04-CV-112
Request to Testify
2/11 DC

"Craig Ball" <craig@ball.net>
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To <Rules_Support@ao.uscourts.gov>
cc
Subject Request to Testify

To The Rules Committee:

I respectfully request the opportunity to testify in person concerning the proposed changes to the Federal Rules of Civil Procedure during the scheduled Civil Rules hearing in Washington, D.C. on February 12, 2005. Apart from questions, I believe my testimony will not require more than approximately 15 minutes. Please confirm if I will be afforded this opportunity. Thank you.

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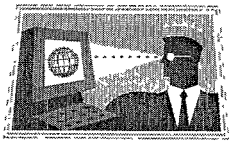

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04-CV-112
Testimony
2/11 DC

Tuesday, January 18, 2005

Re: Comments Respecting Proposed Amendments to Civil Rules 26(b); 34(b); 37(f) and 45(d)(1)(B)

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

Dear Mr. McCabe and Members of the Committee:

My name is Craig Ball, from Houston, Texas. I'm a former plaintiffs' trial lawyer and also an author, teacher, sometime student and certified computer forensic examiner. After two decades in court sparring with automakers, medical device manufacturers and polluters in mass document cases, my work has changed such that electronic discovery is now the sole focus of everything I do. I frequently serve as a court-appointed Special Master or Neutral Expert in matters of computer forensics and electronic discovery, and I've had the good fortune to counsel everyone from Fortune 500 corporations and prominent law firms to solo practitioners and Mom-and-Pop businesses about such matters. Perhaps as much as anyone, I've knocked around nearly every corner of the e-discovery neighborhood, and not a week goes by without the pleasure and privilege of my instructing a roomful of lawyers or judges about electronic discovery, helping them reach that "ah-ha" moment. The physicist Niels Bohr said that an expert is a man who has made all the mistakes that can be made in a very narrow field. By that definition certainly, I come to you as an expert in e-discovery.

Though asked, I am not here on behalf of the trial lawyers, nor for any corporate client that would benefit from limiting the scope or shifting the costs of e-discovery. I'm here on my own nickel, on my own time, to echo the ideal that evidence must remain freely available in discovery and that the cost of finding the truth must not serve as a disincentive to seeking the truth. I seek as well to fairly balance the concerns of those who contend with equal vigor that we must guard against e-discovery becoming an instrument of abuse, extortion or oppression.

I applaud the careful deliberation and hard work of your committee that's brought us to these hearings. Though I respect the thoughtful and forward-looking efforts of the drafters of the proposed rules, I still must caution, "If it ain't broke, don't fix it."

Sometimes the hardest thing to do is nothing, but that is precisely the proper course for now with respect to the proposed amendment to Rules 26(b) and 37(f).

The proposed amendment to Rule 26(b) will make it more difficult and expensive for parties seeking discovery to get to the evidence. Further, the delay engendered by the necessity of motions, expert testimony and hearings insures an increased potential that evidence will be overwritten or corrupted by the passage of time. The justification for this sacrifice is that the explosion of information in electronic form has made discovery too expensive and risky for producing parties to bear. But, before parties seeking discovery lose important rights, it's worthwhile to look back and ask, "How did this happen and are those claiming to be victims of e-discovery the architects of their own demise?"

How Did We Get Here?

Like the Captain of the H.M.S. Pinafore, "when I was a lad I served a term as office boy to an attorney's firm." Then, and subsequently in my years as a young lawyer, the process of responding to a request for production was straightforward. If the request concerned correspondence in the Doe Matter, one visited a room reserved to file storage, located the cabinet, shelf or drawer for Doe, and then found, reviewed, redacted and produced the Doe Correspondence File. Rarely was it necessary to look elsewhere because the producing party could say with reasonable certainty, "This is the Doe file." That certainty grew out of adherence to records management throughout the business process. Documents with unique headings were placed in labeled or numbered files and, in turn, stored in labeled folders, red ropes, drawers and cabinets within controlled environments. Managing paper in this way was costly and so created an incentive to discard what wasn't needed.

In the rush to automate, businesses largely abandoned sound records management in favor of commingling everything willy-nilly on massive networks, strewing the rest across countless back up tapes, local hard drives and portable digital devices. We keep many more digital documents than needed because it feels inexpensive to do so. Instead, what we've done is defer, Enron-like, a big part of the true cost of computerization. Some of these chickens have come home to roost, only to be re-deployed as harbingers of, "The sky is falling!"

But is it *Really* Broke?

Despite the hue and cry of those who embraced automation while recklessly abandoning sound records management, the facts show the sky isn't falling. Where are the uncorrected abuses of discretion? Who are the district judges so bereft of judgment that only these new rules can rein them in? Where are the appellate decisions correcting such abuses or reconciling gaping inconsistencies between districts or circuits? Looking at the cases where district judges have imposed sanctions, would anyone claim these were instances of innocent and diligent action met by penalty? No, the sanctions in the cases follow egregious, flagrant, venal abuses of litigants' rights and contempt for the courts' authority. In Texas, it's said, "Even a dog knows the difference between being kicked and being tripped over." We should trust a district judge to be no less discerning.

The proposed amendments to rules 26(b)(2) and 37(f) are premature and will likely prove unnecessary, unavailing and expensive. Let's not swap a perceived problem for a real one. Changes in the rules should grow from reason, not anxiety, and be grounded on empirical, not anecdotal, evidence. The existing rules framework can and will successfully adapt to meet the challenge, and I see that adaption taking place right now in genuine and productive ways. The bench, bar and litigants we serve continue to accrue expertise and experience in digital discovery. Sound e-records management systems are emerging. Storage technologies are racing forward. There is progress aplenty, but if we dilute incentives and erect roadblocks to benefit a few, we reveal our distrust of the common law and of the bench. Both have well-earned our trust.

A techno-savvy bench and bar isn't a pipe dream. I majored in English, but with study late in life, became fluent in computer forensics and e-discovery. A level of expertise and interest much less than mine is sufficient to grasp the challenges and fashion workable solutions. And I'm not alone. Many lawyers you've heard from already "get it." Many more lawyers and judges are starting to wrap their arms around e-discovery issues and fashion real-world solutions and strategies. The Zubulake case is an example, but just one of many on its heels, if and only if we allow the law and technology to evolve unhampered by special interests and stop gap rulemaking.

Rule 26(b)(2) Reasonable Accessibility Criteria

If an eyewitness didn't speak English, we wouldn't regard their testimony as inaccessible. Likewise, if probative documents are in Japanese or German, they wouldn't be dismissed as "inaccessible" and beyond the bounds of proper discovery absent good cause shown. Electronic evidence is just relevant, probative information recorded in an unfamiliar language. What we are finding is that more and more evidence in our cases comes to us in an unfamiliar tongue. In Texas, it's common to encounter witnesses speaking only Spanish or Vietnamese. Do we dismiss that evidence as inaccessible, or do we embrace the truth by working through skilled translators and better educating ourselves?

Data that some commentators assume to be inaccessible (i.e., deleted files or back up tapes) may actually be easier to access, review and produce than accessible active data (e.g., relational databases, voice mail and instant messaging traffic). Considering the dynamic and fragile nature of electronically stored information, the interposition of a new procedural hurdle and attendant delay creates greater problems than it solves. That delay is particularly troubling because the proposed rules don't expressly impose an obligation to preserve items identified as inaccessible pending the court's consideration. The delay then serves as an opportunity to migrate evidence from inaccessible to gone.

If the proposed amendment to Rule 26(b)(2) is not abandoned, the better approach would be an express requirement to preserve all data claimed to be inaccessible pending the court's determination whether good cause exists for production.

Rule 26(b)(5)(B) Non-Waiver of Privilege Amendment

Other commentators have expressed concerns about the feasibility of securing return of inadvertently produced privileged data, recognizing that after the information is used in

deposition, or shared with experts or other counsel, the toothpaste just won't go back in the tube. I share those concerns but harbor another, being that the terms "return, sequester or destroy" are problematic when applied to data stored on magnetic media. Once digital data has been stored or even viewed on a computer system, it is no small undertaking to eradicate it from the local hard drive, necessitating specialized software or expertise. You cannot "return" the bits on the magnetic media and, even when deleted, the privileged information remains on the media indefinitely, commingled with all other deleted data within the unallocated clusters of the volume. What might a party claiming unintended disclosure be entitled to demand in the way of eradication by the innocent recipient? Is deletion sufficient, notwithstanding the growing awareness that ***delete*** doesn't mean ***gone***? Must the media be wiped or physically destroyed? Must a computer forensic expert be brought in to locate and overwrite the data?

Perhaps it would be sufficient to simply change the wording to state that "a party must take reasonable steps to return, destroy, delete or sequester the specified information and any reasonably accessible copies."

Rule 34(b) Specifying Form of Production Provision

I heartily endorse the effort to provide for discussion of e-discovery issues in meet-and-confer sessions and the proposed amendment to Rule 34(b) authorizing a party to specify the form for production of electronically stored information.

I suggest one small-but-important clarification to Proposed Rule 34(b), being to substitute "form(s)" for "form." As written, the rule requires the requesting party to choose a single format for production of all manner of electronically stored information when it makes better sense to allow the requesting party to specify the format best suited for each particular type of electronic information. For example, it's often useless to request that spreadsheets be produced in TIFF or PDF formats, where such paper-like formats may be ideally suited to electronic mail or word processed documents. Compelling the requesting party to select a single production format for all data is as counter-productive as requiring the producing party to convert everything to paper. I urge the Committee to expressly afford requesting parties the flexibility to select the most appropriate production format for each class of data sought. Such a change need never be oppressive as the producing party is entitled to object to any or all requested forms of production. To this end, the language "The party need only produce such information in one form" should also be omitted from the proposed amendment to Rule 26(b)(ii). Similar language should be removed from the proposed amendment to Rule 45(d)(1)(B) relating to subpoenae.

Rule 37(f) Safe Harbor from Sanctions Amendment

Rule 37(f) merely codifies the principle of "the dog ate my homework." Though likely to be infrequently applied, the proposed rule isn't altogether benign. At worst, some fear it will come into play as a means to cloak deliberate spoliation. At best, it's one less reason to act diligently and decisively to promptly preserve relevant evidence. A judge is capable of distinguishing inadvertence from misbehavior. Just as we don't need a rule compelling a judge to grant sanctions, we need none stripping a judge of the power to do so when warranted.

If the proposed amendment is not abandoned, it should be changed to reference both "discoverable" information *and* "information sought in discovery." As written, the proposed amendment creates a safe harbor for anyone who knew or should have known the information was discoverable. Instead, the fact that the information was expressly sought in discovery should alone be sufficient to trigger reasonable steps to preserve same pending action by the Court.

Should Back-Up Tapes Be Out-of-Bounds?

Businesses have entrusted the power and opportunity to destroy data to virtually every person in the organization, including those with strong motives to make data disappear. Back up tapes are often the only means to preserve information that lies beyond the ambit of those with the greatest incentive to destroy evidence. If we reach back as far as Col. Oliver North's deletion of e-mail subject to subpoena in the Iran-Contra affair, it was the government's back up system that served as the means to recover the evidence demonstrating obstruction of justice.

While it can be indeed be difficult and expensive to restore back up tapes, it should be noted that everything on those back up tapes came from active data, and the necessity of difficult, costly restoration stems only from the destruction of the active data by its custodian. If all discoverable information resides within active data, back up tapes are merely cumulative and there is no obligation to preserve truly identical copies of information. However, if the information has been deleted, the back up tapes may then be the sole source of the deleted data. If the producing party preserves neither the active data nor the duplicate back up data, how has it met its preservation obligation? Put another way, perhaps no litigant should demand the contents of back up tapes at the outset, but neither should the contents of back up tapes be overwritten before the producing party has ascertained that the information is available in the active data. Those who delete evidence without checking if it remains otherwise available should not be heard to complain about the cost of its restoration.

Another issue that militates against treating back up systems as inaccessible is the fact that much discoverable data no longer exists in a paper-philic format. By that I mean, key evidence like databases and even spreadsheets bear little resemblance to what we think of as "documents." These are very dynamic data compilations and how they are constituted at a point in time may be of signal importance, yet they may only be captured on a back up tape. Tomorrow's database will be different and the following day's much different still. Because a snapshot of the database in a relevant form may exist *only* on back up tapes, rotation of those tapes obliterates the only source for relevant evidence. Often a database will not be produced outright in discovery for reason stemming from third-party licensing issues to trade secret concerns to simple logistics. Instead, the database may need to be queried in the form it existed at some relevant time in the past. This isn't possible unless there is a way to reconstitute the database for the relevant time, hence the importance of the back up.

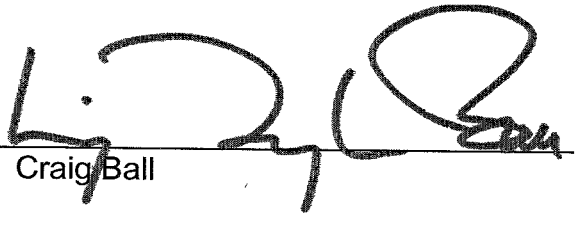
It should be noted that although one witness who previously testified posited the dynamic character of a database as grounds for its inaccessibility--the implication being that databases can't be frozen in time—in fact, a database can be and is captured at intervals. Further, the complex and sophisticated databases mentioned typically

maintain logs which journal changes made to the source data, so it may indeed be possible to extrapolate the contents of a database at a prior point in time using these journaling entries.

This, Too, Shall Pass

I hope the committee will favorably consider these suggestions, most particularly the proposed modification of the amendment to Rule 34(b) respecting form of production. Lawyers have successfully buried their heads in the sand about electronic discovery for far longer than seems possible considering the ability to discover electronic data compilations has been part of our law for decades. Though the current costs of e-discovery eclipse even the pricey old ways of paper discovery, this is a temporary disparity. In spite of the gargantuan data volumes, e-discovery can and will deliver economies and efficiencies like those we take for granted when exploring the 8 billion web pages indexed by Google or the 80 billion bytes on our computer's hard drive. The solutions will entail a mix of new technologies and proven methodologies. Companies will compel employees to "file" their e-mails before they can be sent. System back ups won't require complex and costly restoration. Deleted data will actually be erased from the media. *Electronic discovery will disappear.* It will just be "discovery," and we will soon forget we made any distinction at all.

Thank you for the opportunity to contribute to the rulemaking process.

By: 

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