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Will e-discovery get squeezed?

JAMES E. ROOKS JR.

New proposed amendments to the Federal Rules of Civil Procedure would limit discovery of electronic data and give defendants more opportunities for obstruction.

The quest for proof in products liability cases might remind us of two rhetorical gems of 1960s pop culture. In 1965, Bob Dylan advised us with impeccable logic that "when you got nothing, you got nothing to lose."[1] Two years later, chain-gang prisoner Paul "Cool Hand Luke" Newman made some of us feel a bit better by assuring us that "sometimes nothin' can be a real cool hand." Neither Bob nor Luke was a products liability lawyer.

If there are situations in which "nothin' can be a real cool hand," proving liability in the courtroom is not among them. In court, "when you got nothing" by way of evidence of liability, you and your client have everything to lose—and you will.

It is hardly surprising, then, that there are squads of lawyers whose main occupation is ensuring that plaintiff lawyers with products liability cases have nothing in the way of proof—or as close to nothing as can be achieved. It's their job, and many of them are very good at it.[2] Lately they've been getting too good at it for comfort, and the ever-increasing contraction of discovery rights through court rule amendments helps them to keep secret information that will prove the products liability case.

For at least the past 15 years, the ability of requesting parties—which, in products liability cases, usually means the plaintiffs—to use the broad discovery rights originally envisioned in the Federal Rules of Civil Procedure, and the notice-pleading regime they complement, has been steadily curtailed.[3] Similar developments have been seen in state courts, owing to the trickle-down effect of the federal rules on their state counterparts.

In major part, discovery rights have been truncated through neither the intransigence of opposing parties nor the rulings of judges—but through amendments to the rules themselves by the federal courts' own official rule-makers,[4] urged on by the lobbying of tort "reform" advocates.[5]

During that period, federal court liti-

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gants have lost at least the following:

- the right to obtain information through lawyer-managed discovery, not through mandatory, limited disclosure requirements
- the right to determine how many interrogatories and depositions are necessary to develop adequate proof
- the right to depose a witness for as long as it takes to get answers to relevant questions
- the right to get all relevant information, not merely what the opposing party decides is supportive of claims and defenses
- the right to complete discovery without repeated hearings before judges or discovery masters, with the attendant cost in time and money.

Throughout this period, for every de jure right lost, an opposite de facto right has been created for defendants. Most of this occurred in the rule amendment cycles of 1993 and 2000.

The 1993 discovery amendments. The 1993 amendments established the federal courts' current system of initial disclosure, which relieved federal judges of some of their discovery workload. The amendments also established presumptive limits of 25 interrogatories[6] and 10 depositions[7] per side in each case. Escape from the presumptive limits requires at least one motion by a requesting party and a decision by a judge, magistrate judge, or discovery referee. The net effect has been increased time and money spent on discovery—a change that has benefited defendants more than plaintiffs.

The 2000 discovery amendments. These changes included proposals long advocated by both the American Bar Association's Section of Litigation and the American College of Trial Lawyers—organizations that, while nominally neutral, are populated largely by corporate and insurance defense counsel.

The rule-makers made initial disclosure mandatory for nearly all cases, in all courts; limited the required disclosure to information supporting the disclosing party's claim rather than requiring disclosure of all information relevant to the case; established a presumptive limit of "one day of seven hours"[8] for depositions; and—most critically—narrowed the scope of discovery defined in Rule 26(b)(1) from "the subject matter involved in the action" to "the claim or defense of any party."

What—or who—drives this curtailment of discovery rights? The public comments on the 2000 amendments show clearly the interests that promote this kind of rule-making: A number of the proposals that led to the 2000 amendments were supported by officers of, or advocates for, business and defense bar organizations. Among them were the Chemical Manufacturers Association, the Defense Research Institute, Dow Chemical Co., the Federation of Insurance and Corporate Counsel, Ford Motor Co., the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, the Product Liability Advisory Council, Roche Pharmaceuticals, Shell Oil Co., and various defense bar organizations.

Several proposals were opposed by consumer, public interest, and trial lawyer organizations, and by academics. Among the groups were the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense Fund, the National Association of Consumer Advocates, the New York State Bar Association's Commercial and Federal Litigation Section, and ATLA. And both the scope-of-discovery amendment and a cost-shifting proposal (which the Judicial Conference later rejected) were opposed by the U.S. Department of Justice.[9]

At its September 1999 meeting, the Judicial Conference handed the rule-makers a victory, approving all but one of the discovery amendments.

Targeting e-discovery

The latest phase of the campaign to curtail discovery rights began officially in August 2004 with the publication of a new set of proposed amendments to the rules, directed at perceived problems of electronic discovery and privilege waiver. The proposals are published to elicit comments from the judiciary, the bar, and the public on whether they should be adopted formally.

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Where did the latest proposed rule amendments come from? While the 2000 amendments were being developed, a lobbyist for several business organizations urged the rule-makers to address problems related to inadvertent production of privileged materials. The Defense Research Institute made more extreme suggestions, including putting presumptive time limits on discovery of documents and electronic materials, and treating e-mail messages like telephone conversations rather than written memoranda.[10]

On its face, the analogy between sending e-mail and communicating by telephone not only is absurd, but flies in the face of modern business practices: E-mail has become the primary mode of

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communication and record-making for millions of workers. Many businesses now seldom, if ever, use regular mail or fax or make written memos or notes and rely almost exclusively on messages they send electronically.

Messages are saved and sometimes printed to preserve information and reconstruct past events. Fleeting verbal communication, in contrast, can be reconstructed only through the memory of participants, which raises hearsay issues and opens the way for misconstruction, outright fabrication, and claims of lack of memory.

To treat e-mail messages like telephone calls would create a loophole in the accountability of wrongdoers that would be greater than any immunity in substantive law. The mere suggestion of this approach was a blatant and clumsy attempt to put masses of electronic information effectively beyond the reach of discovery.

Anyone who doubts the necessity of treating e-mail messages like written correspondence need only consider the recently settled fraud litigation brought by the state of New York against GlaxoSmithKline over its concealment of clinical test data on the antidepressant Paxil. Investigators found an internal company e-mail that discussed management's perceived need to "effectively manage the dissemination of these data in order to minimize any potential negative commercial impact."[11]

Once the work on the 2000 amendments was concluded, both electronic discovery and privilege waiver became new areas of inquiry for the rule-makers' continuing study of discovery. The stated purpose of these proposed amendments is to cure alleged problems involving e-discovery. The arguments for the proposals are short on evidence of need for them. Many lawyers, judges, and academics believe that the present federal rules work well for all kinds of discovery, even in complex cases, and need little, if any, change.

However, changing the e-discovery rules is a high priority among corporate counsel, defense attorneys, and the burgeoning industry of electronic discovery consultants and contractors.[12] It appears that demand, rather than actual need, has produced the 2004 proposals.

Triple threat

Some of the new proposals are benign, albeit unnecessary. Three of them, however—which would add language to Rules 26 and 37—are problematic and possibly dangerous. Numerous lawyers, academics, and judges have already complained that these amendments, if adopted, will invite more discovery abuse, give corporate litigants additional procedural and substantive advantages, continue the erosion of the right to discovery, and, ultimately, threaten the notice-pleading system and the broad access to justice that are hallmarks of American law.

Two-tier discovery. This language would be added to Rule 26(b)(2):

> 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.

Trial lawyers argue that this proposal would establish an unprecedented two-tier system of document production that would invite abuse.

An example might be an instance in which the plaintiff requests five-year-old data from the manufacturer of a product no longer on the market. The data was duly stored but is now on backup tapes held by a commercial data-storage company. Finding it will require a search of many backup tapes. In response to a request for production, the defendant objects that the requested data is "not reasonably accessible."

The plaintiff must file a motion to compel. If the court is convinced that the data is not reasonably accessible, it may sustain the defendant's objection. If the plaintiff can show good cause, the court may order production of the data.

The "electronic data" age makes the concept of inaccessibility absurd. If a company still used mid-20th-century business practices and stored all its records in unmarked cardboard boxes, the proposal might make a bit of logisti-

Help keep discovery fair

The federal court rule-makers are soliciting attorney comments on proposed changes to e-discovery rules—whether favorable, adverse, or otherwise—especially from practitioners who have substantial experience in this area. They consider all comments carefully and expect a robust debate on the subject of e-discovery.

ATLA members, to help preserve a fair discovery regime, can file comments to tell the rule-makers how e-discovery works in practice on the plaintiff side in the federal courts—and in the state courts, whose rules often track the federal rules closely.

The official notice of the proposed rule amendments on e-discovery appears on the federal judiciary Web site at www.uscourts.gov/rules/comment2005/Memo.pdf. A summary of the proposed changes is available at www.uscourts.gov/rules/comment2005/CompleteBrochure.pdf. The complete proposed amendments, with an explanatory memorandum and extensive notes by the Advisory Committee on Civil Rules, is published at www.uscourts.gov/rules/comment2005/CVAug04.pdf.

Send comments to Peter McCabe, Administrative Office of the U.S. Courts, One Columbus Circle, N.E., Washington, D.C. 20544, or use the online form at www.uscourts.gov/rules/submit.html.

The rule-makers have scheduled three public hearings on the proposed amendments: January 12, 2005, in San Francisco; January 28, 2005, in Dallas; and February 11, 2005, in Washington, D.C.

For more information on the proposals, contact Jim Rooks of the Center for Constitutional Litigation at jim.rooks@cclfirm.com.

cal sense, because searches of paper documents are difficult, time-consuming, and expensive. Searches of electronic information, however, can be conducted at lightning speed once the proper media and search program are identified. There are degrees of accessibility, but true inaccessibility occurs only when a business has gone to special lengths to encrypt or hide its data to avoid detection and accountability for bad deeds.

Allowing the producing party to self-designate electronic information as "not reasonably accessible" will invite even more stonewalling than requesting parties already encounter. Requiring the requesting party to obtain the information through an extra hearing before an already-overburdened federal judge is oppressive and flies in the face of Rule 1, which requires that the federal rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Even worse, adopting the proposal could be an intermediate step toward establishing similar requirements for all discovery requests.

"Claw back" of privileged material. This new section (B) would be added to Rule 26(b)(5):[13]

> 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.

Trial lawyers argue that letting a litigant claim privilege for materials already produced—and routinely demand their return—would sanction late declarations of privilege made when the producing party believes the requesting party has found a way to use them.

Consider the previous example, but this time the defendant turns over the information without any review for possible privilege. A later pleading suggests strongly that the plaintiff believes the information contributes to his case for liability. The defendant files a notice that claims the information is privileged. The plaintiff must ask the court to review the claim. In the meantime, the plaintiff lawyer may have to locate any copies of the material that she sent to others and request that they be returned to the defendant or destroyed.

It is hard to imagine a real "problem" that this change would solve. It is not hard, however, to imagine the satellite litigation the proposal would prompt. Like the two-tier proposal, it would require extra hearings, with the inevitable expenditure of lawyers' time and judicial resources to overcome the privilege claim. It would lead to more motions to compel production (the only recourse allowed to the requesting party), and it would set a high standard for a requesting party to meet: proving that the information was not privileged, or that the party "intended" to waive its privilege.[14]

Worse still, if adopted, this amendment would apply to all discovery, not just e-discovery. It would create a new substantive right with regard to privileged material, which is outside the rule-makers' power under the Rules Enabling Act.[15] The rule-makers' authority to make such a rule will inevitably be challenged, leading to even more litigation.

Constitutional challenges might also be anticipated, as the proposed amendment would in effect preempt state substantive law that declares privilege nonexistent once disclosure is made, even inadvertently. It would also preempt some existing state ethics rules that require lawyers to use all disclosed information that will advance their clients' interests, even if technically privileged.

Finally, the proposal would have a critical impact on one of the few methods available to the plaintiff bar to circumvent defense stonewalling and the use of secrecy orders: If the producing party's claim of privilege is successful, it would require return or destruction of material passed along to other attorneys or to organizations like the ATLA Exchange, the Consumer Product Safety Commission, and other federal and state agencies dedicated to protecting public health and safety.

"Safe harbor" for data deleters. This new section f would be added to Rule 37:

> 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: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Trial lawyers argue that this proposal would green-light destruction of information that would establish liability.

Under the present rules, entities that may become parties to litigation are deterred—by the potential for charges of spoliation—from destroying discoverable electronically stored information. Giving companies a safe harbor when they destroy information through the "routine" operation of their document-retention system will invite them to set up "routine" data purges at short intervals.

In one recent, notorious example, a tobacco company appears to have used that very strategy. It set up a system that purged, every month, e-mail messages more than 60 days old, making them unavailable for production in litigation with the federal government.[16]

Beyond litigation considerations, allowing short-term purging of records used for the conduct of business (which sometimes includes the commission of torts) is both bad policy and

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technologically unjustified. Perhaps the paramount reason for storing data electronically is that, in modern systems, nearly infinite amounts can be stored indefinitely and searched quickly. The cheapest and easiest thing a user can do with a computer is to add storage memory. It is bad business practice to purge recent records, for all the imaginable reasons for which businesses have made record-keeping standard practice for centuries.

These proposed changes, like earlier rule amendments, would amount to more than the sum of their parts. First, they would join the body of earlier amendments whose cumulative effect has been the destruction of many discovery rights available to litigants 20 years ago.

Second, two of the 2004 proposals, the two-tiered-discovery and safe-harbor amendments—which might not seem sinister by themselves—would have a special combined effect. Operating together, the two proposals would open a vast area for legalized spoliation. The early, frequent, total, and "routine" destruction of data, under a belief—or assertion—that the data did not relate to a claim or defense in likely litigation, would be protected from sanctions by the safe-harbor provision.

Rule 26(b)(2) creates a presumption that "inaccessible" data is outside the scope of discovery without a court order to the contrary, and Rule 37(f) would allow the destruction of that "inaccessible" data, even if relevant to the claims and defenses, until such a court order is in place. By then it would be too late.

Everything to lose

The liberal discovery regime that supports notice-pleading, minimizes costs and delay, and protects litigants from "trial by ambush" is ours to lose.

If this campaign to alter the Federal Rules of Civil Procedure succeeds, it will provide "producing" parties with extra opportunities not to produce. It will force lawyers to decline or abandon legitimate litigation for want of resources. And along the way it will provoke satellite litigation, constitutional challenges, and tests for compliance with the Rules Enabling Act.

If it succeeds, in a little over 10 years, litigants will have lost—in addition to all the rights discussed above—the following discovery rights that existed before 1993:

- the right to compel discovery of electronically stored information in the same way information stored on paper is discovered
- the right to rely on state law regarding claims of privilege
- the right to hold an opposing party accountable for destroying electronically stored information in the same way it would be held accountable for destroying paper information.

If the debate over the content of the Federal Rules of Civil Procedure were merely a drawing-room discussion among lawyers, it might be less threatening. It might even lead to improved rules.

But the involvement of the business and tort "reform" lobbies from one end of the rule-making assembly line (the Judicial Conference's committees) to the other (Congress) suggests strongly that this contest is not about electronic discovery alone. In its most unvarnished nature, it is a raw struggle to roll back the U.S. civil justice system to an era when corporate interests had even more leverage in court than they do now, leaving tort litigants with nothing to prove their cases—and everything to lose. ■

Notes

1. BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia 1965).

2. For two examples of abusive discovery strategies employed by members of the defense bar, see James E. Rooks Jr., *Abridged Too Far: Discovery Rights and the Campaign for Special E-Discovery Rules*, CORP. COUNS., Oct. 2004, at EDD 18.

3. Some academics trace the campaign to diminish discovery rights back as far as the Warren Burger Court. *See* Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery 'Reform,'* 64 LAW & CONTEMP. PROBS. 197, 206-07 (2001).

4. Rule-making is carried out through a system of committees under the auspices of the Judicial Conference of the United States, the policy-making body for the federal courts. For a good synopsis of the rule-making process, see the federal judiciary's Web site, www.uscourts.gov/rules/newrules3.html (last visited Sept. 28, 2004). *See also* ROSCOE POUND INST., CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS 4-6 (1999).

5. *See* James E. Rooks Jr., *Rewriting the Rules for Class Actions: Rulemaking Has Become Another Front in the Tort "Reform" Wars*, TRIAL, Feb. 2002, at 18.

6. FED. R. CIV. P. 33(a).

7. FED. R. CIV. P. 30(a)(2).

8. FED. R. CIV. P. 30(d)(2).

9. Judicial Conference Comm. on Rules of Practice and Procedure, Draft Minutes 22-23, 25 (June 14-15, 1999), *at* www.uscourts.gov/rules/pracproc1.pdf (last visited Sept. 28, 2004).

10. *See* Summary of Public Comments, Preliminary Draft of Proposed Amendments to the Federal Civil Rules Regarding Discovery 1998-99, at 190, 193, *at* www.uscourts.gov/rules/archive/1999/summary.pdf (last visited Sept. 28, 2004).

11. *See* Brooke A. Masters, *Paxil Maker Will Post Its Unfavorable Test Results*, WASH. POST, Aug. 27, 2004, at E1.

12. The proposals have particularly strong support among corporate counsel and the defense bar. An initial formulation of the proposal's language earned high praise from the "E-Discovery Study Group" of Lawyers for Civil Justice (a tort "reform" advocacy group), whose members include representatives of BASF Corp.; Caterpillar Inc.; CIGNA; ExxonMobil; General Motors; Microsoft; and Nationwide. Memorandum from the Lawyers for Civil Justice to the Advisory Committee on Civil Rules Regarding E-Discovery Proposals for Discussion at the Apr. 2004 Meeting (Apr. 13, 2004) (on file with author).

13. The current Rule 26(b)(5) would become Rule 26(b)(5)(A): "Privileged information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Judicial Comm. on Rules of Practice and Procedure, Advisory Committee Report on E-Discovery Proposals, *at* www.uscourts.gov/rules/comment2005/CVAug04.pdf (last visited Sept. 28, 2004).

14. The committee note accompanying the proposal states that "if the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information." *Id.* at 16.

15. 28 U.S.C. §§2071-77 (1982). The act grants authority to the federal courts to make their own rules. However, its §2072(b) provides that "such rules shall not abridge, enlarge, or modify any substantive right."

16. *See* United States v. Philip Morris USA, Inc., No. CIV.A.99-2496 GK, 2004 WL 1627252 (D.D.C. July 21, 2004); *see also* Eric Lichtblau, *Judge Fines Philip Morris for E-Mail Loss*, N.Y. TIMES, July 22, 2004, at C5 (reporting court's sanction order, fining Philip Morris $2.75 million plus costs for destruction of more than two years' worth of e-mail messages).