LAWYERS FOR CIVIL JUSTICE

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December 10, 2002

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-170
Washington, D.C. 20544

Re: Inquiry from Discovery Subcommittee Regarding Discovery of Electronic Materials

Dear Mr. McCabe:

I am writing in response to Professor Richard L. Marcus's September 2002 invitation for comments on the appropriateness of an amendment to the Federal Rules of Civil Procedure (the "Rules") to address issues unique to the discovery of electronic and computer-based information. For the reasons set forth in this letter, Lawyers for Civil Justice ("LCJ") supports an amendment to the Rules to address several unique issues related to electronic discovery.

I would like to begin by providing background information on LCJ. LCJ's membership consists of in-house corporate counsel, outside defense counsel, and the leadership of the Defense Research Institute, Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel. LCJ has long promoted consideration of issues which directly impact the problems confronting corporate and defense counsel, and has always sought to achieve solutions that fairly and reasonably address the needs of the defense bar. LCJ has worked with the U.S. Judicial Conference Advisory Committees and has testified before Congress on issues such as class action reform, tort reform, and case management. LCJ is committed to working with other members of the legal community to appropriately address issues of imbalance in the civil litigation system. Accordingly, LCJ feels it is imperative to address the questions relating to electronic discovery raised by Professor Marcus.

I will now discuss LCJ's position on the issues raised in Professor Marcus's September 2002 invitation for comments. Professor Marcus first asks whether the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee") should consider Rules amendment. LCJ believes the answer to this question is a resounding "yes." The past several years

have brought a variety of judicial opinions from the federal courts relating to electronic discovery, and the result is an inconsistent jurisprudence which is often highly fact-specific and fails to provide sufficient guidance to corporate defendants confronted with electronic discovery issues. Compare, e.g., McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D. D.C. 2001) (restoring all backup tapes not necessary in every case), with Linen v. A.H. Robins, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct., June 15, 1999) (obligation imposed to cease recycling of backup tapes). Rules amendments are necessary now because, without Rules amendments, corporate defendants and the defense bar will continue to lack a clear sense of how to treat electronic evidence and what to do with it in civil discovery.

Professor Marcus next asks what form those amendments should take. In order to answer that question, it is necessary to examine some of the problems litigants have encountered under the current Rules. LCJ has conducted an informal survey of its membership as well as counsel for other corporations, and we have learned of a number of incidents involving electronic discovery that we wanted to share with you in this letter.

- One company had to review 13 gigabytes of electronic documents to comply with a discovery request. The company paid more than $340,000 to electronic evidence consultants who helped the law department collect and process this data and put it in reviewable form. The company was then required to pay more than $750,000 to a group of contract lawyers to review each individual electronic document, including attachments to e-mails.

- One company was required to preserve backup tapes at 9 different data centers for a period of 13 months. The number of tapes produced at these locations exceeded 1600 each month. The cost of purchasing new tapes exceeded $120,000 per month, or more than $1.57 million for a 13-month period (storage, labor, and other related costs are not included in this amount).

- One company, upon receipt of a broad subpoena and document request, was faced with considerable uncertainty as to its preservation and production obligations with respect to electronic materials such as backup tapes. The company did not use backup tapes as a filing or records retention system, but rather primarily to restore computing environments and business data in the case of a disaster. The uncertainty was compounded by the large volume of electronic materials available: some of the company's data centers took up multiple floors of buildings that covered entire city blocks; thousands of backup tapes accumulated each month in the ordinary course of business; and the cost of purchasing tapes alone sometimes exceeded $100,000 a month.

- One company discovered upon departure of one of its executives that he had saved over 80,000 e-mails over a 5 year period. Many of these e-

mails contained attached imaged documents, which were often long and difficult to open, read and print. These 80,000 e-mails, which were not searchable electronically, had to be evaluated for content and privilege during discovery. It took a paralegal 1.5 months just to print the e-mails. The privilege review was complicated by a number of factors: some of the recipients were attorneys while others were not; the e-mail addresses did not always identify who is an attorney, what client the attorney represents and the type of information being shared. In order to determine whether variations of a single e-mail (e.g., the sent copy, response, forwarded copy, etc.) needed be produced, the company had to engage in a word-by-word review of each variation.

- One company agreed with plaintiffs' class counsel to a reasonable preservation order designed to preserve the documents relevant to plaintiffs' claims. Subsequently, plaintiffs sought to expand the preservation order to require preservation of a broad class of electronic documents. The preservation order proposed by plaintiffs would have imposed enormous costs on the company. After spending substantial time and resources over a period of months arguing over the scope of what was properly subject to preservation and discovery, the parties finally agreed on the contours of an amended preservation order.

- One company was asked in a subpoena to produce electronic records of interactions with over 2 million of its customers. Records of interactions with over 1.5 million customers were available only through archives. The company determined that, in order to access the active records, it would need to retain a consultant, who would have to work for approximately seven weeks. To access the archived data, the consultant would have to work an additional six weeks to prepare the archived materials to be restored. The company would then have to take its computer systems offline for a period of 1600 hours in order to restore the archived materials. Finally, the company would have to spend an additional seven weeks to index and review the restored materials. After the company invested substantial time and expense to prepare a motion to quash the subpoena, a limitation to the subpoena was negotiated.

- One company was the subject of a temporary restraining order entered at plaintiffs' request shortly after the commencement of the lawsuit. The plaintiffs were individuals and therefore did not have reciprocal electronic discovery obligations. The order was broadly worded; it prohibited the company from altering or erasing any electronic materials relating to the subject matter of the lawsuit, and it required the disabling of any automatic provisions for the deletion or overwriting of electronic information.

- One company was the subject of a preservation order entered during discovery in a class action. The plaintiffs were individuals and therefore did not have reciprocal electronic discovery obligations. The order was

broadly worded and required, among other things, that the company preserve all existing backup tapes and set aside on an ongoing basis monthly backup tapes of its entire e-mail system. The company was required to spend over $1 million to comply with the preservation order, and the plaintiffs did not request any of the preserved materials.

These examples are by no means exhaustive, and represent only a selection of the problems encountered by the in-house corporate and outside defense counsel to whom LCJ spoke. In addition, I understand that several LCJ members and other defense counsel intend to write separately to you to share some of the experiences with electronic discovery. Together, they underscore the very real need for Rules amendment and provide some guidance on the form such amendment should take. LCJ believes that Rules amendment should take the following form:

1. Rule 16 and Rule 26(f) should be amended to include discussion of electronic evidence in the pretrial conference process.

2. Cost-shifting rules should be added to Rule 26 in order to differentiate between costs which a party must ordinarily bear and costs which arise solely because extraordinary discovery has been permitted.

3. The Rules should provide a "safe harbor" for the routine treatment of electronic documents pursuant to business systems operated in good-faith where no court order or discovery demand is in effect.

First, Rule 16(b) and Rule 26(f) should be amended to specifically include electronic discovery as a mandatory topic. The text can be minimal, with comments and the model forms developed in a "key issue" checklist format. The meet and confer discussions – some of which are already occurring in certain Districts (see U.S. Dist. Ct. Ark. R. 26.1; U.S. Dist. Ct. Wyo. R. 26.1(d)(3)(a)) – can and should be coordinated with and based on the substantive standards, presumptions and "safe-harbor" provisions discussed herein. This could require consideration of, among other topics, a specific preservation order, tailored to the unique needs of the case and based on the parties' then current knowledge of the potentially relevant electronic documents and establishing the areas of dispute between them. Such an amendment would also serve to signal to the judiciary that, more so than conventional paper discovery, electronic discovery often requires active judicial management.

Second, cost-shifting rules should be added to Rules 26(b)(2) or 26(c) that differentiate between those costs which a party must ordinarily accept and those which may be shifted because they require "extraordinary steps" to reconstruct electronic documents. See, e.g., Tex. R. Civ. P. 196.4; ABA Discovery Standard, 29(b)(iii). This should be done in conjunction with a rule establishing the principle that the duty of production does not ordinarily extend to materials available only through extraordinary steps on the part of the producing party. A producing party should ordinarily only be required to produce those electronic records which are reasonably available to that party in the ordinary course of business, and if extraordinary steps, such as forensic

reconstruction of backup tapes or hard drives are sought (including requests for deleted materials), there should be a mechanism for the Court to review the necessity of those steps being undertaken. This would require an affirmative showing by the party seeking discovery of either misconduct by the party required to do the search or a strong need for the material being sought. Such a rule would enforce the notion of proportionality that is present throughout the Rules by reminding litigants and courts that discovery should be tailored to the needs of the specific dispute. Thus, for example, in a case in which a party seeks damages of a few hundred thousand dollars, a court should be reluctant to permit electronic discovery which would cost the producing party hundreds of thousands or even millions of dollars, and if such discovery is permitted, the court should consider shifting the costs to the requesting party.

The decision in Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al., 205 F.R.D. 421 (S.D. N.Y. 2002), is a classic example of the types of factors that go into a decision to shift the costs of electronic discovery. While it has been suggested that the Rowe approach simply represents a codification of the best decisions under existing Rule 26, it would be more valuable for courts and litigants to have a rule that explicitly and uniformly sets forth guidelines on the burden of production and cost shifting.

Finally, the rules should provide a "safe harbor" for the routine treatment of electronic documents pursuant to business systems operated in good faith after commencement of litigation where no court order or discovery demand is in effect. LCJ has found that the greatest concerns of producing parties arise in regard to when and how they must alter or suspend their normal business systems upon the commencement of litigation. The nature of electronic evidence makes this a major problem not present in paper discovery. For example, the continued recycling of the "backup tapes" of a computer system to which a computer is linked means that some fragmentary evidence of changes is also gone. Is the failure to cease recycling a justification for sanctions? If the producing party has implemented a reasonable process of notifying key personnel and sequestering their electronic documents on a going forward basis, LCJ would argue that this would not constitute "spoliation." See Martin C. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L. J. 561, 621 (2001). Indeed, under those circumstances, it seems clear that there should be a presumption in the Rules that the obligations of preservation have been met.

The problem is, though, that a producing party must "guess" as to the answers to these questions since the evaluation of the propriety of its actions with respect to electronic discovery occurs much later, in retrospect. This is grossly unfair in the context of those business systems that are maintained without the purpose of hiding or destroying evidence (if they are so established and have that effect, they are clearly sanctionable). Thus, LCJ proposes that no order of sanctions could be issued against a producing party for the continued good faith operation of business systems absent a specific order or unobjected discovery demand which was willfully disregarded. In evaluating that compliance, LCJ would favor giving great weight to the use of a system of notification calculated to achieve preservation. This would encourage the development of "best practices" among producing parties which focus on complying with

that obligation while clarifying the intent of the sanctions provisions is not to force unnecessary alteration of business systems which are operated in good faith.

While LCJ recognizes that there is necessarily much work that remains to be done before the Rules can be amended to address issues unique to electronic discovery, LCJ feels the time is right to begin the process of Rules amendment. Amending the Rules as outlined above would contribute to the conduct of fair and reasonable discovery without impinging upon the truth-seeking function of the discovery process. LCJ looks forward to providing whatever support it can to the Discovery Subcommittee of the Advisory Committee as it further considers the issues raised in Professor Marcus's September 2002 invitation for comments.

Sincerely,

Rex Linder

Rex K. Linder

President, Lawyers for Civil Justice

cc: Professor Richard L. Marcus