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From: "Sinclair, J. Walter" <JWSINCLAIR@stoel.com>
Subject: Reporter, Discovery Subcommittee, Civil Rules Advisory Committee
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Professor Richard L Marcus:

I am the President-elect of the International Association of Defense Counsel and practice as a corporate trial attorney with Stoel Rives, LLP in Boise, Idaho, representing corporate clients such as Albertson's, DuPont, Micron Technology, etc. In my trial practice I have experienced some very challenging and expensive discovery requests dealing with electronic data. I would like to share a few of my concerns for you and your committee.

It is not unusual when participating in mass tort litigation, or complex corporate litigation, to have discovery requests asking essentially for every e-mail, piece of information or document the company has "on a certain issue." In an attempt to gather that information, with companies having anywhere from 500 or up to 10,000 employees, it is a tremendous task, that depends on establishing appropriate parameters in organizing your data/information/document search. It has not been unusual in the past for the Court's to believe that our clients can push a button and produce all of this data/information/documents. The shear number of documents involved can be mind-boggling and the expense is tremendous. In one case we have spent over $1,000,000 in just trying to identify all of the documents and data sources and attempting to agree on reasonable search criteria to find everything relevant and exclude the 90% of other document/data that have nothing to do with the litigation at hand. That does not include the cost of actually doing the search, which will be many time more. And, the parties have labored over trying to agree on the scope of the search and the appropriate search terms. If we had to produce everything initially requested, it would potentially cost more than the company would pay.

It is essential that the parties be required to discuss and resolve at the earliest opportunity any disagreements involving the scope of electronic discovery and the search terms to be used in the search for discoverable data/information/documents. Ultimately the producing party should have the right and the obligation to determine a reasonable method of producing relevant documents. The requesting party should not be able to make it's demands overly broad or burdensome. The costs of undertaking extraordinary efforts required to produce electronic data/information/documents, that are not otherwise reasonably available, should be shifted to the requesting party, unless special circumstances can be shown that dictate otherwise. If the request is burdensome under the facts of the case, the Court should shift the cost, again, short of special circumstances, to the requesting party. And any such production should be limited to an intentionally created document or data such as an e-mail, memorandum, or database. This should not include the types of information automatically generated by software or operating systems such as file directories, annotations as to changes, etc ("meta" or "embedded" data"). While potentially this type of information could be separately discoverable upon a proper request and for good cause shown, metadata should not be deemed to be part of the documents themselves. If the

parties cannot ultimately agree on what should be produced, the Court should make the ultimate determination, with the cost-sharing as part of that determination.

Finally, the party requesting the production should have to make a showing of substantial need as a condition precedent to the production. It is easy to send a large, general request without tailoring it to what is actually needed in the case, and this type of practice should be eliminated.

While 10 years ago these problems did not seem to arise much, they are becoming a much more regular issue now. Sometimes, the cost of discovery can exceed the projected value of the litigation. Some counsel are attempting to force settlements by threatening to make litigation more expensive then settlement, which is not an ethical practice nor a proper purpose of discovery. More often, counsel simply do not understand, appreciate or care about the burden and expense they are putting others to, and nor do the courts. We need rules that specifically address these issues and make discovery a reasonable and appropriate vehicle for the development of relevant and pertinent information for litigation.

If you have any questions of me or of my experiences, please contact me at your convenience.

Very truly yours,

J. Walter Sinclair, Esq.
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