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04-CV-110

January 21, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Changes to Federal Rules

Dear Attorney McCabe:

I feel strongly that the proposed amendments are likely to promote discovery gamesmanship and discovery abuse. The amendments appear to be designed to frustrate discovery rather than to promote full and fair disclosure.

Enclosed is an article which I wrote which will appear in the next edition of the Massachusetts Bar Association Section Review Journal. The article sets forth my thoughts on the proposed changes.

Thank you for taking the time to review my comments.

Very truly yours,

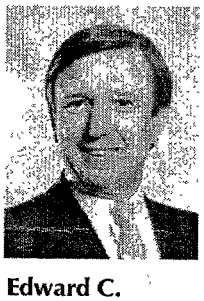
Edward C. Bassett, Jr.

ECB/js
Enclosure

ELECTRONIC DISCOVERY AND THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By Edward C. Bassett, Jr and James A. Wingfield

In August 2004 the Civil Rules Advisory Committee published a set of proposed amendments to the Federal Rules of Civil Procedure. The amendments are intended to cure "alleged" or "perceived" problems with the location, retrieval and production of certain electronically stored information. Although the proposed amendments have strong support from "tort reform" groups and corporate counsel, many judges and academics have concluded that some of the proposed amendments are unnecessary and may lead to more discovery abuse. This article will deal with the controversy surrounding the proposed changes to Rule 26(b)(2) and the proposed addition of Rule 26(b)(5)(B).



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Currently, once a party anticipates litigation, it has a duty to take affirmative measures to preserve potential evidence, including suspension of usual procedures for data destruction or recycling.[1] A party who anticipates litigation must institute a "litigation hold" to ensure the preservation of relevant documents.[2] While this litigation hold may not include inaccessible "disaster recovery" tapes, it should include those data storage tapes that are actively used for information retrieval.[3]

In *Zubulake v. UBS Warburg*,[2] the court held that a corporation is not under a duty to preserve every e-mail, electronic document or backup tape, even where litigation is anticipated. However, the court did hold that anyone who is or anticipates becoming a party to a lawsuit has a duty to preserve what it knows or reasonably should know is relevant to the action, may lead to the discovery of admissible evidence or has been or is likely to be requested during discovery.[4]

The proponents of the amendments suggest that since electronic discovery is uniquely time consuming and expensive the rules need to be amended to address these issues. However, Rule 26(b)(2) already provides protection from unduly burdensome or expensive discovery requests. A court may deny a discovery request or require a requesting party to pay expenses if the burden or expense of the proposed discovery outweighs any likely benefits. Under the current rule, a party responding to a discovery request must comply if the documents sought are not privileged, are relevant and the request does not pose an "undue burden" or expense.[5] The current "undue burden" standard is defined as instances where "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[6] The opponents of the amendments point out that the present set of rules works well for all kinds of discovery, even in complex cases, and there is little need for any significant changes.

Rule 26(b)(2)

The committee has proposed a significant change 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.

The proposed amendment to Rule 26(b)(2) will, by and large, decrease the responding party's responsibility to produce documents required by current law. The proposed rule inserts new language that limits discovery of electronic documents so that the producing party only has an obligation to produce those documents that are "reasonably accessible." If the responding party simply asserts that some information is not "reasonably accessible," the requesting party must then file a motion to compel the responding party to "show that the information is not reasonably accessible." The court must then decide if the information is reasonably accessible and even if it is not, whether there is good

cause for production. Thus, the traditional "undue burden" standard would be replaced, for purposes of electronically stored information, with a new standard that adds an expensive and time-consuming step to the discovery process. It is likely to spawn a whole new generation of discovery motions. It appears as if the new standard would not take into account the importance of the issues, the amount in controversy or the rest of the factors currently a part of the evaluation. Hence, the responding party would now have an additional opportunity to delay the discovery process, increase the expense of discovery, burden the court with more discovery motions and ultimately defeat the liberal purposes and fairness of "full disclosure."

As one commentator has pointed out,

> 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 over burdened Federal judge is oppressive and flies in the face of Rule 1, which requires that the Rules be construed and administered to serve the just, speedy and inexpensive determination of every action.[7]

Rule 26(b)(5)(B)

The committee has also proposed a significant change to Rule 26(b)(5)(B) dealing with the inadvertent disclosure of privileged information. If adopted, this amendment would apply to *all discovery,* not just e-discovery.

> 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.

Under current law, if a court determines that a party has waived a privilege as a result of inadvertent disclosure, this may lead to the use of the specific document at trial or to the disclosure of the document to government agencies. History is replete with examples of attorneys who have uncovered "smoking gun" documents which have been handed over to government agencies who then use the documents to require recalls or design modifications.

The proposed rule may change all of that. Under the proposed rule, when a party produces information "without intending to waive a claim of privilege" it may subsequently notify the receiving party of its claim of privilege. After notification, the party must return, sequester or destroy the specified information and any copies. The rule adds an "undo button" to allow one party to "put the genie back in the bottle."

In reality, the proposed amendment is unworkable. If the responding party's claim of privilege is successful, the rule requires the return of all documents that the attorney has received and/or passed on to third parties such as safety experts, the Consumer Product Safety Commission or any other state or federal agency dedicated to protecting public heath and safety. However, as some judges have noted, when documents have already been viewed by third parties there is *little* that can be done to undue the damage or unring the bell.

Waiver of privilege

For more than a century, our state and federal courts have grappled with the issue of inadvertent disclosure of privileged documents and the waiver of privilege. Some states and federal circuits follow the "never waived" approach, which holds that an inadvertent or negligent disclosure can never effect a waiver because the holder of the privilege lacks a subjective intent to forgo production. However, other courts have adopted the "strict accountability" rule, which provides that any disclosure constitutes a waiver of the privilege without considering the intention of the disclosing party.

In Massachusetts, the Supreme Judicial Court has rejected the "never waived" approach in favor of a "middle test."[8] Similarly, in the First Circuit, the Honorable William G. Young has adopted the "middle test." In *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*,[9] Justice Young explained the rationale for adopting the "middle test."

> "[A] client may be deemed to have met the burden of establishing that a privilege exists and no waiver has occurred if adequate steps have been taken to ensure a document's confidentiality." This approach empowers courts to consider a number of circumstances relating to the inadvertent production, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice. Thus, depending on the totality of these factors, the court may rule either that the inadvertent disclosure has effected a waiver of the privilege or that the privilege remains intact.
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> Providing a measure of flexibility, the "middle test" best incorporates each of these concerns and accounts for the errors that inevitably occur in modern, document-intensive litigation ... "[T]he middle test provides the most thoughtful approach, leaving the trial court broad discretion as to whether waiver occurred and, if so, the scope of that waiver." In light of the preceding consideration, the Court joins the many jurisdictions throughout the federal and state systems that have adopted the flexible "middle test."[10]

In *Amgen,* Justice Young notes that no judge in the First Circuit has ever adopted the "never waived" approach. The judges in the First Circuit have adopted the "strict accountability" rule or the "middle test." The judges who have adopted the "strict accountability" approach have concluded that the automatic waiver rule would best encourage lawyers to

safeguard their confidences from inadvertent disclosures and that there is "little benefit" in continuing to recognize a privilege which has as its foundation the principle of confidentiality when that confidentiality has already been breached. The strict accountability rule effects a waiver of the privilege regardless of the privilege holder's intent or inadvertence.

Even though our state and federal courts have adopted a "middle test" or the "strict accountability approach, the proposed amendment (Rule 26(b)(5)(B)) is closely aligned with the "never waived" approach. Therefore, it is important to recognize that if the proposed amendment is adopted, the new rule may preempt state and federal substantive law addressing the complex issues of inadvertent disclosure and privilege.[11]

The proposed amendment (Rule 26(b)(5)(B)) may also create an ethical dilemma for an attorney who is on the receiving end of the inadvertently disclosed documents. In the *Amgen* case, Justice Young made note of the following:

> The ethical duties of an attorney who receives inadvertently-produced documents is also presently a matter of some dispute. See Paul D. Boynton, "MBA Panel: OK To Keep Opponent's 'Lost' Mail," 27 Mass. Law. Wkly. 2569, 2569, 2603 (1999). Relying substantially on the attorney's duty zealously to advocate for the client's interests, the Massachusetts Bar Association's Committee on Professional Ethics advised that an attorney who mistakenly received a potentially privileged letter was not ethically bound to return the letter. See MBA Comm. On Professional Ethics, Op. 4 (1999). The opinion was widely criticized and flew in the face of contrary American Bar Association formal ethics opinions, which advised the recipient attorney to refrain from reading the documents and comply with the request made by the negligent attorney, including a request to return the documents, or refrain from using the documents until a court definitively resolves the proper disposition of the materials. See ABA Comm. On Ethics and Professional Responsibility, Formal Op. 382 (1994); ABA Comm. On Ethics and Professional Responsibility, Formal Op. 368 (1992). To its credit, Amgen followed the latter approach by segregating the documents and refraining from reviewing them further until this dispute is resolved.

Conclusion

Modernizing the Rules of Civil Procedure to keep pace with the realities of e-commerce and e-mail is appropriate. However, when the proposed amendments are likely to delay the discovery process, increase the number of discovery motions and increase the cost of litigation, we must ask ourselves if some of the proposed changes are really in the best interest of our civil justice system.

Furthermore, before adopting the proposed amendments, careful consideration must be given to the impact that the amendments may have on our common law of privileges and the waiver of privileges as articulated by the Supreme Judicial Court of Massachusetts and our federal courts.

Whether you are in favor of or against the amendments, we should all take the opportunity to make comments to the Advisory Committee. 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: Jan. 12, 2005, in San Francisco; Jan. 28, 2005, in Dallas; and Feb. 11, 2005, in Washington, D.C.

End notes

1. Virginia Llewellyn, *Electronic Discovery Best Practices,* 10 RICH. J.L. & TECH. 51 (2004).
2. Zubulake v. UBS Warburg, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
3. *Id.*
4. *Id.*
5. FED. R. CIV. P. 26(b)(2).
6. *Id.*
7. James Rooks, *Will e-discovery get Squeezed,* Vol. 40 No. 12 TRIAL 18, 18-25 (Nov. 2004).
8. In re Reorganization of Electric Mutual Liability Ins. Co., 425 Mass 419 (1997).
9. 190 FRD 287 (1st Cir 2000).
10. *Amgen,* 190 F.R.D. 287, 291-2 (1st Cir. 2000) (internal citations omitted, quoting In re Reorganization of Electric Mutual Liability Ins. Co. 425 Mass 419, 423 (1997) and Gray v. Bicknell, 86 F.3d 1472 (8th Cir. 1996)).
11. The Rules Enabling Act specifies that "such rules shall not abridge, enlarge or modify any substantive right." *See* 28 USC §§2071-2077. If the amendment is adopted constitutional challenges will follow.