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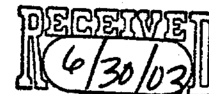

Via E-mail

Date sent: Mon, 30 Jun 2003 14:12:22 -0400
From: "Levy-Sachs, Rebecca" <rlevy-sachs@rc.com>
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I understand that you are collecting comments from practitioners regarding proposed rule changes for application in electronic discovery.

I have tracked the case law and am aware that although initially courts were ordering everything but the kitchen sink at the producer's expense, more recently Courts have been more measured and have attempted to impose some proportionality and cost shifting. Obviously the 2nd Circuit case of Rowe, is an example of a more reasoned approach. While I do not believe there should be wholesale changes to the Rules to separate e-discovery from the normal discovery process, there are areas which I think require rule change consideration, including:

- A safe harbor regarding document retention and destruction which, imposes only an obligation to maintain records in the regular course of business, and not to take extraordinary steps to preserve back-up tapes, or other records maintained solely for historic or redundancy purposes, once litigation has begun. The risk to a party of being sanctioned for spoliation is far too great, and the cost of preserving some types of materials far too high. Parties need guidance in this area with respect to how and what to preserve in light of commencement of litigation, and as to insurance companies the anticipation of litigation, since some courts have taken the position that insurance companies are in the business of anticipating litigation;

- A cost shifting formula which is based upon the reasonableness of a request; the necessity for the documentation in electronic form, and respective costs to the parties of alternative production, such as on paper;

-A preservation mechanism that would address inadvertent waiver of the attorney client privilege as a result of mass e-mail productions. Courts have ruled both ways on these issues, and it is almost impossible to review every one of millions of e-mails in order to assure that no potentially attorney client protected material is produced. There should be consideration to some type of time period during which a party can assert privilege to documents inadvertently produced. In my own experience (representing a telecom company in a breach of contract action) the relevant computer geek personnel sent over 2 million e-mails in an 18 month period. We had inadequate time to review for privilege during the allowed production period, but because both parties were in the same boat (their tech personnel had also generated about a million e-mails) we were able to agree to a process for each side whereby subsequent assertions of privilege were honored.

I know the Committee has researched these areas in detail, and as an attorney who regularly represents carriers and commercial entities I appreciate the work and effort that has been put into this project. The opinions expressed in this e-mail are my own and do not necessarily reflect the position of any client or other members of my law firm.

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