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December 9, 2002

The Honorable Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

RE: Inquiry from Discovery Subcommittee of the Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials

Dear Mr. McCabe:

I appreciate the opportunity to respond to Professor Marcus's letter of September 2002 seeking input on behalf of the Discovery Subcommittee Advisory Committee on Civil Rules regarding discovery of electronic materials. I submit these comments in my capacity as a practicing lawyer and as an officer of the Defense Research Institute ("DRI"). DRI is the international membership organization of lawyers involved in the defense of civil litigation.

INTRODUCTION

The preservation and production of electronic materials does raise unique and challenging issues for our clients and outside counsel. As the Subcommittee continues to analyze electronic discovery issues, DRI hopes that they will be guided by the principles of predictability and consistency. These principles are particularly important to clients who are engaged in litigation in multiple jurisdictions.

DRI is concerned that unless additional guidance is provided through a rules amendment, courts and litigants will continue to deal with these important issues in an unpredictable and inconsistent manner.

DRI is ready to assist in any way it can with this Subcommittee's ongoing evaluation of whether the rules should be amended.

IS SERIOUS CONSIDERATION OF RULE CHANGES APPROPRIATE IN LIGHT OF ALTERNATIVES?

Judicial Education:

The Federal Judicial Center is to be commended for its judicial education efforts in the area of electronic discovery. However, these efforts to date have not led to a discernable increase in predictability and consistency of rulings on a national level. While it is very important that judicial education efforts continue to be made, DRI is concerned that those efforts will not lead to the level of predictability and consistency in decision making that litigants are entitled to expect. Particularly in the area of the preservation of electronic information, one overly broad preservation order has the effect, as a practical matter, of overriding multiple reasonable orders and can result in a substantial ongoing financial burden to litigants. Therefore, it is important that in addition to judicial education the Subcommittee continues to evaluate whether a rules amendment in this area is appropriate.

Relying on Case Law:

Professor Marcus raises the issue that the rule amendment process takes three or four years and he questioned whether it is likely that developing case law will lead to reasonably predictable rules or practices in the area of electronic discovery. We are concerned that while the discovery of electronic information has been a key issue in much litigation over the past five years there has not been a developing body of case law that is widely accepted and that provides guidance to litigants and to other courts. We are not optimistic that the next three to four years will result in case law that is generally accepted and leads to predictable and consistent results. In part, this is due to the fact that these issues arise in the discovery process and are rarely addressed in any depth in published opinions and even less rarely are they reviewed by an appellate court. Therefore, we are concerned that even three or four years from now the developing case law will not have provided the degree of predictability and consistency that is needed in this area.

The Alternative of a Manual:

We are not in a position to comment on the revisions that are being considered to the "Manual for Complex Litigation" because we have not reviewed those proposed revisions. Using the format of a manual could provide more guidance to courts and litigants than currently exists in the electronic discovery area. However, we would encourage the Subcommittee to continue to assess whether a rules amendment is the appropriate vehicle for providing guidance in this area.

The Problem of a Moving Technological Target:

It is inevitable that computer technology will continue to change quickly and that it will impact the storage and production of electronic information. However, based on our experience in the area, as well as our consultation with computer experts, we do not believe that there is a significant risk that technological change will eclipse any rule amendment that would be developed in the near future. We believe that a rule amendment and note could be drafted in such a way as to maintain its applicability into the foreseeable future.

POSSIBILE AREAS FOR RULE AMENDMENTS

(1) Directing the parties and the court to consider electronic discovery in the discovery planning process.

We believe that it is worth considering an amendment to Rule 26(f) to mandate consideration of electronic discovery. It has been our experience that it is preferable to discuss and arrange a reasonable solution to particular electronic discovery issues early in the case rather than to have them become issues late in the discovery process.

(2) Prescribing preservation obligations.

The lack of predictability and consistency regarding a litigant's duty to preserve information maintained in electronic format is a very major issue. It would be desirable to have a clear trigger for preservation obligations, as well as a prescribed set of obligations. We would encourage the Subcommittee to consider providing a safe harbor by rule. The combination of a generally applicable safe harbor by rule with the required consultation and planning that could be included in expanded Rules 26(f) and 16(b) could be an appropriate vehicle for achieving greater predictability and consistency early in the discovery process. With regard to what must be done to preserve evidence once the obligation to preserve is triggered, we would urge the Subcommittee to consider a rule amendment providing guidance in this area. The notes to the rule amendment could address the handling of specific situations that occur in most cases. While it might be true that a rule amendment could not go much beyond requiring "reasonable steps", a note could provide specific guidance on issues such as deleted e-mails, back-up tapes, metadata, etc. ...

With regard to the entry of preservation orders after litigation has begun, we would encourage the Subcommittee to consider a note accompanying the rule change discussed above that would address the propriety of preservation orders and the factors pertinent to whether to enter them. Because the case law generally recognizes that there is a duty to preserve evidence even in the absence of a preservation order, the

issuance of a preservation order should be only after a hearing in which the moving party meets its burden of demonstrating a need for injunctive relief.

(3) Conditioning the duty to obtain information from backup media or unearthed deleted material on a showing justifying the effort.

We would encourage the Subcommittee to consider the adoption of language similar to that contained in the Texas rule which requires the responding party to produce data that "...is reasonably available to the responding party in its ordinary course of business". Texas Civil Procedure Rule 196.4. For a requesting party to seek to compel a responding party to exercise extraordinary efforts to preserve or produce material that is not readily available in the ordinary course of business, the requesting party should be required to make a showing of substantial need before the responding party should be required to use heroic efforts to respond to the discovery request.

(4) Amplifying rule provisions regarding cost.

Professor Marcus's letter provides a succinct summary of the issues relating to the cost of electronic discovery. We would encourage the Subcommittee to consider language similar to Tex.R.Civ.P. 196.4 which requires the requesting party to pay the reasonable expenses of any extraordinary steps required for the responding party to retrieve and produce the information.

(5) Regulating the form of production of computer-based materials.

With regard to the form of production of electronic information, it has been our experience that parties are discussing these issues early in the litigation and have usually been able to reach an agreement on the form of production. When an agreement cannot be reached, the form of production is a relatively straightforward issue to present to the court for a decision. This process might be assisted by revisions to Rule 26(f) or 16(b) as noted earlier in these comments.

(6) Addressing privilege waiver problems.

The risk of inadvertent waiver of privileged communications in the area of electronic discovery is a very real risk and it is driving up the cost of responding to requests for electronic discovery. DRI would encourage the Subcommittee to evaluate the merits of Texas Rule of Civil Procedure 193.3(d) or a similar rule which would explicitly modify the inadvertent waiver rule. We believe that such an amendment would have the effect in some cases of reducing the cost of the production of electronic information.

CONCLUSION

The increasing amount of electronic information that is being created by individuals, government agencies, small businesses and large corporations is having a significant impact on the discovery process and litigation. It has become clear over the last several years that the preservation and production of electronic information does raise unique and problematic issues that are not adequately addressed by current rules or by existing case law. DRI is appreciative of the efforts of the Discovery Subcommittee, Professor Marcus, and the Federal Judicial Center in working to bring more predictability and consistency to this very important area of the law. DRI hopes that the Subcommittee will continue to evaluate potential rule amendments in this area. We appreciate the opportunity to provide these comments and are prepared to assist the Subcommittee as it continues its efforts.

Very truly yours,

David E. Dukes

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