04-CV-053
Request To Testify
2/11 DC

RECEIVED 12/15/04

"Daley, M. James (SHB)"
<MJDALEY@shb.com>
12/15/2004 04:12 PM

To peter_mccabe@ao.uscourts.gov

cc

Subject Request to testify regarding Proposed E-Discovery Rule Changes

Peter,

Please accept this request to testify at hearings on the proposed e-discovery rule changes. I would prefer to attend the February 11 hearing in D.C., but am open to the other venues and dates, if needed. I plan to submit written comments on behalf of several clients shortly. I understand that those comments should be sent to you. If this is incorrect, kindly advise.

Thank you.

Jim

"MMS <shb.com>" made the following
annotations on 12/15/04 15:12:36

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you.

RECEIVED 2/11/05

04-CV-053

"Daley, M. James (SHB)" <MJDALEY@shb.com>
02/13/2005 10:37 PM

To peter_mccabe@ao.uscourts.gov
cc judy_krivit@ao.uscourts.gov
bcc

Subject Submission of Written Comments Regarding Potential Amendments to the Federal Rules of Civil Procedure to Address Electronic Discovery Issues

Dear Mr. McCabe:

Per my brief phone conversation with you last Friday, I have attached my corrected personal comments regarding potential amendments to the Federal Rules of Civil Procedure to address electronic discovery issues. Kindly post these in lieu of the draft I provided on Friday to Judy Krivit. Please thank Ms. Krivit for her many courtesies in helping me during my visit.

Thank you for the opportunity to provide my oral comments on February 11.

Please contact me if you have any difficulty opening the attachments.

Thank you for your attention to this matter.

Very truly yours,

M. James Daley

<<M James Daley Shook Hardy Bacon 04-CV-053_Feb 11 2005.pdf>>

M. James Daley, Esq.
Shook, Hardy & Bacon LLP
Technology Law & E-Discovery Group
2555 Grand Ave.
Kansas City, MO 64108
Direct Line: (816) 559-2104
Fax: (816) 421-2708
Email: mjdaley@shb.com

Confidential Attorney-Client Communication
Containing Opinion Work Product Of Retained
Outside Counsel

"MMS <shb.com>" made the following annotations on 02/13/05 21:37:33

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you.

M James Daley Shook Hardy Bacon 04-CV-053_Feb 11 2005.pdf

04-CV-053
M. James Daley, Esq.
February 11, 2005
Washington, D.C.

MEMORANDUM

TO: Committee on Rules of Practice and Procedure of the Judicial Conference of the United States c/o Peter G. McCabe, Secretary

FROM: M. James Daley, Esq.[1]

DATE: February 11, 2005

RE: Comments to the Committee on Rules of Practice and Procedure Regarding Proposed Amendments to the Federal Rules of Civil Procedure Governing Discovery of Electronically-Stored information

I. INTRODUCTION

Thank you for the opportunity to submit my personal comments regarding the proposed amendments to the Federal Rules of Civil Procedure governing the discovery of electronically stored information.[2] The comments expressed are my own, and are not intended to reflect the views of my law firm, or its clients.

II. PERSONAL PERSPECTIVE

My background is that of a trial attorney and a technologist. For the past 25 years, I have tried cases on both sides of the aisle. For the past ten of those years I have counseled and represented a wide range of clients on electronic records retention and e-discovery issues. I strive to use my computer programming experience and Masters Degree in Information Sciences to help guide e-discovery efforts in litigation and regulatory contexts. In this effort, I have had the pleasure of working with many of the nation's top technologists, records managers, and colleagues as a charter member of the Sedona Working Group on Electronic Records Retention and Production. I currently serve as Co-Editor of the Draft Guidelines for Managing Information in the Electronic Age, and as Co-Chair of the Sedona Working Group on Search and Retrieval Sciences, charged with exploring the development of national benchmarking standards for e-discovery. I also serve on the steering committee for the Inaugural Sedona International E-Discovery Conference scheduled for July of this year at Cambridge University in England, focusing on the challenging issues of e-discovery in multi-national litigation.

---

[1] Chair, Technology Law & E-Discovery Group, Shook, Hardy & Bacon, LLP, mjdaley@shb.com

[2] These comments relate to the proposed amendments to the Federal Rules of Civil Procedure governing the discovery of electronically stored information, as published for public comment in amended form on August 4, 2004.

III. GENERAL OBSERVATIONS

I would like to begin my general observations by applauding the efforts of the Advisory Committee on Civil Rules in addressing the unique issues involving the discovery of electronically stored information. I have been very impressed by the open, fair and thoughtful process used by the Advisory Committee in dealing with these complex, multi-disciplinary issues. In an age of perennial spin—which some find particularly acute in this city--this process has been refreshing. It is a model for the kind of full, fair and free exchange of ideas that is the hallmark of our democracy.

Why are we here: because e-discovery impacts us all, whether in the lunchroom, boardroom or courtroom. After all, in the information age, virtually all information has a primary electronic source. And the vast majority of information we use in our daily business and personal affairs is generated, transmitted and stored electronically.

A. Historical Perspective

How did this become such a huge problem? Taking a moment to reflect on this question can help address why we need changes to the federal rules of civil procedure to address the unique challenges posed by e-discovery. Perhaps it can also help us avoid the mistakes of the past. As I will develop more fully later, I believe neither backup tapes nor large database systems pose our most urgent e-discovery challenges. Rather, the bigger risk posed to the cost-effective administration of justice e-discovery flows from the proliferation of unmanaged, individual, unstructured electronic information, such as e-mail, word processing, spreadsheet, PowerPoint and similar electronic documents.

Very briefly, the existing disconnect between our use of electronic information–and our lack of process and tools to manage it--took root between 1970[3] and 1985. In 1970, as some of us recall, electronic information was the domain of centralized data processing centers. We relied on punch cards and entire floors of computer mainframes. Computing was very expensive. Businesses paid great sums for "time-shares" for the use of the computers—long before this concept was applied to condos. Data storage was a luxury. The high cost of data storage drove careful management of this

[3] Ironically, in 1970, the definition of "document" in Federal Rule of Civil Procedure 34 was amended to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." The Advisory Committee Notes for the 1970 amendment considered it to be "noncontroversial" that "in this definition of what you can do, taking into account the advent of computer accounting. . . you should be able [to] . . . compel a person who has the records in computer form, to run it off for you."

information. When it was no longer needed for business or legal reasons, it was discarded, making room for new, mission-critical data.

It was the rare case where e-discovery was in the crosshairs of litigation. And when it was, a party could threaten the other with mutually assured destruction. Little attention was paid to these "weapons of mass discovery" until the early 1990's, when the first attention was paid to e-discovery in major class action litigation involving the tobacco and pharmaceutical industries, in particular.

What followed was a quiet, yet revolutionary "strategic inflection point."[4] In the mid-1980s and beyond, businesses began to place PCs on every desktop. Thanks to the efforts of Microsoft and others, computing was made available to the masses. First, we were blessed with all manner of personal productivity software; then e-mail was introduced. This was quickly followed by networking software, which allowed us to share programs and to replicate computer files over local and wide area networks. Next, came Internet access, digital voice mail, and even more recently, text and instant messaging. And we shouldn't forget the impact of the latest, greatest personal mini-electronic storage devices at Best Buy that we see advertised each Sunday. Recently, the Wall Street Journal identified smaller, cheaper and faster electronic storage devices as one of ten major trends in consumer electronics.[5]

In short, what has happened is that without any formal training, or notice, we all gradually have been anointed individual electronic records custodians. No longer is electronic information the domain of a small, centralized, and disciplined cadre of Data Processing Managers, but rather it is the domain of the individual worker. And no one has been appointed master of this distributed, rather than centralized domain. As computing technology and storage has become faster, cheaper and smaller, yesterday's filing cabinets and file clerks have been replaced by bigger hard drives.

B. Recent History

E-Discovery has captured the attention of legislators, regulators and litigators nationwide with the unfolding of the Arthur Anderson / Enron, WorldCom, Frank Quattrone and Martha Stewart scandals. As the Wall Street Journal's ongoing "Executives on Trial" attests, e-discovery has quietly become a lightning rod for scrutinizing corporate records retention conduct, from well-publicized antitrust trials to obstruction of justice convictions. Third-party subpoenas for electronic evidence have become commonplace, extending to e-mail, digital voice mail, instant messaging, and even

[4] This term was coined by Andrew S. Grove, former CEO of Intel Corporation, to describe how Intel's decision to launch its "Intel Inside" campaign directly to consumers, rather than suppliers, resulted in a dramatic and unforeseen negative outcome when a mathematician discovered a minor flaw in Intel's initial Pentium chip design.

[5] McWilliams, Gary. "The Journal Reports: Trends. Consumer Electronics – It All Connects– and Converges." The Wall Street Journal. January 31, 2005: p. R3.

Kobe Bryant's text messaging. The focus, whether of prosecutors, regulators or judges is increasingly on the content, rather than the form of the information. And as aptly noted in the *Zubulake V* decision, we are "fully on notice" of our obligation to preserve, and possibly produce electronic information that is relevant to existing legislation, regulation and pending or reasonably foreseeable litigation.

Fast forward to today. We use broadband connections to telecommute via e-mail and instant messaging. Many use universal in-boxes to organize and access our e-mail, voicemail and faxes, and thumb size USB memory keys to store, transfer, and transport vital personal and business records. And most of us even use our multiple e-mail accounts as virtual personal electronic file rooms.

In addition, businesses have aggressively invested in technology as a means to increase personal and corporate productivity. This has, in turn, fueled workforce downsizing and/or outsourcing—both here and abroad. But in every case, little attention has been paid to managing this information. In a cost-cutting frenzy, businesses have eviscerated their records departments. The trusty file clerk has been furloughed, leaving a vacuum for print and especially electronic record management. As knowledge workers have been asked to do more with less, in many cases they lack the necessary training and tools to efficiently and effectively manage their electronic information. The natural, human, knee-jerk reaction has been to save everything, for fear of not saving enough—a "packrat" mentality.

And let's be candid, why not? Disk storage has become cheaper and cheaper; and floppy disks can now be purchased for pennies. Why not use the money and human resources on growing the business, or on profit centers? With cheap storage, there is, after all, little incentive for managing e-records. The premise that companies, and workers can and should be able to declare, classify and apply retention schedules and hold notices on an e-mail-by-e-mail basis is a fiction. Leading technologists at the 2004 Managing Electronic Records (MER) Conference, sponsored by Cohasset & Associates, candidly opined that we are still 3-5 years from an integrated solution for managing individual, unstructured electronic information.[6] The problem isn't abating any time soon.

C. Positive Impact of Proposed Rules: Predictability and Opportunity

While the proposed federal rules changes are certainly no "silver bullet" for e-discovery challenges, they nevertheless lay a common foundation for the business case in favor of immediately dealing with, rather than continuing to defer the problem. These rule changes not only provide a level of predictability and guidance to these efforts, but they provide an incentive for business to undertake such efforts. Why? For two reasons: (1) It

[6] See Cohasset's survey of 2200 corporate records managers, finding a wide disparity among businesses concerning their awareness and steps to deal with e-discovery issues. The survey is found at www.merresource.com/whitepapers/pdf/survey.pdf.

raises the national profile of e-records management, such that business will elevate its priority in capital budgets; and (2) With uniform national requirements, businesses can be confident that their investment will be recognized in courts throughout the land.

This outcome is good for litigants, good for the courts, and even better for business. The proposed rule changes provide business with an opportunity to reduce duplication of time, cost and effort with respect to electronically stored information. They bring into sharp focus the need and desirability of sustained attention to responsible and timely records retention communication, coordination and compliance. They provide an opportunity to more cost-effectively leverage electronic information for records retention, compliance, knowledge management and e-discovery purposes. Independent returns on investment (ROI) studies have confirmed that businesses can save substantial amounts by focusing on the entire electronic information lifecycle.[7] An important—albeit perhaps collateral—benefit of the proposed e-discovery rules is that they will act as a catalyst in leading this change.

Litigants are acutely aware what is generally expected regarding e-discovery, but they lack clear guidance and direction—both procedural and substantive--regarding the boundaries of these obligations. They lack a common framework and vocabulary for communication, coordination and compliance with these obligations. They lack standards for uniformity, consistency and predictability as to how these obligations are applied. The proposed rule changes, with certain exceptions I note later, substantially satisfy what is lacking.

Perhaps the most important goal advanced by the proposed e-discovery rule changes is uniformity, consistency and predictability. Without this type of sustained guidance, we are left adrift to deal with a flood of electronic information. We have already seen numbers of states, district courts and even one circuit court s provide independent e-discovery rules and guidelines. A patchwork quilt of competing, jurisdiction-specific e-discovery expectations is evolving in the absence of uniform direction. Without the unifying impact of the proposed rule changes, this trend will likely continue unabated, leading to even greater complexity, cost and uncertainty.

As echoed by many of my close Sedona colleagues, Messrs. Redgrave, Allman and Ragan, and others who have testified or submitted comments, the time to act is now. On a daily basis, we see the paralyzing effect of a lack of clear and consistent e-discovery guidance. This concern is reflected in the ever-increasing number of seminars and conferences held each year dealing with e-discovery issues—from a legal, records management, and information technology perspective. Each of these constituencies has a

[7] For example, a 2003 Nucleus Research ROI Case Study of Guidant Corporation reflected a 318% return on investment from implementing an electronic records management system. See http://mimage.hummingbird.com/alt_content/binary/pdf/collateral/roi/guidant.pdf

stake in the kind of predictability (in process and substance) provided by the proposed rule changes.

This concern is likewise reflected in the massive amounts of time, energy and capital being applied by IBM, EMC, and a parade of venture capitalists to electronic records management. In the big picture, e-discovery challenges can be viewed as a symptom of inadequate electronic records management. The problem is complex and multidisciplinary. Any solution must span the legal, records management and information technology worlds, and requires a legal, technology and records management multi-linguist.

The proposed rules add significantly to the development of a common vocabulary for communication, coordination and compliance with respect to e-discovery obligations—to which I refer as the *Zen of Zubulake*.[8] This common language is essential for clear communication. This commonality of language is one of our national treasures and distinguishes us from other nations. Some have even suggested it has contributed to our unity of purpose and our record of achievement. Whatever one's belief, it is unassailable that a common vocabulary and procedural framework with which to discuss e-discovery obligations will advance the "just, speedy and inexpensive administration of justice" invoked by Rule 1.

Failing to act will only exacerbate the problems and costs associated with e-discovery in the judicial system. Failing to act will also only increase the societal and business costs of a lack of predictability to corporate electronic records retention challenges. Enacting the proposed rules will, on the other hand, reduce the time and cost of e-discovery. It will also help eliminate the counterproductive fear that is paralyzing business. Acting now will encourage and reward the development of transparent, reasoned policies, procedures and processes to deal proactively with the flood of electronic information. It will thus aid the overall administration of justice, and will provide a model to the world for handling discovery in the electronic age.

It is my fervent hope and belief that many of the proposed rule changes will help us convert e-discovery from what is often perceived as an obstacle, into an opportunity to reduce the time and cost of e-discovery, and to reduce the business cost of managing this information. What follows are some specific comments concerning proposed rule changes, including some modest suggestions for improvement.

[8] Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. 2004)

IV. SPECIFIC PROPOSED RULE CHANGES

A. Rule 16(f)(b) (Pretrial Conferences; Scheduling; Management

I endorse adding electronic discovery issues in the proposed Rule 16(b)(5). It is vital that e-discovery issues be raised at the earliest possible date. These issues devour scarce judicial resources. As a matter of process alone, they heap undue burden and expense on the parties and on an already overloaded, and under-funded judicial system. [9]

In contrast, I believe the "quick peek" reference in the accompanying Committee Note should be expressly limited to reflect the reality that this is a very seldom-used option, unless mutually agreed-upon by the parties. As a litigator, I cannot think of a single case in the last 25 years where I would have endorsed this approach.

B. Rule 26. General Provisions Governing Discovery; Duty of Disclosure

I believe the "two-tier" distinction is helpful. However, I believe it can better applied using an "active – inactive" rather than an "accessible – inaccessible analysis. The reason for this is simple. What is accessible is a function of time and effort. Experts tell us that almost any data, unless corrupted or completely wiped is accessible with enough time and money. The real test should be whether a party is using or accessing the date in the ordinary course of business. If so, it is active. If not it is inactive. I believe the language in the proposed Rule and Note should be modified accordingly. In addition, I agree with others that they should exclude a mandatory identification of inactive data that is not subject to discovery.

In addition, I believe the Committee Note should reflect cost-sharing and cost-shifting as it relates to the review and production of electronic information that is not actively used in the ordinary course of business, as well as the retrieval and processing of it. To do otherwise, does not adequately address very real costs that should not be borne by the responding party alone.

Inactive data should be presumptively non-discoverable, even if it is occasionally "mounted" or "read." The mere fact of "accessing" the data should not, in an of itself, change this status. For example, access for maintenance purposes only, such as moving it from one computer system to another, due to a hardware or software change, should not void this presumption. Such access to media should be one factor, but not a determinative one in finding it presumptively non-discoverable.

The proposed section 26(b)(5) concerning claims of privilege is, in my opinion, very balanced and provides part of the predictability to which I refer above.

---

[9] See The Sedona Principles (2004), Principle No. 3: "Parties should confer early in discovery regarding the preservation and production of electronic data..."

Businesses and individuals alike, I believe, want to do the right thing with respect to handling and adjudicating challenges concerning inadvertently produced electronic information. They simply need a procedural vehicle for doing so. This section provides that vehicle in a fair and balanced way, without infringing on any substantive rights.

C. Rule 33. Interrogatories to Parties

I endorse this change. I am sensitive, however, to some of the views expressed concerning it leading to a "slippery slope" of Motions to Inspect. I do not believe this is the intent of the change, but out of an abundance of caution, the Note could be expanded to reflect this fact.

D. Rule 34. Production of Documents, Electronically Stored Information, and Things, and Entry Upon Land for Inspection and Other Purposes

I agree with expressly identifying electronically stored information in Rule 34. I find novel the idea of using "tangible information" as the main focus, and I believe it should be in the formulation, but I would not support using the term to the exclusion of "electronically-stored information." Including both adequately serves to satisfy the "test of time" as we move to nano-technology, embedded national identification chips, and holographic data storage.

In contrast, I disagree with the current form of production language of proposed Rule 34(b) because, as drafted, it does not allow the responding party to choose the form of production, even where the requester is silent on the issue. This does not seem to serve the spirit or the purpose of the overall scheme of the proposed rules.

E. Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

As others have stated far more eloquently that I am able, this is neither a true harbor, nor is it very safe. The question arises, is it better than doing nothing? This is perhaps the most treacherous channel for those impacted by the e-discovery rules. They deserve more protection, provided they can demonstrate good faith reliance on a reasoned and reasonable records retention policy, procedure and process. In this respect, the alternative formulation by the Advisory Committee is the preferred one. It indeed would improve the *status quo ante.*

I also agree with those commentators who suggest that an element of "willfulness" should be substituted for the current draft's threshold standard of "intentionally and recklessly." As a careful harmonization of the sanctions case law reveals, there remains sufficient latitude for courts to weigh the relevance of the information lost and the degree of responsibility of the offending party in its evaluation of

an appropriate sanction. I further agree that in such a critical area, where guidance is desperately needed, Rule 37(f) should mandate that such a preservation order should identify with specificity the type of electronic information that must be preserved. Lastly, I believe it would be helpful to transfer some of the language from the excellent Committee Note concerning litigation hold notice obligations to the text of the rule itself.

Three distinct, but related points of view are at issue in Rule 37: litigants, records management professionals and information technologists. If, as the Sedona Working Group has tried, we listen to the needs of each of these constituencies, what emerges is a clear consensus. The consensus is that if parties abide by a "constitution" of reasoned, systematic, uniform records retention policies, procedures and processes, they should be able to avail themselves of a "bill of rights" concerning electronic information. Namely, they neither need to become hardware and software museums, so that they can access inactive data, nor do they need to preserve everything forever. This should hold true whether they are an individual or a Fortune 100 company. Granted, the degree of "reasonableness" will and should always be tested. But fundamentally, the same standard should apply to all.

F. Rule 45. Subpoena

Empirically, we know that third-party subpoenas are on the rise. As above, with respect to Rule 34(b), the responding party should be able to designate the form of production where the requesting party is silent. A more direct, and explicit reference to cost-shifting and cost-sharing could be added to the Note, in light of the increased burden and expense imposed upon third parties.

G. Form 35

I agree with this change.

V. CONCLUSION

In closing, I again commend and thank the Committee for its conscientiousness and care in addressing the important issues raised by e-discovery practice. I firmly believe the guidance afforded by the bulk of the proposed rule changes will improve the practice of law, the administration of justice, and yield enduring and tangible benefits to commerce and society. I look forward to submitting these comments in testimony before the committee on February 11, 2005.