI.

Please let me know if you need any additional information.

Best regards,

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04-CV-034
Testimony

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December 22, 2004

Via E-Mail (peter_mccabe@ao.uscourts.gov) and Federal Express

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, DC 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure Governing Discovery of Electronically-Stored Information

Dear Mr. McCabe:

I appreciate the opportunity to submit comments to the Civil Rules Advisory Committee on the proposed amendments to the Federal Rules of Civil Procedure Governing Discovery of Electronically-Stored Information. I also look forward to appearing before the Committee on January 12, 2005, in San Francisco. My comments are based on my experience as an attorney who primarily represents defendants in civil litigation. I have served as national trial counsel for companies in the computer software and the pharmaceutical industries. In addition, I serve as President-Elect of DRI and will become President of DRI in October 2005. I have participated in several groups that have worked on electronic discovery issues over the past few years including Lawyers for Civil Justice (LCJ) and the Sedona Conference.

Based on my work in this area, I believe that there exists a clear need for more guidance to litigants who are dealing with the discovery of electronically-stored information. Litigants deserve discovery rules in this complex area that lead to predictable and consistent results regardless of the districts in which their cases are pending. Our civil justice system also needs to address the excessive costs and burdens being created by the many different attempts to apply the existing rules to the discovery of electronically-stored information. I commend the Committee for the thoughtful work that it has done in gathering information on these issues and proposing amended rules.

I would like to focus my written comments on two areas: (1) two-tiered discovery of electronic information, and (2) the importance of a safe harbor from sanctions under certain circumstances.

I am also supportive of many of the other proposed amendments, but I will limit my written comments to these two areas.

TWO-TIERED DISCOVERY OF ELECTRONIC INFORMATION

The proposed amendment of Rule 26(b)(2) that distinguishes between electronically-stored information that is "reasonably accessible" versus information that "is not reasonably accessible" appears to strike the appropriate balance between the benefits of potentially discoverable information on the one hand and the costs and burden of producing that information on the other. Importantly from a balance standpoint, this proposal contemplates that there will be situations where the benefit does outweigh the costs and burden and under these circumstances "for good cause shown the District Court has the discretion to order the discovery of information that is not reasonably accessible."

I would encourage the Committee to clarify the meaning of "reasonably accessible" in the Note to the proposed rule. One way to clarify the meaning would be to use language similar to Principle Number 8 of the Sedona Production Principles which states that the "primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval" and that "[r]esort to disaster recovery back-up tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the costs, burden and disruption of retrieving and processing the data from such sources."

Finally, I would also encourage the Committee to carefully consider the identification obligation in proposed amended Rule 26(b)(2) and to eliminate the obligation to identify all information that is inaccessible so that the rule maintains the more traditional method of the requesting party submitting specific discovery requests and the responding party either responding or stating an appropriate objection. If the discovery request seeks information that is not reasonably accessible then the responding party could state an objection to that information and the court could rule on that objection if the parties were not able to reach an agreement.

In the event that the obligation to identify is considered essential to ensure the fair and efficient functioning of the two-tiered discovery structure, then I would urge the Committee to clarify in the Note to the proposed amended rule that the obligation to identify is satisfied by the identification of a generalized description of broad categories of information such as "disaster recovery back-up tapes," as opposed to the creation of a specific log like a privilege log.

SAFE HARBOR FROM SANCTIONS UNDER CERTAIN CIRCUMSTANCES

I support conceptually the Committee's proposal to establish in Rule 37(f) an explicit "safe harbor" from sanctions when information becomes unavailable due to routine computer operations.

However, I would urge the Committee to adopt alternative language for proposed Rule 37(f) as follows: "A Court may not impose sanctions under these rules on a party for failing to provide electronically-stored information deleted or lost as a result of the routine operation of the party's electronic information systems unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information."

I believe that this proposed language would be consistent with the reasons for establishing a safe harbor and would be reflective of the challenges that exist in the technology environment in which litigants preserve and produce electronically-stored information.

* * *

I appreciate the work that the Committee has done so far in this area. I also appreciate the opportunity to submit these written comments and I look forward to clarifying or answering any questions about these comments during the hearing on January 12, 2005, in San Francisco.

With highest regards, I am

Very truly yours,

David E. Dukes

DED:hps