04-CV-177 RECEIVED 2/15/05

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02/15/2005 02:25 PM

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Subject Electronic Discovery Proposals--Comments

Attached are comments from American Airlines, Inc. on the proposed amendments to the Federal Rules of Civil Procedure addressing electronic discovery. Thank you for the opportunity to submit these comments.

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Electronic Discovery Rules--American Airlines Comments.doc

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February 15, 2005

Via E-Mail to "Rules_Comments@ao.uscourts.gov"
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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: **Comments on Proposed Amendments to the Federal Rules of Civil Procedure Addressing Electronic Discovery**

Dear Mr. McCabe:

American Airlines, Inc. appreciates the opportunity to submit comments on the proposed amendments to the Federal Rules of Civil Procedure addressing electronic discovery. American Airlines is the world's largest carrier, with over 90,000 employees located at airport stations and aircraft maintenance bases worldwide. American and its regional carriers American Eagle and AmericanConnection® serve more than 250 cities in over 40 countries with more than 3,800 daily flights. In January 2005 alone, we boarded more than seven million passengers. In addition, American Airlines Cargo provides more than 100 million pounds of weekly cargo lift capacity to major cities in the United States, Europe, Canada, Mexico, the Caribbean, Latin America, and Asia. With cargo terminals and interline connections across the globe, American offers one of the largest cargo networks in the world.

Ensuring that our customers, their luggage, and their cargo reach their destinations safely and on time requires us to generate and use a vast amount of electronic records, equivalent to billions of typed pages of information. For example, American has been a consistent industry leader in the move from paper to electronic ticketing. Today, only a small percentage of our tickets are issued in paper form. On American's Web site, www.AA.com, our customers can purchase e-tickets, check-in for flights, select seats, and print boarding passes from home. In addition, numerous federal and state agencies, including the Federal Aviation Administration, require that we generate and maintain numerous reports and records, and we do so increasingly in electronic form. Given our size, it is also no surprise that we also are often the target of litigation. In that context, we may be required hundreds of times each year to retrieve and produce records. In some of our larger cases, we may spend upwards of $1-2 million to identify, review, and produce millions of pages of records. For all of these reasons, American has a significant interest in this rulemaking.

I. General Comments on the Committee's Proposal

American strongly supports the Committee's efforts to develop a uniform set of rules governing electronic discovery in the federal courts. We share the concerns frequently expressed by many scholars, judges, corporations, and lawyers about the excessive costs, burdens, and ineffectiveness associated with electronic discovery. We would like to see a single, uniform set of rules applied in federal courts throughout the country, rather than a series of ad hoc, potentially inconsistent local court rules. In particular, American supports, with limited reservations, three major, innovative concepts that the Committee has included in the proposed amendments:

- First, we endorse the Committee's proposal to limit a party's obligation to preserve and produce electronic data that is "not reasonably accessible" without a court order. See Proposed Rule 26(b)(2), pp. 4-5 ("A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible.") The proposed limitation is consistent with the existing discovery rules, beginning with the 1983 amendments that first empowered judges to limit or forbid discovery where costs or burdens to the producing party outweigh the benefits to the requesting party, made more explicit in the 2000 amendments.

- Second, we endorse the Committee's proposal to require that parties "discuss" issues relating to "preserving discoverable information," including electronic data, at the outset of a case. This requirement should help minimize abuse of the discovery sanction process by promoting early resolution of electronic data preservation disputes.

- Third, we endorse the Committee's "safe harbor" proposal for discovery omissions that result from routine computer operations, such as the routine overwriting of computer backup tapes intended solely for use (as are our backup tapes) in a disaster recovery situation. We also endorse the Committee's formulation that would deny the "safe harbor" to a party only if that party has "intentionally or recklessly" failed to preserve requested electronic data. See Proposed Rule 37(f), pp. 33-34. In our view, the risk of sanction abuse with any lesser standard of care, including simple negligence, would be too great.

II. Specific Comments on the Committee's Proposal

A. Electronic Data That Is "Not Reasonably Accessible"

1. Meaning of "Not Reasonably Accessible"

As referenced above, the Committee has proposed to restrict a party's obligation to produce electronically stored data that is "not reasonably accessible" without a court

order. Data sources that are "not reasonably accessible" include, for many companies including ours, computer backup tapes used for disaster recovery purposes. Some plaintiffs' attorneys seem to believe that a company's disaster recovery system is the same thing as an electronic data archive. That is simply not true. American's disaster recovery system is intended to preserve only mission-critical data which is essential to our business operations, in the event a natural or man-made disaster brings down our e-mail or other computer systems. Our disaster recovery system was never designed to be a comprehensive tool for archiving e-mail messages and other electronic data. The backup tapes provide only a "snapshot" of the contents of our computer systems at any one time. They are not easily searchable for individual e-mail messages or other electronic records. Attempting to retrieve and produce individual records on those backup tapes (assuming such records could even be identified) would be a very lengthy and expensive process, potentially outstripping the company's maximum exposure in a particular case.

The Committee's proposed limitation on a party's obligation to produce electronic data that is "not reasonably accessible" resembles the eighth principle of the Sedona Production Principles (www.thesedonaconference.com). That Sedona Principle states that 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" and that "[r]esort 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." We recommend that this language from the eighth Sedona Principle be added to the Note under Proposed Rule 26(b)(2).

Proposed Rule 26(f) also requires the parties to confer early in a case on issues relating to the preservation of electronic data in each party's possession, custody, or control. We agree with the view that any requesting party that fails to seek a stipulated or unilateral preservation order after early discussions with its opponent should be deemed to have waived any objections when the opponent, in good faith, does not preserve electronic data that is not "reasonably accessible." This point should be incorporated into the Proposed Rule.

2. Standard for Discovery of "Not Reasonably Accessible" Data

The Committee's proposal states that a requesting party may obtain a court order requiring its opponent to produce electronic data that is "not reasonably accessible" on a showing of good cause. While American supports the proposed default rule that electronic data which is "not reasonably accessible" need not be preserved or produced, the threshold burden for overturning the default rule is too low. Requiring a showing of "substantial need," comparable to the showing necessary for a party to obtain access to an opponent's attorney work product, would be a fairer standard.

3. Cost Shifting

As drafted, Rule 26(b)(2) does not include a mandatory cost-shifting requirement when a party under a court order must retrieve and produce electronically stored records that are "not reasonably accessible." We understand that the Committee considered but rejected the mandatory cost-shifting approach applicable in the Texas state courts, which to our knowledge has been successful in reducing the number of unreasonable electronic discovery requests. We respectfully request that the Committee reconsider its decision on this point. Mandatory cost shifting would be the most effective deterrent against overbroad, unduly burdensome, and marginally relevant discovery, and should not prevent or deter a requesting party from obtaining access to the records, including electronically stored records, that it legitimately needs to prepare its case.

4. Identifying "Not Reasonably Accessible" Data

Proposed Rule 26(b)(2) states that "[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible." We are concerned that requiring a party to "identify" its electronic records that are "not reasonably accessible" at the outset of a case could be overly burdensome, depending on how specific the responding party's "identifications" must be. The "identification" requirement also seems unnecessary. If an opponent's document requests are reasonably specific—as they must be under the existing Federal Rules—then it should be sufficient for the responding party to object to requests for specific types of electronic records on the ground that the records are "not reasonably accessible." The requesting party could then seek judicial intervention via a motion to compel, as is the standard practice today. American sees no persuasive reason to introduce an extraneous and unnecessary "identification" requirement for inaccessible electronic data.

B. Early Discussions Regarding Electronic Data Preservation and Discovery

1. Discussing Preservation of Discoverable Information

Proposed Rule 26(f) requires the parties to "discuss" issues relating to "preserving discoverable information" at the outset of a case. An accompanying Note suggests that parties could agree voluntarily to "specific provisions" balancing the need to "preserve relevant evidence with the need to continue routine activities critical to ongoing business [since] [w]holesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted." We have no objection to this statement, but would suggest adding a further statement cautioning parties to take special care in negotiating the scope and extent of any stipulated preservation orders, to avoid any misunderstandings later in the case.

2. Discussing the Form of Production and Privileged Information

American supports the idea of requiring the parties to discuss at an early stage in a case the form in which electronic data should be produced. The default form of

production, according to Proposed Rule 34(b)(ii), would be "a form in which [the data] is ordinarily maintained, or in electronically searchable form." We suggest that a default form of production in a "reasonably useable form" would be a better formulation. "Reasonably useable" is the standard contained in existing Rule 34, and would allow the parties greater flexibility in determining the best form of production in any given case.

American supports the Committee's efforts to formulate in Proposed Rule 26(b)(5) a uniform procedure for asserting privilege after production of documents or electronic information. We endorse the view that a party who receives notice that privileged material has been produced should be required to certify that the material has been sequestered or destroyed, if the party declines to return the privileged material. Otherwise, the party asserting privilege after production would have a difficult time verifying that the privileged material will not be used against it in the case at hand or disclosed to third parties.

C. "Safe Harbor" for a Party's Inability to Produce Requested Data as a Result of its Routine Computer Operations

American supports the inclusion of a "safe harbor" from discovery sanctions when electronically stored information is lost due to the routine computer operations of the producing party. For a company like ours, with nearly a hundred thousand employees and hundreds of work sites, not to mention tens of thousands of computers and computer-related equipment, our business would grind to a halt if we were required to shut down our computer systems every time we are served with a complaint or subpoena. Provided a party has taken reasonable precautions to preserve "reasonably accessible" electronic data that is potentially relevant to a case, that party should not be penalized for the inadvertent loss of other data as a result of the routine operation of that party's computer systems.

We also support the alternative wording that the Committee has circulated in a footnote to Proposed Rule 37(f) that would deny the safe harbor to a producing party only if that party has "intentionally or recklessly" failed to preserve relevant electronic data. However, as drafted the "intentional or reckless" wording could be interpreted to permit the imposition of sanctions for the routine destruction of "not reasonably accessible" data, such as computer backup tapes, in the absence of an agreement or court order requiring such data to be preserved. We therefore recommend re-wording this provision as follows:

> A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information.

Thank you for considering these comments.

Very truly yours,

Gary C. Epperley