ALSTON&BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
Fax: 404-881-7777
www.alston.com

Laura Lewis Owens
Direct Dial: 404-881-7363
E-mail: lowens@alston.com

04-CV-070
Request to Testify
1/28 Dallas

January 5, 2005

VIA FACSIMILE

Peter G. McCabe
Secretary
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

I am writing to request to testify at the upcoming hearing on the proposed amendments to the Federal Rules of Civil Procedure governing e-discovery in Dallas, Texas, on January 28, 2005. Please let me know if you need anything further to secure my spot.

Very truly yours,

Laura Lewis Owens

LLO:fnf
ATL01/11823579v1

Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
704-444-1000
Fax: 704-444-1111

90 Park Avenue
New York, NY 10016
212-210-9400
Fax: 212-210-9444

3201 Beechleaf Court, Suite 600
Raleigh, NC 27604-1062
919-862-2200
Fax: 919-862-2260

601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, DC 20004-2601
202-756-3300
Fax: 202-756-3333

04-CV-070
Attached Paper

"Owens, Laura"
<LOwens@alston.com>
02/15/2005 07:01 PM

To Rules_Comments@ao.uscourts.gov
cc "Fonger, Fran" <FFonger@alston.com>
bcc
Subject final comments on federal rules

I respectfully submit the attached paper:

Neutralizing "Weapons of Mass Discovery" and Managing Disaster Recovery: A Statement in Support of Changes to the Federal Rules of Civil Procedure Governing the Discovery of Electronically Stored Information.

final comments on federal rules-v1.DOC

Neutralizing "Weapons of Mass Discovery" and Managing Disaster Recovery: A Statement in Support of Changes to the Federal Rules of Civil Procedure Governing the Discovery of Electronically Stored Information

Submitted by Laura Lewis Owens, Alston & Bird LLP[1]

We have "weapons of mass discovery." That is the phrase we heard at the Fordham Conference from an advocate for parties requesting production of exponentially expanding electronic evidence. In response, this paper advocates effective changes to the Federal Rules of Civil Procedure. It is a plea for disarmament, not of the essential tools the rules intended for all litigants, but of the weapons of burdensome and costly requests and sanctions threats in the discovery arsenal that have increased discovery disputes and decreased our ability to litigate, arbitrate, or mediate cases on the merits.

To address the challenges of technological advances, the proposed concepts of a "two-tier" structure and a safe harbor from sanctions are good ideas that will inevitably be enhanced by the predictability and guidance provided by well-drafted, uniform rules.

---

[1] As head of Alston & Bird's Products Liability Group, I welcome this opportunity to recognize that many individuals on the rules committees have served as counsel, teachers, and on the bench for years beyond the twenty years I have practiced. I am grateful for their time devoted to evaluating best practices in e-discovery, privileged to have a voice in the process, and hopeful we will all be the beneficiaries of the ultimate results. The statement I offer is my own and is not offered on behalf of my firm, my clients, or any professional group.

1. The Proposed Amendment to Rule 26(b)(2) To Create a "Two-Tier" Structure Is a Reasonable and Necessary Change.

The concept of "inaccessible data" in the proposed amendments appropriately captures the technical point that, typically, forms of "disaster recovery" are not designed as systems for "litigation discovery." While Judge Scheindlin admirably applied some basic guidelines concerning inaccessible data in the context of an employment discrimination action in the *Zubulake* decisions, those concepts can be challenging to apply in complex litigation where an agreement about who are the key witnesses and what particular backup tapes are responsive is much more difficult to achieve.

A. Change is Needed Because of the Volume and Expense of Inaccessible Data.

Consider the case of the midsized company, facing litigation pending outside of the Southern District of New York, that was required to restore 100 backup tapes to capture eight months of data. The company was unable to reduce the number of tapes because it had three different servers that were often "rebalanced," so that different individuals worked on different servers at different times – a fairly common practice. I have been told the cost to restore the backup tapes was $450/tape, totaling $45,000.

The same company had another case in which it had to restore backup tapes for six months of data. It restored most of the tapes, but a few tapes were corrupt. The company was advised by a vendor that the cost of restoration would be in the

range of $100,000. The company advised the other party that it would not restore the tapes but would preserve them for the duration of the matter. So far, this arrangement has been acceptable.

At the same time, the same company faces a large class action in which claimants' counsel has thus far not agreed to any restriction on time periods, custodians, or subject matter. The company, thus, faces the prospect of having to restore over 1,800 backup tapes and the exorbitant costs of attorney review. The cost to restore these tapes, at the $350 per tape quote from the prospective e-discovery vendor, would be in excess of $600,000. I am advised that storage costs alone are approximately $100,000 per year.

The greatest expense in all this is the very significant attorney time to review the millions of documents. Here is a current scenario for just one 12-month period of tapes: over 1800 tapes are believed to hold roughly 266 million documents. Assuming 5% of the documents may be privileged and can easily be isolated as such, the company will have 13.3 million documents to review further for privilege. At an estimated pace of one minute per document, the task would take 221,666 hours. At a billable rate of $200/hour for lawyer review, the cost would be $44,333,200 for review of five percent of the documents from only one year of tapes. These numbers illustrate the challenges of high volume and the importance of the concepts of sampling and producing from inaccessible sources only for good cause.

B. Relevant Information is Typically Accessible in the Ordinary Course of Business.

Some have raised a concern that responding parties would abuse the "inaccessible data" limitation by transferring active data into a storage medium that could be claimed to be inaccessible. This concern is unfounded. The draft comments state that "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." Following that reasoning, information would be rendered "accessible" by the very act of attempting to shield it from discovery. Thus, the issue already appears to have been addressed by the existing comments.

Moreover, outside of disaster recovery obligations, corporations today have little incentive to render their business information "inaccessible." To the contrary, they invest significant resources to make information available for business, not legal, reasons. The rules should not be founded on an assumption of wrongful conduct of discovery avoidance but rather should function based on the way companies routinely work in the ordinary course of business.

C. Inaccessible Data is Information Not Accessed By Means Employed in the Ordinary Course of Business.

I join those who have struggled to settle on a concise definition of inaccessibility but offer the best I have thought of so far, which is to associate accessibility with what is done in the "ordinary course of business." In other

words, information is inaccessible if the responding party cannot access it using the means routinely employed in the ordinary course of business. The meaning of this definition will evolve as technology evolves, and the concept balances retrieval obligations by requiring the producing party to use those means in litigation it is already using for business purposes but to take extraordinary steps only for good cause.

2. The Amendments Should Also Include a Cost-Shifting Presumption.

The proposed amendment to Rule 26(b)(2) should include a presumption that "appropriate cost shifting" will occur when inaccessible data is produced. That presumption would deter unreasonable requests and would appropriately signal to counsel a preference and give courts a firm textual basis for cost-shifting where appropriate. *See Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309, 321-24 (S.D.N.Y. 2003).

3. The "Identification" Requirement Is Problematic and Should Be Modified.

The "identification" requirement in the draft amendments is vague and has the potential to generate further dispute. I understand that production of a detailed log to "identify" inaccessible data would not be required. In the alternative, a general list likely to take the form of boilerplate language would be of little use.

The problem on the side of the producing party that possesses inaccessible data is that the company typically does not know the content of stored data unless it bears the expense of restoring it. A representative of PriceWaterhouseCoopers

spoke at a recent ABA meeting about a company that hired it to restore over 100 tapes, yet was surprised to learn that a significant percentage of the tapes were blank because their backup system had unknowingly failed. At most, if companies are using a backup tape system today, they may be able to associate particular tapes with particular dates. They often cannot associate particular tapes with particular people. It is unclear what identifying information they can offer that would be of any use to the requesting party. This lack of clarity could lead to unnecessary disputes over whether appropriate information has been identified and whether it has been adequately identified. I support maintaining the existing obligations on the requesting party to specify the information it seeks, leaving it to the parties to meet and confer about what types of information exist and how it is stored.

4. The Safe Harbor Provision of the Proposed Amendment to Rule 37 Is Necessary and Consistent With the Caselaw.

Anyone who operates on the producing side of the fence suffers from an anxiety of the sanctions that may be sought for electronic evidence lost as a result of routine operations of IT systems. Where a party willfully fails to preserve accessible electronically stored materials, sanctions are available. *See, e.g., Thompson v. United States Dep't of Housing & Urban Development*, 219 F.R.D. 93, 100-02 (D. Md. 2003). But where a party in good faith maintains its ordinary information systems and institutes a litigation hold to preserve what is reasonably anticipated to be relevant in a case, sanctions are not in order and they threaten to

convert discovery from a useful tool into a weapon. *See, e.g., Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004). Where information is lost as a result of operations in the ordinary course of business, sanctions are not warranted unless there is a willful violation of a preservation order. To dilute the concept with a negligence standard would run the risk of perpetual controversy over allegations of wrongdoing that do not rise to the level of sanctionable conduct. Hopefully, many attempts to sanction the inevitable and inconsequential losses of electronic data would be avoided by the safe harbor provision.

5. The Proposed Amendment to Rule 34(b) Should Only Require the Responding Party to Produce Information In a Usable Form.

I advocate avoiding language that could be read to mandate production in native format, and I am concerned that requiring productions to be in the form of "searchable" data could complicate document productions. The current term, "usable," allows the parties to discuss when searchable data is needed and available. *See, e.g., Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 413, 416 (Fed. Cl. 2004).

Indeed, if documents produced must be "searchable," must all metadata be produced and preserved? If so, the "deduplication" solution vendors offer as the best method for addressing the overwhelming volume of emails by eliminating duplicate documents becomes unusable. If we deduplicate, we lose some metadata. We do not want a world in which litigants and the courts must deal with the metadata on every produced document and in which multiple copies of identical documents must be

produced because the metadata could vary nominally from one to the other. Therefore, I support modifying the proposed amendment to Rule 34(b) to only require the production of information in a usable form.

6. Rule 26(b)(5) Should be Amended to Provide a Procedure for Asserting Privilege After Production.

Few published cases address the concept of what litigants often refer to as "claw back" agreements. Adding this concept to the rules will not always expedite production in all cases where careful privilege review is essential, but it will often benefit both the producing and requesting parties by avoiding worries over inadvertent waiver of the privilege. The policies behind the assertion of privilege continue to be valid today and should not be diluted, whether information is in electronic or paper form. Addressing inadvertent waiver in a uniform rule will reinforce those important concepts.

CONCLUSION

In these days of vanishing trials on the merits, my vision is a world in which we rarely hear that a party settled a case simply because it could not bear the cost of complying with discovery obligations. My vision is a world in which companies can maintain disaster recovery systems in good faith without concern they will have to bear the burden of data recovery from those systems in response to routine discovery requests and in the absence of good cause. The proposed amendments offer a way to halt proliferation of "weapons of mass discovery" and should be adopted.