04-CV-069.
Request to Testify
1/28 Dallas

Stephen Gardner
<steve@consumerhelper.com>
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To <Rules_Comments@ao.uscourts.gov>
cc Ira Rheingold <ira@naca.net>
bcc
Subject Request to testify at Civil Rules Hearing, Dallas, January 28

I request to testify at the Dallas Civil Rules Hearing, on electronic discovery, on behalf of the National Association of Consumer Advocates (NACA).

I will file my testimony early next week, but NACA may submit additional comments by the February 15 deadline as well.

Please confirm that this request to testify can be accommodated.

Thanks,

Steve

Stephen Gardner
Law Office of Stephen Gardner
6060 North Central Expressway, Suite 560
Dallas, Texas 75206
214-800-2830 (voice)
214-800-2834 (fax)
steve@consumerhelper.com

Testimony of National Association of Consumer Advocates

Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States

Dallas, Texas

January 28, 2005

My name is Stephen Gardner. I am Chair Emeritus of the National Association of Consumer Advocates ("NACA"), and appear today to testify on behalf of NACA.

NACA is a non-profit advocacy group whose membership is comprised of over 1,000 private and public sector attorneys, legal services attorneys, law professors, law student, and other advocates working for the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country, and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused primarily on predatory and fraudulent business practices affecting consumers.

I appear today to testify on behalf of NACA on the proposed amendments to the Federal Rules of Civil Procedure ("FRCP") relating to electronic discovery ("e-discovery"). NACA anticipates filing formal comments on or before the February 15 deadline. My comments today will serve to highlight NACA's concerns with the proposed amendments.

Summary of Testimony

My testimony today addresses four points:

1. Treating e-discovery different from other discovery is not necessary and will encourage dilatory tactics and collateral litigation.

2. The proposal to amend Rule 26(b)(2) to allow a party to determine unilaterally refuse to produce e-documents that it considers "not

reasonably accessible" (a) is unnecessary because it can be addressed by current rules, (b) reverses the concept of full discovery, and (c) gives inadequate clarity on the standard.

3. The proposal to amend Rule 26(b)(5)(B) to allow a dilatory assertion of privilege will encourage sloppy initial production and gamesmanship.

4. The proposal to create new Rule 37(f) to give special treatment to retention of e-documents encourages policies that would otherwise be spoliation.

Point 1

Treating e-discovery different from other discovery is not necessary and will encourage dilatory tactics and collateral litigation.

The most likely effect of adoption of these proposals will be to further restrict plaintiffs' access to the courts, by encouraging dilatory defensive tactics and increasing collateral litigation during the discovery phase.

Although there will always be exceptions, it is a given among plaintiff lawyers that (1) at the outset of the case, most of the relevant documents will be in the exclusive possession of the defendant, and (2) defendants will use whatever means are available to them to avoid producing any damaging documents, even clearly relevant ones.

It does not appear that there has been any empirical or principled basis established to show that there is a pressing need to treat e-discovery different from any other discovery.

There are three characteristics of electronic documents ("e-documents") that are important with respect to these proposals. First, there is more e-discovery now than ever before. That is a function of our growing reliance on computers and the fact that e-document storage is often both cheaper and more convenient than paper storage. One disk can hold the contents of many file cabinets.

Second, because of the ability to search electronically, virtually all e-documents are more readily accessible than paper documents.

Third, because of the nature of e-mail communication and the ability to save drafts of documents and metadata, e-documents more often reveal clear evidence, even of such traditionally difficult-to-prove elements as intent.

These characteristics should convince the Committee to make sure that e-documents are more easily available, not less.

Point 2

The proposal to amend Rule 26(b)(2) to allow a party to determine unilaterally refuse to produce e-documents that it considers "not reasonably accessible" (a) is unnecessary because it can be addressed by current rules, (b) reverses the concept of full discovery, and (c) gives inadequate clarity on the standard.

Discovery is the single biggest road block to efficient litigation. Dilatory tactics are common. Although the rules provide for sanctions for refusal to cooperate in discovery, actual sanctions are the rare exception.

The usual practice is for the defendant to file an initial response to discovery that produces no documents, but makes plenty of boilerplate objections.

After extended discussions between counsel, some documents may be produced but others will not, necessitating a motion to compel. Often, just before hearing, defendant will make sufficient additional production to make proceeding with the motion to compel fruitless.

So it goes. NACA understands that solving these endemic problems is beyond the current purview of this Committee. But we do entreat the Committee not to promulgate rules that will make legitimate discovery ***more protracted, and more difficult.***

As things stand, if a defendant asserts that production will be unduly burdensome, it must seek protection from the court.

But under this proposal, a defendant can—with little or no basis—simply complain that e-documents are not "reasonably accessible."

Since the parties would not likely be in federal court if the plaintiff agreed with the defendant's position as to what was "reasonable," it is probable that this is not a point with which the plaintiff will be in agreement.

But this new provision puts the burden on the plaintiff to move for production—adding another step to the process. If the defendant then shows that the information is in fact not reasonably accessible, then the court has discretion to order discovery only if the plaintiff then shows good cause, and to impose additional restrictions. If the Committee adopts this proposal, it should also provide that sanctions should be ordered when a party's unilateral initial claim of unreasonableness is not found to be valid.

However, aside from the addition of a defendant's right of first refusal, all of these protections are now available under the rules, and courts have managed to apply these rules to e-discovery as well as paper discovery.

Beyond the fact that the system is now working, it is also probable that it is in fact cheaper and easier to retrieve e-documents than paper documents, just as it is cheaper and easier to store them.

In other words, aside from rare instances (which federal judges and magistrates can handle under existing rules), existence of e-documents means that ***they are more accessible than paper documents***, not less.

What does this matter? My point is that, as a rule, the evidence supports allowing greater access to e-documents—if accessibility is the governing criterion—and not

reduced and dilatory access. The proposal unfortunately would achieve the former, not the latter.

Point 3

The proposal to amend Rule 26(b)(5)(B) to allow a dilatory assertion of privilege will encourage sloppy initial production and gamesmanship.

This proposal, although put forth as relating to e-discovery, actually applies to all forms of discovery, paper and electronic.

Procedurally, this is a problem, because these amendments have been identified as dealing only with e-discovery. The proposed Committee Note does not mention this expansion at all, much less discuss the logic behind it.

The Note says that "the Committee has repeatedly been advised that "privilege waiver, and the review required to avoid it, add to the costs and delay of discovery." There is no source for this advice, and it is certainly contrary to my own experience in the 28 years I have been practicing, and the experiences of other NACA members.

If reduction of delay and discovery costs were the ultimate goal, one discovery rule would be enough: "Give the other side everything you have."

Instead, as the rules now are written, the true delay and cost of the discovery process lies in the lengthy efforts plaintiffs must expend to get clearly-discoverable documents from defendants.

This proposal addresses a very rare (and currently curable) problem with a significantly greater problem—encouraging sloppy lawyering, gamesmanship, and blindsiding.

A defendant, as I noted earlier, does not want to produce any document that the plaintiff might actually want, and that defendant will carefully review all documents

prior to discovery to insure that every possible objection to every document has been set forth. Privilege is just one ground that will always be the subject of the initial review.

Thus, this proposal will not reduce the time of review, except for the lawyer whose default position is ineptness verging on malpractice.

And nothing about this proposal actually reduces the time or cost of discovery—it merely shifts it to a later stage, when the parties fight over documents that are produced and only later—when the plaintiff manages to find some utility in the documents—identified as privileged.

A secondary problem exists in that this provision appears to be a substantive change in the law of privilege, which is outside allowable rulemaking powers under the Rules Enabling Act, 28 U.S.C. § 2071 *et seq*. Rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). In addition, this proposal will intrude on the application of state laws and ethical requirements relating to waivers of privilege and use of privileged documents.

Point 4

The proposal to create new Rule 37(f) to give special treatment to retention of e-documents encourages policies that would otherwise be spoliation.

As I said earlier, it is almost always cheaper and easier to store e-documents than to store paper documents. That is, in fact, the primary reason a party elects to use electronic data storage.

Beyond that, after the initial decision is made, it will always be cheaper to maintain those electronic documents than to store comparable amounts of paper documents.

Thus, cost is not a factor. Nor is effort—it takes effort to delete documents, but no effort at all to leave them alone.

Furthermore, those parties who do store electronically are also diligent at insuring that data are backed up and preserved. Again, this is cheap and easy.

Nonetheless, the proposal is to rewrite the laws relating to spoliation as long as e-documents are destroyed "because of the routine operation of the party's electronic information system."

Some companies already have document retention plans that seem intended to destroy potentially-damaging documents before suits are filed.

This proposal would make that the standard practice. Indeed, under this proposal, it would be foolish for any company to retain any e-document any longer than was necessary, and to institute a regular program of destroying all electronic records after a short period of time. Since it will be rare that a party will be asked to produce e-documents until at least a year after the event, it is quite possible for that party to institute regular destruction of records that is part and parcel of the "routine operation of the party's electronic information system." And thus make the evidence against it disappear.

Some companies will do this anyway. They do not need the federal rules telling them it's okay.

Conclusion

NACA thanks the Committee for this opportunity to set forth our views on the proposed e-discovery rules.

NATIONAL ASSOCIATION of CONSUMER ADVOCATES
1730 Rhode Island Avenue, NW ■ Suite 710 ■ Washington, DC 20036
(202) 452-1989 ■ Fax: (202) 452-0099 ■ www.naca.net

February 15, 2005

(Filed via email to Rules_Comments@ao.uscourts.gov)

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, DC 20544

Re: **Comments of National Association of Consumer Advocates on Proposed Electronic Discovery Amendments to the Federal Rules of Civil Procedure**

Dear Mr. McCabe:

The National Association of Consumer Advocates ("NACA") provides these comments on the proposed revisions to the Federal Rules of Civil Procedure ("FRCP") relating to electronic documents ("e-documents").

NACA is a non-profit advocacy group whose membership is comprised of over 1,000 private and public sector attorneys, legal services attorneys, law professors, law student, and other advocates working for the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country, and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused primarily on predatory and fraudulent business practices affecting consumers.

NACA continues to oppose any revisions to the Rules as unnecessary, and has already filed the testimony of its Chair Emeritus, Stephen Gardner. In addition, Mr. Gardner testified in person at the Dallas hearing on January 28. NACA attaches Mr. Gardner's testimony as part of these comments, and also incorporates his oral testimony as part of this comment, but it will not repeat the contents of either the written or oral testimony.

Instead, this comment will stress two points that were not covered in the written testimony:

1. **Proposed Rule 26(b)(2) should allow a party to refuse to produce e-documents only if production is an "undue burden" and not merely if the requested documents are "not reasonably accessible."**

2. **The current wording of proposed new Rule 37(f) encourages knowing spoliation, by allowing a party to destroy e-documents that it subjectively and unilaterally concludes are not "discoverable."**

Point 1. **Proposed Rule 26(b)(2) should allow a party to refuse to produce e-documents only if production is an "undue burden" and not merely if the requested documents are "not reasonably accessible."**

Although NACA continues to believe that there is insufficient empirical evidence of any need to create a special rule for refusing to produce e-documents, it urges the Committee not to create additional confusion by adopting a new standard, by permitting a responding party to refuse to produce "information that the party identifies as not reasonably accessible."

The Rules already contain a standard for protection from production: "undue burden." This standard occurs in several places: FRCP 26(c), FRCP 45(c)(1), and FRCP 45(c)(3)(A)(iv), and it has repeatedly been applied by the courts. *See, e.g., Alexander v. F.B.I.*, 186 F.R.D. 60 (D.D.C. 1998); *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533, 535 (D.Kan. 2003); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 463 (D.C.Utah 1985); *Hussey v. State Farm Lloyds Ins. Co.*, 216 F.R.D. 591, 596 (E.D.Tex. 2003); *Kansas Waste Water, Inc. v. Alliant Techsystems, Inc.*, 2005 WL 327144, *3 (D. Kan. 2005).

The Rules do not use the "reasonably accessible" standard. This appears to be a lesser standard than the traditional "undue burden" standard.

Because it is so much easier in almost every instance to store, search and access e-documents, there is no principled reason to lower the standard for e-documents.

Accordingly, if the Committee determines that it must write a special rule for e-discovery, then it should at a minimum keep the existing "undue burden" standard, so that the exception allows a party to refuse to produce "information if the production will cause an undue burden to the party."

Point 2. **The current wording of proposed new Rule 37(f) encourages knowing spoliation, by allowing a party to destroy documents that it subjectively and unilaterally concludes are not "discoverable."**

NACA continues to believe that proposed new Rule 37(f) has not been shown to be necessary. But if the Committee retains it, care must be taken to close a large loophole relating to discoverable information. As written, the proposed Rule creates a safe harbor for a party that destroys e-documents, as long as it took "reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action . . .."

The flaw in this language is that, in the experience of NACA's members, a frequent first response to any discovery request is a boilerplate objection that the information requested is simply not discoverable, for a variety of reasons. Generally, courts disagree and production is eventually made.

This initial stonewalling delays production, but it does not prevent it. For the Rules to allow a party's subjective decision of discoverability to serve as the basis for destroying documents is a significant mistake, and an invitation to spoliation. The fact

that the standard is that a party "knew or should have known" is no solace after the party has destroyed the documents.

NACA recommends that if this Rule is adopted, the standard be the same as for the scope of discovery generally in Rule 26(b)(1): "any matter, not privileged, that is relevant to the claim or defense of any party."

The safe harbor should exist only if the destroying party took "reasonable steps to preserve ***all information that is relevant to any claim or defense of any party . . ..***"

Conclusion

NACA thanks the Committee for this opportunity to set forth our views on the proposed e-discovery rules.

Respectfully submitted,

National Association of Consumer Advocates

Ira Rheingold, Executive Director

Michelle Weinberg, Board Member

Stephen Gardner, Board Chair Emeritus