04-CV-188

"Andre Cronthall" <acronthall@sheppardmullin.com>
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To <Rules_Support@ao.uscourts.gov>
cc
bcc
Subject Comments to Proposed Amendments to FRCP

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Please forward these comments to the Secretary of the Standing Committee of the Advisory Committee on Rules.

Thank you very much.

Andre J. Cronthall
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Direct Line: (213) 617-5474
Fax: (213) 620-1398
e-mail: acronthall@sheppardmullin.com


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ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl®
Los Angeles, California

P.O. Box 351649
Los Angeles, CA 90035
Ph: (323) 939-1999
Fx: (323) 935-6622
E-mail: abtl@abtl.org
www.abtl.org

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Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Washington, D.C. 20544
Attn: Secretary to the Standing Committee,
Peter G. McCabe

Re: Comments to Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

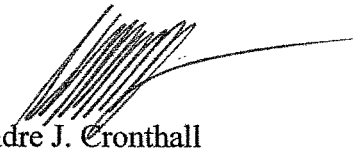
On behalf of the Los Angeles, California Chapter of the Association of Business Trial Lawyers ("ABTL"), I am pleased to submit our comments to certain of the proposed amendments to the Federal Rules of Civil Procedure. Specifically, attached with this letter are comments of the ABTL's Los Angeles Chapter to the Proposed Amendments to Rule 26(b)(2), Rule 26(b)(5) and Rule 37. The ABTL appreciates the diligent work performed by your committee and also appreciates the opportunity to submit these comments.

The Los Angeles Chapter of the ABTL consists of almost one thousand members of the Los Angeles trial bar. Our members represent plaintiff's and defendants in complex business litigation. Consequently, the proposed amendments are of particular interest to our association. The ABTL is a nonpartisan, nonprofit organization consisting not only of lawyers, but also federal and state judges, many of whom have served on our Board of Governors.

In order to evaluate the proposed amendments and develop comments, we formed a subcommittee of our Courts Committee. Members of our subcommittee include Magistrate Judge Andrew Wistrich, Allen Grodsky, Ben Scheibe and John Ulin. Our Chapter President, Jeff Westerman, also contributed to these comments. The attached comments have been considered by our Board of Governors, but of course do not necessarily reflect the views of all of the members of our organization. They do, however, reflect a strong consensus among our Board of Governors and officers.

We appreciate your consideration of these comments. If you wish I would be happy to discuss these comments with you in greater detail.

Very truly yours,



Andre J. Cronthall
Chair, Court's Committee

Association of Business Trial Lawyers (Los Angeles Chapter):
Comments on Proposed Amendments to
Fed. R. Civ. P. 26(b)(2)and 45(d)(1)(C)

Summary

The proposed amendment to Rule 26 would add the following language to paragraph (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 and may specify the terms and conditions for such discovery."

The proposed amendment to Rule 45 would add similar language to paragraph 45(d)(1)(C), but it substitutes "person" for "party" and omits from the third sentence the phrase "and may specify terms and conditions for such discovery."

Because the proposed amendments are flawed and unnecessary, they should not be adopted, at least in their present form.

Discussion

1. Rule 26(b)(2).

The proposed amendment to Rule 26(b)(2) is reminiscent of the 2000 Amendment to Fed. R. Civ. P. 26(b)(1), in which the scope of discovery was presumptively narrowed from "relevant to the subject matter involved in the action" to "relevant to the claim or defense of any party," with the broader scope available only on a showing of "good cause." The proposed amendment represents a further presumptive narrowing of discovery from all relevant electronically stored information to only that which is "reasonably accessible," with discovery of electronically stored information that is not "reasonably accessible" available only on a showing of good cause. The following are some concerns about this approach and the way in which the proposed amendment implements it.

At the outset, we believe that the proposed amendment places undue emphasis on electronically stored information. The quantity of such information is large, and can pose some unique challenges, but cases that involve a large quantity of paper documents that are stored in "Siberia," or commingled with millions of irrelevant documents, pose similar (or given the inability to "word search" such paper files, perhaps greater) problems. In these situations as well, the responsive documents are not "reasonably accessible" in the sense that retrieving and reviewing them would entail extraordinary effort and expense. Nevertheless, Rules 26(b)(2)(iii) and 26(c) are regarded as sufficient to handle these sorts of circumstances. We are not aware of significant problems unique to electronically stored information that would render these existing

rules insufficient to handle discovery issues arising from the use of electronically stored information. Indeed, we note that the authors of *The Sedona Principles* (perhaps the most detailed discussion of the discovery issues raised by the advent of electronically stored information), who are among the chief proponents of the need for guidelines to cover electronic discovery, consider the existing balancing approach of Rule 26(b)(2) to be "particularly applicable to discovery of electronic documents and data." J.M. Redgrave, *et al.*, *The Sedona Principles* (2004), at 14. We therefore would recommend that the proposed amendment to Rule 26(b)(2) not be adopted, with one possible exception, as discussed below.

If, however, the amendment is to be adopted, we believe that significant changes and clarifications should be made. The following outlines areas where we believe modification or clarification is needed.

First, the proposed amendment may place too much control in the hands of the responding party. It allows parties to exercise control over what is or is not discoverable (at least without good cause) by choosing what they elect to store (and for how long) in a "reasonably accessible" manner. The proposed amendment may encourage sophisticated or well-heeled parties who believe that they might be sued to make some electronically stored information inaccessible as rapidly as possible in the normal course of business, such as by using a program that automatically deletes all e-mail after 30 days, or to keep in reasonably accessible form only information which they think will be helpful to them.[1]

Second, the term "reasonably accessible" is not adequately defined. The proposed amendment does not define the term at all.[2] The Advisory Committee Note says that the

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[1] The better solution to the problem of electronically stored information in the long run may be to provide parties with an incentive to store all material in a readily accessible manner. For example, there may be no technological reason why backup tapes cannot be both easily restorable and word searchable, although a grace period of a few years may be required to allow computer systems to evolve to that point. (Of course, data that is no longer readily accessible because of changes in hardware or software (legacy data) falls into a different category because parties usually do not choose that sort of inaccessibility, although if customers wanted data to remain accessible, computer companies presumably could add backward compatibility as a feature of new versions of hardware and software.) This would result in more information being preserved in the long run, which may be a good idea if accuracy of adjudication is the principal goal.

[2] This raises a more general concern. There has been a trend toward longer Advisory Committee Notes, especially insofar as Rule 26 is concerned. Although the notes are useful, finding pertinent material in them is becoming increasingly difficult. Moreover, shifting definitions and other guidance from rules to notes may result in less precise drafting of the rules themselves. It might be time to split Rule 26 into two or more rules (*e.g.*, Rule 26 for discovery

meaning of the term "may depend on a variety of circumstances." Fortunately, some guidance is provided. The Note says that, if the responding party has "actually accessed" the information, then it is "reasonably accessible," regardless of its nature. The Note also offers three examples of information that "ordinarily" would not be considered reasonably accessible: (a) "information stored solely for disaster-recovery purposes," (b) information "retained in obsolete systems," and (c) information "deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques." The Note also indicates that, if the responding party routinely accesses or uses the electronically stored information, then the information "would ordinarily be considered reasonably accessible," but it adds that, if the responding party does not routinely access or use the information, that does not necessarily mean that the information is not "reasonably accessible." In the end, the Note suggests that the governing criterion is whether "access requires substantial effort or cost." Whether this is to be determined in the abstract, based simply on the manner in which the information is stored, or in relation to the amount at stake, is unclear. If the former, then the examples are helpful; but if the latter, then the factors governing the "reasonably accessible" determination are poorly specified and likely overlap with Rule 26(b)(2)(iii) or Rule 26(c). As currently drafted, we believe the Amendment may encourage a new "standard objection" to discovery requests and may create satellite litigation concerning whether electronic discovery may be "reasonably accessible" when in many such cases it may be easier to produce electronic information than "hard copies" of the information in question. [3]

Third, it is unclear whether the proposed amendment will affect the law of spoliation and, if so, how.[4] Presently, spoliation is defined as "the destruction, significant alteration, or non-preservation of evidence that is relevant to pending or future litigation." *E.g.*, David Bell, et al., *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 Az. St. L. J. 769, 771 (1997). Under the proposed amendment, however, electronically stored information that is not reasonably accessible is presumptively not discoverable and does not have to be produced unless good cause is shown. Does the presumption of non-discoverability mean that destroying such information even after litigation becomes visible on the horizon may no longer constitute spoliation? Does this undercut the emerging common law rule that routinely overwriting or recycling backup tapes may constitute spoliation once the prospect of a lawsuit has arisen? *See, e.g., Zubulake v. UBS Warburg LLC,*

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and Rule 26.1 for disclosures) and to arrange the notes by subdivision or topic instead of (or in addition to) chronologically.

[3] A forensic accounting expert conferred with our committee and noted, for example, that current technology is such that it may be more common than not that information in back-up tapes often can be recovered and used within twenty-four hours. As a practical matter, it may be inappropriate to generalize and conclude that such information typically is inaccessible.

[4] The proposed amendment to Rule 37(f) may have a similar effect.

220 F.R.D. 212, 220-21 (S.D.N.Y. 2003). *The Sedona Principles* contains a detailed discussion of the types of spoliation issues that can be raised by electronic data storage, the use of back-up systems and the recycling of storage media, and electronic document retention practices. *The Sedona Principles*, at 47-50. The proposed amendment and accompanying Note, however, are silent on this important issue.

Fourth, the interaction between the proposed amendment and Rule 26(b)(2)(iii) (and perhaps Rule 26(c)) is unclear. The Note indicates that a motion to compel information that the responding party contends is not reasonably accessible "would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery, although other limitations - such as those in Rule 26(b)(2)(i), (ii), and (iii) - may apply." Thus, the Note suggests a multi-stage process. Initially, the court must determine whether the information is reasonably accessible. If it is, then the court must apply Rule 26(b)(2)(iii) to determine whether, even though the information is reasonably accessible, it nevertheless should not be produced. Rule 26(c) also might have to be considered if a motion for a protective order is filed. If the court determines that the information is not reasonably accessible, the analysis becomes more complicated. The Note says that, "[w]hen the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause." The Note explains that "[t]he good-cause analysis would balance the requesting party's need for the information and the burden on the responding party." This appears similar to the analysis already conducted under Rule 26(b)(2)(iii), which requires that the court limit discovery of relevant information if it determines that "the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

Because Rule 26(b)(2)(iii) does not use the term "good cause," however, it is unclear whether the good cause analysis under the proposed amendment is intended to be something different than what courts already do under Rule 26(b)(2)(iii). If not, then the proposed amendment simply shifts the burden of persuasion employed in the Rule 26(b)(2)(iii) analysis once the court has found that the information is not reasonably accessible, and the good cause requirement is redundant.

If the "good cause" analysis under the proposed amendment is intended to be something different, then exactly what is the court supposed to do? Perhaps the answer is that the court is supposed to do whatever courts already are doing under Rule 26(b)(1). The relation between Rule 26(b)(1)'s good cause analysis and Rule 26(b)(2)(iii)'s analysis, however, has never been adequately spelled out.[5] *See* Advisory Committee Note to 2000 Amendment to Fed. R. Civ. P.

[5] Notably, the Advisory Committee previously has said that "good cause" is a term "whose generality has tended to encourage confusion and controversy." Advisory Committee Note to 1970 Amendment to Fed. R. Civ. P. 26(b)(3).

26(b)(1) (stating that "[t]he good cause standard . . . is meant to be flexible" and that "[t]he court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested"). Finally, it is not clear whether, if the court finds "good cause" for discovery of information that is not reasonably accessible, it still must conduct the Rule 26(b)(2)(iii) analysis.

Fifth, allocating the burden of persuasion on the issue of good cause to the requesting party is problematic. Under the proposed amendment, although the requesting party must file a motion to compel once information is identified as not reasonably accessible, the responding party bears the burden of persuasion on the issue of whether the electronically stored information is reasonably accessible. If it carries that burden, then the requesting party bears the burden of persuasion on the issue of good cause. This may create confusion because the "good cause" analysis involves a determination of "the burden on the responding party," and the "reasonably accessible" analysis involves a determination of whether access "requires substantial effort or cost," so the two issues are intertwined.

It also may be unfair to place the burden of going forward on the "reasonably accessible" issue (and the burden of persuasion on the "good cause" issue) on the requesting party, because it presumably has less access to information about the cost or burden of accessing the information than the responding party. Although a requesting party often has to take the initiative in filing a motion to compel discovery if an objection to relevance or burden is interposed, what makes this situation different is that, in this context, the responding party is more likely to have specialized knowledge about the relevant facts. On the other hand, if the responding party successfully carries its burden of persuading the court that the information is not reasonably accessible, resolution of the good cause issue may be a foregone conclusion. It seems doubtful, then, that this particular change will make much practical difference, especially if "reasonably accessible" is defined in relative rather than absolute terms, so the shifting of the burden of going forward (on the "reasonably accessible" issue) and the burden of persuasion (as the good cause issue) may be less troublesome than it seems.

Sixth, by quoting a portion of the Manual for Complex Litigation (4th), the Note suggests that production of files "with all associated metadata" should be conditioned on a showing of need or sharing of expense. This may be unsound because it is not significantly more difficult or more expensive to produce electronically stored information in electronic form with metadata than without it.

Finally, the last phrase of the proposed amendment - "and may specify terms and conditions for such discovery" - is redundant of other provisions contained in Rule 26. Even the Note concedes as much.

The one exception to our recommendation that the proposed amendment not be adopted pertains to the obligation the proposed amendment places on the responding party to advise the requesting party of the existence of electronically stored information that is not being produced on the ground that the responding party claims the information is not "reasonably accessible" (though this language could be placed elsewhere, such as in Rule 34). We do note, however, that neither the proposed amendment nor the Note describes the manner in which such information must be identified. The Note simply indicates that "[t]he specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case." This is analogous to the way privilege claims are handled. *See* Fed. R. Civ. P. 26(b)(5) & Advisory Committee Note to 1993 Amendment to Fed. R. Civ. P. 26(b). While the proposed amendment may generate discovery disputes in the short term until case law providing detailed guidance about what level of specificity is required has developed, that is probably not a serious deficiency in the long run.

2. Rule 45(d)(1)(C).

Insofar as the proposed amendment to Rule 45(d)(1)(C) is concerned, the same comments apply. In addition, it is not clear why the last phrase of the proposed amendment to Rule 26(b)(2) was omitted from the proposed amendment to Rule 45(d)(1)(C). Although it would be best to omit it in both places, if it is included in one, it should be included in the other as well.

Conclusion

In sum, we suggest that the proposed amendments are unhelpful. They introduce ambiguity, add complexity, create the potential for unfairness, and may reduce the quantity of relevant evidence available in the long run. The proposed amendments also are unnecessary. They accomplish almost nothing that cannot already be accomplished more simply under the existing versions of Rules 26(b)(2)(iii) and Rule 26(c).

We believe that it would be better if the proposed amendment to Rule 26(b)(2) simply said: "In making a determination under either Rule 26(b)(2)(iii) or Rule 26(c) about what relevant electronically stored information should be produced, and if so, under what conditions or at whose expense, the court should consider whether the electronically stored information is not reasonably accessible for reasons beyond the reasonable control of the producing party." The proposed amendment also might offer a more clear definition of "reasonably accessible." A parallel provision or a cross-reference could be added to Rule 45(d)(1)(C).

Association of Business Trial Lawyers (Los Angeles, California, Chapter)

Association of Business Trial Lawyers (Los Angeles, California, Chapter): Comments on Proposed Amendments to Fed. R. Civ. P. 26(b)(5)

Summary

The proposed amendments to Rule 26 would add the following language as a new paragraph (b)(5)(B):

> "(B) Privileged information produced. 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."

Paragraph (b)(5) also would be amended to include a new subheading (A) "Privileged information withheld" immediately after the existing heading for Rule 26(b)(5). Because the proposed amendments to Rule 26(b)(5) provide a reasonable procedure for asserting claims of inadvertent disclosure of privileged information, they should be adopted; however, additional language prohibiting the use of such information pending a ruling on whether a waiver has occurred should be included in the new subparagraph. Two issues not addressed in the Proposed Amendment and Committee Note are whether the Proposed Amendment is intended to replace or preempt any obligations, including ethical obligations, that may exist under state law, and confirmation that the Proposed Amendment is not intended to affect the existing law prescribing the burden of proof on the producing party concerning waiver of any applicable privilege.

Discussion

The proposed amendments to Rule 26(b)(5) provide a formal means to identify and protect, pending a court ruling, potentially privileged information asserted by the producing party to have been inadvertently disclosed.

Although case law exists in which producing parties have obtained orders to compel return of inadvertently produced documents (*See e.g.*, City of Worcester v. HCA Management Co. 839 F. Supp. 86 (DC Mass 1993); Zapata v. IBP, Inc., 175 F.R.D. 574 (DC Kan 1997); Employers Reinsurance Corporation v. Clarendon National Insurance Company, 213 F.R.D. 422 (DC Kan 2003)); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985); U.S. Ex Rel. Bagley, 204 F.R.D. 170, 177 (C.D. Cal. 2001), there is little appellate authority on the subject and no formal procedural mechanism within the federal rules requiring the prompt return, sequestration or destruction of documents pending a determination by a court. At lease one Ninth Circuit opinion does discuss at length the ethical obligations of lawyers to return inadvertently disclosed privileged documents, although the case did not concern a response to a discovery request. Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001). Consequently, the proposed amendments would provide a more effective and immediate remedy

to a party asserting that privileged documents inadvertently were produced. Also, providing formal guidance within Rule 26 is consistent with the *Sedona Principles* and amendments to the American Bar Association's Civil Discovery Standards promulgated last year.

One issue mentioned in the Committee Note to the proposed amendment, but not addressed in proposed Rule 26(b)(5)(B), is the prohibition against use or disclosure of the information pending resolution of the claim of privilege. Since the protection afforded by the amendments could be diminished or rendered meaningless should the receiving party use or disseminate the *information* contained within the privileged document or thing, it would more effectively serve the purpose of the amendment to include a prohibition against such use within the rule itself.[1]

Some jurisdictions already recognize an inadvertent disclosure rule (which would apply to a privilege analysis under Fed. R. Evid. 501 in a case grounded on diversity jurisdiction), and additionally impose upon counsel receiving privileged or work-product information from an adversary an ethical duty (i) not to review or otherwise use the material; and (ii) to promptly notify the sending party and request instructions. (e.g., State Compensation Ins. Fund v. WPS, Inc. 70 Cal.App.4th 644 (1999)(California Law).) The proposed amendment or at least the Note should state that it is not intended to replace or preempt any obligations on conduct or ethical obligations that otherwise might exist under state law.

Conclusion

In sum, we support the proposed amendments, but recommend that they specifically mention the requirement stated within the Committee Note that, after receiving notice, a party must not use, disclose, or disseminate the information pending resolution of the privilege claim. Also, even within the Rule or the Committee Note, we would recommend stating that nothing within this Rule is intended to affect the ethical or other legal obligation to return any inadvertently disclosed privileged material, and also confirm that it does not affect the producing party's burden under applicable law required to obtain relief, if any is available, for an alleged inadvertent waiver.

Association of Business Trial Lawyers (Los Angeles, California, Chapter)

[1] The earlier comment concerning the proposed amendments to Fed. R. Civ. P. 26(b)(2) and 45(d)(1)(C) discuss (at footnote 2) our general concern regarding the trend toward longer Advisory Committee Notes, especially insofar as Rule 26 is concerned. In short, because of the length of the notes to Rule 26 and the significance of this issue, the requirement should be set forth in the rule itself.

Association of Business Trial Lawyers (Los Angeles Chapter):
Comments on Proposed Amendments to
Fed. R. Civ. P. 37

Summary

The proposed amendment to Rule 37 provides as follows:

(f) 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.

Discussion

In light of the disparate views among our membership concerning key provisions of this proposed amendment, we are not providing a comment concerning the standard or degree of culpability appropriate for an award of sanctions. The ABTL's inability to reach a consensus concerning this proposed amendment should not be construed as a statement of support or opposition to it.

Our Committee submits two suggestions for consideration. First, we believe it would be helpful to add a statement in the Rule or the Committee Note should confirm that nothing within the Rule vitiates a party's common-law duties concerning preservation of evidence. We also suggest for your committee's consideration whether it is better to provide a safe harbor that requires only negligent destruction of electronic evidence to support lesser sanctions, such as requiring the responding party to pay the cost of attempting to recover information lost as a result of negligent failure to preserve electronic evidence, but requires a heightened standard of culpability before more severe sanctions, such as case termination, striking pleadings, issue sanctions, evidence sanctions, or establishing facts. Perhaps available sanctions could vary depending on whether the responding party was negligent, reckless or acted with an intent to conceal information.

Finally, a court order must doubtless be obeyed and disobedience can be punished. Nevertheless, a question exists under the proposed amendment about what sort of court order will vitiate the safe harbor. A general order requiring parties to preserve all relevant documents apparently does nothing more than memorialize the common-law obligation to preserve evidence. It may be advisable to clarify in the Committee Note that the sort of order contemplated by the rule is one that imposes an obligation on the responding party to preserve specified electronic evidence or a specified category of substantive evidence that the party has

reason to know is contained in electronic files that are subject to routine destruction. The goals should be to have the rule provide certainty concerning what evidence must be preserved.

Association of Business Trial Lawyers (Los Angeles, California, Chapter)