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To peter_mccabe@ao.uscourts.gov
cc
Subject Request to Testify in E-discovery Hearing on 2/11/05

04-CV-058
Request to Testify
2/11 DC

Dear Mr. McCabe,

I write 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 four Yale Law School students who will also be submitting written comments on the proposed amendments.

I appreciate the opportunity to participate in this process.

Sincerely,

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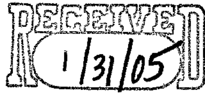

January 26, 2005

04-CV-058
Testimony
2/11 DC

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

RE: Proposed Testimony to the Committee on the Rules of Practice and Procedure

I am one of several Yale Law School students who were both honored and inspired by a visit to our school by Judge Lee Rosenthal, chair of the Advisory Committee on the Federal Rules of Civil Procedure. I was moved by Judge Rosenthal's presentation to formulate comments on the proposed e-Discovery amendments, and appreciate the opportunity to present these comments to the Committee.

I. The amendments to Rule 26(b)(2) should not be adopted. Instead, new guidelines for shifting costs should be added to Rule 26(c).

As my colleague Joseph Masters discusses in his testimony, the proposed amendment to Rule 26(b)(2) would allow a responding party to hold back relevant information that would otherwise come to light under today's rules. I agree with Mr. Masters' conclusion: no changes should be made to Rule 26(b)(2).

I suggest amending Rule 26(c) instead. Rule 26(c) sets up a careful procedure through which the responding party may petition the court for a "Protective Order[]" shielding it from an "undue expense or burden." Because a decision to shift the costs of discovery onto the requesting party is one such protective order, the decision to shift costs should be and is now governed by the procedure laid out in Rule 26(c).

The only reason that Rule 26(b)(2) is on the table at all is that Rule 26(b)(2) contains a helpful list of factors that guide courts when deciding to "limit" discovery. By chance,

these factors also turn out to be much the same factors that a court uses when applying the Rule 26(c) procedure to shift the costs of discovery. Because Rule 26(c) offers, unfortunately, no guidance on when and by how much to shift these costs, courts have turned to the helpful factors considerations outlined in Rule 26(b)(2). Rule 26(b)(2)(iii) is the most helpful section: it says, in part, that courts may "limit" discovery when the likely benefits of that discovery are outweighed by its costs.[1]

This is the right test, but it is in the wrong place. Rule 26(b)(2) does not give the court power to shift costs. Rule 26(c) does. Unlike Rule 26(b)(2), which only allows for "limiting" the "frequency or extent of use" of discovery requests, Rule 26(c) gives the court a list of robust mechanisms that a judge can use "to protect a party or person from . . . undue burden or expense." Under Rule 26(c), for example, a court may craft confidentiality orders to protect trade secrets, or may limit the persons present during discovery, or may even order that discovery not be had. The Supreme Court has also approved the use of 26(c) to shift costs.[2]

The most important difference between a Rule 26(c) protective order and a Rule 26(b)(2) motion to "limit" discovery is that a 26(c) protective order chokes off specific requests for relevant data, on the sole ground that the discovery of that data would place too great a burden on the responding party. Rule 26(b)(2), on the other hand, is not so specific: by limiting the *number* of requests that a party can make, the court does not prevent any one, specific piece of evidence from coming to light. The most important requests, one imagines, will still be made. A Rule 26(c) order, by contrast, removes this choice from the requesting party by saying, for instance that the plaintiff may not conduct a physical examination of person X, or, that she may not discover any emails on last year's backup tapes unless she pays her former employer half a million dollars. The specificity of Rule 26(c) means that a protective order might well hide a smoking gun, and win the case for the responding party.

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[1] See, e.g., Zubulake v. UBS Warburg, 217 F.R.D. 309, 323 (S.D.N.Y. 2003) (Deciding whether to shift costs by applying seven factors, the first six of which "correspond to the three explicit considerations of *Rule 26(b)(2)(iii)*").

[2] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (discussing the court's "discretion under Rule 26(c) to grant orders protecting [the responding party] from 'undue burden or expense' . . . including orders conditioning discovery on the requesting party's payment of the costs of discovery").

In the three cases cited by the Committee Note, the courts considered themselves to be acting under Rule 26(c).[3] In those cases, the plaintiffs' requests were all specifically tailored to discover relevant information, and all three courts ordered that the responding parties would have to comply with those requests where the data still existed in "active" form on their computers. Difficulties arose only because the cost of complying with some of those requests (the ones involving older and deleted data) was so high that those requests might constitute an undue expense for the defendants. The issue was not whether the courts should "limit" the overall number of requests (e.g., "plaintiffs may only request 25 emails") but rather whether the court should put a price tag on some specific requests (e.g. "all of plaintiff's requests for emails stored on backup tapes may be had only if plaintiff pays X dollars to the defendant.")

So in the e-Discovery cases, judges are issuing protective orders under Rule 26(c), but are taking for guidance the factors laid out in Rule 26(b)(2)(iii). The proposed amendment to Rule 26(b)(2) would bridge this strange divide by writing a new and unprecedented protective order into Rule 26(b)(2) itself: the judge would name the "terms and conditions" of discovery. By removing this powerful protective order from the careful procedure built into Rule 26(c), the proposed amendment runs a big risk.

Because the idea of concealing legitimately discoverable information goes against our country's tradition of broad and open discovery, Rule 26(c) – unlike Rule 26(b)(2) – requires the court to follow a thorough procedure before making a protective order. Under Rule 26(c), it is up to the responding party to make a special motion asking for the order. To prevail, the responding party must first show that it has conferred "in good faith" with the requesting party in an attempt to resolve the issue, and then – if that conference fails – show "good cause" for a cost-shifting order. Only by thus rebutting the principle of open discovery can the responding party convince the court to take the unusual step of ordering the requesting party to pay some of its opponent's costs. This procedure preserves our country's tradition of broad and open discovery, under which

[3] Id., at 316; Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001).

requesting parties "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense."[4]

Rule 26(b)(2)'s procedure is considerably more lax. Under Rule 26(b)(2), the responding party is under no obligation to confer with the requesting party to resolve the issue, nor to show "good cause." Under Rule 26(b)(2), the court may even "act on its own initiative," without any motion from responding party. The proposed amendments to Rule 26(b)(2) would make this lax procedure yet more permissive: under the proposed amendment, whenever the responding party can convince the court that the data legitimately sought is not "reasonably accessible," then the *requesting* party will have to make the "good cause" showing.

The decision to shift the costs of discovery risks restricting legitimate discovery, and therefore should only issue after following the careful procedure of Rule 26(c). I suggest amending that Rule in order to codify the factors to be weighed when shifting costs.

This might be done as follows (proposed revisions are underlined):

> **(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> . . .
>
> (9) that the discovery of electronically stored data be had only under terms and conditions, including the sharing of costs, specified by the court. In making such an order, the court should consider: (i) the extent to which the request is specifically tailored to discover relevant information; (ii) the availability of such information from other sources; (iii) the total cost of production, compared to the amount in controversy; (iv) the total cost of production, compared to the resources available to each party; (v) the relative ability of each party to control costs and its incentive to do so; (vi) the

[4] Rule 26(b)(1).

importance of the issues at stake in the litigation; and (vii) the relative benefits to the parties of obtaining the information.[5]

II. Attorneys should be required to meet with their client's technical expert prior to a Rule 26(f) scheduling meeting.

The proposed amendments to Rules 26(f) and 16(b) would require lawyers and judges to deal with e-Discovery issues as early as possible prior to litigation. This is an excellent idea. As the Committee writes in the accompanying Note to the amendments to Rule 26(f), e-Discovery issues will often involve more than matters of law, and will depend as well on the "nature and extent . . . of the parties' information systems." It is essential that these complicated, fact-based issues be understood and grappled with well before trial.

From my experience, the one sure and best way to understand a complicated computer system is to talk directly to the technical expert who runs it. Prior to the scheduling and discovery conference mandated between the parties by Rule 26(f), attorneys should be required to identify this person or persons whose expertise will be needed in facilitating discovery, and confer with them about these issues before meeting with opposing counsel. A similar provision is provided in the local rules of New Jersey's District Courts.[6]

The ideal solution in my view would be for the tech experts of the two sides to meet face-to-face, perhaps in the presence of a neutral moderator, with a confidentiality agreement and blanket immunity from waiving privilege, to talk candidly about the types of computer systems used, and the steps needed to preserve, search, and reproduce the needed information. Such a meeting might resemble a settlement negotiation or mediation.

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[5] These factors are used by Judge Scheindlin in Zubulake, 217 F.R.D. at 322. As Judge Scheindlin notes, the first six factors are substantially similar to the three explicit factors used in limiting discovery under 26(b)(2)(iii). The seventh factor is entirely new, and very relevant to the rare but important case where the responding party obtains some benefits from the process of responding to the discovery request. Id. at 323.

[6] See D.N.J. Local Civ. R. 26.1(d) (amended by N.J. Ct. Order 501 (2004)) ("Prior to a *Fed. R. Civ. P. 26(f)* conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved.")

Alternatively, as provided in the NJ rules, the attorneys of both parties should be required to interview their clients' IT specialists, and then in turn discuss e-Discovery issues with each other in the 26(f) conference.[7] If the parties are further required to produce or identify relevant electronically stored data under 26(a)(1) (as proposed above in Section IV), that will also help focus legal minds on the nuts-and-bolts issues of how their client's system works.

III. The meaning of "electronically stored information" should be clarified. I suggest, "electronically stored data" instead.

The Committee has wisely decided to adopt an expansive definition of "electronically stored information" in the Note to the proposed changes to Rule 34(a). I suggest broadening this term yet further, both to leave open the Rules to future technological developments, and to clarify possible ambiguities that may exist today.

I suggest using the word "data" instead of the proposed term, "information." The definition of "information" is, according to Random House Unabridged Dictionary (1966): "knowledge communicated or received regarding a particular fact or circumstance," while the word "data" refers to "any fact[s] assumed to be a matter of direct observation." The difference between the two is not trivial. Because "information" implies knowledge, created by a human user of the computer, it is likely to be under-inclusive.

Although e-Discovery has indeed focused on "information" created by human beings and saved on computers, lots of other discoverable data is also created by the computer itself. This data includes: computer logs detailing who has logged into the computer, when, and what files they accessed; caches of saved web pages, and "cookies" automatically placed onto the computer by visited websites. This data will prove particularly relevant in the anti-discrimination lawsuits that have generated much of the

[7] As Mary Henifin of Willem Pickering, Hale & Dorr noted in the 2004 Fordham Conference Electronic Discovery, "there was concern" with the original draft of New Jersey's rule "that there could be some kind of IT-nerd-to-IT-nerd-type communication. Well, that of course would not be acceptable to attorneys in litigation." 73 Fordham L. Rev. 85, 94 (2004). The adopted rule represents a workable compromise: the attorneys avoid the possible pitfalls of a face-to-face meeting of their client's IT expert and the IT expert of the opposing party, but at the cost of having to learn all about the system themselves.

e-Discovery precedent up until now.[8] In such cases, questions of who knew what and when are crucial, and likely to be answered by computer-generated data.

Even if the word "information" were used instead of the word "data," my concerns could also be addressed by including a broader definition in the Note. I would suggest adding a line to the Note to the amendments to Rule 34(a): "The term 'electronically stored information' shall be construed broadly, so as to include data automatically generated by an electronic device."

IV. "Electronically stored data" should be included in the mandatory disclosures listed in Rule 26(a)(1)

Rule 26(a)(1) lists the disclosures that a party must make before a 26(f) conference. At present, Rule 26(a)(1) requires that parties produce all "documents" and "data compilations" that it plans to use in its claims or defenses. If the Committee does not expressly include "electronically stored data" in this passage, future litigants may argue that the Committee intentionally left it out, and therefore construe 26(a)(1) more narrowly than it was meant to be interpreted. Rule 26(a)(1) should be amended to expressly include "electronically stored data" among the mandatory disclosures.

V. Conclusion.

The decision to shift costs is a protective order, taken in rare cases when required to protect a party from undue expense. As such, the cost-shifting mechanism belongs in Rule 26(c), from which it can be exercised only through a careful procedure designed to preserve our country's tradition of broad and open discovery.

The Note to Rule 26(f) should require that attorneys actually meet face-to-face with their client's IT specialist and be thoroughly versed in their client's electronic storage systems prior to their Rule 26(f) scheduling conference with opposing counsel.

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[8] See, e.g., Zubulake (former employee of UBS Warburg sues the company for gender discrimination and illegal retaliation); Rowe Entm't Inc. (black concert promoters sue booking agencies for discrimination and anti-competitive practices); McPeek (former employee of the Bureau of Prisons sues for illegal retaliation for his complaints of sexual harassment).

Because not all of the relevant evidence stored in computers is expressed by the word "information," the proposed amendments would do better to use the phrase "electronically stored data."

Rule 26(a)(1) should be amended to include "electronically stored data" among the materials relevant to the "claim or defense" that each party must disclose at the outset of litigation.