DRegard@lecg.com
12/13/2004 03:36 PM

To Peter_McCabe@ao.uscourts.gov
cc
Subject Request to Testify in Dallas

04-CV-044
Request To Testify
1/28 Dallas

December 13, 2004

Dear Mr. McCabe:

This e-mail will serve as my formal request to testify on proposed e-discovery rules in Dallas, Texas on January 28 , 2005.
I appreciate the opportunity to be part of this process.
If you require additional information from me regarding the above, please contact me via e-mail.

Thank you,

Dan Regard, Esq.
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January 20, 2005

04-CV-044
Testimony
1/28 Dallas

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Building
Washington, D.C. 20544

Re: Proposed E-Discovery Amendments to Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am scheduled to testify at the January 28, 2005 hearing in Dallas. I anticipate my testimony will encompass the talking points attached.

I thank you for your attention and look forward to testifying in Dallas.

Respectfully submitted,

Daniel Regard

Cc: John Rabiej, Chief of Staff
Judy Krivits

Testimony Outline for Dan Regard

Introductory Remarks

1. I am Daniel Regard, a Managing Director in the Washington DC office of LECG. LECG is a global expert services firm that offers expert testimony, original research and consulting. My area of specialization is electronic discovery. I have been a consultant in the computer industry for more than 20 years. I hold a B.S. in Computer Science, a JD and an MBA. I have come to testify today because I believe I bring a unique perspective to the discussion about the proposed amendments to the Federal Rules of Civil Procedure.

2. This perspective has evolved from my direct experience with the technologies that have created the situation before us. I believe there is a commonly held assumption that technology has gotten us into this muddle — and technology should, or can get us out of it. I believe this is misguided.

3. Today, I would like to make some general comments about the technologies that have inspired this quest for a better way to deal with electronic discovery, and offer my opinion on three of the proposed amendments.

Technology

1. Technology poses unique, exciting and formidable challenges. It has made the process of discovery in litigation complex and costly. This is not the "fault" of any specific party — it a natural consequence of the disconnect between the pace of technological change and the inability of business processes to keep up with it.

2. Insofar as the use of technology to solve the problems it has created, it is inadequate and imperfect. What it has done is shift the burden. Whereas technology may allow for larger volumes to be *copied* and *transferred* easily, the searching capability afforded by technology is elusive. This is where burdens are unequal. The ability to search thousands, or millions of files helps where you are looking for a single document. But if you are *producing* information in a discovery, you cannot stop after you've found one privileged document. You need to find and mark them all. That is the difference: the difference between *one* and *all*. Search technology helps much more with finding the *one* than with finding the *all*.

Reasonably Accessible

1. While the intention of this amendment is good, I am opposed to it.

"Reasonably Accessible" Electronic Information (Rule 26(b)(2)).

Rule 26(b)(2) would be amended to permit a party to object to a discovery request that calls for electronically stored information that is not "reasonably accessible," requiring a motion to compel to obtain the data:

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

2. The term "reasonably accessible" may soon be (or already is) outdated. The phrase has mostly been used in the sense of "online" versus "offline." Data that is live and accessible, versus data that is stored offline and may be difficult to access due to age, manner, technological changes, etc.

3. Data stored off-line may be becoming a disappearing concept and practice. Corporations are actively considering or implementing "hot-sites" that rely on duplicate live systems rather than backup systems for recovery. Backup tapes are being used in those organizations for short-term (e.g., one week or less) storage. As another example, Google has recently released their online email system, gmail. With gmail you are encouraged "don't throw anything away" (see www.gmail.google.com). Under such a scenario, literally everything is "reasonably accessible."

4. Finally, the aspect of burden seems to be well covered in 26(b)(2)(iii)

Claw Back

1. I am in favor of this amendment. One reason is the unprecedented volumes that parties must contend with. The second is because of the varying degrees of difficulty presented in locating and reviewing different types of information in the production of electronic data.

Claw-Back of Privileged Information (Rule 26(b)(5)).
The proposed amendment to Rule 26(b)(5) would renumber the existing provision Rule 26(b)(5)(A) (Privileged Information Withheld), and add a new Rule 26(b)(5)(B):

Privileged information produced. When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

2. I am in favor of providing parties the ability to assert privilege over produced information. Because of the volumes, the review for privilege is fast becoming a strained process. The ability for a small group of highly knowledgeable individuals to review a production is gone in many of our larger cases. Instead, manpower has been deployed to look for various types of privilege, all under a default rule-imposed time frame.

3. The pressure to handle the increasing volumes must have a safety-release valve. This amendment can provide that valve.

4. Further consideration should also be given to the fact that some electronic information may be easily discernable (e.g., the contents of an email) while other information may be only with great difficulty or using specialized tools. Not all types of imbedded information in various spreadsheet and document files are documented. Hence, the ability to find and review data, which may be privileged or the basis for a privilege, may not be equal among parties. As such, only with greater difficulty might some parties actually become later aware of the full extent of information in their own files. For this reason, as well, I am in favor of a rule providing parties the ability to assert privilege over produced information.

Safe Harbor

1. I am in favor of a Safe Harbor from sanctions.

Sanctions Safe Harbor (Rule 37(f)).
A new Rule 37(f) includes a safe harbor from sanctions relating exclusively to electronically stored information:

Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

   a. the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

   b. the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

2. I have been in a number of preservation situations. Some have been easy, some complex. Based on my experience, I would caution the Committee to look beyond the relatively well- understood paradigm of emails and user files to consider the more complex environment of database systems.

3. Large database systems such as Oracle, JD Edwards, PeopleSoft and many other custom systems are different from email systems. Identifying all the various areas

within a complex system that are responsive takes a significant investment of time and effort. While this process is taking place, automated processes often are deleting information. And the ability for companies to turn off deletion processes can be limited, at best, impossible at worst.

4. Large systems, while capable of being copied (sometimes) as a single "snapshot," may be limit restoration of that snapshot only on the system from which it was copied.

5. There may be data in the system, temporary or transactional tables, that were never created or intended to be retained for any measurable duration of time. Changing these schedules may be difficult, and the ability to store the resulting data streams may be impossible.

6. As an example, consider an energy company that tracks 19,000 data points per second. This information is then summarized and discarded. Were it necessary to keep the data for any duration, significant amounts — gigabytes and terabytes — of storage would be required.

7. With time to act reasonably, trained engineers, data users and litigation experts can examine the system. A targeted capture can be made. Data can be preserved as appropriate.

Comments by Dan Regard, Esq to the committee on Rules of Practice and Procedure on the Proposed Amendments to the Rules on Electronic Discovery.

February 15, 2005

INTRODUCTION

1. I am a Managing Director in the Washington DC office of LECG. LECG is a global expert services firm that offers expert testimony, original research and consulting. My area of specialization is electronic discovery. I have been a consultant in the computer industry for more than 20 years. I hold a B.S. in Computer Science, a JD and an MBA from Tulane. In my work I have managed some of the largest data collections and provided electronic discovery consulting for several high-profile financial investigations. In previous positions, I worked in electronic evidence and consulting and analytical dispute services. I started my career with a private national litigation support practice.

2. The opinions reflected herein are those solely of the author and are not the opinions of LECG, LLC or its employees, directors and officers.

3. I am submitting these comments because I believe I bring unique perspective to the three-way discussion about technology, electronic discovery and the proposed amendments to the Federal Rules of Civil Procedure. I want to first of all thank the committee for its invitation to hear comments from individuals like myself.

4. My perspective has evolved from direct experience with the technologies that have created the situation before us. I believe there is a commonly held assumption that technology has gotten us into this situation — and technology should, or can get us out of it. I believe this is misguided.

5. Because of this, and for other reasons I will present today, I want to state up front that I am in favor of the proposed amendments. While there's always room for improvement, I believe they will benefit litigants on both sides of the courtroom.

6. Today we are at an imbalance where the issues of procedure and spoliation have overshadowed merit. The pundits who demand technological perfection instead of legal reasonableness are taking advantage of ambiguity in the rules, the gap of awareness and education, and the lack of best practices, to exploit this imbalance. To paraphrase a colloquialism: the tail of electronic discovery is wagging the dog of litigation. I believe that these amendments will restore reasonableness and clarity to the litigation process and allow for parties to focus on the merits.

7. Today, I would like to provide my observations about current and future technologies that are creating the imbalance before us today, and offer my opinion on two of the proposed amendments.

TECHNOLOGY

1. Let me first address technology in general. Technology poses exciting and formidable challenges. But it has made the process of discovery in litigation complex and costly. E-discovery consulting and processing fees are projected to rise to $1.87 billion in 2006 — almost a one thousand percent increase over 2003 fees of $270 million.[1] This is not the "fault" of any specific party. Rather, it a natural consequence of the disconnect between the pace at which we are generating information and the pace at which we are able to cope with those volumes of information in a litigation context.

2. I have observed — and yes, been a participant in — discovery as it has transitioned from copying of paper to imaging of paper; from printing of e-mails to the imaging of emails; to the production of electronic native files, TIF's and PDF's. As a society we have gone into the technology one layer at a time. As technologies have become more mainstream, our legal system has acknowledged, grappled — even become entangled — with them. Bill Gates has said, "The first rule of any technology used in a business is that automation applied to an efficient operation will magnify the efficiency. The second is that automation applied to an inefficient operation will magnify the inefficiency." We are entangled in the magnification of inefficiency.

3. I do not need to speak to the volumes of the information, they appear self evident. Yet the forecasts of the future are mind boggling. It is predicted that the 15,451 Terabytes of storage media sold in 2003 will grow to 13,021,100 Terabytes by 2008.[2] These volumes have placed enormous burdens upon producing parties to collect, organize, review and produce information in discovery.

4. Technologies are introduced and adopted with such rapidity, they may come and go before we really understand them. How many of us were just figuring out how to use our VCRs, even as this equipment is being fazed out in favor of DVDs and TiVo? How many of us use cell phones without understanding how they really work but know that if we did not have one, we may be left out of our social or vocational circles? For some, IM is just as critical. Arthur C. Clarke once remarked, "Any sufficiently advanced technology is indistinguishable from magic." We live in a world where users and companies adopt technology before they fully understand it, where it still appears as magic.

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[1] 2004 Socha-Gelbmann Electronic Discovery Survey

[2] "Looking for Data in all the Small Places", Tom M. Coughlin, 2004

5. Yet within this magical world of data we continue to work within a paradigm of obligations structured by and large for a world of paper documents. The discrete, finite, tangible and revealed nature of paper documents represents everything electronic data is not. Data is often not discrete, the volumes appear to be non-finite, the data is certainly not tangible and it is often not easily or fully revealed upon a casual inspection.

6. Finally, in electronic discovery there is a strange sense of time frames and urgency. Data is considered both fragile and indestructible. On one hand there is the perception that if you don't act immediately, data will be lost forever. On the other hand, computer forensic specialists will confirm that they often find information thought lost from days, months or years back. Who is right? They're both right. What we lose over time is the organization of data. It migrates like chaos theory from organized information to disorganized information. And every step increases the cost and complexity of putting it back into shape.

7. With respect to this time paradigm, data has been compared to objects in a river flowing through a town and towards a waterfall. When litigation causes us to seek the objects in the river we have only some choices. We can damn up the river, but only so long before it floods the town. We can pluck some of the items out of the river quickly, but know that we may not keep up with the flow and we will soon be overwhelmed, or we can risk some to fall over the falls while we organize a methodical method to capture as much of the rest as possible while not disrupting the flowing river and endangering the town.

8. As these proposed amendments are considered, it is important to look not only to the present, but the future. There are already constructs that I would respectfully suggest are far beyond the technological training, interest or capacity of most people in this process to understand. Many of the proposed rule changes are framed in terms of emails, discrete data files, isolated users and backup tapes. This is the technology of today (if not yesterday). It is not the technology of tomorrow. So we must work in generalities, not specifics.

9. Technology has helped litigation. We are making gains in terms of search engines, e-file processing, hosting, automated review, auto-coding and auto-categorization. But these are not a panacea.

10. Consider the effect of technology on the burden of production. Search technology alone has greatly shifted the burden of production onto the producer. It is the producer that must locate, gather, search, review, categorize, convert and deliver data to the requestor. It is the requestor that then searches and reviews. Whereas this may seem somewhat balanced, it is not. It is not because search technology works in favor of the requestor. The ability to search thousands, or millions of files helps where one is looking for a single document. And when it is found, this signals a point at which a requesting party might stop. But if you are *producing* information in a discovery, you cannot stop after you've found one relevant

document. You need to find and sequester them all. That is the difference: the difference between *one* and *all*. Search technology helps much more with finding the *one* than with finding the *all*.

REASONABLY ACCESSIBLE
["Reasonably Accessible" Electronic Information (Rule 26(b)(2))]

I would first like to comment on proposed Rule 26(b)(2), which would be amended under the proposals to permit a party to object to a discovery request that calls for electronically stored information that is not "reasonably accessible," requiring a motion to compel to obtain the data[3].

1. The proposed changes under 26(b)(2) effectively create a two-tier system for discovery.

2. In my preliminary outline I indicated that I was opposed to this amendment. My opposition was based on my belief that the language needed change or additional clarification.

3. While I am not entirely convinced that the notes establish a sufficient definition for "reasonably accessible," and I feel that the rule language may need some wordsmithing, I definitely am in support of a two-tiered system. It is my hope that my comments today will provide the committee with further support for expanding the definition of "reasonably accessible".

4. The proposed rule uses the term "reasonably accessible." In recent months "reasonably accessible" data has been broadly interpreted to be as online data, where as inaccessible data has been defined as off-line data. I believe that the use of the term "reasonably accessible" in this manner may soon be outdated.

5. The discipline of storing data off-line is rapidly becoming a disappearing concept and practice. Corporations are actively considering or implementing "hot-sites" that rely on duplicate live systems rather than backup systems for recovery. Backup tapes are being used in those organizations for short-term storage — typically one week or less.

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[3] The exact language is:

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

6. Furthermore, with the decreased cost of live storage, and the rapid pace of electronic search capability, it may seem like everything is becoming "accessible".

   Perhaps the best harbinger of this future practice can be found in Google's recently released online email system called gmail. Google calls gmail "*an experiment in a new kind of webmail, built on the idea that you should never have to delete mail and you should always be able to find the message you want.*" It boasts that using Google you can always find the exact message you want without having to bother to file or sort; that you will never throw anything away due to substantial storage capacity offered and everything is kept in context. Under such a scenario, literally everything might be considered "reasonably accessible."

7. And if it's not accessible by the people using the systems, there always seems to be an expert who will testify that they can find it, access it, export it, review it and produce it. To me, this means that it is "eventually accessible", not "reasonably accessible".

8. It is my conviction that any two-tiered system must afford parties the ability to actually handle the majority of electronic discovery without *requiring* services of a professional expert. I think experts are appropriate in complex cases, critical even. But how can litigants seek justice when the mechanics of the process in every case is beyond them and beyond the attorneys?

9. Under a two-tiered system, there should be acknowledgement that information may be generated or stored beyond the reach, knowledge or expertise of the average user. And also acknowledgement that this information may require a more rigorous effort, sophisticated expertise and perhaps even cost shifting if not, at the least, an examination of the burdens.

10. Data that may be classified as not reasonably accessible might include metadata, deleted files and fragmented files. It may also include log files, temporary or transactional tables in large databases. As systems become more automated and integrated and more reliable, the logistical data — which is the data that greases the wheels of integration and encompasses much of the so-called metadata at the center of attention here — may become even less accessible, certainly less obvious, to the reasonably average user.

11. One of the Sedona Principals cuts right to the heart of this issue. Sedona Principal number eight states:

The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to

demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

12. In summary, whether the language of the rule is adjusted, or the notes are expanded, I am in favor of a two-tiered system for electronic discovery. I think that such a system must look beyond mere backup tapes to include live yet potentially "not reasonably accessible" information.

SAFE HARBOR
[Sanctions Safe Harbor (Rule 37(f))]

Rule 37(f) provides a safe harbor for the reasonable actions of a producing party relating exclusively to electronically stored information[4].

1. I am in favor of a Safe Harbor from sanctions.

2. I have had experience with a number of preservation efforts involving e-mail systems, employee laptops and corporate enterprise systems. There is no single characterization I can give to this: Some have been easy, some highly complex. Some have been overt and some done behind the scenes, depending on the nature of the investigation and whether litigation was begun or anticipated. Some have involved employee participation. Some have been corporate wide, others very limited to a few key players.

3. Based on my experience, I would urge the Committee to look beyond the well-understood paradigm of emails and user files to consider the more esoteric environment of database systems.

4. Litigants, or at least e-discovery experts, are becoming more and more adept at intervening into the corporate email systems to preserve information either through backup tape, suspension of deletion routines, exporting of mailboxes or through litigation hold orders.

5. However, large database systems, such as Oracle, JD Edwards, PeopleSoft and others differ from email systems in that they may span many multiple systems,

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[4] **Electronically Stored Information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

a. the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

b. the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

encompass a far more diverse range of tables and data, and embody many different types of data retention schedules. Identifying all the various areas within a complex system that are responsive requires a significant investment of time, effort and expertise. While this process is taking place, automated processes often are deleting information. And the ability for users to turn off these internal deletion processes can be limited at best and impossible at worst.

6. While some large database systems are capable of being copied as a single "snapshot," restoration of that snapshot may only be possible on the system from which it was copied. Unless the original system is suddenly made available, or an identical system is purchased and built, which may not be possible depending on the age and documentation of the hardware, firmware and software, the snapshot may be effectively useless.

7. There may be data in a system in the form of temporary or transactional tables that were never retained nor intended to be retained for any meaningful duration of time. Changing these schedules may be difficult, and the ability to store the resulting data streams may be impossible.

8. As an example, consider a litigation party preserving data on an ongoing basis is asked to preserve temporary data tables. Data that is used to monitor the performance of in-store database systems. Data that is useful if the system crashes so that the last 15 minutes of activity can be examined. The burden to preserve this short term data --- the database equivalent of a short-recycle disaster recovery tape --- would require either a major upgrade of tape backup equipment at every location or an upgrade of their entire network bandwidth to accommodate bringing the data back to headquarters. Both requiring significant code changes. Both taking time to implement. Data may be purged through these regular operations even while solutions are being developed, tested and deployed.

9. As an example, consider a factory tracking 19,000 data points per second. This information is viewed to monitor plant operations, but then summarized and discarded. To keep the data for any duration, significant amounts — gigabytes and terabytes — of storage would be required, internal systems would have to be understood and changed.

With time to act reasonably, trained engineers, data users and litigation experts can examine the system. A targeted capture can be made. Data can be preserved as appropriate. But data, even relevant data may be lost while this preservation plan is put into place.

10. Thus, I am in favor of a safe harbor for reasonable actions. My only caveat to the committee is to urge them to expand their consciousness beyond email and backup tapes to include more complex database systems.

SUMMARY AND CONCULSIONS

Technology is not solving the problems that it creates. We are already in a state of imbalance, and the balanced scales of justice are continuing to tip. I am in favor of addressing the issues of electronic discovery through amendments to the Rules. I favor making discovery duties clearer to both parties in a dispute. I am in favor of a system that lends itself to a standard of reasonableness. I favor a two-tiered discovery. I favor a safe-harbor against sanctions over information deleted through the routine operation of a party's electronic information system.

I believe the two-tiered discovery should be more than back up tapes. I believe that the safe-harbor should be more than email systems.

I thank the Committee for your time and attention to my testimony and hope it will be useful in making your final recommendations.