We’d like your help. The Federal Civil Procedure Committee of the American College of Trial Lawyers (the “American College of Trial Lawyers Federal Civil Procedure Committee” for short) has on its agenda the issue whether we need an amendment to the Federal Rules to cover electronic discovery.

The Committee is in the information collection stage – not even tentative decisions have been reached on whether the present rules are up to the task and, if not, what changes might make the rules better. And as part of the information gathering process, we need to know what practitioners in the trenches think.

So, within the limits of our one-page format, we’ll make the case for and against a rule change. We’d like you to send us an email and let us know what you think.

Wake Up and Smell the Twenty-First Century

When the Federal Rules of Civil Procedure were adopted in 1934, “digital discovery” was illegal in many states and in bad taste in most others. The electronic age has brought revolutionary changes to the way we create, communicate and store information. Since 1934, only one amendment relating to electronic information – adopted a digital lifetime ago in 1970 – has been made to spell out that data compilations are within the scope of discovery. But the rule does nothing to address the special problems of the information age. We need a 21st century rule for a 21st century phenomenon.

The computer age has turned David into Goliath. The computer age has put Goliath at a distinct, overwhelming disadvantage. Sue Decrepe brings a sexual harassment claim against her boss, Heywood Jablome, at Nicenbig Enterprises. Sue is represented by Han Solo, whose practice is smaller than his name; Nicenbig is represented by Thorough & Redundant, the largest law firm in the Capitalist world.

But it is Solo, in this electronic age, who has the economic leverage. Sue alleges she was harassed, in part, via email; Heywood, she alleges, forwarded his boorish insults to his cronies, each of whom were doing similar awful things to other poor Sues. Solo makes a Rule 34 request for every email ever sent by or to any supervisor in Nicenbig. 50,000 employees. Average 100 emails per work day per worker bee. 5 years. Do the math. We’re talking over a billion messages.

Now, a good eight hundred million of those messages can’t be retrieved without heroic efforts. Nicenbig, like any sane company, routinely deletes emails after 90 days or so. But “delete” just means “move” in the computer age. A deleted email probably still exists on a backup tape. And if the backup tapes have been purged or overwritten, a reconstruction expert can probably find many of the supposedly deleted files.

So what does Solo get for his half-hour of effort? If Nicenbig is to comply, it must suspend normal business operations and tie up its computers to search and reconstruct the files. And then it has to produce a billion pages of emails. If it does that in hard copy (get out your calculator again) it will have a copying bill with more zeros than hit Pearl Harbor.

Well, come on, you say, no judge is going to make Nicenbig go to that cost. Maybe, maybe not – but so long as there is discretion, there will be abuse of discretion. We need a rule. But Solo, crafty guy that he is, says “I don’t need hard copy; in fact I don’t want hard copy. Give me access to your mainframe and I’ll just browse for what I want.” Good deal for Solo. As paper, a billion pieces makes an impressive pile but not an easy read. In electronic form, those billion messages can be sorted by author, recipient, date, department, key word, whatever. In fact, Solo demands production in electronic form for the very reason that he should be allowed to manipulate the data. Good for Solo; major headache for Nicenbig. No company should be required to tie up its computer systems or lay bare its entire body of data.

Whether hard copy or electronic, a billion messages. Even if only one in a million are privileged, that’s, uh, carry the one, still a thousand potentially
privileged documents. How does Nicenbig make sure it doesn't turn those over and blow the privilege? You can read an average email in 10 seconds. At a billion messages, at a typical 20 hour day, 7 day week for a Thorough & Redundant associate, she could do the review in 400 years. Pu-lease. The Federal Rules do not address the enormity of the data that has become potentially producible nor the burdens that producing it entails. We need a new rule.

The proliferation of digital information brings with it the multiplication of digital destruction. Despite the ability of reconstructionists, digital information must be routinely purged – and often is truly deleted. The memories are refreshed to make room for current data. The current rules on spoliation, the draconian inferences drawn from destruction of records, no matter how benign, do not meet modern reality. We need a rule to address the business reality that old information must constantly make way for new.

What about a commercial case, say a patent infringement action where Nicenbig’s sales are relevant? Solo asks for access to Nicenbig’s mainframe computer so that he can sort and segregate and reasonableness and available in its ordinary course of business; the requesting party must pay for extraordinary costs of retrieval. In Virginia, Va.R.S.Ct. 3A:12, parties get electronic data only if it is not reasonably capable of being provided by tangible copy, and then only if the electronic data can be isolated and accessed during normal business hours; otherwise, the requestee may bring a motion for protective order or to quash.

These rules are good first steps. But there should also be a rule, when the burden of conducting a privilege review is economically indefensible, that a review need not be undertaken – and any privileged document thus produced shall be deemed an inadvertent production. There should be a rule that reasonable information “refreshing” does not constitute spoliation. There must be a rule that no adversary is allowed unfettered access to his opponent’s computer memories. We need a rule.

**The Rules We Have Are Just Fine, Thank You**

Excuse me, we have a rule. Sure, times have changed. So what. The rules we have cover today’s news nicely, and constant tinkering with a rule is the surest way to eviscerate it.

The Texas and Virginia rules may provide comfort that the courts will impose cost shifting in appropriate circumstances – but that is already what the Federal Rules require. When the 1970 amendments were enacted to cover data compilations, the Committee Comments noted that “the burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense.”

What more do we need?

The present rules have all the flexibility – and none of the rigidity – needed for digital discovery. Concerned about the burden? Balderdash. In the paper age, the Nicenbigs of the world routinely responded to discovery by assembling millions of pieces of paper, shuffling them into no discernable organization, stuffing them into cartons stacked ten-high in a windowless, airless basement, and inviting poor opposing counsel to come and inspect them. So the digital age may have turned the tables. So what? The rule is still simply “if you have it, produce it.”

Rule 26 (c) allows Nicenbig to seek a protective order any time that a discovery request might result in “oppression” or “undue burden or expense.” There is no reason why digital discovery ought to presumed to be oppressive by rule; there is no reason why it can not be addressed on a case by case basis as is all discovery.

Intrusion into computer secrets? The present Rules have it covered. Protective Order. Spoliation? Companies have been throwing out trash since there was trash. Nothing has changed, just the effort required to empty out the bins.

Actually, it has become so easy and relatively inexpensive to save stuff, that it may no longer be reasonable to throw it out. Take those billion emails. An average text email message uses 10 KB of computer memory. A billion messages is ten trillion bytes. That’s a lot. But you could store all of that in a small number of storage devices (dude, you’re getting a Dell!) the size of a VCR that costs a few thousand dollars. Is that too much to ask of a company the size of Nicenbig? Maybe, maybe not – but that’s a question judges and juries can answer just fine under existing rules.

Privilege waiver? How is that different than it has been from time immemorial? We waive privileges if we do not maintain their confidence. If Nicenbig hasn’t taken steps already to identify its privileged materials, if it isn’t willing to take steps to review its materials prior to legitimate discovery, that’s their problem. In particular cases, the court can construct particular rules for inadvertent production. But a general rule change would allow the Nicenbigs of the world to abrogate entirely their obligations to maintain privileges. The present rule is just fine.
Judge Richard Best, of the San Francisco Superior Court, summed it up, well, best: “... judges are not perfect but neither are rule makers. ... A mistake in one case, much as it should be avoided, does not have the adverse consequences of a rule enacted in haste ... that will affect every litigant in that jurisdiction in the future.” *Modern Practice* (August 2002). Let’s trust the judges. We don’t need no new rule.

**What Do You Think?**

We haven’t the space to do full credit to either point of view. But tell us what you think. Are the rules OK as is? Do we need amendments? We’d like to hear from you.

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