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From: "Tierney, Don" <Don.Tierney@AIG.com>
Subject: Federal Rules For Electronic Discovery
To: "'marcusr@uchastings.edu'"
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I attach some comments which I hope you will find helpful in your work on behalf of the Advisory Committee. The subject of e-discovery is a very important one today and we all look forward to your work product. Thank you for your kind consideration, I would be happy to respond to any request for additional information.

I am the Manager, Claims Litigation, for the American International Companies (A.I.C.), i.e., the insurer member companies of the American International Group, Inc. Together, the American International Companies are the largest insurer of commercial risks in the world; employing over 50,000 in the United States and over 80,000 worldwide.

A major concern of the A.I.C. regarding e-discovery is the companies' e-mail systems. With so many employees there is need to control the amount of data retained within the e-mail system. The e-mail system is a means of communication, not a data storage facility; messages can be moved from the system to an electronic or hard copy file, but the system has means for purging stale messages which are not moved to storage. To date, all correspondence relating to a specific claim is kept in a hard copy claim file which is kept intact for seven years after it is closed; so there is no issue concerning the availability of that file which is often the relevant critical documentation in most of our cases.

Our greatest concern arises out of the propensity of some attorneys to try their cases through sanctions rather than on the merits. An area of particular concern is the time between the service of a discovery demand and the reaching of a definition of what will actually be produced either through agreement or order of the court or discovery referee. This is often a substantial period of time, especially in multi-party cases where target defendants are addressed first, and more peripheral defendants linger for months. Meanwhile, the systems continue to process data.

The incredible breath of most initial discovery demands is not helpful to inform the company of what data needs to be preserved. Any suggestion to disrupt the company system would create enormous problems regarding data storage capacity and system back-up and would greatly increase the cost of any searches that would eventually be undertaken. The only solution that comes to mind is one that would encourage narrowly defined discovery requests and speedy resolution of discovery disputes, primarily by negotiation but with access to the court or a referee if agreement is not reached. An order to preserve all data should not be issued except in the most extraordinary circumstances.

Back-up tapes present another potential for mischief. Some companies apparently keep back-up tapes for substantial time periods and they become, in effect, an archive which is very expensive to search. Others, such as my own, keep them for very short periods and discard them once they have fulfilled their purpose, i.e., as a source for restoration in the event of a system crash. In the latter case, the likelihood that the tapes contain relevant data that is not otherwise available in the system, is so small that the expense to search is not justified. In either case a request to search back-up tapes should be treated as an extraordinary request for which the cost of compliance would be borne by the party seeking the discovery.

Of course, back-up tapes present the same issue an e-mail, i.e., any disruption of the system causes extraordinary problems. The tapes are normally re-used at the expiration of the retention period; any attempt to put a hold on the tapes will impose substantial expense to obtain additional tapes and the amount of the data to be searched will increase quickly with concomitant increase in cost. You need to recognize that we're not talking about one server or one tape; in a large company you are talking about many servers and many tapes and the systems are backed up nightly.

I have reviewed the proposed model rule amendments for E-Discovery sent to you by Thomas Y. Allman. I am in agreement with the proposed paragraph (a) General. With respect to proposed paragraph (b) Cost Shifting for Extraordinary Steps, I'd change "may" to "shall" in the last sentence.

With regard to paragraph (c):

- (1) The rule should be clear that any request for back-up tapes is an extraordinary discovery request. A prior showing of extraordinary need should be made by the requesting party;
- (2) The rule should not permit sanctions based on a discovery request alone; it should encourage a speedy meet and confer to reach agreement or seek the aid of the court to define what is to be preserved or produced;
- (3) It should specify that a party requesting back-up tapes be preserved should bear the cost of the preservation and the cost due to the disruption, since this is an extraordinary discovery request.
- (4) No ex-parte order should issue regarding preservation of electronic data.