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04-CV-221

February 15, 2005

Peter G. McCabe, Esq.
Secretary of the Committee on Rules of Practice and Procedure
Administrative Offices of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Civil Procedure Concerning Electronic Discovery

Dear Mr. McCabe:

The New York City Transit Authority ("NYCT") is a large, public benefit corporation engaged in the provision of mass transit (subway and bus conditions) services to millions of people within the City of New York. Its interest in the proposed amendments to the Federal Rules stems from its status as a party, principally as a defendant, in a substantial number of federal cases, mostly concentrated in the labor and employment area. It is also a party in other federal court matters, albeit on a far less frequent basis, in the substantive areas of personal injury or commercial litigation.

We offer both general and specific comments regarding the proposed changes to the Federal Rules.

General Comments

The proposed amendments, in our judgment, fail to adequately address and make proper provisions for the varied nature of litigation matters before the federal courts; "one size fits all" solution should not be imposed lightly. In the normal course of events, in the vast majority of cases, important, relevant documents can and will be produced during discovery without requiring a party to undertake the considerable expense and burden of attempting to locate electronic records.

The cost of searching for inaccessible records would easily surpass the ultimate value of most personal injury or employment law cases. Perhaps in large, commercial litigation matters, where business entities with considerable financial resources can evaluate and make a determination of the cost/benefit of engaging in electronic discovery, there might be a reason to believe that electronic discovery is cost-effective. Rarely, however, would that be the case in commercial matters where less than multi-million dollar disputes are at issue; nor would electronic discovery be needed in the usual employment case or personal injury case, where paper records can readily be produced or readily accessible electronic records can be printed. Rarely, if ever, would searches of archived or deleted material be warranted in those cases. However, if truly needed, the courts should engage in mandatory cost shifting in order to prevent undue expense to the disclosing party. Such costs could, in theory, be recoverable if the party seeking discovery was ultimately successful in the litigation. From the viewpoint of a public entity, there would be little justification in expending vast sums of money (in the case of NYCT and other governmental entities, that would be public money) in order to search for records that are not readily accessible, not reasonably identifiable, and not preserved for such purposes. Back-up tapes, automatic deletion of material from active servers, etc. are the business processes used to keep an entity functioning – they are not the equivalent of an office file cabinet that can be easily checked for relevant documents. Moreover, absent mandatory cost-shifting, individual plaintiffs would have everything to gain and nothing to lose by insisting on expensive electronic discovery since they would bear no financial burden.

The rules should, as a general matter, have a presumption that electronic records' not readily accessible by the business entity in the ordinary course of business, are not subject to discovery, absent an objective showing of (i) substantial need for the records and (ii) a likelihood that admissible, relevant and unique evidence will be found.

NYCT agrees that the subject of electronic discovery should be raised at the scheduling conference, but would urge that its use be largely limited to extraordinary cases. Prior to ordering electronic discovery, a court should review a corporate party's record retention schedule to determine if "business records" are in fact, stored only in electronic format. NYCT's record retention schedule, for example, requires that e-mail that would otherwise constitute a "business record", must be retained in hard copy. If the records for the ongoing business needs of the corporate entity are regularly maintained and accessed in electronic format then accessing such records would not impose an undue burden.

Prior to ordering costly searches, the court should also review efforts undertaken in a "litigation hold" process by corporate defendants and counsel. If individuals have been advised, for example, to retain any records, electronic, paper or otherwise, that may be relevant to the pending litigation, such as those residing on a personal computer or server, then those can easily be printed or otherwise be made available for discovery purposes. If such copies are printed, then further electronic discovery should not be considered absent highly unusual and compelling circumstances, such as malicious destruction of documents.

We would respectfully suggest that if a party has a record retention policy, requiring that electronic business records be maintained or printed in hard copy, and if it notifies key individuals of the continuing obligation to retain those and other records that may be relevant to the litigation, the courts should be very hesitant in directing such a party to expend the time and resources to search for and/or retrieve other electronic records on the supposition that "something" might be found.

Specific Comments:

Rule 34

Comment: NYCT would urge that electronic record production be deemed the exception, rather than the rule, but that if it is to be required, the party's obligation should be specific. A party should be required only to produce that which is specifically requested and the burden to search for electronic records should not be placed on a party automatically

Rule 26(b) (5)

Comment: NYCT supports this proposal, but would also recommend that the rule require that the privileged material **must be returned** and the receiving party must **certify** that it has destroyed any and all copies of the privileged material.

Rule 26(b)(2)

Comment: The proposal introduces concepts that are open to a broad range of interpretations. "Reasonably accessible" may vary from one organization to another or even with respect to entities within an organization. A requirement to "identify all electronic information" and "locate it" may not even be possible, absent expensive and time-consuming searches. "Good cause" in this context is equally unclear. Searches of electronic records not readily available should be a last resort and should be ordered only when there is reason to believe that material, relevant and admissible records exist. Further, it should be shown that the information likely to be contained in them cannot reasonably be extracted from other existing sources. For example, business records and deposition testimony may well address the substance of the inquiry, if not the actual wording of a long-since deleted e-mail.

Cost-shifting to the party making the request is essential, absent extraordinary circumstances, e.g. a showing of malicious destruction of records. This would serve to eliminate needless or burdensome requests, largely interposed for the purpose of increasing transactional costs.

Rule 37

Comment: Mere negligence should not be the standard of imposing sanctions for spoliation. The reality is that electronic material exists within large agencies, and routine operation of computer systems will delete or over-ride electronic data. Back-up tapes and similar electronic data are made for disaster recovery purposes, not for file organization and retrieval in perpetuity. Current technology does not allow for easy sorting and storage of records automatically.

The criteria "should have known it was discoverable" is very vague, especially in large organizations. In addition, it is our experience that what is "discoverable" varies widely among judges, magistrates and the facts and circumstances of different cases. Given these parameters, it is impossible to set forth clear and objective directives for record storage and maintenance.

Further, a "preservation order" which would be wide in scope, but short of detail, serves no useful purpose. Counsel recognize that the obligation of discovery is ongoing throughout the case, and if new information is obtained, it needs to be turned over. Satisfying that objective should meet the underlying purposes contemplated by the proposed amendment. A "preservation order" simply places large and complex entities at the risk of contempt and does nothing to cure the problems attempting to be addressed by this rule change. Indeed, the proliferation of electronic records makes it almost impossible to assure with complete certainty compliance with these or similar requirements.

SUBPOENAS.

Rule 45 (c) and 45 (d)(1)(C)

Comment: NYCT suggests that the costs involved in retrieving and providing electronic material, even if retrievable, should be borne by the requestor and not the responding non-party.

Thank you for offering us the opportunity to comment on these proposed changes.

Sincerely,

Denise M. Fraser
Deputy Exec. Asst. General Counsel