04-CV-079
Request To Testify 2/11 DC

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01/10/2005 08:56 AM

To peter_mccabe@ao.uscourts.gov, Rules_Comments@ao.uscourts.gov
cc
Subject Request to Testify on 2/11 in Washington D.C.

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January 10, 2005

Mr. Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Request to testify at February 11, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe,

My name is Keith Altman and I hereby request the opportunity to present comments at the Rules Committee hearing of February 11, 2005 in Washington, D.C.

I have been centrally involved in many of the largest document and electronic productions in pharmaceutical litigation of the last several years on behalf of the plaintiff bar. These would include Diet Drug, Rezulin, Propulsid, PPA (Phenylpropanolamine), Meridia, Accutane, Lariam, Hormone Replacement Therapy, Enbrel, Remicade, Vioxx, and Neurontin. In these cases, I have helped to develop preservation and production protocols for electronic information, including working with defendants to construct mutually acceptable production protocols. I have also been partially responsible for trouble-shooting when there are difficulties with the electronic production.

Based on my experience in this area, I believe that am able to provide useful insight into the issues surrounding requesting and receiving the production of electronic discovery.

Thank you,

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04-CV-079
Testimony DC 2/11

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January 28, 2005

Mr. Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Written comments for my testimony at February 11, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe,

My name is Keith Altman. Kindly accept these written comments in advance of my scheduled testimony at the February 11, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure. A more significant submission will be provided prior to the February 15 deadline.

Introduction

I have been centrally involved in many of the largest document and electronic productions in pharmaceutical litigation of the last several years on behalf of the plaintiff bar. These would include Diet Drug, Rezulin, Propulsid, PPA (Phenylpropanolamine), Meridia, Accutane, Lariam, Hormone Replacement Therapy, Enbrel, Remicade, Vioxx, and Neurontin. In these cases, I have helped to develop preservation and production protocols for electronic information, including working with defendants to construct mutually acceptable production protocols. I have also been partially responsible for trouble-shooting when there are difficulties with the electronic production.

To put some numbers to the above, these litigations have amounted to more than 50 million pages of documents already produced or in the process of production. Probably 30% of these materials are based on electronic documents. Furthermore, since this represents only the portion of the materials actually produced, far more than this was collected for possible production. Additionally, there was in excess of 150 GB (gigabytes) of databases which I have personally had to analyze and prepare for use by attorneys and experts.

My comments below are based on my experiences in the trenches of numerous discovery battles. I have read many of the materials that people have submitted and with all due respect to the other contributors to the rules committee, a practical solution to a complex issue is not suggested. Many of the perceived problems do not in fact exist, nor do the proposed rules address the actual problems - coordination. In order to create an orderly format of coordinated discovery in complex litigation matters, there must be first, a mutual understanding by the parties of the form and type of materials sought, and secondly, an agreed upon format for the production of such materials. The practical solution to a complex problem is communication between the parties. Direct dialogue at a meet and confer prior to the exchange is imperative.

Meet and Confer

There is no question that to this point, there have been too few opportunities to have meaningful dialogue in preparation for complex discovery. In lectures I have given, I have stated that when a complaint is filed, it is necessary to get a very strong preservation order signed at the same time as the complaint is filed. Electronic information is very fragile in nature. I use the term fragile to mean that it is very easy to destroy vast amounts of information with minimal effort. Erasing a single hard drive for re-use in another application can easily destroy the equivalent of 100 million pages of text. That would be 50,000 boxes of documents if in paper. It would be very difficult to destroy 50,000 boxes of paper inadvertently.

Given the fragile nature, the order that I recommend be signed is very simple and short. It states (1) save everything relevant to this litigation; (2) stop all routine records retention recycling; and (3) tell everyone that needs to know to comply with (1) and (2). It is clear that compliance with such an order can be very difficult for the party subjected if it is strictly complied with. This is one of the desired effects, but the primary goal is to protect the information and bring the opposing party to the table very quickly to negotiate a more reasonable and appropriate preservation order given the specific circumstances of the case. Concerns over raised by a preserving party can be raised quickly by the court. Without such pressure, companies will generally drag their feet and it may take months to negotiate the preservation protocol. All this time, responsive, discoverable information may be destroyed through normal business processes. There is no reason for this process to take so long. Given the proposed rule on a safe harbor provision, this is now even more important.

From the above, it is clear that meaningful dialogues are at the heart of minimizing the burden of electronic discovery while at the same time providing requesting parties with responsive materials. Far too often, opposing parties make arbitrary and unilateral decisions as to the format and scope of the preservation and production of electronic materials. Invariably, this leads to much wasted time, effort, and dollars. I can point to numerous examples where I have had to go back to a producing party because the data was deficient and this deficiency could have been prevented with virtually no additional cost or often, less cost to the producing party had I had an opportunity to discuss the issues with the producing party.

In several of the cases I have participated in, we have had very productive, meaningful meet and confers. While there is not always agreement, there is at least an understanding of what are true

issues. Electronic information, especially database type information, can be produced in so many ways that there needs to be discussion as the production format. I have always been flexible to receive the data in a format that is not exactly the way I want it, but can be transformed into that format with reasonable effort on my part.

Based on my experience, I believe the following to be the major topics of discussion at the meet and confer.

1) What are the major sources of electronic information relevant to the litigation?
2) What steps were implemented as soon as the necessity to preserve information arose?
3) Where is the relevant electronic information physically stored?
4) What methodology will be used to locate possibly relevant electronic information?
5) What steps will be taken to collect relevant electronic information?
6) What is the mechanism of the production?
7) How will electronic documents be redacted?

Furthermore, I think there has to be meaningful consequences for failing to have a meet and confer on an important source of data and then producing the information in either an incomplete or inadequate format. This often leads to substantial increased costs for both parties when effort is wasted on reviewing deficient data which then needs to be reproduced. More often than not, this is simply due to inadequate communications between the parties.

There should also be an opportunity made available to a receiving party to call for a meet and confer after the production of a particular data set. This may be necessary to address specific inquiries as to the format and meaning of the data. I have participated in these types of sessions where as the technical expert, I was able to directly query a counterpart concerning the data. Often this is done during a physical meeting where I was able to show the data in question to the opposing expert. Recently, inexpensive services such as Webex have allowed the sessions to be conducted from each party's office while still being able to demonstrate my concerns.

Native Format Production

Concerning the production of electronic documents in native form, I have found that this is often not the most efficient method. For discussion purposes, I like to break electronic documents into three categories:

1) Images
   Clearly, there is little difficulty in the production of images as this has become routine. One thing should be noted. No producing party should be permitted to modify an image in such a way so as to obscure any part of the underlying image. If a bates number or confidentiality stamp is to be added to the document, it must be placed on a strip of clear area appended to the bottom of the image. I have recently seen a production where a watermark specifying the name of the litigation was embossed diagonally across the text of the document. This effectively destroyed the receiving party's ability to perform optical character recognition (OCR) on the documents.

2) Word Processing and spreadsheet type documents

These documents can generally be described as textual in nature. This would include letters, reports, text e-mails, spreadsheets and other similar documents. The defining characteristic of these documents is that by simply viewing these documents, one could effectively learn the content of the material. It would be generally unnecessary to have the native version of the document to read the documents. As to spreadsheets, clearly the inherent nature of the document is destroyed by providing the document as a simple text file. In rare circumstances, it would be necessary to obtain the native spreadsheet. These instances can be addressed as they come up.

3) Complex documents and files
I use the term complex documents and files to describe files that can not be reasonable provided as a text file without destroying the ability to work with the data. The most important example would be databases. There is no reasonable way to produce the content of a database as a series of text documents. Not only is the inherent nature of the data destroyed, but the ability to review the data in a meaningful way is also destroyed.

For the litigations that I have been involved in, we have adopted the following protocol. All images are to be produced as images. All word processing type documents as well as spreadsheets are to be produced in both image format as well as simple text format. The image versions of the documents are the version to be used for "evidence" purposes. The text is simple to allow the materials to be searched. On reasonable demand, specific documents would be produced in native format. This is more likely to occur with spreadsheets. From experience it is a rare occurrence to require many of these documents in native format.

As to database and other complex document types, they must be produced in their native format or in an alternative format that preserves the essence of the document. For example, it would be acceptable to produce an Oracle database as an Oracle unload file or a Microsoft Access database.

Concerning the redactions of electronic information, with respect to word processing and spreadsheet type documents, these redactions must be done upon the original electronic version of the document prior to any conversion to images. Often, these redactions are done after the conversion of the images and defendants are then reluctant to provide the text that goes along with the images of redacted documents. The reasoning behind this is that they would not only have to redact the images but the text as well created an increased burden. This is eliminated by redacting the original electronic document and then converting to text and image.

Accessibility

On issues of accessibility, preservation and production are completely intertwined. Preservation sets the table for production and should information not be adequately preserved, production will become difficult, if not impossible.

The proposed rules do not address what has become one of the major problems concerning electronic information. The safe harbor provision in the proposed rules covers spoliation in the

absence of an order requiring preservation and reasonable steps to preserve information once aware that information may be discoverable. For the purposes of this discussion, I will assume that a party has been served with a complaint and is now aware of pending litigation. At this point, they are no longer covered by the safe harbor provision unless they took reasonable steps to preserve information. The situation would then be the same as it is under the current rules: it is likely that reasonable steps would require the company to preserve all existing backup tapes.

This can be a very costly provision. If a company is following the requirements closely, this would require the suspension of recycling backup tapes. This means that once a tape is used, it may never be reused and a replacement must be purchased. The net result of this is to force a party to expend huge amounts of money. Based on my experience, this is a major source of complaints from opposing parties. Once litigation has started, the company recycles backup tapes at its own peril, for it appears that the safe harbor provision would not protect the party.

The real question, though, is how to mitigate these costs. The rules as written will not help with this process. In the past, I have dealt with this issue by requesting that the company preserve the tapes that are currently in their possession. Employees are then instructed of the duty to preserve information relevant to the litigation and told to submit newly created materials relevant to the litigation to a centralized collecting point. Once this has been implemented, the company can restart their conventional backup operations with a new set of tapes and would have no obligation to specifically maintain the backup tapes going forward. While there are still the costs associated with a replacement of the complete current set of backup tapes, it is far less than a replacement of the sets many times over because of a duty to preserve all tapes.

In my opinion, the proposed changes concerning concepts of accessible and inaccessible data are likely to lead to an increase in motion practice due to the apparent presumption that if the producing party believes the information not reasonably accessible, they need not produce it. As described below, the collection of the electronic information is far easier than that of paper which is not the subject of the proposed rule changes.

To start, I think it is necessary to break electronic information into two broad categories separated by how the information is stored. The first category is "sequential access". The best example of this kind of information would be that stored on backup tape. The defining characteristic is that in order to retrieve information off the media, the media must be wound forward or backward to a specific point. This can be extremely slow, especially if required information is stored on multiple places on the media. This is also complicated by most backup systems that store information for a single backup set on multiple tapes.

Clearly, any responsible organization will be creating backups on a regular basis. Furthermore, most organizations recycle backup tapes on a periodic basis according to one of several commonly used backup schemas. In a large organization, there can be hundreds or thousands of backup tapes in use at any given time. The method of preservation I have discussed above can go a long way towards lessening the burden and cost.

While there is a great deal of talk about producing data from backup tapes, in my experience, it rarely happens. In all of the litigations I have been involved in, information was restored off

backup tapes only one time. Without question, there are times when it is necessary to go to the backup tapes. This does not mean that it is a waste to preserve backup tapes. Clearly, in every case there is the likelihood that the only copy of responsive information is on the backup tapes. It is that in most cases, it is not worth the effort to retrieve this information. Often, though, this can not be known until long after the litigation has started.

The second broad category is "random access". These kinds of media allow information to be retrieved virtually instantly from any location on the media. Generally, information can be retrieved off the media quickly. The most common instance of this type of media is computer hard drives. In my experience, I am hard pressed to describe information stored on random access media that would be not reasonably accessible.

For random access information, the problem is different. It would seem to me that there is a strong potential for abuse with regards to claims of inaccessibility. For example, does inaccessible mean inaccessible to a specific person? If a party has to send out personnel to each workstation for a relevant employee to obtain electronic materials, does that make the information inaccessible? What about if these people are scattered over several facilities in several states or countries? The reality is that the collection of electronic information is the smallest part of the effort. As a hypothetical question, under the proposed rule, is it possible for a producing party to maintain that information sitting on a laptop in the possession of counsel is not reasonable accessible? Is it the mere fact that a party may need to expend effort to extract the responsive information from a database that can be easily accessed make the information not reasonable accessible?

In the current litigation environment, without the existence of a specific rule as to accessibility, parties routinely object to the production of information that they deem burdensome or inaccessible. I have personally been involved in numerous hearings on such issues. It would appear to me that companies are free to invoke the spirit of the proposed rule even without its existence. Judges are free to evaluate the merits of each particular objection. In reality, the battles are generally fought over information that is easily accessible to the producing party.

My concern is the potential for abuse on the part of a producing party with respect to claims that information is not reasonable accessible. I have routinely observed wild overestimations of the amount of time and degree of difficulty required to produce data. In these circumstances, I am required to interpolate based on my own experience to assess the veracity of these claims. If the proposed rule is adopted, this will put requesting parties at a huge disadvantage.

Based on my experience, data that is available on "random access" media as defined above should always be considered reasonably accessible absent very specialized circumstances. Given the fact that it is usually less burdensome to produce an entire data file, the mere fact that a producing party needs to expend effort because they chooses to produce a portion of the data that they deem responsive should not make the data not reasonably accessible.

As to the issue of cost, I find it disturbing that there is a trend for producing parties to seek cost shifting because of the fact that the information is in electronic format. In the past, a producing party made paper available to the requesting party who then paid for the costs of copies which

they chose to take. The cost of the producing party locating responsive documents was always a cost which they were required to bear. Furthermore, the cost of making those documents available for the requesting party to review was also a cost borne by the producing party.

Now we see an expectation that with respect to electronic information, which is far easier to collect and make available, producing parties should bear a substantial portion of this cost. I am not suggesting that all electronic discovery should be had for free. What am I suggesting is that there should be more of a parallel with paper production when it comes to cost shifting. A requesting party should have the opportunity to review electronic information without charge. A producing party can always make a workstation available somewhere for the requesting party to see electronic information.

All of this needs to be tempered with reasonable discovery demands on the part of the requesting party. Clearly, it is within the power of the courts to assess the burden in complying with a request for electronic information in the same way as has always been done with paper. Without question, a party should have the absolute right to obtain information that is responsive but deemed to be unreasonable burdensome by the court as long as they are willing to pay for it. Furthermore, the requesting party should have the ability to control its costs by employing its own resources to obtain electronic information. As an example, if there is a database that contains responsive information in the midst of non-responsive information, the requesting party should be permitted to use its own resources to assist the producing party to extract the data.

Producing parties would never allow this kind of access because it would expose the fact that the vast bulk of the cost of producing electronic information is not the cost of extracting the data but is the cost of the review of the data for privilege and relevance. The rules do not address these costs and I believe that producing parties will use the not reasonable accessible argument as a mask for review effort or not wanting to make the information available to the requesting party for fear of what might be done with it.

Conclusion

In conclusion, I believe that the many of the proposed rules do not solve the problems that they attempt to resolve. There will be a dramatic increase in motion practice and there is a strong potential for abuse. Many of the problems of electronic discovery can be resolved through better education and more meaningful communication between the parties.

Respectfully Submitted,

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February 14, 2005

Mr. Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Supplemental Written comments after my testimony at February 12, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe,

On Saturday, February 12, 2005, I testified at the rules committee hearing. Please accept these supplemental written comments based on my testimony

Preservation Orders

It was clear from the questions directed at me that the committee was concerned about my statements regarding a strong preservation order and the deleterious effects upon a company. I can not over emphasize that my immediate concern once litigation has commenced is the preservation of discoverable information and not punishment of the opposing party.

As I discussed, based on my participation in numerous litigations, companies do a poor job of retaining records in a non-litigation environment. One of the first depositions I recommend take place is a 30b(6) of the records manager for the organization. While the records managers understand the preservation under records retention policies is based upon the content not the format, this understanding is, in my experience, not well-understood in the "field".

Once factual depositions begin, there are terrible inconstancies in how individual employees interpret and execute on the records retention policies of the company. There is poor training in this area and my experience has shown that people will implement their own personal plan based not on specific records retention principles, but on what seems to work best for them. It is this lack of adherence that creates uncertainty in the state of the information at the start of litigation.

Where paper documents are involved, there is generally a built in safety net to prevent destruction of material. Once papers have been identified for off site storage, they are typically

sent with a retention schedule attached. Once the appropriate time has elapsed, the materials are usually returned to the owner for final approval before destruction.

E-mails are very different. Most companies implement some kind of timed purge to a user's inbox. In order to save an e-mail, the user must actively move it from their inbox to some other area that is not purged. While all companies, as I have observed, make provisions for this, it is clear that this requires an active effort on the part of the user to preserve.

Added to this is the reality that in a business environment, vast amounts of information is destroyed daily for legitimate business purposes. Backup tapes are recycled. Old computers are destroyed. Leased computers are reformatted and returned. There is a high degree of uncertainty on the part of a requesting party as to what systems are in place and where discoverable information may exist.

Therefore, there is a schism between the maintenance of paper files and electronic files. Paper requires an active effort to destroy and electronic e-mails require an active effort to preserve. This fundamental difference underlines my belief that a strong preservation order is required until such time that a more appropriate order can be entered that is tailored to the needs of the case. It has been my experience that these orders take too long to negotiate; the reasons may be complex but it is clear to me that companies and their attorneys often understand the benefits of slowly negotiating these agreements. That benefit is inconsistent with preservation of discoverable information. Without the pressure of a strong order that protects the information, companies have little incentive to resolve preservation issues quickly.

My experience has shown me that virtually all preservation issues can be worked out quickly and efficiently in a very short period of time if the parties would actually sit down to communicate without ulterior motives for creating delay

Backup Tapes

During my testimony I was asked about whether I have ever looked to actually using the backup tapes in a litigation and I responded that I had not. I would like to clarify that even though I had not gone to the tapes, that does not mean I have not been involved in litigations where they were important, nor do I think that the preservation of backup tapes is an unnecessary and costly waste. In fact, there are many examples of useful admissible evidence being recovered from back-up tapes.

I operate on the belief that parties act honorably and in keeping with the appropriate rules of civil procedure. Given that, I do not look to the backup tapes to seek evidence to show that this is not true. My belief that absent special circumstances, the backup tapes do not need to be referenced. If the method I suggested in my previous letter were implemented, the cost of preserving the single set of backup tapes is far less than what might have been necessary had all backup recycling been suspended. Once a party has identified areas that would not likely contain discoverable material, the hold on many of the tapes can be removed to further lessen the burden.

I do believe that there are appropriate times where the backup tapes may need to be referenced these might include:

- Systems that were destroyed or damaged resulting in a loss of primary data.
- Failure to fully implement a litigation hold
- Misunderstanding the scope of the litigation hold
- Evidence of spoliation or tampering

In the above circumstances it might well be appropriate to look to the tapes.

Attached to this letter is a copy of the order enter in the Linnen v. Wyeth case from Massachusetts. This case involved the diet drugs Pondimin and Redux. While I was involved in the case overall, I was not involved in that particular dispute. From the order it is clear that there were reasonable grounds for going to the backup tapes. This order predates Zubalake by a few years, but one can see that the basic structure of the Zubalake factors are present in this opinion. It is clear from this decision that at a minimum, the company was negligent in complying with its production requirements.

Accessible vs. Not reasonable Accessible

It was clear to me from all of the speakers and the questions from the committee that the difficulty of defining accessible vs. not reasonably accessible was dominating the discussion. I have some additional thoughts on the topic.

First, I think that if a party were required to preserve discoverable information regardless of its opinion on accessibility, this would allow time for an inquiry into whether the information should in fact be produced.

At its core, the problem with the definition of accessible vs. not reasonable accessible is try to place stereotypes on a moving target based on our 2005 understanding of what constitutes electronic information. While backup tapes are generally thought of as being not reasonably accessible would this apply to the restoration of a single, discrete tape containing the backup of a single discrete database? It would seem that the burden of this restoration would be incremental and in some circumstances virtually equivalent to production of the database is if were active.

It seems to me that the current rules are well equipped to manage this problem. The power of the Zubalake factors is that in reality, they are independent of the format of the information and can be easily applied in other areas. It is these factors, or the next generation of them, that should be looked to for balancing needs and benefits against cost and burden. If this is so, then a specific definition of accessible and not reasonable accessible is unnecessary. The process itself will take care of that.

Conclusion

Therefore, in conclusion, I would recommend that the committee consider that the rules as they currently exist are flexible enough to accommodate the preservation and production of electronic information. Better education on the part of all parties as well as the judiciary combined with active communications between the parties is the ultimate solution to the problem of paper discovery, electronic discovery, and any new formats that may come along in the future.

Respectfully Submitted,

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