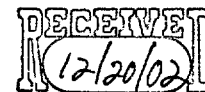


ASSOCIATION OF TRIAL LAWYERS OF AMERICA



02-ED-009

BY FACSIMILE TO 202-502-1766

December 20, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on Professor Marcus's Electronic Discovery Memo

Dear Mr. McCabe:

I am writing to convey ATLA's comments on the September 2002 inquiry and memorandum sent to us by Professor Richard L. Marcus of Hastings College of the Law.

ATLA is a bar association of approximately 60,000 members who for the most part (but not exclusively) represent plaintiffs in personal injury, civil rights, employment, and environmental litigation; the defense in criminal cases; and either side in commercial and family litigation. Many of our members, of course, are involved routinely in matters concerning electronic discovery in the course of their work. ATLA has submitted comments or provided testimony on different aspects of rulemaking proposals many times in the past, and appreciates the opportunity to do so with regard to Professor Marcus's memo.

If I had to sum up ATLA's position on this subject in a single sentence, it would be this:

"Information is information, and electronic discovery is discovery."

Courts and lawyers have engaged in discovery practice under the federal rules for decades. They have kept pace with technological developments as they have occurred for the simplest of reasons: it's their job to do so. Lawyers and their clients have ignored such developments at their peril. The American adversary system of justice has made this not only necessary but inevitable. In the past 50 years our courts have had to address numerous complicated technical matters under litigation—including engineering, chemistry, biology, aviation, pharmaceuticals, communications,

nuclear power, and environmental matters, to name just a few. This has been necessary both because such matters were themselves subjects of civil litigation and because they have been subjects of government regulations that are enforced through the courts.

Since the advent of notice pleading, litigation practice has placed enormous weight on the discovery process, and all of these technical subjects have involved voluminous record keeping. In recent years our business and legal cultures have stored less of this material in paper form and more in electronic form, resulting in a concomitant increased emphasis on electronic material in discovery.

The committee's interest in this subject appears to have developed contemporaneously with a series of complaints from corporate lawyers that requests for discovery of documentation created and/or stored on clients' computers have become oppressive. To remedy this purported burden, they propose that specialized court rules are needed. Some proposals would limit what is discoverable, protect various activities involving computer-based material (CBM), and shift costs—in effect creating “pay to play” rules requiring parties who need CBM discovery to pay for its review and production.

Our inquiries to ATLA members, however, have uncovered few members of the plaintiff bar who experience problems with CBM practice under current rules. Members we have queried believe that judges already have all the power necessary to craft reasonable solutions to most CBM issues that arise.

Our view appears to be supported by reports of the inquiries by the Advisory Committee's Subcommittee on Technology, which have indicated that many, and perhaps the majority, of judges, academics and practitioners who have communicated with the subcommittee appeared to be against changing the rules at this juncture. (See Professor Richard L. Marcus, Report on Oct. 27, 2000, Conference at Brooklyn Law School on Electronic Discovery, published as part of agenda materials for the Advisory Committee's meeting of April 23-24, 2001.)

Permit me now to address the specific questions Professor Marcus raised. Our comments track his own subject headings:

I. “Is serious consideration of rule changes appropriate in light of alternatives?”

“Judicial education.”

This can be a critical component of the judiciary's response to CBM issues, and we heartily endorse it—but not because we think judges are ignorant of computer technology. It is, after all, the same technology that keeps their courts running. But we think that, to the extent that judges are not familiar with specific technical matters, the cure is to provide support and education, not to write new rules specifically for CBM. Prof. Marcus observes that every federal judge in the county

has already been provided with opportunity to learn about CBM issues from the Federal Judicial Center (FJC). Not only is the federal court system responding well to the challenge, but there has arisen a considerable private industry around management of computer-based material. For instance, FJC Research Associate Ken Withers's web site, which is devoted to CBM in the courts (www.kenwithers.com/articles, last visited Dec. 6, 2002) provides a list (which Mr. Withers states is incomplete) of nearly 30 businesses that consult on these matters with lawyers and courts.

“Relying on case law [to develop CBM guidelines].”

ATLA also endorses this path. No doubt there has been a judicial learning curve of some dimension on CBM, but we don't believe that federal judges, operating within our adversary system, will find CBM inherently more difficult to deal with by following developing case law than they have earlier challenges (e.g. product liability, patent, and antitrust litigation).

“The alternative of a manual [on CBM matters in litigation].”

This could be another valuable resource. Professor Marcus's memo, at p. 2, notes that, concurrently with judicial education programs, the FJC is already providing judges with CBM guidance in its *Civil Litigation Management Manual*, and will provide further guidance in the next edition of the *Manual for Complex Litigation*. History suggests that, as time goes on, other publications will inevitably carry on the task of guiding the federal courts.

“The problem of a moving technological target.”

This is not a special problem of computer based information. “Technological targets” are always moving. It is sometimes quipped that every computer is obsolete on the day it is purchased. Rapid advances and frequent changes are often the price of technological success. Professor Marcus correctly observes that the development of widespread use of photocopiers changed document discovery drastically, yet it engendered no new federal rules. The near-universal response of courts and lawyers to photocopying was positive. Use of photocopiers by lawyers and by business in general made discovery easier. In our view, the nearly universal result of the use of computer technology by all kinds of business, worldwide, including courts and lawyers, has been exactly the same: it has allowed them to be more productive and efficient, and it has led to unprecedented successes in the business community. The resulting increased efficiency and productivity of business far outweigh any problems that have come with computer technology.

II. “Possible areas for rule amendments.”

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

This hardly seems necessary. Nowadays some CBM is almost always present in significant litigation. It is hard to miss it. No rule to advise, prompt, or require courts and parties to include CBM issues in their planning can improve on the incentives that already exist in our system. Judges rightly expect (and require) lawyers to know, adhere to, and use all of the rules of court. An even more powerful incentive for lawyers to know and use the rules comes from our adversary system. The price of ignorance, or violation, of the rules can include sanctions and, most powerfully, a lost case. Judges and litigants already know full-well that they overlook or ignore CBM at their peril.

“(2) Prescribing preservation obligations.”

There is no more need to specify procedures and standards for preservation of electronic data than there is for paper-based information (which the current federal rules do not do). “Information is information, and electronic discovery is discovery.”

Parties create and maintain CBM for at least three reasons: (1) it is good business practice; (2) it often must be retained pursuant to government regulations; and (3) it may be subject to discovery if the party becomes involved in litigation. I suspect far more time is taken up with the first two considerations than is taken up with litigation.

Professor Marcus indicates (p. 4) that a preservation program that provides a “safe harbor” for purposes of federal litigation may not be safe for other purposes, such as meeting regulatory requirements. Indeed, government regulation is one of the principal reasons some businesses must retain information. The very recent example of major fines levied against five Wall Street brokerage firms (Goldman Sachs, Salomon, Morgan Stanley & Co., Deutsche Bank Securities Inc., and U.S. Bancorp Piper Jaffray Inc.) for failing to preserve email messages is instructive. “Five Wall Street Firms Fined Over E-Mails,” Reuters wire dispatch, Tuesday, December 3, 2002, <http://www.washingtonpost.com/wp-dyn/articles/A2687-2002Dec3.html>, last visited Dec. 3, 2002.

We now of no evidence that the lack of a specific court rule addressing this matter has kept potential litigants from preserving information, or has been an impetus for spoliation of evidence. Viewed from another angle, it seems not only unnecessary but potentially dangerous and counterproductive to prescribe preservation of data in a “one size fits all” rule. One size cannot fit all, and creating a single rule will

inevitably cause potential litigants to tailor their preservation methods to comply with the minimal requirements of the rule. Such “tailoring,” while conforming to the letter of the rule, can confound proper discovery.

“(3) Conditioning the duty to obtain information from back-up media or unearth deleted material on a showing justifying the effort.”

As Professor Marcus notes (p. 6), there is little or no evidence that a drastic problem of recovery of deleted material actually exists. The Advisory Committee should continue its consideration of this question only if substantial, hard evidence exists. The plaintiff bar cannot prove a negative on this question, so the burden of proof must be placed on those who complain of this phenomenon of unknown proportions.

“(4) Amplifying rule provisions regarding costs.”

We know that discoverable electronic material often is very extensive, but we believe that is because business entities have found it increasingly necessary to create and maintain extensive information. Creation of the information in the first place is a business necessity. The possibility of future litigation is always a consideration in business planning, and litigation costs can and should (and, we believe, usually are) factored into business plans, but the information is created for business (and perhaps regulatory) reasons. The format in which the material is maintained and stored (i.e. hard copy or various electronic media) is chosen by the party that creates it, usually to make it easier to maintain. Thus, if electronic media are part of a problem, they are also a major part of the solution, as electronic searches of voluminous information format are far more efficient than searches of information in paper form. Again, “information is information, and electronic discovery is discovery.”

We have yet to see evidence that litigants frequently encounter production costs for CBM that are significantly higher than those for other types of discovery. When they do, courts, lawyers and parties already know what to do. Judges already have ample authority to shift extraordinary costs to the requesting party under the existing rules. Thus we think particular kinds of discovery costs that are rarely imposed by courts are not an appropriate subject for rules meant to be applied nationwide. A new rule amendment to make the existing power more “explicit” would be mere surplusage.

There is another issue—the *in terrorem* nature of cost-shifting rules. In that regard, this suggestion is like the many other similar “cost-shifting” proposals that have been advanced by business interests in a variety of venues during the past 30 years. Requiring requesting parties to pay for production of a particular format of information (i.e. electronic, not paper), whether during litigation or after it is concluded, is no more or less than a formula for injustice. It would be the “English Rule” (i.e., imposing costs on the side that does not prevail) spirited into American

justice under a tent flap. It would inevitably cause some potential litigants not to initiate even meritorious litigation, and cause parties in meritorious litigation already filed to abandon their cases. Producing parties would be tempted to exaggerate the estimated costs of production when discovery is being planned, and, if discovery is ordered, to inflate claimed "actual" costs for the purpose of encouraging the requesting party to abandon the case.

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

We believe the issue Professor Marcus raised in this section is important, but our guess is that it is already being addressed by courts and counsel, who already have incentives to do so. They cannot afford to do otherwise. The current Propulsid multi-district litigation may represent the paradigm in this area. (See discussion below.)

"(6) Addressing privilege waiver problems."

We believe this matter is another that is amenable to solution through litigant negotiation and judicial management. We know of no evidence that there are general problems in this area.

"(7) Other possible areas for amendment."

We believe the two other possibilities mentioned by Professor Marcus (guidance to courts and parties on highly technical matters of data access, and employment of court-appointed experts) are unnecessary subjects of rulemaking. First, no single rule can be useful in specific technical matters whose nature cannot be predicted and that will surely differ from case to case. Such a rule would reach far beyond the usual concepts of federal court rulemaking. Second, court-appointed experts are already authorized by Federal Rule of Evidence 706. An overlapping civil rule would be surplusage.

III. The BASF Proposal.

As we know, the current interest in electronic discovery is not an academic exercise. While the Advisory Committee's study continues, business interests have been advocating the creation of new rules or rule amendments specifically directed toward CBM. Such amendments could shield them from producing some CBM.

One leader of that effort is Thomas Y. Allman, the General Counsel of the multinational chemical manufacturer BASF Corporation, who has used the General Counsel Committee of the National Center for State Courts as a forum to promote a model rule on CBM (see Attachment A to this letter). That rule would (1) limit a corporation's duty of production to "those records that can be secured in the ordinary course of business, as is the practice in hard copy discovery" and (2) impose

costs on the requesting party for information beyond that scope. It would also establish a “safe harbor” in corporate document retention policies, and employ, very high standard for overriding such policies:

Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met.

Thomas Y. Allman, *A Proposed Model for State Rules re Electronic Discovery*, presentation to General Counsel Committee of the National Center for State Courts, November 15, 2001, viewable at www.kenwithers.com/articles (last visited Dec. 6, 2002).

The BASF Proposal “in Action.” The BASF proposal has not been adopted by the Advisory Committee, nor by any other jurisdiction that I know of at this time. All of the issues it raised were covered in Professor Marcus’s memo, and are discussed above in this letter. I will not belabor them. Nevertheless, we already have several examples, from the cataclysmic events in the business community over the last year, of how a CBM discovery regime that is based on an “ordinary course of business” standard might work in practice.

Arthur Andersen’s “Ordinary Course of Business.” Frequently, the “ordinary course of business” will be established or recognized in a corporate document retention policy. One such policy, that of the Arthur Andersen accounting firm, recently received considerable public attention. Andersen, of course, became a focus of investigations related to the collapse of Enron Corporation. At that time, presumably in an effort to be more open to the public about its practices, Andersen published its full document retention and destruction policy on its Internet site. Arthur Andersen & Co., *Practice Administration: Client Engagement Information—Organization, Retention and Destruction*, Statement No. 760, February 2000 (on file at ATLA; downloaded from Andersen web site in January 2002, but may no longer be available on the Internet).

I assume the Andersen policy was created in good faith. Its Sections 2.9, 4.5 and 4.7 provide that document destruction will be delayed or waived if the firm is advised of impending litigation or a criminal or regulatory investigation involving Andersen or a client. Later violations of that “spirit” of the policy led to Andersen’s prosecution and conviction for obstruction of justice. In entering a guilty plea in that case, one Andersen partner testified that “I obstructed justice . . . I instructed people on the engagement team to follow a document-retention policy which I knew would result in the destruction of documents.” Carrie Johnson, “Enron Auditor Admits Crime: Andersen’s Duncan Ordered Shredding,” *Washington Post*, Tuesday, May 14, 2002, at A1. (Emphasis added.)

Of course Andersen’s troubles in the Enron scandal did not stem specifically from electronic discovery matters, but the principles are the same, and several of the Andersen policy’s provisions on electronic files are pertinent to this discussion. First, the policy prescribed destruction of electronic material in such a way as to make recovery impossible—or extremely expensive. Section

2.8 ordered that “Deletion of information from electronic files will be accomplished in such a way that precludes the possibility of subsequent retrieval by AA personnel or third parties.” Section 3.6.2 specified that, “For electronic files, appropriate techniques (such as ‘absolute delete’) should be used to make sure the data cannot be reconstructed from the storage mechanism on which it resided.” And Section 4.5.1 provided that “The destruction of all working papers and electronic data must be accomplished in such a way as to prevent the data from falling into unauthorized hands and to prevent any possibility of reconstruction from partially destroyed files.”

Policies comparable to Andersen’s will inevitably lead to loss, at least temporarily, of information that may be highly relevant in later litigation. Allowing such a policy to protect its creator from the costs of production of electronic material will virtually guarantee that discovery costs will be inordinately high, no matter who bears them. Setting an injunction-level standard for a preservation order, as would be done under the BASF proposal, will inevitably lead to loss of critical information.

IV. A Success Story: The Propulsid Litigation.

While thinking about electronic discovery, we believe it is important to recognize the good management, cost-containment, and efficiencies that are possible under the present rules. The Propulsid litigation now pending in the U.S. District Court for the Eastern District of Louisiana (MDL-1355 Propulsid Product Liability Litigation) before the Honorable Eldon E. Fallon appears to be a good example of success. (Propulsid (cisapride) is a prescription drug used to treat symptoms of gastroesophageal reflux disease (GERD)).

This is major, extensive litigation involving discovery of information created and stored worldwide. Under the direction of Judge Fallon, the district court maintains a special Internet site dedicated to the litigation, displaying all the pertinent information about the case—including orders, minute entries, forms, the case calendar, reports from counsel, a list of contacts, frequently asked questions (“FAQ”), transcripts, motions, and docket entries. *See* <http://propulsid.laed.uscourts.gov> (last visited Dec. 6, 2002). Without attempting to characterize either the entire Propulsid litigation or, for that matter, the entire website, the site displays what appears to be a model of attorney professionalism and good judicial management. Working within the existing Federal Rules of Civil Procedure, Judge Fallon crafted a comprehension order establishing the manner in which electronic discovery would be handled. *See* Pretrial Order No. 10, April 19, 2001, at <http://propulsid.laed.uscourts.gov>. As of Nov. 21, 2002, the defense had produced some 7,207,813 pages of documents, electronic databases, plus 13,131 pages of email messages and attachments. These documents were furnished to plaintiffs’ counsel either directly from computers or in compact disk (CD) format, thus greatly reducing the expense of discovery. *See* Joint Report No. 19 of Plaintiffs’ and Defendants’ Liaison Counsel, Nov. 21, 2002, at <http://propulsid.laed.uscourts.gov>.

Discussions between ATLA staff and members of the Plaintiffs’ Steering Committee in the Propulsid litigation have indicated that the litigation has progressed smoothly, with very few discovery disputes and very few motions to compel discovery. They attribute this success both to a commitment by both plaintiff and defense counsel to conduct the litigation in a cooperative and professional manner, but

also, most significantly, to excellent management of the litigation by Judge Fallon.

Indeed, Judge Fallon has made cooperation and professionalism a condition for attorneys to participate in the case. Significantly for the questions being studied by the Advisory Committee, one of Judge Fallon's first orders in the case stated as follows:

Prominent in [the *Manual for Complex Litigation 3d*] at Section 20.21 is the following reference to courtesy and professionalism:

The added demands and burdens of complex litigation place a premium on professionalism. An attitude by counsel of cooperation, professional courtesy, and acceptance of the obligations owed as officers of the court is critical to the successful management of the litigation.

The Court expects, indeed insists, that these two words—"Courtesy" and "Professionalism"—permeate this proceeding from now until this litigation is concluded. The Court record should never be the repository of ill chosen words arising out of a sense of frustration over real or imagined issues. Because of the high level of competence and experience displayed by the attorneys who attended the initial conference the Court is confident that this objective will be achieved without judicial intervention. We believe that cooperation, professionalism, and good management have never been created by court rule. Judges can and do insist on them routinely.

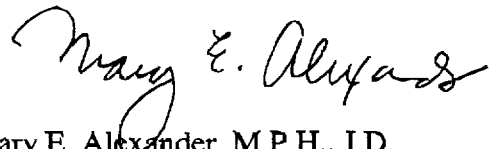
See Pretrial Order No. 2, Oct. 2, 2000, at <http://propulsid.laed.uscourts.gov>. (Emphasis added.) We believe similar examples of successful handling of CBM may be found in the litigation concerning Ford automobiles with Firestone tires, Rezulin (database production), the MS antitrust litigation, and in the litigation concerning phenylpropanolamine (PPA, an ingredient of over-the-counter cold medications)).

V. ATLA's Conclusion.

ATLA's position is similar to Judge Fallon's observation. We believe that the key to handling CBM matters is the same as the key to handling all other discovery matters: cooperation, professionalism, and good judicial management. There is no need for new, or changed, Federal Rules of Civil Procedure to deal with CBM issues in litigation.

I hope our comments will be useful to the Advisory Committee. Should you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Mary E. Alexander".

Mary E. Alexander, M.P.H., J.D.
President

CC: Thomas H. Henderson, Jr., Esq.
ATLA Executive Committee
ATLA Board of Governors
ATLA Legal Affairs Committee

Attachment A

Proposed Model Rule Regarding Production of Data or Information in Electronic Form; Cost-shifting and Safe Harbor

[Downloaded from www.kenwithers.com/articles (last visited Dec. 6, 2002).]

[Electronic Discovery; Provisions for]

(a) **General.** To obtain discovery of data or information that exists in electronic, digital or magnetic form, a requesting party must specifically request production of such data or information and specify the form in which it should be produced. The responding party must produce the data or information that is responsive to the request and is reasonably available to the responding party in the ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules.

(b) **Cost-Shifting For Extraordinary Steps.** A court may order, upon showing of substantial need, production of data or information that is otherwise subject to production but is not reasonably available in the ordinary course of business. If the court orders production of such data or information in the requested or other form, the court should also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) **Safe-Harbor; Sanctions.** Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met. No sanctions or other relief predicated upon a failure to maintain or preserve documents or data shall be entered in the absence of a discovery request or preservation order that describes with particularity the specific documents or data requested and evidence that the party upon whom the request or order was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance with obligations under such discovery requests or preservation orders.

ASSOCIATION OF TRIAL LAWYERS OF AMERICA

**Facsimile Transmittal Sheet**

To: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts

Fax no. 202-502-1766

CC: Professor Richard L. Marcus, fax no. 415-565-4865
John Rabiej, Esq., fax no. 202-502-1755

From: James E. Rooks, Jr.
Senior Policy Research Counsel
202-965-3500, ext. 268

Date: December 20, 2002

Re: **ATLA Comments on Professor Marcus's Electronic Discovery Memo**

Number of pages (including this cover sheet): 12

Dear Mr. McCabe,

Following are ATLA's comments on the above-referenced matter. We regret that it has taken extra time to forward these to you, but trust that they will be useful to the Advisory Committee on Civil Rules.

Sincerely yours,


James E. Rooks, Jr.