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Repeat request

To <John_Rabiej@ao.uscourts.gov>,
<James_Ishida@ao.uscourts.gov>
cc "Kathy Beardsley" <kbeardsley@prslaw.com>
Subject ATLA testimony at February 11, 2005, civil rules hearing

Dear Mr. Rabiej,

Please reserve a witness spot at the civil rules hearing for February 11, 2005, for a representative of my client, the Association of Trial Lawyers of America. I expect that the witness will be ATLA's president, Todd A. Smith, Esq., of Chicago.

Thank you.

James E. Rooks, Jr.
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CC: Kathy Beardsley, Assistant to Mr. Smith

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04-CV-012

Before the Advisory Committee on the Rules of Civil Procedure

Judicial Conference of the United States

Statement of Todd A. Smith, Esq., President, Association of Trial Lawyers of America

on proposals for rulemaking on discovery of electronically stored information

Washington, D.C.
February 11, 2005

Good morning. My name is Todd Smith. I practice law in Chicago, Illinois. I am the 2004-05 president of the Association of Trial Lawyers of America (ATLA), and am here today to give ATLA's perspective on the recently published proposals to amend the Federal Rules of Civil Procedure.

As you may know, ATLA is a private bar association of approximately 60,000 members who, for the most part (but not exclusively) represent plaintiffs in personal injury, civil rights, employment, and environmental litigation; the defense in criminal cases; and either side in commercial and family litigation.

I. Input from ATLA's Members.

ATLA has monitored the e-discovery issue since its inception, and several of our members have been participants in the Committee's activities to date. Since the current proposed amendments were published in August, we have been asking our membership to tell us what they think of them. We also urged them to send comments to the Committee. We did this in three steps:

- ATLA members can belong to one or more of eighteen sections, all of which have newsletters. All of our Fall 2005 section newsletters had a two-page article about the proposals with information on how to send comments to the Committee.
- I devoted my president's page in the January issue of *Trial* magazine to this subject.
- In mid-January I sent an email message to our entire membership on this subject.

In each of these steps we explained our emerging concerns about three of the proposals.[1] We gave our members the links to the websites where the proposals are published and urged them to read the proposals for themselves. We gave them the addresses where comments could be mailed, and urged members to send their own comments to the Committee if they felt as we do. We didn't tell them what to say. We gave them a format to follow to relate specific examples from their practices, but no content. We asked them to tell the Committee, if possible, of any relevant, specific experiences they may have had with electronic discovery, to report on how well the present rules worked, and to tell the Committee how their cases might have been affected if the current proposals had been in force when they were litigating. I believe the spirit in which we approached our members is best summarized in the closing of my email to the full membership:

> *The rulemakers welcome all comments on their proposals, whether favorable, adverse, or neutral—especially from practitioners who have substantial experience to relate. They consider all comments carefully, and they expect a robust debate on the subject of e-discovery. As always, the way to preserve an effective discovery regime, with a level playing field, and to retain our system of notice pleading, is to tell the rulemakers the truth about how discovery works in practice on the consumer side, in both the state and federal courts.*

Based on what we have heard back from our members in this process, and on a review of the comments posted to date on the Judicial Conference's website (www.uscourts.gov), it is clear that many lawyers who represent consumers and personal injury victims believe that, if adopted, these proposals would invite additional discovery abuse, give corporate litigants procedural and substantive advantages beyond those they already enjoy, and continue what we feel is a steady erosion of the right to discovery. Our members are also concerned about the effect the proposed rules might have on practice in the state courts because of the well-known "trickle down" of the federal rules into the state rules. Members told us that they believe that the present federal rules generally work well for all kinds of discovery, even in complex cases, and need little if any change. A brief review of the latest comments posted on the Judicial Conference's website shows that lawyers who represent businesses (albeit not large corporations or casualty insurers), both as plaintiffs and as defendants, are also opposed to one or more of the proposals.

I will not attempt to address all of the arguments that have been raised for and against the proposed amendments. Other commentators—some of them ATLA members, some not—have made those arguments ably.[2] Rather, I want to address what we think are the general problems that would

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[1] The three proposals that give us great concern are: the proposed amendment to Rule 26(b)(2) (the "not reasonably accessible" proposal); the proposed amendment to Rule 26(b)(5)(B) (the proposal on claims of privilege); and the proposed amendment to Rule 37 (the "safe harbor" proposal).

[2] *See, e.g.*, comments opposing the proposed amendments filed by Keith L. Altman, Gary M. Berne, William P. Butterfield, Magistrate Judge Ronald Hedges, Steven J. Herman, Michael J. Ryan, Gerson H. Smoger, Anthony Tarricone, the Chicago Bar Association, the Federal Magistrate Judges Association, and several lawyers from each of the firms of Lerach Coughlin and Lieff Cabraser.

be created by the proposed amendments in actual practice. To that end I'd like to give a rough idea of how we believe these three proposed changes would affect a typical dispute that eventually leads to litigation.

II. The Proposed Rules in Action—a Hypothetical.

Please assume that an Illinois-based corporation, called Company X, makes medical devices. It has a new product, called Product Y. The company has been sued before in products liability actions related to other products it developed, and its management wants to be prepared in advance in case Product Y turns out to have a dangerous defect.

The "Safe Harbor" Proposal.[3] Aware of the advantages they can achieve in civil discovery with a short email retention period, Company X's corporate counsel persuades the company's management to issue a directive to the entire staff to delete email messages (whether business-related or personal) every three weeks—no exceptions. After three more weeks, emails that have been deleted will be removed from the employees' "recycle bins" (as Microsoft Windows calls them), and stored on backup tapes. After six months, the backup tapes will be overwritten, permanently destroying the data.

Company X now has what proposed rule 37(f) would call a new "routine operation [for its] electronic information system"—and it is a routine that is specifically intended to deprive any future plaintiffs of access to information that may prove liability for product defects, to the end that it will prevail in court should it be sued.

A year later, Company X begins to get reports of deaths of patients in whose treatment Product Y was used, including Patient A, who lived in California. One of Company X's employees, Engineer Z, mortified by the patient deaths, sends an email to the rest of the engineering staff with the reference line "Product Y: Reports of Patient Deaths." The message says, "I told you so. I sent at least a dozen emails about this before Product Y was shipped. Now we'll get sued." Engineer Z was referring to earlier emails sent among the engineers in which he warned that he thought the product would malfunction and that patients could die as a result. Another engineer prints a copy of the email and adds it to his file of miscellaneous Product Y items.

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[3] The proposed amendment to Rule 37 would exempt parties from sanctions in some cases when they destroy electronic files through "routine" use of their document retention systems—even those systems set up with short time periods for destruction. For ease of reference, the proposed language is as follows:

> Rule 37. . . . (f) Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

By this time, all of the other emails have been destroyed "routinely," but not the company's paper records, which it is required to hold for a much longer period of time.[4] Under the "safe harbor" proposal, it appears that no federal court would ever be able to sanction Company X if and when litigation takes place at a later date, because the information was "lost" through the "routine" operation of Company X's email system—whose retention period was dictated not by the Company's information technology department but by its legal staff.

The "Not Reasonably Accessible" Proposal.[5] Two months pass. The family of the deceased Patient A retains Lawyer B, California practitioner, who files suit against Company X in the United States District Court for the Central District of California in Los Angeles, alleging that Patient A's death occurred because of a defect in Product Y. Company X's general counsel receives the complaint, and in due course a set of interrogatories and a request for production of paper documents and electronically stored information is received by the lawyers hired by the company's insurance company to defend it. One of the document requests says, "Produce copies of all email messages relating to Product Y." Company X's lawyers, knowing that they will be permitted to assert that the already deleted emails now on backup tapes are "not reasonably accessible" under the new Rule 26(b)(2), decide that it follows, under the proposed amendment, that the emails should not even be *discoverable*, and they advise Company X's legal department to destroy them. Their advice is followed.

Company X's lawyers then respond to the discovery requests, sending copies of ten recent emails (i.e less than six months old) referring to Product Y which say, in essence, "We've been sued, please call the insurance company." As to all other emails relating to Product Y, the lawyers respond by saying that any such emails, if they exist at all, are "not reasonably accessible," having been "routinely" deleted earlier, even though they are on backup tapes. The lawyers for both sizes meet and confer, but Company X's lawyers are adamant that they will not retrieve or recover the destroyed emails unless ordered to do so by a court.

Under the proposed amendment to Rule 26(b)(2), Company X's own statement that the emails are "not reasonably accessible" is all that is required to put the ball back into the court of Lawyer B. Lawyer B must, if he wants his best chance of proving Patient A's case, demand a hearing and attempt to interest a busy federal district judge or magistrate judge in what has now been turned into

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[4] Paper records are typically held for longer periods of time pursuant to regulatory requirements or on advice of counsel or auditors. ATLA's document retention policy, for instance, calls for tax-related documents to be kept for ten years, payroll records for four, and personnel records for two.

[5] Proposed Rule 26 would be amended to provide producing parties an initial exemption from their current obligation to turn over e-discovery material if they claim that it is "not reasonably accessible." Again, for ease of reference, the proposed language is as follows:

> Rule 26(b)(2). A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

a discovery dispute through predictable use of the new Rule 26(b)(2). The court agrees that there may be earlier emails on tapes that are discoverable, but agrees with Company X's claims that the cost of retrieving and recovering any surviving data will be unreasonable, and orders Lawyer B to bear the cost of the recovery operation if he really wants to get any information that still exists on the backup tapes.

Under the proposal to amend Rule 26(b)(2), Lawyer B has no recourse other than to appeal the judge's decision or to pay for recovery of the information out of his own pocket.

The Proposal on "Claw Back" of Information Claimed to be Privileged.[6] In the meantime, Company X's lawyers have ordered young associates to inspect large quantities of paper documents that Company X was always required to preserve under other applicable regulatory and court rules. One such associate, coming across the email that was printed by Engineer Z's colleague, flags it with a red sticker as needing further review to determine if it is privileged. However, the red flag falls off and the email copy winds up in a pile that says "DOCUMENTS TO BE PRODUCED." Company X then turns over large amounts of paper documents—with appropriate caveats, of course, that it does so without waiving any privilege that may apply to any of the documents.

Reviewing the produced documents, Lawyer B comes upon the email copy and is stunned to see Engineer Z's words, "I told you so." He sends a supplementary request for copies of all of the other email messages to which Engineer Z referred, sends interrogatories asking for the names of all Company X employees who received originals or copies of the "I told you so" email, and notices the deposition of Engineer Z. He also sends Xerox copies of the email to a group of other attorneys who represent families of other patients who died after being treated with Product Y, so that the other attorneys will know that critical documents may have been identified.

When Company X's lawyers see the supplemental request for production, they realize that they face a serious problem. They examine the documents that were produced and see the copy of Engineer Z's email. Knowing that they have the protection of the new Rule 26(b)(5)(B) not only for electronically stored information but for all of their paper records as well, they write to Lawyer B, telling him that the email copy is privileged and was produced inadvertently. They demand that Lawyer B return it to them, keep no copies, and retrieve the copies he sent to the other lawyers.

Under the proposal to amend Rule 26(b)(5)(B), Lawyer B would have to return the email copy and ask all other attorneys who received it to return their copies as well. However, if he cannot use the email copy in his representation of the family of Patient A, a serious miscarriage of justice may

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[6] Proposed Rule 26 would be further amended to create a previously unheard-of right to recover already-produced material that a party later claims is "privileged:" Again, for ease of reference, the proposed language is as follows:

> Rule 26(b)(5)(B). When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

result.

Replying to Company X's lawyers, Lawyer B asserts that he has not only a *right* to use the document, but also an ethical *obligation* under California law to use all information available to him on his client's behalf.[7] He files a motion to compel discovery and makes this argument to the district judge.

The competing arguments would require the federal court to make a ruling—not presently required of a federal court under the existing rules—on this conflict with state law, and its decision could amount to a *de facto* change to that body of law for purposes of federal court practice. Such a result might be beyond the boundaries of the Rules Enabling Act[8] and might offend principles of federalism.

This hypothetical should give a rough idea of our concerns in the context of actual litigation. We need not pursue the case of *Family of Patient A v. Company X* through all of its possible ramifications for me to make my point: these proposed amendments are fraught with danger to litigants, to the courts, and to justice itself. The kind of resistance to discovery that I have described is mild in comparison to much defense conduct in American litigation practice, and it will only get worse if the proposed rules are adopted.

III. The Corporate Culture of Discovery Abuse.

The proposed amendments address alleged problems that are negligible, and they would exacerbate a problem that is substantial. Most discovery in the federal courts, by far, goes smoothly because of the professionalism of the attorneys involved and the careful exercise of authority by federal judges. Serious disputes arise in only a small minority of cases.[9] The complaints that this

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[7] *See*, e.g., *Aerojet-General Corp. v. Transport Indemnity Insurance*, 18 Ca. App. 4th 996, 22 Cal Rptr. 2d 862 (Cal. App. 1993), under appeal on other grounds, in which the appellate court stated in dictum that

> once [the lawyer for the plaintiffs] had acquired [information from defense counsel's law firm in a manner that was not due to his own fault or wrongdoing, he cannot pruge it from his mind. *Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf.*

18 Cal. App. 4th at 1006, 22 Cal. Rptr. 2d at 867-68 (emphasis added).

[8] 28 U.S.C. §§ 2071-2077. The Act grants authority to the federal courts to make their own rules. However, its § 2072(c) provides that "such rules shall not abridge, enlarge or modify any substantive right."

[9] *See* DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL AND CLOSED FEDERAL CIVIL CASES (Federal Judicial Center study, 1997) and DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (Rand 1998), in which it was stated,

> The empirical data show that any problems that may exist with discovery are concentrated in a

Committee hears about astronomical discovery costs refer to an even smaller number of cases, and high costs are almost always related to intensive efforts to defend high-stakes cases.

In ATLA's view, the greatest current problems of discovery practice are not the amount of paper involved or the number of electronic records. We believe that the really substantial problem in the area of discovery is the well-documented, continuing, obdurate recalcitrance of defendants in tort litigation (and, judging from the reported cases, in business litigation and regulatory matters as well) to make reasonable and necessary discovery in good faith.[10] This culture of discovery abuse, which has vexed both consumer attorneys and the courts for decades now, can be illustrated by just a few examples from the paper-based discovery era involving automobile products liability, [11] tobacco litigation,[12] and financial services/securities litigation.[13]

> minority of cases. Subjective information from our interviews with lawyers also suggests that the median or typical case is not "the problem." It is the minority of the cases with very high discovery costs that are the problem, and that generates the anecdotal parade of horribles that dominates much of the debate over discovery rules and discovery case management.
>
> These findings suggest that policymakers consider focusing discovery rule changes and discovery management on the types of cases likely to have high discovery costs, and the discovery practices that are likely to generate these high costs. More attention is clearly needed on how to identify those high discovery cost cases early in their life, and how best to manage discovery on those cases.

DISCOVERY MANAGEMENT at 74-75.

[10] *See generally* FRANCIS H. HARE, JR., ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES (ATLA Press, 1994).

[11] *See, e.g.,* Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969) (Ford fined for failure to obey court order to make discovery); Traxler v. Ford Motor Co., 576 N.W.2d 398 (Mich. App. 1998) (Michigan Court of Appeals, operating under rules similar to the present Federal Rules, affirmed a trial court's decision to order a default judgment against defendant Ford. In so doing, the court made a point of quoting from the trial judge's opinion:

> What plaintiffs' counsel discovered . . . was disgusting; no other word would be accurate. For over two years, Ford had concealed very significant documents and information, and, worse, had blatantly lied about those documents and about the information in them; any word other than "lied" would understate what Ford did. . . . After carefully reviewing plaintiffs' discovery requests and some of Ford's responses (hundreds of pages), studying several rounds of briefs, and listening to counsels' very helpful oral argument, this Court had to agree that an outrageous fraud has been perpetrated by Ford . . . and that the sanction of a default . . . is the appropriate response.

576 N.W.2d at 400; Bollard v. Volkswagen of Am., Inc., 56 F.R.D. 569, 583 n. 4 (W.D.Mo. 1971) (observing that "[e]xperience has shown that, for some reason, possibly to avoid class actions, defendants in motor vehicle products liability cases based upon defects in design and workmanship have been unusually evasive and loathe to make discovery").

[12] *See, e.g.,* Smith v. R. J. Reynolds Tobacco Co., 630 A.2d 820 at 826 n. 7 (N.J. Super. App. Div. 1993) (suit seeking compensation from Reynolds for plaintiff's lung cancer), in which the New Jersey Superior Court accepted in evidence a memo from defendant's counsel, uncovered in the course of paper-based discovery, that stated in part,

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make

The defense strategy of resistance to discovery arguably reached a new level in 2004 a well-publicized instance in which a tort defense lawyer gave the following advice to attendees at a CLE program on nursing home litigation:

> I can't tell you how much I would encourage you defense attorneys to not give over any document willingly, other than the [medical] chart. . . . People give over stuff not realizing it. I mean, we try to fight everything . . . Because we find that fifty percent of the time plaintiffs' attorneys had asked for something, we give them an excuse why we can't give it to them—because it's privileged, or this or that, and they never make a motion, and then they never get it. . . .[14]

The above examples strongly suggest that, as bad as the problems would be if the proposed amendments are adopted, they would be nothing new. They would be merely an extension of corporate resistance to discovery into new media. As comparatively new as the e-discovery phenomenon is, erasures of email messages and the creation of chronologically short retention requirements have already played prominent roles in recent regulatory matters and litigation involving, for instance, securities regulation,[15] employment discrimination,[16] and the federal

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these cases extremely burdensome and expensive for plaintiffs' attorneys, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [our client's] money, but by making that other son of a bitch spend all his.

Significantly, the memo was introduced by the plaintiff's attorneys *not* in an attempt to obtain sanctions against Reynolds, but to persuade the trial judge that they should be allowed to withdraw from the case because they no longer had the financial resources to prosecute it given the defense lawyers' obstructive approach to discovery in the case.

[13] *See, e.g.,* In re the Prudential Ins. Co. of America Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997) (suit alleging deceptive sales practices in which the court held that the insurer's consistent pattern of failing to prevent unauthorized document destruction, even though no willful misconduct occurred, warranted sanctions).

[14] Remarks of Donald D. Davidson, Esq., at a CLE seminar in New Jersey on March 6, 2004. Source: audio tape of proceedings at New Jersey Institute for Continuing Legal Education (NJICLE) course no. S1330a-9927, "Litigating Nursing Home Cases," March 6, 2004. The tape is for sale by NJICLE, One Constitution Square, New Brunswick, New Jersey 08901-1520, www.njicle.com. (NJICLE is a joint venture of the New Jersey State Bar Association, Rutgers—The State University of New Jersey and Seton Hall University.)

[15] In 2002 major fines for failure to preserve email messages were levied by the SEC against five Wall Street brokerage firms: Goldman Sachs, Salomon, Morgan Stanley & Co., Deutsche Bank Securities Inc., and U.S. Bancorp Piper Jaffray Inc. *See* "Five Wall Street Firms Fined Over E-Mails," Reuters wire dispatch, Tuesday, December 3, 2002, www.washingtonpost.com/wp-dyn/articles/A2687-2002Dec3.html.

[16] The recent *Zubulake* employment discrimination litigation is a prime example of the issues that can arise around electronic discovery—and that can be dealt with under the existing federal rules. It is cited by both sides in this debate as authoritative.

Zubulake is an employment discrimination action brought by an equities trader against her former employer for gender discrimination, failure to promote, and retaliation. The six decisions (to date) have addressed numerous e-discovery issues: *See* Zubulake v. UBS Warburg LLC,, 217 F.R.D. 309 (*"Zubulake I"*) (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); Zubulake v. UBS Warburg LLC,

government's fraud litigation against several major tobacco companies.[17]

In view of this record, ATLA is concerned that arguments are being advanced in this debate by entities that have been sanctioned by federal judges in the past for discovery abuse. The corporate side is not coming to this debate with clean hands. We see nothing in these proposals to change the federal court rules that can deter such conduct in the future—and many things that may enable even worse conduct.

IV. Satellite Litigation.

Should any of the proposed amendments eventually become part of the Federal Rules of Civil Procedure, they will inevitably engender satellite litigation of three types:

- **The meaning of the rules.** The need to interpret the rules will create satellite litigation. If the disputes are serious enough, that process could easily occupy ten years, during which the exact meaning of the rules will be unclear. Busy federal judges will have to devote even more time to discovery disputes than they do already. Costs to litigants on both sides will increase, but with different effects. Those on the corporate side will simply absorb the costs and come back to the Committee to complain about costs getting even higher. On the consumer side, however, it will result in the curtailment of legitimate discovery requests, the abandonment of some meritorious cases, and miscarriages of justice when other meritorious cases are lost.

- **The applicability of the rules.** Producing parties' resistance to discovery requests will work its way into the courts in motion practice over specific applications of the rules.

- **The validity of the rules.** Finally, I have absolutely no doubt that, if amended Rule 26(b)(5)(B) is adopted, allegations will be made that it reaches beyond the rulemaking authority given by Congress to the federal courts under the Rules Enabling Act, and possibly

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No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") (addressing Zubulake's reporting obligations); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (allocating backup tape restoration costs between Zubulake and UBS); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (ordering sanctions against UBS for violating its duty to preserve evidence); Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243 (SAS) (S.D.N.Y. July 20, 2004), 2004 WL 1620866 ("*Zubulake V*") (Employer bank *and its counsel* sanctioned for deletion of emails, late production of documents, failure to impose a "litigation hold," and failure to safeguard backup tapes; required to pay a variety of costs for redepositions, etc.; negative inference jury instruction would be given); and Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243 (SAS) (S.D.N.Y. Feb. 3, 2005), 2005 WL 266766 ("*Zubulake VI*") (denying defendants' motion to assert an affirmative defense based on after-acquired evidence).

[17] United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21 (D.D.C. 2004) (court fined tobacco manufacturer Philip Morris $2.75 million dollars plus costs for destruction of more than two years' worth of email messages during the federal government's fraud litigation against several tobacco companies).

even that, in operation, the rule violates principles of federalism. Although I am reluctant to say it, if I were representing a client who would be disadvantaged by the amended Rule 26(b)(2)(B), and if the interests of justice required it, I would feel obligated to bring such a challenge myself.

There may be even more serious consequences. If the Committee goes forward with the three proposals I have discussed above, it will have taken a particular side in a serious partisan dispute—one that goes beyond the law into areas of policy and politics. The comments made to the Committee to date show the partisan nature of the debate clearly. The demarcation lines are obvious. With few exceptions, corporate lawyers and defense-side litigators are lined up in support of the proposed amendments, and consumer-side lawyers ("plaintiff lawyers," if you wish) are opposed. The arguments that are made about the need for astronomical amounts of storage space and enormous costs of compliance with discovery are, to put it bluntly, red herrings. The impetus for these proposals for amended rules come from the corporate bar, not from the technology community. ATLA believes that the proposals are not really about storage space or money at all. Rather, they are about seeking partisan advantage in the litigation process.

If there must be further battles over discovery they should be fought in court, not in the Advisory Committee. Federal judges presently have all the authority they need to handle any problems that arise involving electronic discovery. One need only look at the *Zubulake* decisions to see that. It is far better to resolve specific questions that arise, on a case-by-case basis, than to try to dictate answers in advance with rules of broad effect.

V. Conclusion.

ATLA commends the Advisory Committee and its Discovery Subcommittee, both for the prodigious amount of work you have done on this subject and for your continuing openness to input from the bar and from the public. We regret that we cannot support the three proposals I have discussed.

However, we believe that they are unnecessary, unbalanced in their effect, and represent such bad policy that they cannot be made acceptable through adjustments of language. Accordingly, ATLA urges the Advisory Committee to abandon all three proposals.

ATLA takes no position on the other proposals before the Committee.

If the Committee has questions that cannot be answered here today, or if matters arise during the rest of the hearing that call for further ATLA comments, we will file supplemental comments on or before February 15. Otherwise, this statement will serve as ATLA's comments on the proposed amendments.

Thank you. I will now try to answer any questions you may have.

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2/15/05

Before the Advisory Committee on the Rules of Civil Procedure

Judicial Conference of the United States

04-CV-012
Supplement to 2/11 Testimony

Statement of Todd A. Smith, Esq., President, Association of Trial Lawyers of America

on proposals for rulemaking on discovery of electronically stored information

Washington, D.C.
February 11, 2005

Supplement to Hearing Testimony

(This Supplement adds Mr. Smith's testimony on two matters that were not included in Mr. Smith's written statement.)

A Real-world Example of a Privilege Problem

In my written statement I offered a hypothetical case to show how ATLA members think the proposed rules could have a negative impact on litigation. The case of *Family of Patient A v. Company X* is a hypothetical, but the danger posed by any rule that would give cover to litigants who want to "claw back" documents or other information that will actually prove negligence or other wrongdoing is *anything but* hypothetical, and talking about cases that don't really exist can trivialize this process and get us away from what the focus must be.

Let me give you an example of a real privilege problem from my own practice. It doesn't involve electronic discovery, but the proposed Rule 26(b)(5)(B) on recovery of documents under a claim of privilege is not limited to electronic evidence. It would apply to paper documents as well.

Last year I was representing a medical malpractice victim. We were well into the case, and were at the stage where the main question was whether the health care providers would settle or insist on taking it to trial. One day I received an item from the defense counsel's office which looked to my assistant like a letter to me. It was in an envelope addressed to me, and of course my assistant opened it and put it with other mail I needed to read.

It was a two-page letter. Partway through the second page, I realized that the letter was not

intended to come to me at all. It was a letter from the defense counsel to a representative of a malpractice insurer whose insured was a defendant in the case.

I was amazed at what I saw. It wasn't about some fact that I hadn't learned or some document I hadn't discovered yet. It was much worse than that. The lawyer was telling the insurer that he had consulted with an expert witness (a medical doctor) whom he had used a number of times before. He wrote that the doctor had told him that the provider clearly had not satisfied the standard of care for the medical specialty involved, and that there was considerable exposure. The lawyer added, however, that the doctor had told him that if the case went to trial he would still be willing to take the stand and testify that the standard of care had been met!

In short, I was looking at a letter that said, "Don't worry. Our expert will lie for us."

I won't ask you what I should have done with that letter, although we can talk about that if you'd like. I won't ask you to put yourself in my shoes, or in the defense lawyer's shoes, or in the judge's shoes, or even or in the malpractice victim's shoes. Whose shoes they are shouldn't matter. *Justice* matters. If I get a letter like that, and if the defense lawyer is allowed to retrieve it, and if I can't use it or refer to it at trial, is justice served? Are we here just talking about what should be done when a secretary reverses the envelopes for two letters?

We aren't. Ultimately, we're talking about achieving justice for human beings. I claim that anything that gets in the way of that is unacceptable, and I believe that these proposals would get in the way.

Evidence of it Professionals' View of Email Retention/destruction Programs

In my written statement I also expressed our belief that many of the arguments that are made about the need for astronomical amounts of storage space and enormous costs of compliance with discovery are red herrings, and that the real impetus for these proposals for amended rules comes from the corporate bar, not from the technology community.

Just few days ago at ATLA we discovered some fascinating statements on that point, which didn't come from lawyers or judges. They came from a discussion among people who ought to know—nineteen senior information technology professionals. These are well-credentialed, vastly experienced professionals who run their departments for some large organizations. It's clear that they are concerned with running the best information systems they can, and as economically as they can. They aren't focused on destroying crucial evidence or dodging discovery requests. Best of all, these people weren't talking to their companies' managements or legal departments or to the news media or the public. They were talking to *each other*, through an open email list maintained by an organization they all belonged to. It was a true, unprompted exchange of technical information and professional opinions.

We downloaded the messages they sent among themselves and put them into Exhibit A

(attached), and we brought 100 copies with us today. Every one of the messages is there, in the same order in which they were written. We also downloaded the rules for permissible use of the email list and put them into Exhibit B (copy attached). We formatted the messages to make them easier to read, but we changed none of the content. We segregated the information that would indicate who the nineteen authors are, who they worked for, and who owns the email list. Under the rules for the use of that email list, the identification information is not confidential, but we removed it to a separate document, Exhibit C. In Exhibit C we also reproduced the entire body of original, raw traffic from the email list, exactly as it was downloaded. We have no interest in publicizing the identities of the message authors, so we are providing Exhibit C only to the Committee at this time. The Committee can make any use of that information that it chooses. The rules for the email list (Exhibit B) make it clear that publishing it would not violate anyone's privacy or reveal anything that any of the authors thought they were preserving. We're happy to provide extra copies of Exhibit C to the Committee if you would like them. We can bring extra copies for the Committee tomorrow if you wish, but we did not bring extras today.

As we look through Exhibit A, we can see comments that address several of the issues that have been raised during the deliberations over these rules: (1) the need for specific email retention policies; (2) the most appropriate length of time for retention of email messages or the most appropriate size of the storage space allotted to users; and (3) whether the push for email limits really comes from the technical people or from the lawyers. We put the comments that we think are most relevant and informative into bold type.

We weren't surprised by anything we saw in them.

(1) With regard to the need for email retention policies, the authors wrote:

- "Many of us don't have a retention policy. I know that the type of organizations I've worked at have not wanted to establish any for email due to the 'once we loose it we'll need it' mentality." [Author #2, Exhibit A p. 2.]

- "I really don't understand the perceived need to clean house every 'X' ticks of the clock." [Author #3, Exhibit A p. 2.]

- "We'd rather our users focus on their work than constantly worrying about their mailbox size." [Author #14, Exhibit A p. 6.]

- "The non-legal benefits to forced e-mail retention basically boil down to speed of the system, available storage space and number of tapes it takes to back up the e-mail system. . . . I would say that unless you have a legal requirement to enforce limited retention you will probably do yourself more harm than good by trying to implement this." [Author #4, Exhibit A p. 2.]

(2) On the subject of appropriate amounts of storage space or time limits on retention, they wrote:

- "We are at 3 months for sent and trash." [Author #10, Exhibit A p. 5.]

- "We have a 365 day retention on email (Received and Sent) and a 7 day retention on Trashed email." [Author #9, Exhibit A p. 4.]

- "We have no limit on any folders whatsoever." [Author #11, Exhibit A p. 5.]

- "I personally have 250,000+ stored email messages and they come in handy more often than you'd think. Storage space is cheap and ease-of-work for IT staff should not get in the way of the organization's mission." [Author # 5, Exhibit A p. 3.]

(3) Finally, as to the legal—not technological—impetus for retention policies, they wrote:

- "We are taking a serious look at our retention policy for email . . . We have a whole staff working group looking at this issue and Legal is involved." [Author # 1, Exhibit A p. 1.]

- "Our mailbox polices were initially a suggestion from our legal department. They wanted very strict rules on the keeping of email (one suggestion was no more that 3 weeks of email to be kept). We formed a staff working group and went to upper management with a proposal. . . . ***We set these limitations based on legal reasons and not on technical reasons***. Email can be very conversational in nature and the last thing you want is to find your [organization] under subpoena and all that email being subject to discovery." [Author #1, Exhibit A p. 7.]

- "Unless you are going to force auto-delete after 30 days and disallow archiving and ban saving e-mail attachments, you are leaving yourself open to discovery requests, right? The funny thing is we have a strict document retention policy for paper. . . ." [Author #8, Exhibit A p. 4.]

- "[The concern about email retention] has to do with the loose, conversational nature of email and not wanting something leaked or discovered in a legal process that could be contrary to our cause, be it a political cause or a legal action in which we are trying to defend ourselves. ***We are also trying to limit the amount of material that would be available in a legal discovery process.***" [Author #1, Exhibit A p. 3.]

Conclusion

In conclusion, let me say that ATLA is glad that the Judicial Conference has the Advisory Committee and the Discovery Subcommittee that it has. We know that the Committees have worked on this subject for years now. We especially appreciate your willingness not just to receive input from the bar and from the public but actually to seek it out, and to accept that the debate has at times become noisy.

I wish we could be supportive of this work product. But we are convinced, based on what we've seen in the past and on everything we've heard back from our members, that there is no need for the three amendments I've discussed this morning. Even if there were a need, all of these proposals are unbalanced, and they would be bad policy for the federal courts to follow. Changing the language can't fix this problem. Regretfully, ATLA urges the Advisory Committee to abandon all three

proposals.

ATLA takes no position on the other proposals before the Committee.

Thank you.

I will now try to answer any questions you may have.

Attachments: Exhibit A referred to above
Exhibit B referred to above

Statement of Todd A. Smith, Esq.,
President, Association of Trial Lawyers of America

E-Discovery Rules Hearing

February 11, 2005

Exhibit A

Exchange of Emails among IT Executives on Subject of Email Retention Policies, March and December 2003

Explanatory note: Following are transcripts of two email threads from an email list used by information technology executives. They were identified and downloaded from the listserver archives by ATLA's Director of Information Technology, who is a member of the list.

The rules established by the list's owner for use of the list **(Exhibit B)** place no restrictions on later use of postings.

No changes have been made in the text, other than to:

1. remove all references to the ownership of the list itself.
2. replace references to the names or types of organizations involved with "organization"; and
3. replace author names with numbers (e.g. "Author #4"), and remove the identifying information to a separate Author Key.

The Author Key and a copy of the raw traffic, in the original format, including all identifying information, constitute **Exhibit C** to Mr. Smith's statement. One copy of **Exhibit C** has been delivered separately to the Advisory Committee for such use as the Chair may wish to make of it, but will not be made available otherwise by ATLA.

Email Thread, March 2003

Date: Tue, Mar 18, 2003
Subject: Email retention - One Last Plea!
Author #1: We are taking a serious look at our retention policy for email and one of the things we need to look at in order to make an intelligent decision is what others in our peer group have as email retention. Right now, we delete any email older than 6 months. There is talk of limiting this to 2 weeks. If you have an email retention policy, what is it? I have posted this twice now and only

gotten 3 responses. Can you please help out a fellow [type of organization] geek? And please, no suggestions on talking to Legal and the like. **We have a whole staff working group looking at this issue and Legal is involved.** Right now I just need to know what you do for a retention time or mailbox size.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author: #2 [responding to Author #1], I'm wondering if the reason that you've gotten so little response is that **many of us don't have a retention policy. I know that the [type of organization]s I've worked at have not wanted to establish any for email due to the "once we loose it we'll need it" mentality.**

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #3: Okay... I'll help out since you've had very little input. But! <grin> I'll do it in my typical contrary style... Why do you need a retention period? I don't understand the reasons for this. Why should it matter to 'the powers that be' how long a user keeps an e-mail in their files? I can see the need to allow users only a finite amount of space in which to store things, otherwise you'd be wheeling in disk storage on a daily basis, but why the limit of 'time'... I don't get it. If their storage place is limited, the mail management just 'happens'... once a the storage space overflows, people naturally delete what they don't need and life goes on. No fuss, no muss. I guess **I really don't understand the perceived need to clean house every 'X' ticks of the clock.**

Date: Tue, Mar 18, 2003
Subject: RE: Email retention - One Last Plea!
Author #4: As [Author #2] said, I didn't reply because we don't have one. In fact, anytime I mention it, I think people actually go through the mental process of reminding themselves not to delete e-mails. The problem is simple - unless you have a legal requirement to purge files, in which case you don't have any need for much discussion - there is no incentive for staff to purge e-mails or participate in a policy of this nature. **The non-legal benefits to forced e-mail retention basically boil down to speed of the system, available storage space and number of tapes it takes to back up the e-mail system.** I have heard loud and long from all supported staff and leadership for years that they would rather have me and my staff swap out multiple tapes weekly, or daily, or add more disk space, than try to enforce them to be more organized. When we've pushed for voluntary e-mail cleanup, they just create PST files on the servers (and PST files take up more room than the compressed native database format that Exchange uses.) **I would say that unless you have a legal requirement to enforce limited retention you will probably do yourself more harm than good by trying to implement this.** If you have a legal requirement, then take yourself out of the loop and let the lawyers be the bad guys. Just my opinions.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #5: We retain as long as the user wants. **I personally have 250,000+ stored email messages and they come in handy more often than you'd think. Storage space is cheap and ease-of-work**

for IT staff should not get in the way of the organization's mission. If a staffer thinks their old email is valuable, we let 'em keep it!

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #1: [Responding to Author #3], **It has to do with the loose, conversational nature of email and not wanting something leaked or discovered in a legal process that could be contrary to our cause, be it a political cause or a legal action in which we are trying to defend ourselves. We are also trying to limit the amount of material that would be available in a legal discovery process.** It would be a lot easier and cheaper to go through 2 weeks of email to see if it has to respond to a legal subpoena than it would be to go through 6 months of email. I recognize we can eliminate (or reduce) this first problem with training on proper use of email communication.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author: #2 I finally made myself auto-archive. At least it puts the stuff on my PC where I can get it, and off the exchange server.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #4: Not to pick nits, but that's an issue best addressed in an appropriate use policy, not data retention. At all. The e-mails that leave your organization are as damaging as the ones that are on your server (more, really). Also, if you are going to implement this, you obviously need to either stop backing up your e-mail system, or routinely overwrite the tapes. Finally, you need to ensure that staff are not doing their own archives (PST) or printing out and keeping the messages. Ugh. This sounds like another classic example of an organization wanting to impose basic management practices through the magic of technology. I don't envy you. :-) By the way - I went through the discovery process with another [type of organization] - 35 banker boxes of paper later (from six backups of only 25 staff) I still couldn't convince my organization to implement something like this. This was also at the height of the Monica Lewinski fiasco, and while I didn't read any of the e-mails that were printing out, you can't help but notice inappropriate images come over the printers. -----

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author: #3 Okay... that's a totally different problem. (One which Enron found a solution to...: only partly kidding.) The issue is now not one of deleting mail (very difficult to do...speak to Oliver North for details.) but of making sure that what is put on record is what you want to put on record. Erasing e-mail is not going to solve the problems you've described. In fact if anything, it might place you on the wrong side of the law. It is not an impossible task to retrieve far more from your computer than what you might believe is there. I could not agree more. Cheers [Author #3]

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #6: Perhaps [Author #4] could include the Auto-Archive feature in his [newsletter?] this

week. I would guess a lot of staff don't understand this feature.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #7: We have put a size limit on users mailboxes but like most others don't have a time limit. But I can share an experience with you. When we configured our current set up the company that provides our network support put a time limit on the email. I didn't manage the function at the time, but I believe they were told by my boss that we couldn't institute a time limit, at least at that time (in the middle of a move, with a thousand other demands being placed on staff. So, they removed the time limit. Or thought they did. Several months later, in the middle of some other routine maintainence, they reactivated the time limit. Monday morning came around and thousands of messages were missing from almost everyone's mailbox. We recovered everything, but in the process we heard loud and clear that not only didn't they want time limits imposed then, but they didn't want arbitrary time limits ever. The most vocal input came from the executive office. All which leads me to my current take on this. Email is conducted by users--it tends not to be delegated. While with training, limits may actually make our support staff and managers more efficient. This training would be a waste of time of senior executives. Being an egalitarian, I'm unwilling to impose limits on some staff but not on others. We haven't, however, yet had a discovery motion we have needed to respond to.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author #8: We are experimenting with size limits on e-mail accounts, but that doesn't really address retention. It used to be official policy to never back-up our e-mail system - but then one of our attorneys lost all of his e-mail in a fiery crash so I was informed to back-up e-mail once per week. The once-per-week tape gets overwritten, but that doesn't really address the discoverability of the e-mail from the mid-90s that staff members keep (and subsequently gets backed up every week.) I have asked our General Counsel to reconsider the back-up strategy, because it doesn't seem all that effective. **Unless you are going to force auto-delete after 30 days and disallow archiving and ban saving e-mail attachments, you are leaving yourself open to discovery requests, right? The funny thing is we have a strict document retention policy for paper**... Thanks.

Date: Tue, Mar 18, 2003
Subject: Re: Email retention - One Last Plea!
Author # 9: We have a 365 day retention on email (Received and Sent) and a 7 day retention on Trashed email. Staff is happy with this. I would prefer to reduce the retention period to 6 months only because of the shear volume of email's on the system (over 90,000 for 55 staff) but that won't happen. I haven't had any requests to increase the retention period beyond 365 days. We just recently changed our backup rotation to reuse the Monday through Thursday backups the following week and the Friday1 reused the first Friday of the following month, Friday 2 reused the second Friday of the following month, etc. Hope this helps.

Date: Wed, Mar 26, 2003
Subject: Re: Email retention - One Last Plea!

Author # 10: **We are at 3 months for sent and trash.** Before I upgraded disk space on the server I was down to 1 month for sent and trash, some people thought that was too harsh so when I add the space I brought it back to 90 days. Currently I don't go into any of the user created folders.

Date: Wed, Mar 26, 2003
Subject: Re: Email retention - One Last Plea!
Author # 11: We have no limit on any folders whatsoever. As you might expect, some people similarly have no personal policy and keep emails until they move on to their next job. What amazes me is that some of these same users don't even use any folders beyond the default folders they start with - making for an unbelievably fat Inbox.

Email Thread, December 2003

Date: Wed, Dec 10, 2003
Subject: Exchange Mailbox Policies
Author # 12: We are in the process of setting policies for mailbox size limit for staff. I would like to know what other organization and companies policies are based on their size and equipment. The size of our organization is 35 staff with about 45 mailboxes. The current Exchange configuration is, Exchange 2000 on a Windows 2000 box. Our current Exchange database is 13.5 GB with 40GB of free space; Microsoft limit for the database is 16 GB. Thanks for your help.

Date: Wed, Dec 10, 2003
Subject: RE: Exchange Mailbox Policies
Author # 13: [Responding to Author #12], I don't think that 16GB limit applies to Exchange 2000. (Not the Enterprise edition, anyway.) And if it does, you could always just partition things out into additional information stores (though, come to think of it, that probably requires the Enterprise edition as well...) All that assumes, of course, that you want to allow that to happen. ;^) We're down to 29 users here; as a general rule, I've put in place a 300MB (!!) limit -- though a few "key" users (i.e. directors) have been given exceptions to that rule. (Yes, there is a user here with a mailbox over 1GB. Most of it is probably unread -- but hey, rank has its privileges...) Three key points: 1) Teach them how to use AutoArchive 2) Teach them not to use e-mail for file storage (note: if you figure out how to get that across, please let me know...) 3) Unless you've got support/buy-in/enforcement from above, you're fighting a losing battle. Start at the top, and work your way down. (If that 16GB limit argument helps in this regard, please ignore the first half of this message... ;^)

Date: Wed, Dec 10, 2003
Subject: RE: Exchange Mailbox Policies
Author # 14: [responding to Author #12], We just recently went through something similar. Over the summer, we ended up unexpectedly running out of space in Exchange information store. At the time, we were running Exchange 2000 Standard (with a 16GB store limit). We had been asking users to keep their mailboxes clean but were holding back on implementing hard policies on the server. We didn't to disrupt our users by deleting old mail they may have needed. For both 2000 and 2003, the 16GB limit applies to Exchange Standard. Enterprise's limit is determined by hard disk capacity.

We discussed at great length our next steps after we filled up the database. After the incident, people realized how serious the problem was and finally got rid of some stuff which got us down to about 14GB - way too close for my comfort. We had three options: Implement strict mailbox size limits Require users to store old mail offline in PST files Upgrade to Enterprise I quickly discounted the second option. I hate PST files for a whole lot of reasons. The first option was discussed at great length but **we'd rather our users focus on their work than constantly worrying about their mailbox size.** In the end, we chose the third option and upgraded to Exchange 2003 Enterprise. It's pricey to do that, but our users don't focus on email management (although they SHOULD, of course), the new Outlook Web Access is the cat's meow and, on Windows 2003 (which we run it on), it has some additional features that make it easier to deal with. We've been running it since late August/early September and not a PEEP. (knock on wood) We have only 50 users, and the migration took less than a day. Budget-wise, it hurt a little, but in the long run, I think it was the right decision.

Date: Wed, Dec 10, 2003
Subject: RE: Exchange Mailbox Policies
Author # 14: [responding to Author #13], The losing battle piece... it definitely would have been a bloody one here... partially why we ditched standard altogether. Sometimes, employees are a little TOO "empowered" :-)

Date: Wed, Dec 10, 2003
Subject: RE: Exchange Mailbox Policies
Author # 15: [responding to Author #14]: I am sure your decision to upgrade will pay off in the long run. Due to budgetary constraints however, we chose your #2 option which consisted of a .pst file in addition to Exchange information Store. We then implemented a combination of server/client side rules to redirect traffic coming through Exchange to PST files on local computer drives. When exchange mailbox is close to max, users get a warning to clean their mailboxes. They then either clean or move unnecessary/unread messages to pst. Those are the only options they are given. Luckily, our execs usually help in carrying out these policies.

Date: Wed, Dec 10, 2003
Subject: RE: Exchange Mailbox Policies
Author # 16: We've got Exchange 2000 standard - definite 16 GB limit - been there, done that, not especially fun (like having a prostate exam). We've got 100 users. They have limits - warning at 70MB, no send at 75MB, no receive or send at 85MB. There are a few exceptions. When a key lobbyist is working on the energy bill, cleaning out Outlook isn't their priority - nor should it be. We typically run up to about 12 GB, then ask the staff to do some cleaning, then we run the utils to comact white space. Then it drops to about 9 GB for a while and builds again. We do this 2 to 4 times a year. We have taught folks to create a .pst on their personal network drive (so it gets backed up) and use this as an archive. I also agree with [Author #13]'s other suggestions on user maint. We plan to move to Exchange 2003 Enterprise in 2005, which will require re-visiting storage needs and backup requirements.

Date: Thu, Dec 11, 2003
Subject: RE: Exchange Mailbox Policies

Author # 1: Our mailbox polices were initially a suggestion from our legal department. They wanted very strict rules on the keeping of email (one suggestion was no more that 3 weeks of email to be kept). We formed a staff working group and went to upper management with a proposal. Here are our current standards: 1. 150 MB limit per user 2. All messages older than 3 months automatically deleted, trash every 7 days 3. NO PST files allowed 4. One folder "Work in Progress" allows for 6 month retention **We set these limitations based on legal reasons and not on technical reasons. Email can be very conversational in nature and the last thing you want is to find your [organization] under subpoena and all that email being subject to discovery.**

Date: Thu, Dec 11, 2003
Subject: RE: Exchange Mailbox Policies
Author # 17: Like many of you, I have problems with mailbox limits. A 300MB limit seems very high to me. I only allow my users a 50MB limit. What I have discovered, and to no ones surprise, is that attachments consume the majority of a persons mailbox. That and the fact that my users don't empty out their SENT and DELETED items folders. With a 50 MB limit, I have one user who has over 9,000 emails in her box. How can anyone ever expect to use that many emails. I would hate to see how many emails a 300MB box contains. 20 I do try to encourage user to archive their files, some like it some don't. I also encourage them to save their attachments to the server, so that those attachments can be accessed by other users. The comment that was made about getting buy in from the top is right on the money. If you can't convince upper management that mailbox limits are necessary, you're fighting a losing battle.

Date: Thu, Dec 11, 2003
Subject: RE: Exchange Mailbox Policies
Author # 18: We had to implement a policy to keep our Exchange DB from growing out of control. We asked everyone to thoroughly clean out their mailboxes and monitored the mailbox sizes. Once everyone had cleaned out their boxes we set their limits to about 15% above the space they were using. The size of our DB has gone from exponential growth to almost no growth. We configured the system to send warning messages, but we don't block any mail based on the limits. A couple people have asked for more space and we have increased their limits as necessary.

Date: Thu, Dec 11, 2003
Subject: RE: Exchange Mailbox Policies
Author # 19: We have the following setup for most of our users: warning - 40mb no send - 50mb no send/no receive - not set We obviously make special exceptions to the limits when dealing with users that need more space (such as the grapic designer and CEO). We have an exchange 5.5 box running on Windows NT 4.0 and a staff of about 100. Our datastore is hovering around 2.5 gb and all is good. I do stress to the staff the importance of cleaning everything out and using personal folders for the stuff they want to keep. Everyone find this reasonable and i've had few complaints

Statement of Todd A. Smith, Esq.,
President, Association of Trial Lawyers of America

E-Discovery Rules Hearing

February 11, 2005

Exhibit B

User Rules for Email List Which Was Source of Exhibit A

Explanatory note: Following are the rules established by the owner of the email list referenced in **Exhibit A** to Mr. Smith's statement. They were identified and downloaded from the listserver by ATLA's Director of Information Technology, who is a member of the list.

Listserver Rules and Etiquette

By joining and using [Owner]'s e-mail lists, you agree that you have read and will follow the rules and guidelines set for these peer discussion groups. You also agree to reserve list discussions for topics best suited to the medium. Basic questions on association management issues either should be posed to Ask[Owner] or asked of [Owner]'s Information Central Department. As with any community, there are guidelines governing behavior on the listservers. For instance, violating antitrust regulations, libeling others, selling, and marketing are not permissible. Please take a moment to acquaint yourself with these important guidelines. If you have questions, contact the list manager noted in your welcome instructions. [Owner] reserves the right to suspend or terminate membership on all lists for members who violate these rules.

- Do not challenge or attack others. The discussions on the lists are meant to stimulate conversation not to create contention. Let others have their say, just as you may.

- Do not post commercial messages. Contact people directly with products and services that you believe would help them.

- Use caution when discussing products. Information posted on the lists is available for all to see, and comments are subject to libel, slander, and antitrust laws.

- All defamatory, abusive, profane, threatening, offensive, or illegal materials are strictly prohibited. Do not post anything in a listserver message that you would not want the world to see or that you would not want anyone to know came from you.

- Please note carefully all items listed in the disclaimer and legal rules below, particularly regarding the copyright ownership of information posted to the list.

- Remember that [Owner] and other e-mail list participants have the right to reproduce postings to this listserver.

- You may send your message to *only* the most appropriate list(s).

Disclaimer and legal rules

This list is provided as a service of the American Society of Association Executives. [Owner] accepts no responsibility for the opinions and information posted on this site by others. [Owner] disclaims all warranties with regard to information posted on this site, whether posted by [Owner] or any third party; this disclaimer includes all implied warranties of merchantability and fitness. In no event shall [Owner] be liable for any special, indirect, or consequential damages or any damages whatsoever resulting from loss of use, data, or profits, arising out of or in connection with the use or performance of any information posted on this site. Do not post any defamatory, abusive, profane, threatening, offensive, or illegal materials. Do not post any information or other material protected by copyright without the permission of the copyright owner. By posting material, the posting party warrants and represents that he or she owns the copyright with respect to such material or has received permission from the copyright owner. In addition, the posting party grants [Owner] and users of this list the nonexclusive right and license to display, copy, publish, distribute, transmit, print, and use such information or other material. Messages should not be posted if they encourage or facilitate members to arrive at any agreement that either expressly or impliedly leads to price fixing, a boycott of another's business, or other conduct intended to illegally restrict free trade. Messages that encourage or facilitate an agreement about the following subjects are inappropriate: prices, discounts, or terms or conditions of sale; salaries; profits, profit margins, or cost data; market shares, sales territories, or markets; allocation of customers or territories; or selection, rejection, or termination of customers or suppliers. [Owner] does not actively monitor the site for inappropriate postings and does not on its own undertake editorial control of postings. However, in the event that any inappropriate posting is brought to [Owner]'s attention, [Owner] will take all appropriate action. [Owner] reserves the right to terminate access to any user who does not abide by these guidelines.

Listserver etiquette

- Include a signature tag on all messages. Include your name, affiliation, location, and e-mail address.

- State concisely and clearly the specific topic of the comments in the subject line. This allows members to respond more appropriately to your posting and makes it easier for members to search the archives by subject.

- Include only the relevant portions of the original message in your reply, delete any header information, and put your response before the original posting.

- Only send a message to the entire list when it contains information that *everyone* can benefit from.

- Send messages such as "thanks for the information" or "me, too" to individuals—not to the entire list. Do this by using your e-mail application's forwarding option and typing in or cutting and pasting in the e-mail address of the individual to whom you want to respond.

- Do not send administrative messages, such as remove me from the list, through the listserver. Instead, use the Web interface to change your settings or to remove yourself from a list. If you are changing e-mail addresses, you *do not* need to remove yourself from the list and rejoin under your new e-mail address. Simply change your settings.

- Warn other list subscribers of lengthy messages either in the subject line or at the beginning of the message body with a line that says "Long Message."