04-CV-226 RECEIVED 2/14/05

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02/13/2005 09:54 PM

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Subject Proposed Amendments to the Federal Rules of Civil Procedure - Electronic Discovery

To: Committee on Rules of Practice and Procedure
U.S. Judicial Conference
c/o Peter G. McCabe, Secretary
Administrative Office of the U.S. Courts

In response to the call for comments about the proposed rule changes, I respectfully make this submission. I mainly am concerned about the 'safe harbor' provision and the reasonableness standard that would apply to discovery of hard-to-access data. While the proposed changes do have their merits, the negative effects may be worse than the initial problems.

On the positive side, the rules do a good job of bringing electronic discovery issues to light at the beginning of a claim. The changes to Rule 26(f) would prompt parties to address any issues relating to disclosure or discovery of electronically stored data during their conference. The changes also call for the parties to discuss an approach to production to protect against privilege waiver. In turn, the changes to Rule 16 would add provisions on disclosure of electronically stored information and any agreements for protection against privilege waiver to the scheduling order. By giving electronic discovery attention early in the litigation process, many of the issues associated with it can be ironed out.

Further, Rule 34 would provide a distinction between documents and electronically stored information. That means parties would have to frame their discovery requests to ask for either documents, electronically stored information or both. This will help prevent any confusion as to what a requesting party seeks in its discovery requests. The changes would also allow the party to specify in what form the electronic information would be produced. If none is selected, the responding party can produce information in its ordinary form or in an electronically searchable format. These changes would resolve issues that can occur among parties that use different software packages to handle tasks.

Despite the advantages of some changes, there are several serious flaws in the proposed amendments that should be addressed before they are put into effect. The most talked about is the 'safe harbor' portion of Rule 37 that would not punish a party that failed to provide electronically stored information when that information is lost because of routine operation of the party's computer system. The "safe harbor" would also protect a party that took reasonable steps to preserve electronic information once it knew that information was discoverable.

This simply will not work. Several questions come to mind. What will be considered as

reasonable steps? When does a party know that something is discoverable or needed for litigation? A company could put forth a good faith effort to preserve information only to have a judge say it was not enough. With no hard guideline in place, both parties and judges are at a disadvantage.

In addition, judges will have to guess when a party knew something was needed for litigation or was discoverable. Disputes are often settled without ever entering a court room. Threats are made in the heat of the moment that parties never intend to carry out. A party could be threatened with litigation and not take it seriously.

In turn, discoverable documents could be destroyed according to routine processes. Is the party protected because the documents where deleted as a part of routine procedure or should they be sanctioned because they should have expected litigation? What happens in the scenario where a person may not remember everything that was included in a document? This pertains to emails in particular where a wide range of topics can be covered in a single email.

In the Committee report, the court proposes the following alternative rule:

> **(a) Electronically Stored Information.** A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
>
> > i. the party intentionally or recklessly failed to preserve the information or
> > ii. the party violated an order issued in the action requiring the preservation of the information.

This is a much better rule, as both the judges and any party in a dispute would have a clearer view of conduct that will result in sanctions. The Committee might also consider stating what a party will need to show to prove their retention policies. This could help deter parties from deleting something and then claiming it was deleted as a part of routine deletion processes.

Further, Rule 26 could be amended to add that a party must request a litigation hold along with their discovery request. This would give both the parties and the judges a clear starting point for when data should be withheld.

The second place where the proposed rules are lacking is in Rule 26(b)(2). The Committee proposal would only make a party provide discovery of information that is "reasonably accessible". The Committee is trying to address several particular types of information here, legacy data, deleted data, and difficult to access backup data. Legacy data is stored information that is no longer used and usually maintained on an obsolete system. Deleted data is just that, deleted data. Sometimes through the use of computer forensics this data can be recovered. Backup data can be difficult and expensive to access, depending on what media they are stored on. Thus, the goal of the Committee is to reduce the burden of producing data in these

circumstances for the producing party. Yet, using a reasonableness standard could just make the problems here more difficult.

The main problem is specificity. Any rule in this area would have to be very clear on what is considered accessible and what is not. The reason is the complex nature and the rapid changes made in technology. What is cutting edge today is obsolete tomorrow. This rapid change will add to the difficulty in handing out fair rulings. The judicial system does not have the level of expertise or time to keep up with all these changes in technology.

Without a clear standard, the proposed rule would likely make judges jobs more difficult. Judges would be forced to base their decisions on the technological question of what is or not accessible. This could vary wildly from judge to judge leaving case rulings more mixed than they already are.

On the other side, litigants will also be in a lurch without a clear standard. The requesting party will never be quite sure what it can or cannot request in discovery. The responding party will not be quite sure of what it does or does not have to produce. Judicial rulings would be just as broad as they are now. With both parties arguing over what should or should not be produced, never ending discovery episodes such as the Zubulake case could pop up all over the place. This rule change really just leaves everything as it is now, completely in the hands of judges. If this is the Committee's goal, then perhaps it should just leave well enough alone and not make a rule.

Yet, if it does wish to make changes, a better approach would be to make it dependent on the nature of the data themselves. There are significant differences between deleted data, legacy data, and backup data. Mainly, legacy and backup data do exist, just in a sometimes difficult to access form. As will be explained later, deleted data may or may not still be accessible. With this in mind, trying to make a blanket rule for all of them is a very difficult task. By addressing them individually, judges and litigants will have a clearer view of how to handle their claims.

First, with legacy data and backup data, time frame may be a better measuring stick of how accessible data is. A new rule could make information that is over a few years old and has not been used for a set period of time inaccessible without a showing of good cause. At that point, the rule could require the requesting party to show why the data is needed and the producing party to show why the burden of accessing it is too high. In cases where the data is not very old, but may require high costs to produce, the producing party will have to show proof of the high costs. Then the court can examine how much the data is really needed and proceed with cost shifting analysis with the interest of the requesting party carrying more weight.

This would place a higher burden on the producing party and rightfully so. First, there is an assumption by many, including the Committee, that producing electronic data is tougher than producing paper documents. This is often not true. Instead of boxes filled with paper documents for an attorney to go through page by page, numerous documents can be placed on a single compact disc that an attorney can search through using but a few key strokes saving both time and money for lawyers and their clients.

With backup data, restoration costs can often be expensive. Yet, the Committee must keep in mind that there are a wide range of options out there for backing up data. From companies that provide online storage to rewritable DVD technologies, there are options for companies that will not result in high costs to restore their data. In short, when a party makes a decision on what medium it will use to back up its information, they should bear all the repercussions of that choice.

A similar case could be made regarding legacy data stored on obsolete systems. Again, these are choices a party makes and working around these decisions to meet discovery responsibilities should be in their hands. Of course, a company should not be forced to produce every document that could be remotely related to a claim. Thus, the rules could be modified to require a discovery request be as specific as possible. Once the requesting party meets that requirement and the requested data is shown to be vital, all measures necessary to retrieve it should be taken.

Deleted data is a far different animal, as now you are dealing with data that may or may not still be on the computer. When someone deletes a piece of information, it is not really destroyed. The computer just marks the space it resided in as available for storing another file. Thus, if another file has not been placed in the spot of the deleted file, it can still be recovered using computer forensics. This is far different from legacy or backup data.

Thus instead of a being based on ease of access, a rule would require the requesting party to show how much the data are needed and that it can not obtain them from another source. If the data are essential to the case and cannot be gained from anywhere else, the producing should be required to produce it. If the data was deleted through routine processes, then perhaps a judge could examine cost shifting scenarios to assist parties who truly did not believe the data would ever be needed. If the destruction was willful and wanton, the culpable party should be sanctioned.

This overall shift in focus would likely require the Committee to work with technical experts to truly understand the differences in the various media, but that is a small price to pay. While no rule will be applicable to all situations for all time, a good one will last at least for the foreseeable future. In their current form, the proposals would cause immediate problems. This clearly is not within the Committee's goals.

Conclusion

Electronic discovery issues are definitely a major concern. Yet, we must be careful to not get too hasty in trying to create a means to address it. The current proposals are almost like putting a band-aid on a severe wound rather than taking the victim to a hospital. Intentions are good, but the remedy is inadequate. By stepping back, consulting more experts in technology and carefully constructing guidelines, the Committee will create a clear standard for judges and litigants. It will also save itself from having to come back years later to clean up its own mess.