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To "'Rules_Comments@ao.uscourts.gov'" <Rules_Comments@ao.uscourts.gov>, "'peter_mccabe@ao.uscourts.gov'" <peter_mccabe@ao.uscourts.gov>

cc

bcc

Subject Request to testify regarding Proposed E-Discovery Rules Changes

04-CV-072

Request. To Testify 1/28 Dallas

Dear Peter,

Please accept this request to testify at the upcoming hearings on the proposed rules changes effecting e-discovery being held on 1/28/05 in Dallas or 2/11/05 in Washington, D.C. I have previously testified in front of the committee chaired by Judge James Carroll at a hearing that was held at the Brooklyn Law School. At the time I was employed by DuPont. I have worked in the field of litigation support for over 20 years and have hands-on experience with e-discovery that dates back to 1992. I am also an original member of the Sedona Working Group for Electronic Document Retention & Production. Ken Withers suggested that I contact you directly because I do bring a non-lawyer's perspective to this discussion and also have been effective in using metrics to support the need for process or rules changes.

I recognize that I am contacting you late in the game but I hope you will still give consideration to my request.

Sincerely,

Jim M.

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04-CV-072
Testimony (Final version)
1/28 Dallas

Jim Michalowicz

<<Michalowicz written statement to FJC.doc>>

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Michalowicz written statement to FJC.doc

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

January 14, 2005

Re: Written Statement for Civil Rules Committee Hearing in Dallas on January 28, 2005

Dear Peter,

I come to testify before the Rules Committee from the perspective of an information management professional with over 20 years of litigation support experience in managing hundreds of cases involving electronic discovery. I was privileged to have had the opportunity to testify in front of the Rules Committee in October 2000 when I served as Dupont's Manager of Legal Services. Since that time, I have gained new insight into discovery management and have developed an approach to e-discovery that seeks to improve the process and satisfy the needs of all parties involved in litigation.

As an information management professional, my focus is developing an efficient **process** in discovery that delivers an accurate and timely response to a defined discovery request. Discovery is an important phase in the litigation process that supports dispute resolution through decisions based on factual information produced in discovery. My comments are based on how the Rules of Civil Procedure can support these overriding goals and objectives.

The Discovery Management Process

To evaluate the utility of document discovery in meeting the goals and objectives of the litigation process, we need to define the discovery management process. Generally, I divide discovery management into the following seven chronological steps:

a. Define the scope of the request;
b. Identify custodians and locations where records & information reside;
c. Preserve potentially responsive materials;
d. Collect responsive materials;
e. Convert & Index materials in order to begin reviewing materials;
f. Review materials for responsiveness and privilege; and
g. Produce materials to requesting party

These steps are followed for any form of discovery, be it electronic or paper based.

Breakdowns in the Discovery Management Process

The root causes of most "problems" in discovery are the imprecise definition of a request's scope, the criticism of steps taken to preserve material sought in discovery and the uncertainty about the form of the production. These breakdowns in the discovery management process may be prevented by the proposed amendments to Rules 16 and 26.

No improvement will be made to the document discovery management process unless all parties agree that these breakdowns are defects to the process. These breakdowns should not be viewed as openings for requesting parties to take advantage of the "unknown" in e-discovery, which shifts the burden onto the responding party to determine what electronic information, and media types may require preservation and production. Poorly defined requests, propounded without any measurable risk to the requesting party, only exacerbate discovery inefficiency and inaccuracy. At a recent e-discovery seminar I attended, an attorney from a plaintiff's firm referred to this phenomena as "when the fun begins".

Precise definition in scope is critical to the discovery management process. Overly broad requests which are imprecise in scope make the *process* burdensome. Shouldn't discovery be viewed as a key step in the litigation process that facilitates the exchange of factual information? Is it wrong that discovery becomes *the* issue in the case and shifts the attention from the merit of the allegations filed in the complaint?

The "unknown" element of e-discovery primarily arises in the steps between service of a production request and preservation of materials by the responding party. Without a clear definition in the scope of the request about the relevancy or format of the evidentiary materials requested, the responding party is vulnerable to accusations over spoliation. While the responding party can attempt to address the request and identify likely custodians of evidentiary materials responsibly, the threat of a spoliation claim remains. The default position forces the responding party to preserve "everything" because of an imprecise or broadly worded request or an opposing party's reluctance to recognize the discovery management steps of definition and identification require conscientious effort.

Proposed Amendments – Improving the Discovery Management Process

As written, the Amendments to Rules 16 and 26 establish a framework for the parties and court to focus *early* attention to issues about disclosure and discovery of electronic information. The proposed amendments support the goals and objectives of a discovery management process that seeks the exchange of evidentiary materials between the parties in a reasonable, efficient and timely manner. Addressing the e-discovery issues early may reduce the "breakdowns" occurring in the discovery process.

Interestingly enough, many companies involved in the litigation process have developed early case assessment (ECA) protocols that define the facts, issues, potential costs and risks to create a strategy to address a particular case. The ECA is a defined process to

collect factual information in order to make an informed business decision. In some ways, the proposed amendments suggest an ECA approach with a framework for addressing e-discovery issues that lead to a decision on the scope, preservation and form of document production. I recommend that the seven steps of discovery, or some variation, be used as a process map to build this framework.

To address the form for production of requested materials, the amendments to Rule 34 (b) permit the requesting party to specify the form in which electronically stored information is to be produced. The proposed amendments go further to suggest that if the parties cannot agree to the form of production, the responding party can either produce in a form in which it is ordinarily maintained, or in an electronically searchable form. The question is do these amendments improve the document discovery management process? I believe that the electronic searchable format with some limitations to protect attorney work product can help support the reasonable, efficient and timely exchange of evidentiary materials. However, the option of "form in which it is ordinarily maintained" may hamper the discovery exchange not improve it. Production in the form of electronic renderings such as scanned images blend well with the familiar numbering and identification systems that supports the exchange of discoverable materials. These proven systems, however, have not easily transferred to the production process for materials categorized as "native format" or "ordinarily maintained" as electronic data is stored in aggregated formats.

Another consideration, which impacts the form of production, is the option for the parties to develop an on-line repository of document discovery materials and share the cost of creation and maintenance. This option may seem foreign to parties in adversarial litigation, but such cooperative solutions to discovery burdens can meet the objectives of reasonable, efficient and timely exchange of evidentiary materials.

The Life Cycle of Records & Information

The routine life cycle of company records and information may be impacted by "life changing" events including litigation, investigations, mergers & acquisitions, audits and true physical disasters. The digital formatting of almost all types of records and information has led not only to volume increases, but also extensions of a record's life span. Any consideration of discovery rules amendments should take into account the impact on a record's life cycle. The record's life cycle stages include:

a. creation;
b. communication and distribution;
c. storage;
d. retention;
e. retrieval;
f. preservation; and
g. disposition

A corporation has some responsibility to manage the life cycle of records and information. This responsibility comes not only in response to litigation requests for production of documents. Records and information should first be analyzed for their business value as knowledge assets to the company and for regulatory compliance. A corollary consideration is the record's characterization as evidentiary material. A company should not be compelled to keep information that does not have business value, does not meet a regulatory requirement nor is needed as evidentiary materials. Proposed amendments to the Federal Rules of Civil Procedure should consider the impact on a company's records and information management process.

Records and Information Management Constitution and Bill of Rights

As a contributing editor to the Sedona Guidelines for Digital Information and Records Management, I take the view that a company should have a responsibility to develop and implement a records and information management program that addresses the life cycle process. I further believe that once this "constitution" is built which includes retention policies and schedules, that a company has a bill of rights. The rights include the disposition of records and information that are no longer needed for business purposes, regulatory requirements or as evidentiary materials. Another right is the ability to modify and update its records and information program to meet changing business or regulatory needs or requirements without risking penalty.

There is a concern that certain judicial decisions on e-discovery issues may have compromised a company's execution of the records and information bill of rights. Too often, responsible disposition of e-records and information is improperly associated with spoliation. Can the proposed amendments help make a distinction between responsible records and information management actions and spoliation violations that impede the document discovery process?

Proposed Amendments that Address E-Records and Information Management

There are two proposed amendments that I would like to address that touch on records and information management:

- Rule 26(b)(2)(C) - accessibility of electronic information
- Rule 37 - safe harbor provision for routine operations

In practice, the *Identify* step in the document discovery management process seeks to identify custodians and locations of potentially responsive materials. When processing this step I often make a distinction between records and information that are "active", "archived" or "back-ups". Information that resides in an "active" area is typically the primary source for potential evidentiary materials. The "active" storage facility is often in an indexed form and lends to the preservation and collection steps in document discovery. "Archived" information is a secondary source for evidentiary material and

may or may not be in an indexed form. "Back-up" information is not typically indexed, serves the purpose of disaster recovery and often is duplicative of information that resides in the "active" area.

I believe a primary goal of proposed amendments to Rule 26 (b)(2)(C) is to minimize the "fishing expeditions" that can occur with overly broad e-discovery requests. Confining the scope of a request to the location where responsive materials reside makes sense and facilitates the reasonable, efficient and timely exchange of evidentiary materials. The terminology used however, accessible and not accessible, does not necessarily correlate to how the information is maintained and managed in the records and information context. I am concerned that the term "accessible" as defined in the proposed amendments begins to take hold in the records and information management world and encourages bad practices. I don't offer an alternative to the terminology but do suggest a very simple approach which is - once the responding party has demonstrated that a responsible process for the identification, preservation, collection and production of evidentiary materials in response to the defined request exists, then no further requirement should be imposed on the responding party to justify why certain storage areas were not searched or produced.

The safe harbor provision in the amendment to Rule 37 is offered to protect a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer system. This proposed amendment has merit in that it does support a company's records and information bill of rights and makes a distinction between responsible electronic records and information disposition and spoliation. This proposed amendment can \be effective if companies operate a records and information program which includes the life cycle process with a records preservation protocol.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Jim Michalowicz
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