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February 11, 2005

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

Dear Mr. McCabe:

Re: Proposed Amendment of Federal Rules of Civil Procedure Relating to Electronic Discovery

Provided below are some comments on the August 9, 2004 proposed amendments to the Federal Rules of Civil Procedure relating to electronic discovery. The comments are those of the undersigned and should not be taken in any way as the position of the law firm of McCarter & English, LLP or of its clients.

The proposed rules at once go too far and do not go far enough. They go too far because they assume that simply because a file is accessible it is reasonable to search the file in connection with discovery. This overlooks the fact that regardless of how easy it may be to search electronic documents, attorney review may not be that easy, and, more importantly, it is not cheap. Expanding the universe of discoverable documents simply because they can be searched strikes an unconsidered balance.

The proposed amendments do not go far enough in that they completely ignore issues of privacy (both individual and commercial) that electronic discovery challenges so directly. Yet there is not one word in the proposed rules or even in the commentary to address the topic.

Reasonably Accessible Files

As an initial matter, disclosure of electronic documents is not mandated by Rule 26(a). That rule requires disclosure of witnesses and documents "the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A), (B). Thus, if a party does not intend to rely on electronic documents, it has no obligation even to disclose their existence.

The e-discovery controversy arises from the broad language of Rule 26(b)(1): "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of

any party ..." Limitations on discovery require that the sought-for-discovery "appear [] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discovery methods "shall be limited by the court" if the discovery is 1) unreasonably cumulative or duplicative, 2) obtainable from another more convenient, less burdensome or less expensive source, 3) untimely or 4) the burden of production outweighs the benefit of production as measured by "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2).

Understood by all practitioners in the application of the current rule is that there is no requirement to review all materials in the possession of the client. One must simply look where one is likely to find the sought-for-information. In other words, and by way of example, when seeking information concerning the technical basis for a patent, a party has no obligation to review the client's personnel records on the chance that a technical document is misfiled or that a personnel evaluation mentions an individual's work on the technology at issue. The basis for failing to review the personnel file comes down to the conclusion (whether acknowledged or admitted by either party) that the burden of reviewing the personnel file is not worth the effort. Thus, even if there is discoverable information in the personnel file (as a fact), the Rules approve not disclosing that information because the party has no obligation itself to learn of the existence of that factual information. The proposed rule changes ignore that basic premise and establish a different predicate: if the material is "reasonably accessible" it is subject to search and review.

The Committee Note on the proposed rule states "in many instances, the volume of potentially responsive information that is reasonably accessible will be very large and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible." Committee Note at 11. The rule only addresses information that is not reasonably accessible. What about the "very large" volume of potentially responsive information that is reasonably accessible? It appears that the presumption is that these documents will be searched and, of necessity, reviewed. Why?

Page 13 of the Committee Notes continues with this theme: "The responding party must identify the information it is neither reviewing nor producing on [the ground that it is not reasonably accessible.]" By implication, counsel will be reviewing information that is reasonably accessible even if it is not reasonable to believe that the accessible files have information reasonably calculated to lead to the discovery of admissible evidence.

Another example may make the burden of this proposal clearer: Fuel Company has been sued by Gas Station for allegedly causing groundwater contamination by overfilling gasoline storage tanks or spilling fuel at Gas Station over the course of five years of deliveries. Based on a review of Fuel Company's delivery records and conversations with representatives of Fuel Company, counsel learns the facts pertinent to the claim, including relevant policies, procedures, training and personnel qualifications. He learns that two drivers who made deliveries to the site

have had prior spills. There is a vague recollection that there was a recall of one of the hose nozzles.

Fuel Company receives discovery demands seeking the delivery records at the site for the last five years, the personnel records of each of Fuel Company's drivers, information on any defects in the delivery equipment, Fuel Company's spill reporting procedure, the qualifications of Fuel Company's environmental manager, and the reference materials maintained by the environmental manager.

In a hard-copy world, Fuel Company's counsel will retrieve the delivery records, two personnel files, the environmental manager's resume and his shelf of books, the maintenance file on the hose and nozzle (if such exists) and Fuel Company's spill reporting procedure. Appropriate objections can be made and the documents turned over or not.

In an e-document universe, however, the situation is very different. Suppose all of these documents were kept by Fuel Company in searchable native text files. Should there be any difference in outcome? Counsel reasonably could simply ask his client for the pertinent files, just as he would in hard copy, but the proposed rule and its commentary suggest that all of Fuel Company's "reasonably accessible" e-files will be searched. Thus, instead of two personnel files, we may have a half dozen or more to the extent one of the drivers is ever mentioned in someone else's file, which could reasonably happen if there were incidents involving multiple personnel or one driver evaluated another driver. How about the drivers' medical files? Those will be returned by the search; thus, they must be reviewed.

The environmental manager's resume may exist in six or eight different versions depending on how often he seeks a better position. It may be attached to a dozen or more emails or letters. All of that will be located and, therefore, reviewed. Further, a privacy issue is raised: Does the manager want his employer knowing he has been seeking another position?

The manager's library in hard copy is approximately a dozen books plus a folder of material that he has gathered over the years. His e-reference materials are easily ten times that because he uses all his colleagues' e-references and has no incentive to ever purge his e-folder. Copyright issues also arise if it is suggested that these e-texts be copied in discovery.

The maintenance file on the nozzle did not exist in hard copy. No one except the ex-secretary to the retired maintenance chief remembers anything about a recall. (Actually, it was styled a "notice of inconsistent specification.") Electronically, there is a document concerning a problem with the nozzle, but there are also several thousand purchase orders, spec sheets, maintenance records and other documents that mention "nozzle." How many nozzle documents will have to be reviewed to find this proverbial nozzle in a haystack?

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Finally, Fuel Company has hundreds of pages of documents relating to the state required Spill Prevention, Containment and Control Plan for its facility and a single two page document on what to do for a spill at another facility.

The point of all this is not to demonstrate that electronic searching will yield a less-than-complete sea of documents. It will not. The e-search will find it all. But it will also find many more documents that are only marginally relevant, if at all. And every one of those documents will have to be reviewed by counsel, with a great increase in expense.

Of course, the parties could agree, or the court could order, that counsel review and, if appropriate, produce only 1) the most recent resume of the environmental manager, 2) the personnel files of the two drivers of interest, 3) the procedures for releases at other facilities, and 4) the nozzle recall file (to the extent it exists). But a fair reading of the proposal would first require producing counsel to review the client's accessible files, and then make his arguments.

The safe harbor for inaccessible data is not a bad idea, but it should not be set forth in either the proposed rule or its commentary as the measure of whether documents are, in the first instance searchable and, therefore, discoverable. That metric has already been properly set down in Rule 26(b)(1) and (2) and should be emphasized in the commentary.

Privacy and Confidentiality

With the advent of e-documents and the internet, documents exchanged in discovery on a CD-ROM on Monday may be in the inbox of one's business competition, or a public interest group or a plaintiffs' law firm on Tuesday. The proposed rule contemplates a procedure where privileged documents might be produced and then pulled back by the producing party. If, however, those documents were disseminated by the receiving party, there would be no way they could be pulled back. Thus, the pull-back would be of no avail. The commentary, if not the rule, should least address this Pandora's Box.

Further, one can read the comment that "the time required for the privilege review can substantially delay access for the party seeking discovery" as suggesting that privilege reviews take too long. See Committee Note at 19. That commentary should be discarded. At the same time that the Rules are giving official sanction to discovery ten-times as voluminous as before, they are suggesting that review be conducted in shorter time periods. That technology has expanded the universe of discovery is no basis to erode the privileges approved in every jurisdiction. Privilege review is essential to protect a core value of the judicial process. There should be nothing in the rules or commentary that suggests otherwise.

Areas of privilege are not the only confidential subjects that arise in litigation. Business information may be protected by protective orders, see Rule 26(c)(7), and many courts now require the redaction of private information. The proposed rules and commentary, although

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addressing privilege, fail to even acknowledge the impact of e-discovery on other areas that implicate the values of privacy and confidentiality.

The searchability of e-data means that much more private or confidential information can become available to parties to litigation. Large cases often require the hiring of large staffs of temporary attorneys and paralegals to review the documents. Collaborations between firms mean that larger and larger amounts of personal information are available to larger and larger numbers of people. Because e-data often is never reduced to paper in litigation, it may only be the matter of a keystroke that prevents disclosure of private or confidential information.

As a matter of statistical certainty, we know that mistakes are going to be made, either in the hiring of attorneys and paralegals, in the software used to protect information, and in the access that will be granted, among others. Such mistakes virtually guarantee that private information will be disclosed to the detriment of the individual or business entity.

The hypothetical above concerning the Fuel Company/Gas Station dispute identified two ways (there are certainly many more) privacy can be invaded: disclosure of the drivers' medical files and of the environmental manager's job search. These two topics have nothing to do with the environmental case yet a complete e-search will bring them into the e-discovery world.

Yet, the proposed rules and commentary do not comment on this problem or take any steps to address it. Instead, the rules work to foster e-discovery, making it more likely that private and confidential information will end up in the wrong place. Before the Federal Rules of Civil Procedure fully sanction expansive e-searches and e-discovery, at the very least a cautionary note should be sounded in the commentary.

Sincerely,

J. Wylie Donald, IB

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