04-CV-007
Request to Testify
1/12 San Francisco

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09/16/2004 12:46 PM

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Subject Request to Testify re Proposed Federal Rules (Civil)

I would appreciate the opportunity to testify regarding the proposed amendments to the Federal Rules of Civil Procedure regarding electronically stored information.

I would prefer to testify at the hearing in San Francisco on January 12, 2005. (I will attend the other two hearings as well).

Many thanks for your assistance.

Tom Allman
Mayer, Brown, Rowe & Maw
Chicago
Former Sr.VP and General Counsel, BASF Corporation (1993-2003)
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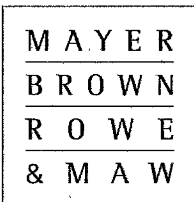
04-CV-007
Testimony
1/12 San Francisco



MEMORANDUM

December 28, 2004

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TO: Committee on Rules of Practice and Procedure, c/o Peter G. McCabe, Secretary

FROM: Thomas Y. Allman

RE: Proposed E-Discovery Rule Amendments

I. Introduction

Thank you for the opportunity to comment on the proposed e-discovery amendments to the Federal Rules of Civil Procedure ("Federal Rules" or "Rules"). In my former capacity as General Counsel of an industrial corporation,[1] I became convinced that appropriate amendments to the Federal Rules are needed to maximize the effectiveness of e-discovery.[2] I commend the Committee for scheduling Public Hearings on the excellent proposals appended by the Civil Rules Advisory Committee ("the Rules Committee") to its August, 2004 Report (the Proposed Amendments") and I look forward to discussing them in San Francisco on January 12, 2005. While I believe that my comments are consistent with and representative of those held by others in the corporate community, I emphasize that the positions stated are my own and are offered as such.

II. The Problem

The increased dependency on electronically stored information in modern business has necessarily affected the discovery process, which lies at the heart of civil litigation. Electronic information is infinitely more ubiquitous in its ease of reproduction, distribution, and misuse and presents correspondingly more complex issues when one is asked to produce "all" copies of specific information in discovery. Instead of discrete content which exist in finite and tangible form in predictable storage locations, the content exists in a distributed, dynamic environment; moreover, the risk of losing that content has spawned new layers of temporary duplication, the sole purpose of which is to temporarily assure that information can be reconstructed if the electronic storage systems are disrupted or destroyed. Thus, the theoretical underpinning of the

[1] BASF Corporation, Mt. Olive, New Jersey (1994 – 2004).
[2] *See* Allman, "The Need for Federal Standards Regarding Electronic Discovery," 68 Def. Couns. J. 206 (2001) and Allman, "The Case for a Preservation Safe Harbor in Requests for E-Discovery," 70 Def. Couns. J. 417 (2003).

existing discovery provisions – that discovery involves discrete things which can be easily assembled – has been undermined by technological advances.

This change has led to a dramatic increase in the costs and complexities of compliance with discovery obligations and to the growth of an unhealthy "sanctions practice," with a focus not on the merits of the case but on the ability to paint an adversary as uncooperative in regard to preservation obligations. In part, these developments result from rigidity and inflexibility in the Federal Rules which:

- Do not differentiate among differing types of electronically stored information based on costs of preservation and production and benefits to the case;
- Provide inadequate incentive to restrain requesting parties from making unreasonable demands for electronic information; and
- Permit sanctions for failure to preserve information despite good faith efforts to identify and preserve electronic information involved in routine system operations.

My comments focus on the proposals which address these key issues.

III. Evaluation of the Effectiveness of the Rules Committee Proposals

A. The Time for Action is Now

Proposals to amend the Federal Rules must address the argument that, over time, change is better left to the evolution of case law. While there have been many fine efforts by individual members of the Federal Judiciary to address these issues, I believe that focused amendments which establish broad principles are needed at this time. The change in focus from hard copy to electronic information will not go away. While "best practice" compilations such as the Sedona Production Principles provide practical guidance, they must function within the general framework of the Federal Rules.[3] Anecdotal experience emphasizes that uniform national standards are needed to help avoid the balkanization of discovery on a geographic basis. While a few District Courts have attempted some reform, those attempts are characterized by a lack of consistency across districts and an inability to address core issues due to inherent limitations on the local rulemaking process. Accordingly, given the appropriate deliberate nature of the Federal Rules amendment process, it is right to begin now.

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[3] The Sedona Production Principles are an attempt to summarize the "best practices" in current preservation and discovery practice. *See* "The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production" (January 2004), available at http://www.thesedonaconference.org. The Production Principles are consistent with the proposals of the Rules Committee. *See* Allman, "Proposed National E-Discovery Standards and the Sedona Principles," ___ Def. Couns. J. __ (2005) (forthcoming January 2005). By way of full disclosure, I am a member of the Steering Committee of the Sedona Working Group on Best Practices for Electronic Document Retention and Production, publisher of the Sedona Production Principles.

B. Only Reasonably Accessible Information Should be Preserved and Produced Without a Court Order

The Rules Committee proposes to address the undifferentiated treatment of electronically stored information by limiting initial production obligations to information that is "reasonably accessible." (Rule 26(b)(2)("A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible."). This straightforward and useful distinction is followed by a fairly complex provision designed to clarify that "for good cause" a court may order production, subject, of course, to the limitations contained in other provisions of Rule 26(b).

I would recommend that the proposal be modified for reasons of clarity as follows:

> *"A party shall provide discovery of any reasonably accessible electronically stored information sought by a requesting party without a court order. On motion by a requesting party for other electronically stored information, the court may order such discovery for good cause and may specify terms and condition, including appropriate shifting or sharing of extraordinary costs relating to such production."*

A major practical benefit from this distinction would be a reduction in uncertainty over the need to preserve inaccessible information. There is, in my experience, no single greater source of angst to producing parties with large volumes of litigation and multiple electronic information systems than issues involving preservation of inaccessible information. The common law obligation to preserve information in anticipation of litigation varies greatly between individual cases. Parties must be free to make their best judgments in good faith without unnecessary risk of second guessing. *Accord,* Sedona Principle No. 6 ("Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents"). As noted in the proposed Committee Note to Rule 37, "[i]n most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order" (Proposed Amendments, p. 34). That observation, which should also be explicitly incorporated into the discussion of the impact of Rule 26(b)(2) in the Committee Note at page 13 of the Proposed Amendments, is probably about as definitive as one can expect. However, it constitutes an important advance in understanding and will be of major assistance to courts and parties.

The suggested rewording set forth above replaces the affirmative "identification" requirement in the original Committee proposal with the traditional approach for handling discovery requests. The requesting party would have the obligation to specify the information sought, which could be clarified, if controversial or in dispute, during the mandatory discussion of pending discovery matters, including preservation issues. *See* proposed Rule 26(f) and 26(f)(3). If necessary, a discussion of the types and locations of information deemed

inaccessible would naturally occur. Thus, the identification process could be better described in the Committee Note on page 13 of the Proposed Amendments as one where "[t]he responding party *should* identify, *when sought by a producing party,* the *type of* information it is neither reviewing, *preserving* nor producing on this ground." (Material in italics added). I believe that requiring parties to affirmatively "identify" such information in each instance, regardless of the request of the party seeking discovery, even if restricted to a generalized description, creates a trap for the unwary. The risk is that a detailed log of omitted information, analogous to a privilege log, would be sought, thus encouraging ancillary litigation and unnecessary controversy.

Finally, I suggest that the description of "reasonably accessible" in the proposed Committee Notes be improved by reference to the purpose for storage of and the ease of access to the electronic information. This concept is captured well by Sedona Production Principle No. 8, which provides that "the primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval . . . . "

C. A Preference for Cost-Shifting Should be More Clearly Articulated

The process for ordering production of inaccessible information under Rule 26(b)(2) does not, in my view, adequately deter unreasonable requests for information which is burdensome to produce but has no substantial value to the case. This problem is not confined to situations where there is an imbalance in the amount of electronic information held by each side (which significantly reduces one party's incentive to be reasonable in its demands). For a variety of reasons, some parties persist in demanding unreasonable production, which imposes extraordinary costs and consumes valuable court time to redress. Absent the negative incentive provided by predictable cost-shifting, this is likely to continue. Accordingly, the proposed Rule 26(b)(b) procedure should be clarified, as noted above, by addition of a reference to "*appropriate shifting or sharing of extraordinary costs*" and the Committee Notes should articulate a preference that Magistrates and District Courts utilize their power to allocate such costs when appropriate.

D. The Rules Should Address Unreasonable Sanction Practice

It is unrealistic to expect that parties can sequester every remotely relevant piece of discoverable electronic information in advance of litigation. Implicit in some reported and unreported decisions, however, lurks an apparent conviction that this is, indeed, both required and feasible and that the failure to do so is evidence of intentional spoliation of evidence. Unfortunately, this encourages "sanctions practice" – the repeated and unwarranted seeking of sanctions even in those instances where common sense indicates that they do not belong. However, preservation in anticipation of litigation is not an absolute value, undiluted by demands of practical reality. The ordinary operation of information systems necessarily creates - and discards – information on a regular basis. Preservation obligations, however, require only

that a party undertake "reasonable steps" in light of the relevant circumstances. *See* cases collected in support of Sedona Principle 5 (obligation to preserve requires "reasonable and good faith efforts" but "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data"). Experience shows that a well-executed "litigation hold" process relying primarily upon active data and accessible information produces the discoverable information needed to resolve litigation.

Accordingly, I strongly support the Rules Committee declared intent to create a limited "safe harbor" from sanctions for loss of information "which disappears without a conscious human direction to destroy that particular information" (Committee Note, Proposed Amendments, p. 34). Rule 37(f) would clarify that the loss of information due to "the routine operation of the party's electronic information system[s]" should not be subject to sanctions, although I note that the multiple conditions attached risk robbing it of its simplicity and, perhaps, its intended effect.

I have elsewhere suggested that any "safe harbor" under Rule 37 should be conditioned on "good faith" operation of the relevant systems and that sanctions should not be imposed without proof that the party "willfully" acted in violation of a specific order addressing the information system at issue.[4] Combining the Rules Committee approach with these two concepts, Rule 37(f) could require that:

> *"A court may not impose sanctions under these rules on a party for failing to provide electronically stored information that is deleted or lost as a result of the routine operation in good faith of the party's electronic information systems unless the party willfully violated an order issued in the action requiring the preservation of that information."*

I understand the impulse to include, as a condition, additional language conditioning the safe harbor on a demonstration that a party met its preservation obligations in that instance. I would suggest, however, that the "good faith" requirement would more effectively weed out those instances where a party acts to avoid its obligations to respond to unique preservation conditions. This would help avoid confusion in applying "litigation holds" and would not overstep the limitations the Rules Committee acknowledges in this sensitive area.

It is respectfully submitted that a limited safe harbor would also help deter abusive sanctions practice in several ways. It would promote early discussion of preservation options regarding predictable losses from routine operations of business systems. It also would emphasize the need for proof of an element of culpability before sanctions will be imposed under the Federal Rules. This would reduce the incentive to allege that otherwise inevitable losses of electronic information are sanctionable.

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[4] *See* Allman, "The Case for a Preservation Safe Harbor for E-Discovery," 70 Def. Couns. J. 417, 429 (2001).

IV. Supplemental Comments on Questions Raised by the Rules Committee

The Rules Committee identified certain questions in its Report accompanying the Proposed Amendments. The following comments respond to those questions.

1. Proposed Rule 26(b)(2) differentiates in preservation and production obligations based on the nature of the electronic information sought. (See text above for suggested alternative formulation and explanatory comments).

    - **Question from the Committee**: Is "reasonably accessible" adequately defined?
      Answer: It can usefully be improved by reference to the purpose and nature of the storage media utilized and the ease of search and retrieval, as noted in Sedona Principle 8 (See Text).
    - **Question from the Committee**: Are the terms of the production provisions adequate, including those regarding allocating costs?
      Answer: No. A more explicit reference to allocation of costs where the production of inaccessible information is ordered should be included in both the text of the proposed Federal Rule and in the Committee Note (See text).

2. Proposed Rule 26(b)(5)(B) would embody a "best practice" so that privileged information produced without any intent to waive the privilege must be returned if the producing party notifies the requesting party within a reasonable time.

    - **Question from the Committee**: Is a certificate of destruction required if the information is not returned?
      Answer: No. This cumbersome requirement would unnecessarily complicate the Federal Rule as proposed.

3. Under Proposed Rule 26(f)(4), courts would be authorized to enter orders regarding agreements among parties regarding the inadvertent production of privileged materials.

    - **Question from the Committee**: Should the proposed Federal Rule be more general regarding the subject matter of the court order regarding production of privileged information?
      Answer: No. This proposal reflects concepts embodied in Sedona Principle 10 and is consistent with ABA Civil Discovery Standard § 32 (as amended August, 2004), which recommends that parties consider seeking a comprehensive court order regarding inadvertent production of privileged materials.

4. Production requests served under Rule 34(a) may include "designated electronically stored information or any designated documents" including sound recordings, images, data or data compilations "in any medium."

    - **Question from the Committee**: Should the Federal Rule or Committee Note spell out that one must review and produce electronically stored information even if not explicitly requested?
    Answer: It should not be necessary to include such a requirement in the Federal Rules themselves, but the Committee Note to Rule 34 could indicate a general understanding that, in absence of a statement that electronically information is not sought, it is necessarily included.

5. Absent an order or agreement, producing parties must produce electronically stored information as "ordinarily maintained" or in "electronically searchable" form (albeit in only one form).

    - **Question from the Committee**: Is the default rule referencing the two choices "suitably analogous" to existing hard copy practice options (that a party should produce "as they are kept in the usual course of business")?
    Answer: The proposal should focus more on the burdens and ease of production than on the similarity to former practice. The requirement of early discussion in Rule 26 should allow for better self-regulation and if a default form is needed, it should be in a "useable" form. The rule should require the requesting party to designate the form requested and allow the producing party to object and explain the basis for its preference.

6. Rule 37(f) would create a "Safe Harbor" against sanctions under the Federal Rules under certain limited conditions (See text above for alternative proposal and explanatory comments).

    - **Question from the Committee**: Should the safe harbor standard reflect a finding that the party "intentionally or recklessly fail[] to preserve" data before sanctions attach under the Rules?
    Answer: An element of culpability – more than simply negligence - should be required to remove the limited protection provided by the Committee proposal. This could be accomplished without interfering with the inherent power of the Court to punish otherwise sanctionable conduct.
    - **Question from the Committee:** Are the types of routine automatic computer operations such as "recycling and overwriting" adequately described in Proposed Rule 37(f)?
    Answer: The language in the Rule is generally adequate but the word "system" should be made plural ("electronic information systems") in recognition that many types and applications are routinely used. There is no single "system."

RECEIVED 1/21/05

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01/19/2005 12:49 PM

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Subject Supplemental Filing (04-CV-007) re Advisory Commitee Public Hearings

04-CV-007
Supplemental Filing of Testimony 1/12 San Francisco

Dear Peter:

I would appreciate it if you could accept for filing this supplmental Memorandum.

Best regards,

Tom

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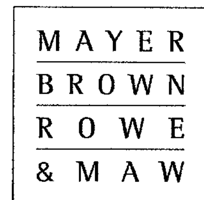

MEMORANDUM

January 19, 2004

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TO: Civil Rules Advisory Committee, c/o Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

FROM: Thomas Y. Allman

RE: 04-CV-007: Supplemental Comments Re Proposed E-Discovery Rule Amendments

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These additional comments are respectfully submitted as a supplement to and clarification of my comments made at the hearing in San Francisco on January 12, 2005.

1. **Preservation Orders/Safe Harbor.** The safe harbor proposed for Rule 37(f) would serve an important purpose by clarifying when a loss of information which attends the "routine operation" of a business system is acceptable. During my testimony, I may have unintentionally created confusion about my position on the role of an existing preservation order. There is no doubt that carefully crafted preservation orders can be essential in preventing unnecessary disputes when the continued operation of certain systems are in question. My concern is with the unfair impact of broad and unfocused orders which make it almost impossible to know precisely what conduct is being prohibited. For that reason, I indicated a willingness to eliminate the reference to preservation orders in Rule 37(f). However, I am persuaded that this type of risk is manageable if preservation of the information whose continued existence becomes the issue was specifically required by the order. Since my proposed language of December 28, 2004 (04-CV-007) was designed to accomplish that goal, I would like to reaffirm that suggestion:

> *"A court may not impose sanctions under these rules on a party for failing to provide electronically stored information that is deleted or lost as a result of the routine operation in good faith of the party's electronic information systems unless the party willfully violated an order issued in the action requiring the preservation of that information."*

I also discussed in my testimony the proposed condition to the safe harbor that a party must have taken reasonable steps to preserve information when they "should have known" of circumstances requiring such action (Subsection (f)(1)). A party operating a business system which routinely deletes information must consider any special circumstances which might trigger a need to take extraordinary steps to suspend operations of those systems. For example,

Guideline Five of the "*The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (2004)*," available at www.thesedonaconference.org., lists various "best practice" triggers for suspension which shuld be considered. However, reference to a duty to act in "good faith" might better convey the broad obligation of a party to act rather than a mere reference to what they "should" have known.

2. **Two-Tier Production and Self-Management.** I strongly support a two-tiered presumptive limitation on production of electronically stored information which is not "reasonably accessible." This mirrors commonly accepted practice in the hard copy world where the ability to retrieve discarded information has long been recognized as a touchstone. Adoption would materially aid producing parties in planning for preservation, since, by and large, reasonably accessible information generally satisfies production requirements in the great majority of cases. Allowing self-management of the determination on "accessibility" in individual cases is fair and consistent with current discovery practice. As several witnesses noted, producing parties are not rationally motivated to make information inaccessible in a business context, and any parties who deliberately seek to do so in particular cases will quickly find that effective remedies, including criminal penalties, apply to those who act to interfere with discovery. Finally, the additional point was made at the hearings that enterprise data bases involving dynamic fields might be "accessible" and also burdensome to actually produce. This reminds us that a party must retain the right to object that a specific production would be unduly burdensome as contemplated by Rule 26(c) and Rule 26(b) (2)(iii). It would be appropriate to emphasize this in the Committee Note.

3. **Effect on Electronic Records Retention Policies.** Finally, one of the most discussed topics among corporate counsel today is the need to implement sound electronic records management policies in light of the incredible increase in electronic information now in use. Adoption by the Committee of the proposals will help clarify the requirements of e-discovery and thus materially assist this process. For example, adoption of a safe harbor for operation of routine systems will reinforce their reasonable use while emphasizing the need for effective procedures to meet preservation obligations by adopting best practices which incorporate the ability to suspend deletions. See, e.g., *The Sedona Guidelines*, cited above. A self-managed presumptive limitation on production of reasonably inaccessible information would help clarify when and under what circumstances disaster recovery systems confined to that purpose need be interrupted. For the reasons stated above, neither parties nor their counsel are likely to abuse this important responsibility, despite concerns expressed by those who may not fully understand the realities of business practices in this age of SOX and heightened compliance focus.

For all these reasons, I believe that the core principles of the Committee proposals are sound and deserve to be enacted. The Committee is to be complimented for its diligence in soliciting diverse comments and taking the lead to provide a balanced recommendation for the Standing Committee and the Judicial Conference.