04-CV-080
Request To Testify
2/11 DC

David Romine
<DRomine@langsamstevens.com>
01/10/2005 03:42 PM

To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject request to testify

Sir/Madam:

Please accept this e-mail as a request to testify regarding the proposed changes to the Federal Rules of Civil Procedure on February 11, 2005, in Washington DC. Thank you for your consideration.

- David Romine

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01/28/2005 05:12 PM

To Rules_Comments@ao.uscourts.gov
cc
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Subject Written Statement

04-CV-080
Testimony 2/11 DC

Dear Sir/Madam:

Secretary Peter G. McCabe, Esq. asked me to provide my written statement to the Committee by today in light of my request to testify on February 11, 2005. I was not able to complete my written statement by today so I enclose the attached. I plan to supplement the attached, and respectfully request permission to submit the supplement to the Committee next week.

I am mailing you a hard copy of the attached today.

Thank you for your courtesies.

- David Romine Rules Comment Summary.pdf

Some of the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery are constructive and welcome. The requirement of early identification of and conference regarding potential problems with electronic discovery will likely lead to better management of cases. In addition, the clarification of rules regarding inadvertent disclosure of privileged materials will lead to better predictability, more free exchange of discovery, and ultimately less expense.

Some of the proposed changes are unnecessary. In particular,

- **Permitting a party to withhold electronically stored information that the party identifies as not reasonably accessible will encourage hiding discoverable and relevant information. The current Rule allowing for objecting to discovery on the ground that "the burden or expense of the proposed discovery outweighs its likely benefit" is sufficient protection.**

- **There is no reason to create a distinction between "electronically stored information" and "documents." Courts and parties have been treating electronically stored information as documents with no problem.**

- **Creating a safe harbor for failure to produce relevant, discoverable information would create the wrong incentives. The failure to respond to legitimate discovery requests is a more serious systemic problem than the cost of responding to requests for discovery that call for electronically stored information.**

David Romine

WRITTEN STATEMENT OF DAVID ROMINE

to the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

February 4, 2005

Testimony scheduled for February 11, 2005

Some of the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery are constructive and welcome. The requirement of early identification of and conference regarding potential problems with electronic discovery will likely lead to better management of cases. In addition, the clarification of rules regarding inadvertent disclosure of privileged materials will lead to better predictability, more free exchange of discovery, and ultimately less expense.

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- **There is no reason to create a distinction between "electronically stored information" and "documents." Courts and parties have been treating electronically stored information as documents with no problem.**
- **Creating a safe harbor for failure to produce relevant, discoverable information would create the wrong incentives. The failure to respond to legitimate discovery requests is a more serious systemic problem than the cost of responding to requests for discovery that call for electronically stored information.**

A. The Current Rule Is Sufficient.

The proposed change to Rule 26(b)(2) will encourage litigants to withhold discoverable and relevant information, will needlessly involve courts in discovery disputes that are frequently handled by lawyers under the current rule, and will resurrect a "good cause" requirement that the Committee correctly discarded in 1970.

1. The Proposed Rule Will Encourage Needless Withholding of Information

The proposed Rule change provides that a party "need not provide discovery of electronically stored information that the party identifies as not reasonably accessible." The change would reduce the obligation on a party that chooses not to search for and produce information from providing proof of undue burden[1] to identifying the source of the information with more or less specificity. Proposed Fed. R. Civ. P. 26(b)(2) advisory committee note.[2]

Under current practice, a party that objects to a discovery request on the ground of undue burden must provide specific information regarding exactly why responding to the request would entail burden that is "undue." "A party asserting undue burden typically must present an affidavit or other evidentiary proof of the time and expense involved in responding to a discovery request." Waddell & Reed Financial, Inc. v. Torchmark Corp.,

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[1] Greg Joseph observes that the limitation on discovery expressed in Rule 26(b)(2), i.e., "the burden or expense of the proposed discovery outweighs its likely benefit" is often collapsed with the "undue burden" language of Rule 26(c), even though the latter refers to protective orders and not specifically to objections. Gregory P. Joseph, Electronic Discovery I, Nat'l L. Jour., Oct. 4, 2004, at 12.

[2] The Committee Note implies that the identification must be communicated to the requesting party, but the proposed Rule includes no such requirement. I think the proposed change should not be approved by the Committee, but if it is approved, it should be amended to read "that the party timely identifies to the requesting party in writing as not reasonably accessible" (suggested additions underlined).

222 F.R.D. 450, 454 (D. Kan. 2004) (collecting cases); Smith v. Wettenstin, 2003 WL 22434096 (S.D.N.Y. Oct. 24, 2003) (responding party waived objection by making no showing of undue burden).

These types of disputes are often resolved under current practice by "meet and confer" requirements. During a "meet and confer" the objecting party usually provides some detail to the requesting party about why the burden of production is "undue." The objecting party who provides no detail either in its written objections or as a result of a "meet and confer" runs the risk that the court will hold that its objection has been waived by its failure to provide any specificity. See Smith v. Wettenstin and McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D.D.C. 2001) ("DOJ has chosen not to search these backup tapes and therefore runs the risk that the trial judge may give the jury an instruction that this failure to search permits the inference that the unfound files would contain information detrimental to DOJ").

The proposed Rule eliminates risk for the litigant that withholds information. A party that has electronically stored information damaging to its case that might or might not be "reasonably accessible" loses nothing by simply not producing it. No obligation to justify the withholding of the information kicks in until the requesting party files a motion to compel. The requesting party may not file a motion, in which case the withholding party achieves its objectives without judicial scrutiny of its "not reasonably accessible" assertion. Even if the requesting party files a motion, the court may rule in the withholding party's favor. Even if the court rules (or would rule) in the requesting party's favor, the decision may be delayed long enough that the withholding party achieves a partial victory by getting a favorable settlement or by reducing its opponent's

willingness to continue the litigation without having the evidence it was hoping to garner through discovery. At the very least, the proposed Rule would put disputes that are currently handled buy lawyers into judges' laps.

Zealous and ethical lawyers whose clients have electronically stored information will advise them not to retrieve it under any circumstances and especially not in response to a discovery request because no good could ever come of it. Retrieval would mean that the information is accessible and will have to be produced,[3] possibly uncovering bad evidence, so the safest course is not to try. The words "not reasonably accessible" are vague enough that a client who believes that its stored information is "reasonably accessible" would be well counseled to assert that it is "not reasonably accessible" within the meaning of the Rule. Retrieving data means production of potentially bad evidence; asserting that data is "not reasonably accessible" likely means no production, or at worst, production after substantial delay.

2. The Current Rule Works Fine

The Committee Note's prediction that the "good cause analysis balances the requesting party's need for the information against the burden on the responding party" is optimistic but not necessarily accurate. Notwithstanding the prediction, judges will likely interpret the change in the Rule as requiring a departure from a balancing test and adoption of a more objective "reasonably accessible" standard (like the objective "reasonable person" standard in tort law), because that is what the proposed Rule says. If implementation of a balancing test is the goal of the proposed change, then it is

[3] "But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information." Proposed Fed. R. Civ. P. 26(b)(2) advisory committee note.

unnecessary because that is precisely how the "undue burden or expense" standard currently operates.

The Committee rejected the "good cause" standard for production of documents in 1970, and with good reason: "Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought ....". Fed. R. Civ. P. 26(a) advisory committee note. Resurrection of the good cause standard threatens to resurrect "uncertain and erratic protection," because that is a likely outcome when a diverse set of judges conscientiously applies objective standards to problems (like discovery disputes) that are more amenable to the application of discretion.

I wonder whether the intent of the proposed change to Rule 26(b)(2) is to excuse parties from production of electronically stored information where the production would entail "undue burden or expense" as its meaning has developed in case law but under no other circumstances. If it is, then either there is no need for the change as proposed, or the intent could be achieved with more clarity by something like the following changes:

> "the burden or expense, <u>including the burden or expense of accessing electronically stored information,</u> outweighs its likely benefit," (Rule 26(b)(2)), and/or:
>
> "undue burden or expense, <u>including the burden or expense of accessing electronically stored information</u>" (Rule 26(c)).

(suggested additions underlined).

If the intent of the proposed change is to excuse parties from the obligation of production where that obligation would not entail "undue burden or expense," I do not understand why such a change is necessary. First, observations about increased volumes of data due to the existence of electronically stored information are largely anecdotal, not systematic. Second, even if litigants have significantly more potentially discoverable

information because of electronic storage than they did in the paper age, there has been no evidence that the "undue burden" standard is inadequate to the task.

All the cases cited by the proposed Advisory Committee Note applied the current standard, and I am aware of no suggestion that the results were unjust because the Rule is outdated. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) ("When evaluating cost-shifting, the central question must be, does the request impose an 'undue burden or expense' on the responding party?"); Rowe Entertainment, Inc. v. William Morris Agency, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) ("Nevertheless, a court may protect the responding party from 'undue burden or expense' by shifting some or all of the costs of production to the responding party"); and McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) ("Finally, economic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent 'undue burden or expense.'"). No judge of whom I am aware has complained that the "undue burden or expense" standard required an unjust result and that correction could be achieved only through a Rule change.

B. Rule 34 Has Never Been About "The Traditional Concept of a 'Document'"

The proposed change to Rule 34 creates an unnecessary distinction between "documents" and "electronically stored information." The proposed Committee Note explains that the reason for this distinction is that "[i]t is difficult to say that all forms of electronically stored information fit within the traditional concept of a 'document.'"

This potential problem was addressed and solved in 1970, when the Committee defined "documents" to include "electronics data compilations from which information can be obtained only with the use of detection devices." Fed. R. Civ. P. 26(a) advisory

committee note. Although the "Report of the Civil Rules Committee" relates that "Common usage of 'documents" under present Rule 34 has been inconsistent," I am not aware of any such inconsistency. See Zubulake, 217 F.R.D. at 316-17 ("documents" has included electronic data since the 1970 amendments); Rowe Entertainment, 205 F.R.D. at 428 ("Electronic documents are no less subject to disclosure than paper records"). Since the adoption of the Rule in 1937, the word "documents" has included "photographs" and "phonorecords," neither of which fit "the traditional concept of a document."

For purposes of Rule drafting, the pertinent question is not what fits "the traditional concept of a document," but what definition accomplishes the goal of establishing "liberal discovery rules" that "define disputed facts and issues and dispose of unmeritorious claims." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002). The broad, bright line definition has served that goal well since 1937, and the observation that electronic data does not fit "the traditional concept of a document" is not sufficient reason to change it. Limiting the definition of the word "documents," either by creating a distinction between "documents" and "electronically stored information" or otherwise, gives an excuse to litigants who want to withhold evidence that the evidence was not requested because the form in which it exists is not a "document."

C. The Wrongful Withholding of Discovery Is a Bigger Problem Than The Cost of Producing Electronic Information

The facts of Zubulake are instructive. In that gender discrimination case, plaintiff requested "all documents concerning any communication by or between UBS employees concerning Plaintiff." 217 F.R.D. at 312. Defendant produced 100 pages of e-mails and other documents in response. 217 F.R.D. at 312-313. After objections and negotiation, defendant agreed to produce "responsive e-mails from the accounts of five individuals

named by" the plaintiff. 217 F.R.D. at 313. Despite the agreement, defendant provided no more e-mails. It asserted that its initial, 100 page production was complete. 217 F.R.D. at 313. Plaintiff knew that defendant's production was incomplete because "she herself had produced approximately 450 pages of e-mail correspondence." 217 F.R.D. at 313. Defendant had not searched any of its back-up tapes for responsive documents, and, significantly, it did not even disclose to the court in its papers opposing a motion to compel that it had not searched them. It simply asserted that its production was complete. 217 F.R.D. at 313. In addition, defendant had not searched its optical disks, which were not back-ups of e-mails but copies that were "easily searchable." 217 F.R.D. at 315. After an order compelling it to do so, defendant searched the disks and produced responsive e-mails. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 282 (S.D.N.Y. 2003). Later, the Court sanctioned the defendants for deleting e-mails. Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). See also United States v. Philip Morris USA, Inc., 327 F. Supp.2d 21 (D.D.C. 2004) (sanction of $2,995,000 for failure to preserve e-mail evidence).

In Rowe Entertainment, a withholding party argued that its employees "have historically conducted business by telephone and fax and have been slow to utilize e-mail." 205 F.R.D. at 424. Another withholding party argued that it "does ninety percent of its business by means other than e-mail, including telephone and fax." 205 F.R.D. at 425. The Court found otherwise.

> General representations by [the withholding parties] that their employees do little business by e-mail are undocumented and are contradicted by data proffered by these same defendants. [One], for example, estimates that its eight computers contain 198,000 e-mail messages ...,

> while [the other's] figures lead to the conclusion that each of its agents sent or received about 43 e-mails per day.

205 F.R.D. at 428.

There is evidence that these are not isolated examples of improper withholding of discovery, but rather a well known and successful strategy.

> "I can't tell you how much I would encourage you defense attorneys to not give over any documents willingly other than the [patient's medical] chart," [a lawyer] said, drawing hearty laughter from the audience.
>
> "People give over stuff not realizing it. I mean, we try to fight everything – incident reports, surveys, anything, logs," he said. "Because we find that 50 percent of the time plaintiffs' attorneys ask for something, we give them an excuse why we can't give it to them, because it's privileged or this or that, they never make a motion and they never get it."
>
> ..... "So you have to streamline. Deny documents," [he] said.
>
> Claim that the documents sought are privileged, he said, and there's a good chance your adversary won't bother to make a motion to seek them.

Charles Toutant, Candid Comments at ICLE Seminar Bring Lawyer National Notoriety, New Jersey L. Jour., Sept. 20, 2004.

Do we want to encourage this kind of behavior? If the Rule is amended to provide that "A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible," or if there is a "safe harbor" for not producing evidence, there will be no such thing as electronically stored information that is "reasonably accessible."

David E. Romine