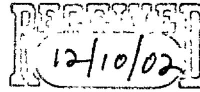

02-ED-002

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

1730 Rhode Island Ave., NW, Suite 805
Washington, DC 20036
Phone: (202) 452-1989 Fax: (202) 452-0099

December 9, 2002

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, DC 20544

Re: Inquiry from Discovery Subcommittee Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials (September 2002)

Dear Mr. McCabe:

This letter is the response of the National Association of Consumer Advocates to questions raised in Professor Richard L. Marcus's letter dated September 2002 and headed "Inquiry from Discovery Subcommittee Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials."

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of approximately 800 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA advocates the interests of consumers in this country. Its advocacy takes many forms, including publication of the NACA STANDARDS AND GUIDELINES FOR LITIGATING AND SETTLING CLASS ACTIONS, 176 F.R.D. 375 (1997) and comments and testimony before this Committee relating to the proposed amendments to Rule 23. This letter represents a summary and distillation of the collective experience of NACA's members.

In summary, NACA has concluded that there is no need at this time to amend the Rules merely to address special features of the discovery of electronic or computer-based information (herein, "electronic discovery"). Should the Committee conclude to the contrary, NACA urges the Committee to consider the costs to the judicial system as well as the costs to the producing party when formulating any electronic discovery guidelines for the bench and bar.

The bases for NACA's positions are that electronic discovery is not intrinsically different from any other type of discovery and that any rule change meant to address electronic discovery must not restrict discovery more than it would if the information existed in printed form. Furthermore, the very nature of electronic discovery is in flux,

so that any rule that expressly addresses one type of electronic discovery may be hopelessly outdated soon after any final rule was adopted.

An underlying precept of NACA's positions is that (1) electronic discovery is almost always in the sole possession of a large corporate defendant, which has chosen for its own reason (usually one of efficiency) to store information electronically, and (2) electronic discovery is usually sought by an individual plaintiff to learn the details of the operation of the corporate defendant.

RESPONSES TO SPECIFIC QUESTIONS

With these fundamental points in mind, NACA will address specific questions and issues raised by Professor Marcus in his September 2002 letter:

> Does the volume of electronic materials actually require discovery response efforts that are qualitatively different from those necessary to respond to requests for voluminous hard copy materials?
>
> Has the advent of computers sometimes eased the burden of responding to discovery?
>
> How often is discovery of embedded data actually important?
>
> How often is access to legacy data actually ordered?
>
> Are difficulties some litigants encounter in responding to this form of discovery the result of their choice to employ certain systems rather than others?
>
> If so should the courts accommodate those choices by relieving parties of discovery response responsibilities?
>
> Is a manual a good idea?
>
> Should the Rules require preservation of electronic discovery?
>
> Should the 26(f) conference require discussion of electronic discovery?
>
> Should the Rules address inadvertent waiver in electronic discovery?

Question:

Does the volume of electronic materials actually require discovery response efforts that are qualitatively different from those necessary to respond to requests for voluminous hard copy materials?

Response:

No.

Electronic materials generally exist simply because the party has chosen, because it is more efficient and cheaper to do so, to store information electronically, instead of either retaining or generating a printed copy.

There is no reason to treat these two types of documents differently, simply based on the records management policies of the producing party.

It is the experience of NACA members that producing parties elect not to produce documents as they are kept in the usual course of business and instead elect to produce them in a segregated fashion, often not in compliance with the requirement of Rule 34 that a party electing to produce documents using this method must "organize and label them to correspond with the categories in the request."

Thus, any significant labor only comes into play when the producing party elects not to produce documents pursuant to the first option provided by the Rule—as kept in the ordinary course of business—but rather to segregate and produce them in a more discrete manner.

The cost of this election should not fall on the producing party.

There is no jurisprudential or pragmatic reason to restrict access to this information by placing any limiters on electronic discovery that do not exist in the existing Rules. If a request for electronic discovery is uniquely burdensome beyond that for printed discovery, then the party may seek protection of the court as currently provided.

Question:

Has the advent of computers sometimes eased the burden of responding to discovery?

Response:

Yes.

The very fact that electronic discovery exists in an electronic format usually makes it simpler, faster, and cheaper to produce, especially if the producing party produces in accordance with the existing provision in Rule 34 for production of documents "as they are kept in the usual course of business." It may be somewhat burdensome on the requesting party to recover the requested information, but that can be the subject of court intervention if it is excessively so.

Question:

How often is discovery of embedded data actually important?

Response:

At times, crucial.

NACA understands "embedded data" to be data that is embedded within a document (such as prior edits) that does not appear in the printed document. As such, in some circumstances, discovery of embedded electronic discovery is crucial to the case, but at other times it may be irrelevant.

Discovery is crucial most often when the party's knowledge or state of mind is at issue. For example, a car manufacturer's longtime knowledge of a vehicle defect may be relevant to an award of punitive damages, or a creditor's knowledge of the details of a disputed debt may be relevant to exemplary damages for damage to credit. Embedded data may be retrievable that would demonstrate that prior knowledge, and thus would be crucial.

In some instances, embedded data would not be relevant at all, if the entire facts centered on a specific event, such as breach of contract caused by a *force majeure* subsequent to the contract. Even in this case, access to embedded date could be used to prove that an event was not caused by a *force majeure* but rather by a known defect, such as poorly-built building that collapses during a hurricane, which was known in advance of the event, but not disclosed.

Question:

How often is access to legacy data actually ordered?

Although NACA does not have empirical data on frequency, it is the experience of its members that legacy data may be sought. As with embedded data, legacy data may be highly relevant to issues of knowledge and intent, particularly with respect to the timing of changes made to corporate standard form documents. In addition, retrieving information stored in outdated formats may be costly but absolutely necessary, for example, in discovery as to class members. However, NACA believes that because each case is unique, depending factors such as the age of the files and whether the producing party has changed its computer system without making arrangements for the preservation of older data, it is unwise to formulate a rule that can be applied to every case. The courts already have discretion to determine when it may be appropriate to require the requesting party to pay some or all the retrieval costs, and therefore a new rule is unnecessary.

Question:

Are difficulties some litigants encounter in responding to this form of discovery the result of their choice to employ certain systems rather than others?

Response:

Yes.

As discussed above, generally the very existence of electronic discovery is due to a prior decision by the party made for sound business reasons having nothing to do with the basis of the lawsuit.

Question:

If so should the courts accommodate those choices by relieving parties of discovery response responsibilities?

Response:

Absolutely not.

Because the discovery exists as the result of a prior decision of the producing party, that party should not profit from that decision by being able to shield itself from discovery.

Question:

Is a manual a good idea?

Response:

No.

NACA strongly opposes development of a manual as a substitute for actual proposed rule changes, for two reasons.

First, as stated above, the developing nature of electronic material, coupled with the essential need for flexibility, militates against casting any precepts in stone. A manual, with the imprimatur of the committee, would suffer from the same flaws as a rule change.

Second, NACA concludes, based on prior experience, that a manual would be developed using a process that is far less transparent, open, and inclusive than this rules-making process. The result would be likely to be unbalanced and unhelpful to courts as they decide these cases individually.

Question:

Should the Rules require preservation of electronic discovery?

Response:

Yes.

The ephemeral nature of electronic materials and the variability of record retention programs combine to make the case for specific requirements for preservation of electronic discovery. NACA believes that the simplest method would be to amend Rule 26 to require that, immediately upon filing or receiving notice of a lawsuit, any party who has electronic materials relating to the subject matter of the lawsuit must implement procedures to insure that all such materials are not spoliated and must then give notice to all other parties to that effect.

Question:

Should the 26(f) conference require discussion of electronic discovery?

Response:

Yes.

At the initial 26(f) conference, it is difficult-to-impossible for the party that might seek electronic discovery to discuss knowledgeably any matters relating to electronic materials, because other discovery has not identified such documents. As consumer advocates, NACA's members can usually describe the categories or types of discovery wished, but have no way to know at the outset of the litigation how the defendant keeps those records.

It is for this reason that NACA proposes an amendment to Rule 26 to require a party to disclose whether it maintains discoverable materials in electronic format and whether it would likely produce substantial electronic discovery.

Question:

Should the Rules address inadvertent waiver in electronic discovery?

Response:

Not specifically.

Inadvertent waiver of privilege in electronic discovery is no different in kind than inadvertent waiver in printed discovery, and does not warrant special treatment. NACA supports the development of a simple rule of discovery providing that there is no inadvertent waiver of privilege, along the lines of Texas Rule of Civil Procedure provision that "a party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege."

CONCLUSION

For all these reasons, and with the limited exceptions discussed above, NACA opposes any revision to the discovery rules merely to address electronic discovery.

NACA appreciates the opportunity to address this issue.

Respectfully submitted,

National Association of Consumer Advocates

Ira Rheingold, Executive Director

Michelle Weinberg, Board of Directors

Stephen Gardner, Board Chair Emeritus