04-CV-212

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February 10, 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

Dear Mr. McCabe:

I am writing to offer comment on the recently proposed changes to the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") regarding electronic discovery.

As practitioner in the federal courts for the past nine years in complex products liability and complex civil mass tort litigation, I firmly believe that the proposed changes would only serve to frustrate a plaintiff's right to discovery, lead to potential discovery abuses by defendants and thus, unfairly tip the discovery process in favor of defendants.

The proposed amendment to the Fed.R.Civ.P. 26 (b)(2) allows a party to provide discovery of electronically stored information that the party identifies as "not reasonably accessible." This proposal would not serve the interest of fair discovery because the phrase "reasonably accessible" is subjective. To this end, it can be subject to a myriad of interpretations by the defense. Surely this amendment would frustrate all aspects of discovery.

In reality, this amendment is unnecessary in that electronically stored information should be more "accessible" than any paper records. There is no explanation why electronically stored information cannot be reasonably accessible. Indeed, the recent four part decision in Zubulake v. UBS Warburg, issued by Judge Sheindlin in the United States District Court for the Southern District of New York actually has addressed this very concern. There, the Court determined far reaching protocols and procedures for electronic discovery, including potential cost-shifting to obtain the discovery should a defendant establish a financial burden in producing the requested

electronic discovery. The Court did not, however, provide a mechanism to preclude and prevent electronic discovery, as the proposed amendment to the federal rules seeks to do.

In fact it stands to reason that documents that are electronically stored are usually more easily accessible, which is why such documents are electronically stored. Any company, individual, or office for that matter that has the ability to store large quantities of records electronically will most likely have an organized system in which to retrieve said records, either by file numbers, index numbers, case names or even key-words. In the event that the electronic data is not reasonably accessible, then said defendant can argue that the production would be burdensome without any mechanism for plaintiffs to challenge the designation -- and thereby thwart/prevent this form of discovery

The next proposed amendment is to Fed.R.Civ.P. 26 (b)(5)(B) which would allow a party to claim a privilege within a reasonable time after having already produced information. This also will greatly frustrate discovery. It will grant defendants a second claim of privilege, when it was clearly waived once such information is filed. This proposed amendment allows a defendant's attorney to haphazardly produce information with the reward of claiming a privilege by merely claiming, "law office failure" or some other excuse. By analogy, should one of our plaintiffs testify at deposition about a privileged matter or should my office provide privileged information – we do not get a do over. Rather, this is the very reason that courts encourage and some mandate the use of privilege logs.

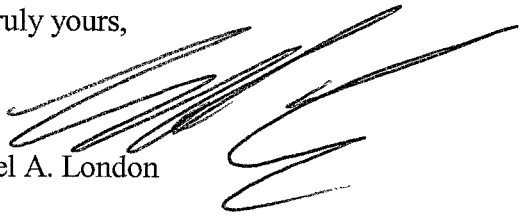
Lastly, the third proposed amendment, which is to Fed.R.Civ.P. 37, would allow a party an exemption from sanctions in certain cases when it destroys electronic files through "routine" use of their document retention system. This provision would clearly and unequivocally invite a party to unscrupulously eliminate damaging evidence so long as it is done in a "routine" manner without the penalty of sanctions.

The other real danger of this amendment is that it will permit and possibly even encourage a party to install document retention systems that destroy data every year, every quarter, or more frighteningly, every day. This amendment will thus permit these parties to do so – so long as the destruction is made in accordance with the party's "document retention policy". This provision provides no recourse for this destruction of potential evidence.

In conclusion, the three proposed amendments will clearly frustrate the discovery process, which has been advanced over the years and also made more difficult with the rampant use of computers, databases, and electronic storage means. The proposed changes will foster or even provide a mechanism for defendants to disguise information as "not reasonably accessible", to claim a privilege once it may have been waived, and/or to "routinely" destroy electronic files without recourse.

For the foregoing reasons, I respectfully oppose the proposed changes to the Federal Rules of Civil Procedure. Thank you for reading the above, and if you or your staff has any questions regarding my position, please feel free to contact me anytime.

Very truly yours,



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