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Via Facsimile #202-502-1755
and Regular Mail

04-CV-091
Request To Testify
2/11 DC

January 14, 2005

Mr. Peter McCabe
Administrative Office of the
U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: February 11, 2005 Rules Hearing

Dear Mr. McCabe:

I am writing to ask that you allow me to present comments at the February 11, 2005 hearing in Washington, D.C. concerning proposed changes to the Federal Rules of Civil Procedure with respect to electronic data and discovery.

I was a panelist at the Fordham Law School Conference and the previous Brooklyn Law School Conference. I am a practicing attorney who represents individuals, and I would like to comment on how the proposed changes will affect individual litigants and the pursuit of justice.

I apologize for the tardiness of my request and would ask that you accommodate me at this late date.

Thank you kindly.

Sincerely,

Anthony Tarricone

Anthony Tarricone

AT/lis

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January 28, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

04-CV-091
Testimony 2/11 DC

RE: Civil Rules Committee Hearing
Proposed Changes to Federal Rules of Civil Procedure concerning E-Discovery

Dear Mr. McCabe:

Thank you for your invitation to testify at the Civil Rules Committee Hearing on February 11, 2005. I look forward to participating.

As requested, I am writing to provide my written statement concerning the proposals to amend the Federal Rules of Civil Procedure as they relate to electronic discovery. I will limit my comments to proposed Rule 26(b)(2) and proposed Rule 37(f).

General Comments

I participated in one of the Panels at the Fordham Conference last February. I feel compelled to mention that I was surprised by what I perceived as imbalance in the background of the participants and the points of view represented. It seems to me that one segment of the bar, representing corporate interests, and indeed corporate America itself, were overly represented, while individual litigants and lawyers who represent them were grossly underrepresented. I consider this imbalance symptomatic of the entire ongoing effort to amend the Federal Rules as they relate to E-Discovery. The focus has been on corporate inconvenience and expense, with too little consideration of the rights of individual litigants—consumers and ordinary Americans—who find themselves in Federal Court, often involuntarily, after removal of their case from state court at the behest of a corporate defendant.

In summary, I believe the proposed Rules are entirely unnecessary and will have the effect, while unintended, of: (1) limiting access to justice for ordinary Americans, (2) creating a dramatically uneven "playing-field" that favors large corporate interests, and, ultimately, (3) undermining the fundamental truth-seeking purpose of litigation in

our adversary system, thereby impeding the rendering of full and fair justice for individual litigants. I also believe that proposed Rule 37(f) will affect substantive rights, and is, therefore, beyond the scope of the rulemaking authority of the Committee.

I begin with the premise that litigation is a convention employed by the most civilized of societies to resolve disputes between two or more parties. The adversary process—which forms the core of federal and state civil justice systems in the United States—is designed to weigh and evaluate evidence for the fundamental purpose of determining the truth and thereby resolving fairly the dispute that is the subject of litigation.

The right to trial by jury, secured by the Seventh Amendment, is a constitutional right that serves as the ultimate guarantor of a level playing-field in litigation. The integrity of the entire civil justice system demands that the fact-finder, judge or jury, weigh and evaluate all available, relevant evidence. Discovery is the means by which evidence is obtained for consideration by the fact-finder. The Rules of Civil Procedure should advance this goal. In my opinion, the proposed changes undermine this goal and will inhibit the fundamental truth-seeking purpose of the civil justice system.

Proposed Rule 26(b)(2) Will Unfairly Restrict Access to Relevant Evidence and Create Costly and Complex Procedural Hurdles That Will Limit Access to Justice for Ordinary Americans

Proposed Rule 26(b)(2) will frustrate the right of individual litigants to have a fair consideration of relevant evidence by creating hurdles to obtaining Computer Based Materials (CBM) in discovery. By singling out and treating CBM differently on the basis of a party's claim that it is "not reasonably accessible," the proposal will further complicate the judicial process by necessitating court involvement in the discovery process, and imposing a difficult burden on the litigant seeking CBM. While the proposed Rule requires the party with the CBM to "show that it is not reasonably accessible," the party seeking the CBM will not be in a position to challenge the unilateral claim and support for the claim. The withholding party will have exclusive knowledge of the contents of the withheld CBM, with respect to both its contents and relevance to the litigation and circumstances bearing on whether it is truly "not reasonably accessible."

A party facing a claim that documents are not "reasonably accessible" will be required to engage in potentially complex and costly discovery proceedings to obtain discovery of relevant evidence. The Court determination required by proposed Rule 26(b)(2) will likely necessitate a court hearing, and may, in many instances, require the taking of live or deposition testimony. The party seeking production of CBM will likely require discovery on the issue whether the CMB is "not reasonably accessible." The Court or parties may determine that expert testimony, from computer experts, is necessary to fairly consider or present the issue. *Daubert* challenges and hearings may be

then be necessary to consider the qualifications of the computer experts to proffer opinions on the subject of "inaccessibility."

These additional hurdles will have the effect of raising the bar for individual litigants by overly complicating and over-pricing the cost of litigation. Ultimately, individual litigants will be denied access to justice by being priced out of the civil justice system or proceeding with their lawsuit without CBM that may be relevant and potentially outcome-determinative. The sad reality is that litigation today is so costly that ordinary Americans often cannot pursue justice for a claimed wrong. Adding additional complexity and cost will further raise the bar and close the courthouse doors to ordinary citizens who will not be able to pay the increased costs necessitated by the proposed rule.

I offer the following additional points on proposed Rule 26(b)(2):

1. The Information Age, with the advent of computers of ever-increasing sophistication and capacity, has enhanced the ability to collect, preserve, identify and analyze documents and data.

2. The Rules of Civil Procedure have worked remarkably well during the tumultuous development and evolution of computers of ever-increasing sophistication and capacity, without specific provisions relating to definitions, obligations to preserve, safe harbors and the like. The fact is, that our judiciary is adapting, as in other areas of law, to the fundamental changes that characterize the Information Age, and indeed have done so well.

3. Computers and data storage systems are changing rapidly. The sophisticated systems that were introduced only a few years ago are obsolete, and changes are occurring exponentially by the month. Less and less "space" is required for storage, and more user-friendly programs are constantly becoming commercially available. In short, a "fixed-in-time" solution cannot possibly account for the moving target that is the Information Age. The computers and CBM storage systems in use when this committee held its mini-conferences in 2000, and even at the time of the Fordham Conference in February 2004, are woefully outdated. As an example, the pocket-sized Apple Computer "I-Pod" that was unveiled just a few months ago, and was so popular during the recent holiday season, holds a whopping 60 gigabytes of data, which is 60,000 megabytes, and can accommodate as many as 1,200,000 (1.2 million) pages of documents. In 2000, the file server in my law office, with some 20 terminals, accommodated only 9 gigabytes of data.

4. Adoption of Rules based on today's technology freezes in time procedures based on technology that inevitably will be obsolete in short order. Rulemaking is not the way to approach this problem. Judges are better suited to address issues relating to CBM within the existing framework, as they have been doing during the past few decades.

5. The idea of creating a classification of certain CBM as "inaccessible" is unnecessary and contrary to the fundamental purpose of revealing and determining the truth. Documents and data, whether paper or electronic, that are probative on issues in dispute should, presumptively, be subject to discovery. I have personally visited warehouses to mine dusty boxes of old documents for pertinent nuggets of information that, ultimately, fill in the puzzle and reveal the truth. Why should CBM be treated differently? Judges have dealt with similar issues pertaining to paper. In many obvious ways, CBM is more accessible, identifiable, and searchable.

6. Classification of certain documents as "inaccessible" will encourage the artificial conversion of whole categories of CBM from "accessible" to "inaccessible." This notion is an invitation for litigants to draft document retention policies designed to avoid production in the event of litigation. This defeats the fundamental purpose of litigation, i.e., resolving disputes based on the truth.

7. The two-tiered approach in proposed Rule 26(b)(2)—protection of "inaccessible" data and the burden of proving "good cause" to obtain access—would spawn an entire new area of procedure-based litigation focused on one litigant's effort to meet the burden necessary to obtain a court order for production. This will further heighten the bar on access to justice in the Federal system by increasing costs and encouraging protracted procedural battles.

8. Litigants are in control of their computer systems, document retention policies, and CBM purging policies. Systems and protocols can be designed to ease disclosure requirements that arise in the litigation setting.

9. In my experience, it is the rare case in which vast quantities of CBM are identified, let alone produced, pursuant to the automatic disclosure provisions of Rule 26. My experience, representing individual consumers in product liability and other claims, is that it is the exceptional case where even easily accessible CBM is voluntarily identified and produced. The reality in today's world of litigation is that ordinary citizens suing corporate interests already have to engage in time-consuming procedural battles to obtain the discovery to which they are clearly entitled under the Rules. In many cases, relevant documents never see the light of day

because individual litigants, even now, cannot afford the time and expense required to obtain CBM from corporate litigants. Proposed Rule 26(b)(2) will create additional procedural hurdles to obtain discoverable CBM. The difficulty of obtaining discovery for individual litigants will only be exacerbated.

The Safe-Harbor Provision of Proposed Rule 37(f) Violates the Rules Enabling Act and Will Encourage Adoption of Document Retention Policies That Favor Early Destruction of CBM and Impede the Fundamental Truth-Seeking Purpose of Civil Lawsuits

Section 2072 of the Rules Enabling Act provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) ***Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.***

Proposed Rule 37(f) will affect the substantive rights of litigants by creating de facto preservation standards that will abridge the rights of litigants affected by a party's intentional "spoliation" of evidence. Federal and state courts have developed substantive law in the area of "spoliation" that typically focuses on whether a party knew or should have anticipated that documents or materials (including CBM) would be relevant not only in existing litigation, but litigation likely to result from an event or occurrence. Further, existing law typically defines as "spoliation" any intentional destruction that is "unreasonable" in the circumstances of a particular case.

Proposed Rule 37(f) modifies and abridges substantive rights in at least two ways. Firstly, subsection (f)(1) refers to a party's taking reasonable steps to preserve information "after it knew or should have known that the information was discoverable in the action." This would appear to mean that the duty to preserve arises only after the action has been commenced. Existing law in many jurisdictions requires the preservation of data even before commencement of the action, where circumstances would alert a party that litigation likely will result from an event or occurrence. This is an important distinction given statutes of limitation in tort actions of one to three years, and in contract actions often as much as six years.

Secondly, Proposed Rule 37(f)(2) abridges substantive rights by creating a safe harbor for a party that destroys relevant information so long as destruction was pursuant to "routine operation" of the party's electronic system. In most jurisdictions, destruction of documents or CBM pursuant to a retention policy is excused only if reasonable under

the particular circumstances relating to the documents or CBM and the nature of the litigation and issues therein. It is for the judge, or jury in some jurisdictions, to determine whether destruction of documents or data pursuant to a retention policy is excusable, or, conversely, should result in the imposition of sanctions. Sanctions can range from an evidentiary inference to default or dismissal. Some jurisdictions even recognize a separate cause of action for spoliation. The proposed rule abridges existing rights by precluding a party from proving that spoliation of CBM was unreasonable under established standards, so long as, per the proposed rule, it was "routine." This is a dramatic departure from existing law and violates the mandate of §2072 of the Rules Enabling Act.

Even more troublesome, the proposed rule, if enacted, will encourage adoption of short retention policies and immunize a party that destroys relevant evidence, even with the intention of thwarting litigation. In my opinion, the notion of a "safe harbor" to protect a litigant from sanctions for willful destruction of discoverable CBM—as distinguished from paper documents—is very unwise. Such a rule would, as with the classification of "inaccessible" documents, encourage parties to adopt retention and purging policies tailored to avoid disclosure of documents, thereby thwarting the essential truth-seeking purpose of litigation. Once again, the resulting imbalance against individual litigants would favor corporate interests. Remarkably, destruction of CBM pursuant to ***any*** "routine operation," however unreasonable and with whatever intent, would be permitted with the imprimatur of the Federal Judiciary.

Lastly, there is simply no need for "safe harbor" protection for CBM as a special class of discoverable materials. Judges are in the best position to determine when sanctions are appropriate based on the particular circumstances of each case, without a presumption favoring a litigant that has already destroyed CBM. Review of case law and experience teaches that cases in which judges have imposed sanctions invariably involve wrongdoing. There is simply no need for rulemaking in this area.

I look forward to presenting my comments to the Committee in person. Thank you kindly for your consideration.

Sincerely,

Anthony Tarricone

Anthony Tarricone