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The Association for Information Management Professionals

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December 7, 2004

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Secretary

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

**RE: Request to Testify Concerning the Proposed Amendments to the FRCP:
Electronic Discovery**

Dear Mr. McCabe:

The Judicial Conference's Advisory Committee on Civil Rules has proposed amendments to address concerns relating to the increasingly frequent use of discovery of electronic information. I am writing to request an opportunity for a representative of ARMA International to testify on the proposed amendment to the Federal Rules to Civil Procedure pertaining to electronic discovery on behalf of ARMA International. It is our organizations' preference to testify at the February 11, 2005 hearing in Washington, DC if possible. ARMA International offers the expertise of the profession of information management and has consistently driven excellence and standards for life cycle management of records created in public and private sector organizations.

Established in 1956, ARMA International (ARMA) is the non-profit membership organization for the information management profession. The 10,000 members of ARMA include records and information managers, imaging specialists, archivists, hospital administrators, legal administrators, librarians, and educators. ARMA provides education, research, and networking opportunities to information management professionals and provides guidance to policy makers on issues involving information management. ARMA serves as a recognized standards developer for the American National Standards Institute (ANSI) towards the development of records and information management standards. ARMA is also a charter member of the information and documentation subcommittee of the International Organization for Standardization (ISO) towards the development of its records management standards.

Please contact my Government Affairs Director Bob Tillman at 888-298-8219 should you have any questions about ARMA International or our interest in providing testimony. Thank you in advance for your consideration.

Sincerely,

David McDermott, CRM

President

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12/13/04

04-CV-041
Request to Testify



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The Association for Information Management Professionals

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04-CV-041
Testimony
2/11 DC

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Government Relations Counsel
Frank Moore
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To: Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States

From: ARMA International
By David McDermott, CRM
President

Date: January 14, 2005

Re: Comments to Proposed Amendments Involving Electronic
Discovery

ARMA International appreciates the opportunity to provide its comments and recommendations on the proposed amendments to the Federal Rules of Civil Procedure involving electronic discovery as submitted by the Advisory Committee on Federal Rules of Civil Procedure. ARMA International looks forward to the opportunity for our association president, David McDermott, CRM, to provide oral testimony on February 11 in Washington, D.C.

I. About ARMA International.

ARMA International (ARMA) is the association of records managers and administrators, whose 10,000 members include records and information managers, imaging specialists, archivists, librarians, and educators in both the public and private sectors. ARMA is also host to the community of service providers and manufacturers who support the records management functions of records managers and administrators in public and private sector organizations.

ARMA serves as an international forum for establishing policies, processes and technology standards to ensure responsible records management. Our members are responsible for the efficient maintenance, retrieval, and preservation of vital information created in public and private organizations in all sectors of the economy.

ARMA has long supported policies that provide for the efficient and appropriate management of records and information in all forms and in all settings. These include policies that allow information to flow between different systems, sectors, and entities, reduce barriers to access to public information, and preserve vital records and information resources that document the history and heritage of public and private institutions and organizations.

ARMA International
Comments to Proposed Amendments Involving Electronic Discovery
Page 1 of 8 Pages

ARMA endorses the adoption and implementation of records and information management policies and procedures, based on best practices and standards, which are well known to the profession of records management, and that provide guidance on organizing, retaining, preserving, and appropriately destroying records. Acknowledgement of the importance of records management by an organization's leadership and a commitment of resources serve as safeguards against inappropriate or unlawful uses and destruction of vital information.

ARMA is a recognized standards developer for the American National Standards Institute (ANSI) towards the development of records and information management standards. ARMA was a charter member of the information and documentation subcommittee of the International Organization for Standardization (ISO) towards the development of its records management standards.¹

As a recognized standard developer for the American National Standards Institute, ARMA has submitted a draft standard to ANSI for approval, which is directly relevant to these Proposed Rules: "Managing Recorded Information Assets and Resources: Retention and Disposition Program" ("Draft Standard").²

The Draft Standard in part updates an earlier ARMA publication, entitled "Developing and Operating a Records Retention Program – A Guide", developed under ARMA's standards making process. For excerpts of this document, see "Guidelines for Retention by Industry Program (GRIP)" at www.arma.org/membership/isg/grip. For example, the Draft Standard incorporates management of electronic records, and it acknowledges those best practices that have since become supported by legislative and judicial action.

An additional source of the best practices of records management may be found in the International Organization for Standardization (ISO) International Standard, "Information and documentation – Records management – Part 1: General" (ISO 15489-1:2001). ARMA is a charter member of ISO Technical Committee ISO/TC 46, Information and documentation, Subcommittee SC 11, Archives/records management. ARMA fully supports ISO 15489-1.³

¹ ARMA was a charter member of ISO Technical Committee ISO/TC 46, Information and documentation, Subcommittee SC 11, Archives/records management and participates in the development of ISO standards on records management. In its updated strategic plan, the National Archives and Records Administration indicates, as a specific strategy, that it will base its approach to records management on the ISO Records Management Standard 15489. See "Ready Access to Essential Evidence: The Strategic Plan of the National Archives and Records Administration (1997-2008) (Revised 2003)".

² These are submitted as a part of ARMA's comments by reference to the ARMA web page. See <http://www.arma.org/standards/documents/RetentionDispositionGuidelinePublicReview0504.pdf>. While the Draft Standard has not completed the formal ANSI standards development process, it represents long recognized best practices for the retention and disposition of information in the custody of organizations in both the public and private sectors.

³ The National Archives and Records Administration (NARA), in its statutory responsibilities to assist and provide guidance to Federal agencies in the development and implementation information management

ARMA International is also a sponsor and member of The Sedona Conference Working Group on Electronic Document Retention and Production. The Sedona Conference is a non-profit law and policy think-tank based in Sedona, Arizona. The Working Group on Electronic Document Retention and Production began addressing issues related to electronic document retention and production in the Summer of 2002, leading to the publication of *The Sedona Principles: Best Practices Recommendations and Principles Addressing Electronic Document Production* in January of 2004, and a public comment version of *The Sedona Guidelines* regarding the management of electronic information and records in September of 2004. ARMA supports *The Sedona Principles*.

II. The Role of Records Management in Organizations and in E-Discovery.

First and foremost, ARMA recognizes that good records management programs are good for business. Records are initially created for the purpose of conducting business, documenting and fulfilling business obligations and facilitating decision-making processes. Businesses have obligations and requirements that affect how they keep their records, independent of the need for records in litigation. By following good records management principles, the business can rely on the integrity and authenticity of the records they create and use.

Good records management principles dictate that all relevant business records remain accessible for the duration of a record's life-cycle. *ISO 15489: Information and Documentation – Records Management Guidelines* codifies good records management principles. It states, in part:

Records are created, received and used in the conduct of business activities. To support the continuing conduct of business, comply with the regulatory environment and provide necessary accountability, organizations should create and maintain authentic, reliable and useable records, and protect the integrity of those records for as long as required.

The ISO standard further states: "Systems for electronic records should be designed so that records will remain accessible, authentic, reliable and useable through any kind of system change, for the entire period of their retention."

Clearly, if a good records management program achieves these aims, the records available for litigation and discovery will also be authentic, reliable, and useable. Attention to issues of legal admissibility and establishing a legal foundation for a records management program have been a part of the core knowledge required of professional records managers for a very long time.

regimes, bases its approach to information management on ISO Records Management Standard 15489. See "Ready Access to Essential Evidence: The Strategic Plan of the National Archives and Records Administration (1997-2008) (Revised 2003)", page 14. NARA's strategic plan may be found at: http://www.archives.gov/about_us/strategic_planning_and_reporting/2003_strategic_plan.html.

The proposed amendments in part address the discovery of electronically stored information and the determination of whether information is or is not "reasonably accessible" for discovery purposes. It is important to note that many organizations have haphazard programs or no programs at all. This is true in the traditional hard copy environment, and even more so in the area of electronic information, which has historically been mismanaged. Such mismanagement means the information may be essentially inaccessible in many instances. However, ARMA strongly believes that rules or regulations should not implicitly or explicitly discourage organizations from adopting and implementing sound records management practices.

III. ARMA International Comments and Recommendations.

ARMA applauds the Committee's efforts in examining whether the current Federal Rules of Civil Procedure "adequately accommodate discovery of information generated by, stored in, retrieved from, and exchanged through, computers". See, Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004), regarding Proposed Amendments Involving Electronic Discovery ("Advisory Committee Report"), page 2. The Committee's report notes that electronic discovery has become a "frequently-seen activity" in the context of litigation filed in the federal courts, and a particularly distinctive aspect of this discovery is the significantly greater volume of data associated with electronically stored information, which has resulted in greater burdens, costs and time. See, Advisory Committee Report, page 2. The report also correctly notes that electronic information is subject to means of destruction and alteration not applicable to traditional paper documents. See, Advisory Committee Report, page 3.

Courts continue to struggle with these challenges. "As contrasted with traditional paper discovery, e-discovery has the potential to be vastly more expensive due to the sheer volume of electronic information that can be easily and inexpensively stored on backup media... Depending on how the electronic data is stored, it can be difficult, and hence expensive, to retrieve the data and search it for relevant documents." See, Wiginton v. CB Richard Ellis, Inc., 2004 WL 1895122 (N.D. Ill.), citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

ARMA would urge the Committee to recognize that organizations should make decisions regarding records management appropriate to their business imperatives and legal and regulatory requirements. Rules of discovery applicable to electronic information should not inadvertently discourage the adoption of appropriate best practices. In caution against adopting rules that may freeze the adoption and implementation of best practices and their supporting technologies for organizations, ARMA notes the observation: "Theoretically, as technology improves, retrieving and searching data will become more standard and less costly." See, Wiginton v. CB Richard Ellis, Inc., cited above.

ARMA also agrees with the Committee's assessment regarding the need to create a single, consistent set of rules governing discovery of electronic records:

Adoption of differing local rules by many district courts may freeze in place different practices and frustrate the ability to achieve the national standard the Civil Rules were intended to provide in the areas they address. As electronic discovery becomes more and more common, the burdens and costs of complying with unclear and inconsistent discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, will also increase. See, Advisory Committee Report, page 4.

ARMA notes that accepted records management policies and requirements do not vary on a local basis; in fact, current standards for management of information are recognized internationally. ARMA also notes that although unique issues have emerged involving the discovery of information stored electronically, the core requirements for integrity and accessibility remain for all information, whether paper or electronic. The Committee is attempting to reconcile the unique issues involving discovery with the increasing use of electronic data; however, ARMA urges the Committee to ensure that any rules not discourage (either directly or indirectly) organizations from following well-established practices and procedures for records management.

In general, ARMA supports the proposed amendments to the federal rules to accommodate the discovery of electronic information. Records management professionals are constantly challenged with the retention of electronic information to meet legal, regulatory and business uses, and this rule would have the intended impact of clarifying the legal requirements.

ARMA recognizes that electronically stored information subject to discovery may include records stored on home personal computers and relating to individual personal information. Our comments and recommendations are made in the context of records management within the settings of corporations and other entities that will have either explicit, written records management practices and procedures, or practices and procedures established by business imperatives. Our concerns reflected in the comments below address the responsibility of corporations and business entities to retain all records following best practices that ensure that records are retained for the appropriate or required period of time and destroyed following articulated procedures to properly safeguard against premature and inappropriate destruction.

ARMA offers the following comments and recommendations for the Committee's consideration relating to the proposed amendments:

Comments

1. The language within the rules for determining whether information is reasonably accessible should be clarified. It is true that if a corporation has a good electronic records management system in place, much more information will be "reasonably accessible" than that of a corporation without such a system. The current language in the proposed

rule change allows the party to determine what is reasonably accessible. This may have the unintended consequence of promoting poor recordkeeping in order to avoid discovery.

2. Bad records management practices should not have the consequence of limiting records required to be produced for discovery. Rule 34 for the production of relevant records is also relevant to this issue. In Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976), the court specifically stated: "The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules." By allowing a party to determine whether the information is "reasonably accessible" or not, the outcome may be far fewer records or information will be initially identified as "reasonably accessible" due to the corporation's non-management of the information.

3. Destruction of records is acceptable, *provided that* it is conducted according to policies and procedures that have been established, based on the organization's operational, legal and regulatory, financial and historical needs. The policies and procedures must include a procedure for stopping destruction when records are relevant to reasonably anticipated or ongoing litigation or investigation. Such procedures should include electronic data, should be well publicized throughout the organization, and should be actively supported by the top ranks of management within the organization.

4. ARMA agrees that deleted data and disaster recovery data should be considered as inaccessible, *if the destruction has occurred in the context of a formal records retention program*. Many companies implementing retention schedules delete information in the regular course of business to comply with their published policies and procedures. This deleted data may still be accessible within the system for a period of time, depending on the system configuration. However, such information should be considered destroyed and inaccessible for discovery, just as it would in the parallel hard copy form. Once a hard copy document has been delivered for destruction, either by shredding or some other methodology, it is in effect "inaccessible". Currently, the same status is not afforded to electronic information that has been deleted under a recognized records retention policy. Forensic efforts are being used to recreate "inaccessible" data.

There is, of course, a fine line to be drawn on deleted data – was the data deleted in the regular course of business or was the data deleted to avoid detection. This would be an issue for the court to resolve.

5. Generalizing legacy information into the category of inaccessible should be reconsidered. The comments section to the proposed amendments to Rule 26(b)(2) indicate reasonably accessible data would include that which is "active" data or used

currently by a corporation. See, Advisory Committee Report, page 12. However, many federal regulations require the retention of data beyond the “active” use within a corporation, thereby requiring “inactive” data to be accessible if required by a regulatory authority during its life-cycle. The standards quoted above stipulate that data must be useable throughout its required retention time. Merely because information is “inactive” or not used on a regular basis should not be cause for deeming the information “inaccessible.”

6. Similarly, good records management practices distinguish between backup tapes which are used for disaster recovery or restoration of data to a server, mainframe or personal computer, and records being retained in an electronic form in order to meet requirements of a retention schedule. Backup tapes should not be relied upon to meet retention requirements, due to the recognized difficulties and expenses associated with searching and retrieving data for a specific purpose. We support the verbiage in the comments section to the proposed amendments to Rule 26(b)(2) that indicate information stored solely for disaster-recovery purposes may be expensive and difficult to recover for purposes of discovery. See, Advisory Committee Report, page 11. Tapes that are appropriately used for backup purposes may be considered inaccessible. Those tapes (or other formats) used for long term retention periods in accord with a retention schedule can be considered reasonably accessible for discovery purposes.

Recommendations

1. Language in the rule should encourage the implementation of good records management programs so that organizations may respond to discovery requests in a timely manner and without a need for extraordinary or heroic measures.

ARMA recommends the following text for incorporation in Rule 26 or the Committee’s commentary to Rule 26:

For corporate entities or any party subject to statutory or regulatory retention requirements, a party will be expected to provide a copy of its formal records retention policies and procedures or otherwise articulate its record retention practices in the absence of a written policy. Records subject to a party’s records retention policies and procedures, whether formal or informal, will be assumed to be reasonably accessible and a party’s failure to follow its practices and procedures will not relieve the party from the requirements of discovery.

2. Language in the rule should acknowledge that legacy data can be considered reasonably accessible during its entire retention period, regardless of whether it is in active use or being retained to meet legal and regulatory requirements.

ARMA recommends the following text for incorporation in Rule 26 or the Committee’s commentary to Rule 26:

Legacy data can be considered reasonably accessible during its entire retention period, whether it is in active use or being retained to meet legal and regulatory requirements, and regardless of the format or technology used for storage.

IV. Conclusion.

ARMA International appreciates this opportunity to comment on the proposed amendments involving electronic discovery. We indicate the important role of information management for organizations with proper incentives to meet their business imperatives and point to well accepted regimes of practices and procedures for records management. We urge the Committee to avoid the adoption of any rules that may serve as a disincentive for organizations to adopt and implementing best practices regarding electronically stored information. We point specifically to the issue of what information may be deemed "inaccessible" for purposes of discovery.

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04-CV-041
Additional Comments



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02/15/2005 04:23 PM

To <james_ishida@ao.uscourts.gov>
cc

Subject Additional Comments by ARMA INTERNATIONAL Regarding
E-Discovery

Dear Sir: Please accept the three (3) PDF document attachments as additional comments submitted by ARMA International in the proceeding regarding proposed amendments to the Rules of Practice and Procedure involving electronic discovery. ARMA submitted its original comments on January 14, 2005 and made its verbal presentation on February 11, 2005. These additional comments address issues that the committee raised during our verbal presentation. Please associate these additional comments with our original comments. As attachments to our additional comments, we include the International Standard for Records Management with permission from the International Organization for Standardization. These standards were referenced in our comments and verbal presentation.

If you have any questions regarding these comments or if there are any technical problems associated with this transmission, please call Frank Moore at (202) 367-1254. Thank you for your attention to this matter. Regards, Frank Moore, Government Relations Counsel, ARMA International.



ARMA International Additional Comments re E-Discovery.pdf



Final ISO_TR_15489_1_2001.pdf



Final ISO_TR_15489_2_2001.pdf

To: Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States

From: ARMA International

David McDermott, CRM
President, ARMA International

Cheryl Pederson, CRM
President-Elect, ARMA International

Date: February 15, 2005

Re: Additional Comments to Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States Involving
Electronic Discovery

ARMA International appreciated the opportunity to testify on the proposed rules involving electronic discovery on February 11, 2005 at the Judicial Conference Center in Washington, DC. We appreciate the panel's attentiveness to the points made by David McDermott, CRM, President of ARMA International, and Cheryl Pederson, CRM, President-Elect of ARMA International. ARMA submitted written comments prior to our verbal presentation on January 14, 2005.

ARMA respectfully submits the following additional comments based on the questions raised during our verbal presentation and points raised by other presenters.

1. Our first comments relate to the document submitted as "Exhibit A" by Todd A. Smith, Esq., and President of the Trial Lawyers of America, which contains an Information Technology (IT) listserv discussion of the retention of e-mail. This document shows the common misunderstanding within IT that records should be retained and/or purged based on size limits applied to the mailbox. This philosophy does not recognize that e-mail messages often contain records and therefore need to be retained and/or disposed of in compliance with legal and regulatory requirements and an organization's records retention schedule. The recognition of e-mail messages as containing records is clearly established in a new standard published by ARMA International – ANSI/ARMA 9-2004, Requirements for Managing Electronic Messages as Records. A corporate records retention schedule is based on legal and regulatory

requirements, applies to all records regardless of format, including e-mail messages, and establishes retention periods based on the content of the records. Another new ARMA standard gives specific instruction for establishing records retention programs: ANSI/ARMA 8-2005, Managing Recorded Information Assets and Resources: Retention and Disposition Program. When records management policies, procedures and best practices are applied consistently and in the normal course of business, the organization will reduce its business risk, ensure that records are maintained in compliance with its legal and financial obligations and ensure that records can be produced for discovery.

2. We would like to reiterate that there is an International Standard for Records Management that was published by the International Organization for Standardization in 2001. The standard is ISO 15489 - 1 Information and Documentation — Records Management — Part 1: General. It is accompanied by ISO / TR 15489-2 Information and Documentation — Records Management — Part 2: Guidelines.¹ Both documents demonstrate an international consensus among participating member countries on the requirements for standardizing international best practices in records management. This standard, if adopted and followed by an organization, will provide accountability for the management of records regardless of format. Furthermore, its adoption and implementation would be similar to the use of Generally Accepted Accounting Practices (GAAP) that accountants rely on in the development of company accounting policies.
3. The implementation of records management best practices will improve the ability of corporations and individuals to manage the ever-increasing volume of records no matter what medium the records reside on. Best practices begin with a solid foundation of board and executive level support for the records management program. Effective policies include the retention schedules that drive the life cycle of the record, documentation of approved disposal processes for records and the litigation/audit hold process to prevent destruction of any records required for legal action. Companies that implement records management best practices will be able to enhance, not hinder record production during litigation, and will be able to show proof of records disposal when it is completed during the normal course of business. When a Records and

¹ ARMA International is pleased to provide the attached ISO documents to the Committee members for their personal use. ARMA has received official permission for this distribution, and has been asked to request that distribution be limited to the Committee.

Information Management (RIM) program is followed in a consistent manner, extraordinary or heroic measures to produce records for discovery and litigation purposes will be greatly reduced.

4. ARMA International is the professional forum for experts in records and information management and is available as a resource for additional information and/or comments to the Committee for any future issues. ARMA is a recognized standards developer for the American National Standards Institute (ANSI) towards the development of records and information management standards. ARMA was a charter member of the information and documentation subcommittee of the International Organization for Standardization (ISO) towards the development of its records management standards.²

Respectfully submitted,

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