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12/06/2004 10:48 AM

To Peter_McCabe@ao.uscourts.gov

cc

Subject Proposed Amendments to the Federal Rules of Civil Procedure

04-CV-029
Request to Testify
2/11 DC

Dear Mr. McCabe,

I write to request the opportunity to testify at the public hearing on the proposed amendments to the Federal Rules of Civil Procedure scheduled for February 11, 2005, in Washington, D.C.

Best regards,

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04-CV-029
Testimony 2/11 DC

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ATTORNEYS AT LAW

February 10, 2005

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Mr. McCabe:

I write in support of the proposed amendment to Rules 26(b)(5)(B) and 26(f) inasmuch as the amendments provide a mechanism for the early discussion of and remedies for the production of privileged information. The comments are those of the undersigned and should not be taken in any way as the position of the law firm of McCarter & English, LLP or of its clients.

Production of electronic data often creates problems not generally encountered in the "paper" world. When reviewing paper documents it is often a fairly simple matter to determine whether a document may be privileged and thereby trigger the need for a more detailed evaluation. For instance, in the typical large-scale review and production, a protocol is established for a multi-tier review. This protocol provides the first- and second-tier reviewer with a method for flagging potentially privileged documents for closer scrutiny by more experienced counsel. Normally, the first-and second-tier reviewers are contract attorneys hired to satisfy the labor-intensive document review. These contract attorneys will have a rudimentary understanding of the facts and issues of the matter and a list of client's legal department personnel and outside counsel names. In the past, the most useful information available to the contract attorneys was, however, the paper document itself. For instance, correspondence on a law firm's letterhead or from the clients' legal department alone was usually sufficient to trigger the flagging of the document for further review, and possible inclusion on a privilege log.

With electronic information, this initial first-and second-tier review is much less productive with respect to the identification of potentially privileged data. Two attributes of electronic information contribute to this problem: (1) the sheer volume of the material and (2) the informality associated with such communication.

Others who have responded to the Advisory Committee's request for comment have done an exemplary job of describing the volumes of data that must be reviewed for production and flagged for privilege review when electronic information is sought. It is not unusual in large-

scale litigation for there to be as many as 1,000 or more current and former employees who may have responsive documents. Collection of electronic data from the company servers, desktops, laptops and other devices associated with these employees often results in the harvesting of terabytes of data. This data is then searched, sorted, de-duplicated and organized for review. This process creates a pool of millions of pages of electronic documents (e-mail, letters, PowerPoint presentations, spreadsheets, etc.) that need to be reviewed for responsiveness and privilege. It is easy to understand how, in this sea of information, a privileged document could slip through and be produced.

Compounding this is the lack of formality associated with electronic information, especially e-mail. In the past, in the "paper" world advice from outside counsel would arrive on law firm letterhead, addressed to the legal department, and signed in the full name of the attorney. In the world of e-mail, that same advice could arrive from bleddin@mccarter.com to jjones@company.com without all the usual trappings that suggest that the correspondence may be privileged. This is exacerbated by the fact that individuals may have multiple e-mail accounts (personally, I have at least four active addresses, and have likely had about a dozen in the past 10 years). In no time at all, the list of attorneys' names and e-mail addresses may grow to the point of futility. Can we reasonably ask contract attorneys to review and use a 100-page counsel list of e-mail addresses as they flash through their review of e-mails and other electronic documents?

Consequently, we are forced to rely on other tools to supplement the initial review in the identification of potentially privileged documents. These tools include name searches using the attorney list previously mentioned and ontologies developed by linguists. The ontology is used to identify potentially privileged documents by collecting those with combinations of words and phrases that suggest that the document contains privileged communications. Since no ontology is perfect, there remains the possibility of producing privileged documents.

A significant compounding factor is the introduction of non-legal personnel into the document review and production process. For electronic document production it is often necessary to engage the services of e-discovery vendors who can harvest, manage, host, and package the documents for production. Gone are the days when the universe of documents could be locked in a secure room with the attorneys as the gatekeepers. Now it is possible for the mechanism of production to be controlled not by an attorney, but rather by a technician in the office of the vendor that is hosting an internet-based document review.

With the increased pressure on litigants to produce large volumes of documents at greater speeds, and these new avenues for error, it is inevitable that privileged materials will inadvertently be produced. We believe that Rule 26(b)(5)(B), which provides a method for retrieving such materials post-production, is an absolute necessity in this new age. We ask that the comments include a note to the Court to encourage the parties to enter a consent order to deal with this issue. Without such protection against waiver, document production would surely grind to a snail's pace.

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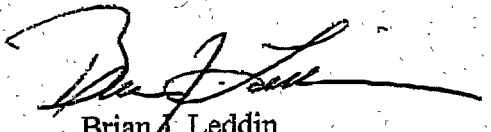
We also suggest that the proposed language of Rule 26(f) require the parties to address this issue before any materials are produced.

The proposed amendments dealing with this issue are laudable in that they encourage the parties to engage in a discussion of these thorny issues long before actual problems arise, and provide a mechanism for dealing with them when they do.

Very truly yours,



Brian J. Leddin

BJL/vfr
Enclosures

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