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Subject E-Discovery-Request to Testify

04-CV-021
Request to Testify
2/11 D.C.

Mr. McCabe:

I would like an opportunity to testify regarding the proposed amendments to the electronic discovery rules in either, Washington D.C, Dallas, or San Francisco. I have attached a short summary of my thoughts on the proposed amendments. Thank you for your consideration.

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electronic discovery.doc

Proposed Electronic Discovery Amendments to the Federal Rules—If it Ain't Broke, Don't Fix it.

By: David J. Fish

Introduction

The Civil Federal Rules Committee has proposed amendments to the Federal Rules of Civil Procedure relating to evidence stored electronically. (hereafter, "electronic discovery") The Rules Committee proposed the amendments in response to what is perceived by some as unique difficulties encountered with electronic discovery.

Unfortunately, the proposed amendments are impracticable, unworkable, and will tolerate the destruction of critical evidence needed for a fair day in court. The proposed amendments also tie the hands of Federal judges and magistrates who are better able to handle discovery disputes on a case by case basis.

Electronic discovery should be embraced by the judiciary as a big step towards providing fact-finders with the truth. Unlike the traditional problems of forgotten conversations and denials that statements were ever said, electronic data such as e-mail can't hide the truth--they say what they say. This is highly-probative evidence well worth the additional effort and expense that the Committee finds problematic.

The rules should be left alone. The current rules adequately address documents/data in all forms--including electronic. As technology develops, so will case law. But, creating a one size fits all approach to electronic discovery is dangerous.

The Proposed Amendments and their Problems

The primary problems with the proposed amendments are summarized as follows:

- ***Prohibiting Rule 37 sanctions for the routine destruction of evidence so long as certain preservation steps are taken.*** In response to computer-automated recycling/overwriting of electronically stored information, the Committee has proposed a "safe harbor" against sanctions. If a litigant's computer system destroyed evidence, that litigant can invoke the "safe harbor" provision if reasonable steps were taken to preserve documents "discoverable in the action".

This provision should be re-named, "the discovery abuser's best friend." Computers may overwrite data, but human-beings control computers. And when litigation is even a possibility, human beings should do everything in their power to avoid having data erased by their automated legless friends.

This proposed amendment fails to recognize that companies usually anticipate litigation well before they are served with a lawsuit. By restricting sanctions to those situations when a litigant should know that documents are "discoverable in the action", this rule implies that there needs to be an "action" pending before a litigation freeze is required.

The safe-harbor amendment contradicts common sense, not to mention precedent--which requires preservation, in many cases, well before being sued. For example, in *Zubulake v. UBS*, 220 F.R.D. 212 (S.D.N.Y., 2003), the court, in an employment discrimination case, ruled that the duty to preserve evidence could occur the moment that litigation was "reasonably anticipated." *Id.* at 217. At this "reasonably anticipated" moment, a litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Id.*

The "safe harbor" amendment is far from safe--it is dangerous. By permitting evidence destruction, and indeed seemingly blessing a standard of care that does not require a litigation freeze until after being sued, the amendments threaten access to justice. The Committee should stay out of this dispute--judges and magistrates are much better able to handle these discovery issues on a case by case basis.[1]

If the Committee feels the need to make an amendment--instead of putting a stamp of approval on denying litigants access to discoverable evidence--it should require a ***mandatory*** sanction if a litigant does not maintain electronic data while it reasonably anticipated litigation.

- ***Early discovery conferences relating to electronic discovery production and preservation.*** Proposed amendments suggest Rule 26(f) conferences cover electronic discovery, especially relating to the form of production, privilege review, and evidence preservation. Proposed changes to Rule 16(b) include scheduling for electronic discovery and potentially having the parties agree against waiving a production for an inadvertently privileged document.

Nothing is really objectionable about these changes, but they are unnecessary--the parties are already supposed to discuss a discovery plan at the Rule 26(f) conference and parties can already stipulate to agreements covering litigation resolution.

- ***Electronic discovery of information that is 'not reasonably accessible.'*** The Committee has proposed amendments relating to electronic data that is not routinely used or accessible to a litigant for production. For example, many companies have e-mail back-up tapes of computer systems, which are maintained for an emergency. There is an expense associated with "recovering" data from back-up tapes.

Under the proposed amendments, a court order would be required before a litigant could be required to produce data that is 'not reasonably accessible'. An elaborate procedure is set out for litigants and judges to follow when data is claimed 'not reasonably accessible' that involves jumping through more hoops than a tiger at a circus.

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[1] Given that this proposed rule would permit potentially damaging documents to be destroyed with immunity, it is not surprising that the discovery amendments are being urged primarily by big business and defense lawyers. *Products Liability, Will E-Discovery Get Squeezed*, Trial, Vol. 40, Issue 12 (November 2004).

First, the party that does not want to produce the data would object on the basis that it is 'not reasonably accessible.'

Second, the requesting party would file a motion requesting the electronic discovery.

Third, in response to the motion, the withholding party would need to demonstrate to the court that the electronic discovery is 'not reasonably accessible.'

Fourth, even if the data is truly 'not reasonably accessible', the court can still require production, but may require the requesting party to show good cause for the production. This good cause analysis would weigh the requesting party's need for the information against the withholding party's burden. The court would also be permitted to impose terms and conditions on the production such as a sampling test and a shifting of the cost to the requesting party in whole or in part.

If the 'not reasonably accessible' amendment is enacted, law firms will amend their "Standard Objections" to always object on this basis. That's just how litigation is nowadays—everyone objects to everything.

This proposed amendment will drive up litigation costs, lead to increased discovery disputes, and burden the judiciary with unnecessary motions. Furthermore, there is already a procedure in place for protecting parties against unreasonable requests. If discovery requests are unduly burdensome, a party can object on that basis--which seems to cover a claim that something is 'not reasonably accessible.'

The proposed amendment relating to cost shifting (*i.e.* the expected terms and conditions of requiring production of not reasonably accessible documents) is contrary to years of jurisprudence that has established a presumption that "the responding party must bear the expense of complying with discovery requests ...." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358, 98 S.Ct. 2380, 2393, 57 L.Ed.2d 253 (1978); *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D.Wis. 2004). If a company is involved in litigation, it has an obligation to make its documents accessible to the extent they are relevant or likely to lead to admissible evidence. Of course there is a cost of gathering documents in response to discovery requests. Just because the documents reside in electronic form should not alter the discovery rules. In fact, it is easier for responding parties to produce electronically responsive documents because they can do word searches---as opposed to looking through each document manually. If a company chooses to rely on the convenience of electronic storage, it has an absolute right to do so. But, when its records are requested in litigation, it has an obligation to produce them.

The Committee should recognize that electronic discovery is not an undue burden--it provides greater access to information. This, of course, is the purpose of discovery.

- ***Assertion of privilege after production of electronic discovery.*** In response to the quantity of data produced electronically, the Committee suggests amending Rule 26(b)(5) to prevent the waiver of a privilege for documents produced inadvertently. The proposed

amendments set up a procedure to allow the responding party to assert the privilege after production and to require the return/destruction of the inadvertently produced document.

Once again, case law already exists about the treatment of inadvertently produced documents that are privileged. Privilege claims are in derogation of the search for truth and must, as a result, be strictly construed. *See, In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000). The Committee should not change this.

- ***Modifying existing rules to deal with electronic discovery.*** The Committee proposes amending the existing rules to specifically relate to electronic discovery. For example, parties are currently permitted under Rule 33 to avoid answering an interrogatory if they can produce a document that is responsive to the request. The amendments propose clarifying the rules to also allow these documents to be produced in electronic form. Rule 34(b) would also permit the requesting party to specify the form (*i.e.*, paper or electronic) that it wants data to be produced.

These proposed amendments are not objectionable--they are just, once again, unnecessary. Back in 1970, the Advisory Committee Notes to Rule 34 applied the rule to electronic data. Now, 35 years later, no lawyer deserving of a bar card could make a straight-faced argument to a Federal judge or magistrate that electronic data is off limits because it is electronic. "It is now axiomatic that electronically stored information is discoverable under Rule 34". Redish, *Electronic Discovery And The Litigation Matrix*, 51 DUKE L. J. 561, 571 (Nov. 2001)(quoting cases). Indeed, every lawyer's boilerplate "Definitions and Instructions" section of document requests and interrogatories defines a document to be everything under the sun, including electronic data and email.

There is one good point made by the Committee--requesting parties should be permitted to require that electronic data be produced electronically. Common practice is to print-out documents rather than turning the information over electronically. This prevents the requesting party from doing words searches of the data. But, an amendment is unnecessary as the rules already require the producing party to produce the data as it is kept in the "usual course of business."

Conclusion

The Federal courts are doing a good job of dealing with electronic discovery based on the existing rules. The proposed amendments are dangerous and must not be enacted. Instead, judges should continue to develop jurisprudence relating to electronic discovery based on the underlying purpose of the discovery rules--to provide access to the truth.

David J. Fish
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Hearing on Proposed Amendments to the Federal Rules of Civil Procedure before the Civil Federal Rules Committee, United States Judicial Conference

January 28, 2005, Dallas, Texas.

Statement of David J. Fish[1]

Concerning Amendments Relating to Electronic Discovery

Introduction

I thank the Committee for allowing me to testify here today regarding proposed amendments to the Federal Rules of Civil Procedure relating to evidence stored electronically. (hereafter, "electronic discovery").

The proposed amendments are impracticable, unworkable, and will tolerate the destruction of critical evidence needed for a fair day in court. The primary victims of the rules will be small businesses and individuals who rely on the judicial system as the only place where they can have their rights protected, and hold accountable those who have injured them. Evidence, needed by small businesses and individuals to prevail in court, will be much more difficult to obtain if the proposed amendments are enacted.

The proposed amendments also tie the hands of Federal judges and magistrates who are better able to handle discovery disputes on a case by case basis.

Electronic discovery should be embraced by the judiciary as a big step towards providing fact-finders with the truth. Unlike the rote denials by wrongdoers to the effect that they've made no statements on certain subjects, electronic data--such as e-mail--does not hide the truth. Indeed, my experience in litigation is that highly complex, but seemingly unprovable, misconduct can be recreated by looking at electronically stored e-mail information. Such electronic discovery allows access to justice and is well worth the additional effort and expense that the Committee finds problematic.

The rules should be left alone. The current rules adequately address documents/data in all forms--including electronic. Any new rule that treats electronically stored information differently than all others--and thereby limits access to it--is greatly at odds with the purpose of the court system.

The Proposed Amendments and their Problems

The primary problems with the proposed amendments are summarized as follows:

- ***Prohibiting Rule 37 sanctions for the routine destruction of evidence so long as certain preservation steps are taken.*** In response to computer-automated recycling/overwriting of electronically stored information, the Committee has proposed a "safe harbor" against sanctions.

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If a litigant's computer system destroyed evidence, that litigant can invoke the "safe harbor" provision if reasonable steps were taken to preserve documents "discoverable in the action".

This amendment will permit discovery abuse. Computers may overwrite data, but human beings control computers. And when litigation is a reasonable possibility, human beings should do everything in their power to avoid having data erased by their automated friends.

This proposed amendment fails to recognize that companies usually anticipate litigation well before they are served with a lawsuit. By restricting sanctions to those situations when a litigant should know that documents are "discoverable in the action", this rule implies that there needs to be an "action" pending before a litigation freeze is required.

The safe-harbor amendment contradicts common sense, not to mention precedent--which requires preservation, in many cases, well before being sued. For example, in *Zubulake v. UBS*, 220 F.R.D. 212 (S.D.N.Y., 2003), wherein the court, in an employment discrimination case, ruled that the duty to preserve evidence could form the moment that litigation was "reasonably anticipated." *Id.* at 217. At this "reasonably anticipated" moment, a litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Id.*

The "safe harbor" amendment thus is far from safe--it is dangerous. By permitting evidence destruction, and indeed seemingly blessing a standard of care that does not require a litigation freeze until after being sued, the amendments threaten access to truth. Respectfully, the Committee should leave this dispute where it currently resides and should reside--in the hands of judges and magistrates who are much better able to handle these discovery issues on a case by case basis.[2]

If the Committee feels the need to make an amendment, instead of putting a stamp of approval on denying litigants access to discoverable evidence, it should require a ***mandatory*** sanction if a litigant does not maintain electronic data while it reasonably anticipated litigation.

• ***Electronic discovery of information that is 'not reasonably accessible.'*** The Committee has proposed amendments relating to electronic data that is not routinely used or accessible to a litigant for production. For example, many companies have e-mail back-up tapes of computer systems, which are maintained for an emergency. There is an expense associated with "recovering" data from back-up tapes.

Under the proposed amendments, a court order would be required before a litigant could be required to produce data that is 'not reasonably accessible'. An elaborate procedure is set out

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for litigants and judges to follow when data is claimed 'not reasonably accessible' that is unworkable, unmanageable, and unreasonable:

First, the party that does not want to produce the data would object on the basis that it is 'not reasonably accessible.'

Second, the requesting party would file a motion requesting the electronic discovery.

Third, in response to the motion, the withholding party would need to demonstrate to the court that the electronic discovery is 'not reasonably accessible.'

Fourth, even if the data is truly 'not reasonably accessible', the court can still require production, but may require the requesting party to show good cause for the production. This good cause analysis would weigh the requesting party's need for the information against the withholding party's burden. The court would also be permitted to impose terms and conditions on the production such as a sampling test and a shifting of the cost to the requesting party in whole or in part.

If the 'not reasonably accessible' amendment is enacted, law firms will amend their "Standard Objections" to always object on this basis. Unfortunately, that is how litigation is carried out--most law firms object to the vast majority of discovery requests. The burden will then be put on the party requesting the documents to file a motion compelling production. In many cases, this will never be done and critically important evidence will never make it into court.

This proposed amendment will drive up litigation costs, lead to increased discovery disputes, and burden the judiciary with unnecessary motions. Furthermore, there is already a procedure in place for protecting parties against unreasonable requests. If discovery requests are unduly burdensome, a party can object on that basis under existing rules--which clearly cover a claim that something is 'not reasonably accessible.'

The proposed amendment relating to cost shifting (*i.e.* the expected terms and conditions of requiring production of not reasonably accessible documents) is contrary to years of jurisprudence that has established a presumption that "the responding party must bear the expense of complying with discovery requests ...." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358, 98 S.Ct. 2380, 2393, 57 L.Ed.2d 253 (1978); *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D.Wis. 2004). If a company is involved in litigation, it has an obligation to make its documents accessible to the extent they are relevant or likely to lead to admissible evidence. Of course there is a cost of gathering documents in response to discovery requests. Just because the documents reside in electronic form should not alter the discovery rules. In fact, it is easier for responding parties to produce electronically responsive documents because they can do word searches---as opposed to looking through each document manually. If a company chooses to rely on the convenience of electronic storage, it has an absolute right to do so. But, when its records are requested in litigation, it has an obligation to produce them.

The Committee should recognize that electronic discovery is not an undue burden--it provides greater access to information. This, of course, is the purpose of discovery.

- ***Modifying existing rules to deal with electronic discovery.*** The Committee proposes amending the existing rules to specifically relate to electronic discovery. For example, parties are currently permitted under Rule 33 to avoid answering an interrogatory if they can produce a document that is responsive to the request. The amendments propose clarifying the rules to also allow these documents to be produced in electronic form. Rule 34(b) would also permit the requesting party to specify the form (*i.e.,* paper or electronic) that it wants data to be produced.

These proposed amendments are not objectionable--they are just unnecessary. Back in 1970, the Advisory Committee Notes to Rule 34 applied the rule to electronic data. Now, 35 years later, no lawyer deserving of a bar card could make a straight-faced argument to a Federal judge or magistrate that electronic data is off limits because it is electronic. "It is now axiomatic that electronically stored information is discoverable under Rule 34". Redish, *Electronic Discovery And The Litigation Matrix*, 51 DUKE L. J. 561, 571 (Nov. 2001)(quoting cases). Indeed, every lawyer's boilerplate "Definitions and Instructions" section of document requests and interrogatories defines a document to be everything under the sun, including electronic data and email.

There is a good point made by the Committee--requesting parties should be permitted to require that electronic data be produced electronically. Common practice is to print-out documents rather than turning the information over electronically. This prevents the requesting party from doing words searches of the data. But, an amendment is unnecessary as the rules already require the producing party to produce the data as it is kept in the "usual course of business."

Conclusion

The Federal courts are doing a good job of dealing with electronic discovery based on the existing rules. The proposed amendments are dangerous and must not be enacted. Instead, judges should continue to develop jurisprudence relating to electronic discovery based on the underlying purpose of the discovery rules--to provide access to the truth.

Respectfully Submitted,

/s/

David J. Fish