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Via E-mail

Date sent: Wed, 02 Jul 2003 16:44:02 -0500
From: Pat Lysaught <lysaught@bscr-law.com>
Subject: Electronic Discovery
To: 'Professor Marcus' <marcusr@uchastings.edu>

Dear Professor Marcus:

I have been a defense lawyer for over 25 years and want to comment with respect to the need for federal rules dealing with electronic discovery. Although it can be argued that all discovery is effectively managed under the current rules, that is simply not an accurate assessment of the current status. We have been involved in litigation in which electronic discovery has been used as leverage by plaintiff's counsel in an effort to secure an otherwise unnecessary settlement. Plaintiffs recognize that electronic discovery is extraordinarily expensive, time consuming and although often not really designed to produce positive results in terms of relevant information, results in multiple problems for defendants. Critical to the rule making function is the recognition that a level playing field is important. One way to ensure a level playing field is by a cost shifting to plaintiffs as it relates to electronic discovery. It is important to note that this places a burden on plaintiffs to use electronic discovery for valid purposes and to reasonably and rationally restrict the scope of the request, since they bear some of the cost and in certain instances perhaps should bear all the costs of such discovery efforts.

Additionally, it is critical that defendants not be required to change current document retention policies after the filing of the complaint premised upon the potential that an electronic discovery request might be made. Defendants need to be given reasonable assurance, sometimes referred to as a safe harbor, as it relates to their document retention policies not being subject to second guessing and the potential of a sanctions motion. Put another way, defendants should not be considered to be "on notice" as to the potential scope and breadth of electronic discovery every time a case is filed where electronic communications could be the subject of discovery.

Finally, with regard to electronic discovery, in addition to cost shifting, it should be made clear that the most significant cost of such discovery includes retention and review, both for the scope of the request and attorney-client privilege and for work product protected materials. Oftentimes plaintiffs seek to require a defendant to search virtually every electronic communication for such information. However, a more rational and reasoned approach would be to impose upon a responding party the burden to search in those electronic communications and electronic materials where the responding party would expect such information to be found and where it would look for such information if it were critical to some need of the producing party.

Thank you for your consideration and I would be more than pleased to further discuss these issues or provide testimony before your committee as appropriate. With best wishes.

Very truly Yours,

Patrick Lysaught

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