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VIA EMAIL

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

Re: Proposed Changes to Federal Rules of Civil Procedure Regarding Electronic Discovery

Dear Committee Members:

My name is Kathryn Palamountain, and I am a partner at the law firm of Chavez & Gertler LLP in Mill Valley, California. My practice now focuses on representing plaintiffs in consumer and wage and hour class actions. Throughout my career, I have practiced law on the civil side and have almost always represented groups of persons – such as the elderly, children, and working families – who do not have ready access to legal services. In the course of my career, I repeatedly have seen how crucial discovery is to establishing liability and to stopping commercial entities and powerful institutions from engaging in unlawful practices. The discovery process increasingly is dominated by responsive and relevant information that is computer-based, or electronic. Given the rise of electronic information, Chavez & Gertler commends the Committee's for making an effort to proactively address electronic discovery issues.

As we explained below, using specific examples from actual litigation to illustrate, Chavez & Gertler LLP submits that some of the proposed civil rule changes directed at electronic discovery are useful and valuable amendments to the current rules, but that a few of the proposed rule changes would make it more difficult for persons harmed by corporate wrongdoing to obtain justice for their claims. Chavez & Gertler appreciates the Committee's rationales for its proposals: excessive costs of production, difficulty of access, and interruption of normal business activities. However, given the very nature of the litigation process, even actions challenging the

most shocking of commercial practices will raise each of these concerns. Hence, the question in considering the proposed rule changes is one of degree, attempting to balance the needs of those bearing the burden of proof against burdens placed on those holding the desired information.

SUMMARY OF COMMENTS

Rule 16

Chavez & Gertler supports the proposal that provisions for disclosure of electronic information be included in the original case scheduling order. In addition to this proposal made by the Committee, Chavez & Gertler believes that two other additions would be valuable:

- the scheduling order also should specify the reasonable steps that the parties will take to preserve electronically stored information relevant to the subject matter of the lawsuit; and,
- should the parties fail to reach agreement on the issue of protection against waiving privilege (proposed Rule 16(b)(6), permit judicial officers to issue rulings regarding privilege.

Rule 26(b)(2)

The Committee has proposed a rule change that states: "On motion by the requesting party, the responding party must show that the information is not reasonably accessible." This proposed amendment represents a sea change from the current state of the law, by seemingly creating a presumption that certain electronic information need not be produced if it is not "reasonably accessible." Chavez & Gertler believes that three (3) supplemental clarifications are necessary to ensure that the balance between providing information and protecting against unreasonable burden is preserved.

- First, the Committee should further define "not reasonably accessible" as "unduly burdensome and costly."
- Second, the Rule should clarify that the party making a claim that information is not reasonably accessible must submit declarations under penalty of perjury establishing this fact, and provide sufficient detail for the Court to assess whether the designation is appropriate.
- Finally, the Rule should permit a Court to consider whether the party seeking discovery may have an opportunity to depose the declarants to test whether or not the "unduly burdensome and costly" standard has actually been met.

Rule 26(f)

Chavez & Gertler agrees that the initial discovery conference should include a discussion regarding the disclosure of electronically-stored information, including the form in which it should be produced. Chavez & Gertler requests that the Committee make a minor change to this rule:

- Consistent with the "not reasonably accessible" standard outlined in Rule 26(b)(2), the Committee should add as a mandatory topic of discussion "the types of electronic information available, and the cost of producing that information."

Rule 37

The proposed changed to this Rule in effect creates a safe harbor for destruction of information that is relevant to litigation. In particular, the phrase "should have known the information was discoverable" is not clear, particularly in light of the "not reasonably accessible" standard. To guard against the interim spoliation of evidence, Chavez & Gertler recommends that Committee alter proposed Rule 37(f)(i) to read:

- "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of an action or reasonably anticipated litigation."

ARGUMENT

I. FAIR OPPORTUNITY TO DISCOVER FACTS RELEVANT TO CLAIMS AND DEFENSES – INCLUDING INFORMATION STORED IN AN ELECTRONIC FORMAT – IS A HALLMARK OF THE CIVIL JUSTICE SYSTEM IN THE UNITED STATES.

As the United States Supreme Court has noted, the discovery rules to which the Committee proposes changes are "one of the most significant innovations of the Federal Rules of Civil Procedure." Hickman v. Taylor, 329 U.S. 495 (1947). As a result of these rules:

> [C]ivil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Id. at 501. Hence, the Supreme Court has expressly found that discovery ensures that the parties can obtain the fullest possible knowledge to further the objective of achieving justice through truth.

In the modern world, information is increasingly kept and stored in electronic forms. Whether to communicate, manage data, or process information, electronic information is ubiquitous and central, both for individuals and corporate entities. By way of illustration, Chavez & Gertler recently has been litigating a case in which communications between a governmental entity and a company were crucial to establishing that the company was aware of its role in creating a threat to public safety. Although some of these communications were in a formal letter format, the full extent of the company's knowledge about the threat to public safety was revealed only after emails between the government (which was not a party to the litigation) and the company were produced.

This illustration is by no means exceptional. Chavez & Gertler now requests electronic discovery as a matter of course in litigation, and our opposing counsel regularly produces documents or information that has come from a digital format. Consistent with my experiences at Chavez & Gertler, a recent study from the University of California, Berkeley, concluded that as much as 93% of corporate information today is in digital format. Skip Walter, *Plaintiffs' law firms no longer as disadvantaged; Technology, legal rulings are leveling playing field between large, small firms*, The National Law Journal, July 5, 2004, § 3. Moreover, the information

stored in electronic form is not always producible in as a paper product. In fact, the information so stored often can only be produced in a digital format. Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64-SUM LAW & CONTEMP. PROBS. 253, 280-81 (2001) (citations omitted).[1]

II. THE PROPOSED AMENDMENTS CREATE AN IMBALANCE BETWEEN THE FULL AND FAIR DISCOVERY OF RELEVANT EVIDENCE AND AN UNDUE BURDEN ON THE PRODUCING PARTY.

A. Failures to Provide Relevant, Requested Evidence Already Riddle Discovery in Civil Litigation.

Although corporate interests frequently advance the idea that electronic discovery is unduly burdensome, in the experience of the attorneys at Chavez & Gertler, one critical problem with the existing civil litigation system is the failure to provide relevant, properly requested information and data on key factual issues that corporations correspondingly assert factual (often erroneous) arguments about.

For example, my firm frequently litigates cases in which the court's ability to manage classwide litigation is called into question by the corporate defendants. These defendants – often entities managing accounts for thousands of customers with outstanding debts –assert that class action litigation is unmanageable in part because the corporation did not see how it could identify consumers affected by the challenged practice except through a file-by-file review. My firm is skeptical of such claims and regularly deposes the "persons most knowledgeable" about the functioning of the company's database system. Not surprisingly, when we are able to question persons knowledgeable about electronic information at the company, it is frequently revealed that in fact the corporation has extensive information on its customers in databases that can be manipulated to identify persons affected by the challenged practice. In other words, my firm needs access not only to the information held in databases but also to the operation of the databases themselves in order to conduct litigation in today's environment.

More disturbingly, my firm has experienced some defendants who failed to provide accurate information or actually provided misleading documentary

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[1] As one federal court has noted, "electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record." *Public Citizen v. Carlin*, 2 F.Supp.2d 1, 13-14 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C.Cir. 1999).

information which was only revealed after the digital file was obtained. For example, one case litigated by Chavez & Gertler involved a railroad accident. My firm needed to obtain crucial data about the operation of the train in the moments just before the accident, including whether or not the horn was blown. The railroad company repeatedly asserted over the course of over two years that no data regarding the train's horn was available; in fact, in the course of discovery the company provided paper print outs of the event recorder data which did not show any such data. However, my firm pressed for a digital copy of the event recorder data, and once obtained, we discovered that not only did the event recorder in fact include such data, but that the digital information revealed that the horn evidence directly contradicted both documentary and testamentary evidence provided by the company.

The experience of the attorneys at Chavez & Gertler is hardly unusual. In fact, our experience is reflected in some of the best known corporate wrongdoing scandals of recent years. As the downfall and destruction of Arthur Anderson indicates, the most critical problems facing the civil justice system today is not an overly burdensome demand on corporations for production of electronic information, but rather that corporate defendants facing investigations or allegations of serious wrongdoing have been repeatedly caught destroying or attempting to destroy crucial electronic records.[2]

In fact, insofar as the proposed rules, and particularly the proffered changes to Rule 37, permit spoliation of evidence, these contemplated changes may run afoul of other federal criminal statutes concerning the destruction of documents. Specifically, a corporation's duties under the document destruction crimes of the Sarbanes-Oxley Act, passed in the wake of the Arthur Anderson / Enron scandal, make it a crime to destroy a "record, document, or other object with the intent to impair the object's integrity or availability for "use in an official proceeding." 18 U.S.C. § 1512(c); see also 18 U.S.C. § 1519 (prohibiting document destruction "in relation to or contemplation of any ... matter or case"). It would be anomalous, indeed, if the FRCP were to permit what the federal criminal laws expressly prohibited.

B. The Proposed "Reasonably Accessible" Standard Will Create an Incentive for Parties to Make Most Electronic Evidence "Inaccessible."

The proposed amendments to Rule 26(b)(2) permit a party to decline to provide electronically stored information in response to a discovery request if it decides that the information is not "reasonably accessible." The Note accompanying

[2] Arthur Anderson employees destroyed thousands of pounds of Enron-related documents after determining that an SEC investigation was "highly probable" and retaining outside counsel to represent it in such an investigation. U.S. v. Arthur Andersen, LLP, 374 F.3d 281 (2004).

the proposed rule explains that "reasonably accessible" electronic information would include information the party routinely uses. Under the proposed rule, if the requesting party moves to compel the discovery of digital information, the responding party can avoid production if it is able to demonstrate that the information is not reasonably accessible. Once that showing is made, the court may still order the party to provide the information at issue if the requesting party shows good cause.

Chavez & Gertler is concerned that the fact that the responding party can self-designate what's "accessible" or not provides responding parties an incentive to create obstacles to discovery. We are also troubled by the fact that it would change the fundamental presumption in the FRCP – that all non-privileged information relevant to the claim or defense of a party is discoverable. Instead, under the new rule, electronic information that is not "reasonably accessible" would be presumptively outside of the scope of discovery. This differs from the approach in leading case law which applies a multi-factor test to determine whether cost-shifting is appropriate when dealing with a discovery request for inaccessible electronic data, but assumes that such data, to the extent relevant under Rule 26(b)(1), is at least discoverable. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318, 322 (S.D.N.Y. 2003). Finally, the proposed rule could pave the way to future adoption of a rule presumptively excluding from discovery paper documents that are not "reasonably accessible" because, for example, they are stored in a giant warehouse in some remote location among millions of other irrelevant documents.

To avoid these potential pitfalls, Chavez & Gertler suggests that the Committee further define "not reasonably accessible" as "unduly burdensome and costly." Under this standard, the party identifying information as not reasonably accessible would have the burden of proving that the production of such information would be unduly burdensome and costly. In addition, the Committee should clarify the rule such that the party making such a claim must submit declarations under penalty of perjury so establishing, and provide sufficient detail for the Court to assess whether the designation is appropriate. Finally, to ensure that discovery would in fact be unduly burdensome and costly, the Rule should expressly permit a Court to allow the party seeking discovery to depose the declarants to test whether or not the standard has actually been met.

C. The Proposed Changes to Rule 37 Will Create a Perverse Incentive for Potential Litigants to Regularly Destroy Electronic Information At Short Intervals.

The Committee's proposed changes to Rule 37 would create a new subdivision (f) intended to protect a party from sanctions under the FRCP for failing to provide

electronically stored information lost because of the "routine operation of the party's electronic information system." This "safe harbor" would not be available if the party violated a preservation order issued in the action, or if the party failed to take reasonable steps to preserve the information after it knew or should have known the information was "discoverable in the action." The Note accompanying the proposed rule explains that the new section is intended to address the contention that suspension of the automatic recycling and overwriting functions of most computer systems can be "prohibitively expensive and burdensome." The proposed rule does not attempt to define the scope of the duty to preserve, and does not address the destruction of electronically stored information that may occur before an action is commenced.

Chavez & Gertler does not believe that any "safe harbor" rule is necessary, as we are unaware of any court which has sanctioned a party for simply following a document retention policy (whether it concerns paper or digital files) which was created and executed in good faith. In any event, the Committee should not adopt a rule that actually creates an incentive for parties to destroy evidence. As the proposed rule is currently written, two such incentives exist.

First, under the proposed rule, it appears that no obligation to preserve evidence arises until after litigation formally commences. However, under the leading case setting forth current law in this area, the duty to preserve electronic evidence may attach at the moment that litigation is "reasonably anticipated." *Zubulake v. NBS*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). The duty to preserve evidence for "reasonably anticipated" litigation is neither new nor unique to the electronic evidence context; Courts have applied the duty to preserve evidence when litigation is reasonably anticipated to documentary evidence as well. *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Ca. 1987). Under the "reasonably anticipated" rationale, it would presumably be improper for a potential litigant to destroy key evidence once litigation pertaining to such information is foreseeable. If a safe harbor rule is to be adopted, it should certainly not remove such an obligation.

Second, Chavez & Gertler is concerned that, even after litigation is pending, the proposed changes to Rule 37, taken together with the proposed changes to Rule 26, would mean that parties would be able to engage in the routine destruction of electronic data. Specifically, the phrase "should have known the information was discoverable" is not clear, particularly in light of the Rule 26 standard that provides that information which is not "reasonably accessible" may not be "discoverable." We are concerned that this "safe harbor" would create an incentive for litigants to set up

computer systems that "routinely" overwrite or purge data at very short intervals in order to thwart discovery in litigation.

To guard against the spoliation of evidence under these circumstances, Chavez & Gertler recommends that Committee alter proposed Rule 37(f)(i) to read: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of an action or reasonably anticipated litigation."

CONCLUSION

In conclusion, Chavez & Gertler strongly urges the Committee to modify the proposed amendments to Rules 16, 26(b)(2), 26(f), and Rule 37(f). Unless the suggested modifications are made, the Committee's attempt to balance the policy interests of fair information exchange and avoiding undue burden's could in fact create perverse incentives making such discovery more expensive while also preventing litigants from obtaining the information necessary to avoid litigating claims and defenses without knowing the facts.

Respectfully Submitted,

Kathryn C. Palamountain