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2/23/04

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02-ED-053

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
JOHN J. HUGHES
United States Magistrate Judge

Clarkson S. Fisher United States Courthouse
402 East State Street, Room 6000
Trenton, New Jersey 08608
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February 23, 2004

Peter G. McCabe, Esquire
Secretary, Committee on Rules of Practice and Procedure

Dear Peter,

Because the Fordham Conference on E-Discovery was such an invigorating experience, I wanted to express my appreciation for the invitation and to *throw my two cents in* as a meager payback. In my humble opinion, the Federal Rules of Civil Procedure should be amended to **recognize electronic information** but not to attempt to **manage** it. Specifically, I think Rules 16(b) and 26(f) (and Form 35) should be amended as suggested in the Lynk-Marcus Memo with the additional suggestion that you add **or other information system** after *electronically-stored data*. This additional language, or something like it, may accommodate future technological advances and new information systems.

I think any further attempt to **define terms** (e.g., *inaccessible data*) or **duties** (e.g., *duty to preserve*) would be more confusing to lawyers and promote more litigation than just leaving Rules 33, 34, 37 alone. Currently, only a small percentage of cases are affected by electronic information issues, terms and duties are continually fluid as technology advances, and problems that do arise are extremely fact/case sensitive. I would not recommend any change in Rules 33, 34, 37 or an added 26(h).

The beauty of the New Jersey Local Rule (if I do say so myself) is that it causes parties to focus on their particular case early on with respect to *form of production, preservation, inadvertent disclosure* and *costs*. This early focus allows lawyers to point to a rule and discuss with their adversaries and clients these topics and, with or without the assistance of the Court, tailor solutions to distinct problems. The New Jersey Rule addresses awareness and education and not scope of, or limitation on, discovery. Personally, I think Federal Rules 26(b)(1) (good cause for subject matter discovery) and 26(b)(2) (other source; cost/benefit) are currently sufficient to resolve most problems that may arise with regard to scope or limitation.

Thank you again for allowing me to participate in a small way in this important endeavor. I am taking the liberty of sending a copy of this letter to Chief Judge Bissell for his information. I also send my best personal regards to you and all at the Administrative Office.

Very truly yours,
/s/ John J. Hughes
John J. Hughes
United States Magistrate Judge

c: Chief Judge Bissell