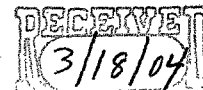


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03/18/2004 04:56 PM

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cc:

Subject: Comments on Amendments to the Federal Rules of Civil Procedure  
on E-Discovery

To: Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts

Mr. McCabe:

I understand the the Federal Judicial Conference Civil Rules Advisory Committee has called for comments from members of the bar on possible amendments to the Federal Rules of Civil Procedure. I am an attorney practicing primarily in the areas of products liability and intellectual property, and I am writing to offer my comments on the need for amendments to the rules to deal with issues of electronic discovery.

My perspective as a practicing attorney is that requests for electronic discovery can easily be so broad and overwhelming as to impose an inordinate cost and burden on the party receiving a request for discovery of electronic information. Second, the present rules do not sufficiently address the issues unique to electronic discovery or provide adequate guidance to courts, counsel or litigants on the parameters of e-discovery. As a result, the extent of required production of electronic information varies widely from case to case and litigants cannot adequately predict the scope of discovery to which they may be subjected. The result of this lack of predictability is lengthier and more expensive litigation regarding the scope of permissible discovery and the exposure of litigants to sanctions for conduct that they could not reasonably predict was in violation of the rules. The lack of clear definition and guidance on the parameters of what electronic information must be retrieved and produced or what information must be preserved by companies that may be involved in litigation at a later date results in higher costs to all parties involved in litigation. Companies cannot accurately formulate procedures for preserving electronic information, and they have little guidance in determining the extent of electronic information to search for or produce when a discovery request is received. The amendment of the rules to increase predictability

and certainty in this area would lower costs to preserve and retrieve electronic information in discovery, provide guidance to litigants and reduce litigation over discovery issues that is expensive for the litigants and time-consuming for the courts.

With those comments in mind, I support the proposal for a two-tier discovery framework that allows for discovery of electronic information that is relevant to a claim or defense that is reasonably available in the ordinary course of business and a requirement of good cause for discovery of information that is not reasonably accessible in the ordinary course of business. This proposal provides an appropriate standard for courts and litigants to follow that courts can apply and interpret in individual cases.

I also support the proposal directing courts to order that a requesting party pay the reasonable costs of extraordinary steps necessary to store, retrieve, review and produce electronically stored information. This will provide an effective check on over-broad requests that impose a great burden on the party receiving the discovery request and will encourage parties seeking discovery to tailor their discovery requests to seek the specific information that is relevant to their claims.

It is also important to address the issue of sanctions for parties which must store and preserve electronic evidence that recognizes the costs to a business of preserving such information. Thus, I support the proposals for a safe harbor in Rule 37 that allows companies to continue to operate their electronic data systems without fear of sanctions unless a discovery request or order describes the documents or data sought with particularity and there is evidence of a willful failure to preserve the data. Likewise, I support the proposal that there should be a presumption that taking reasonable steps to notify custodians of electronic information of the need to preserve such information constitutes prima facie compliance with the standard of care.

Finally, I also support the proposal to incorporate the majority rule on waiver of the attorney client privilege for inadvertent production. As any experienced litigator knows, in the production of large amounts of documents, it is not uncommon that some privileged documents may be inadvertently produced. By providing that the court should consider all of the circumstances to determine whether waiver of any privilege is fair, reasonable and in the interests of justice and including a summary of the applicable factors in notes, the rules provide courts with flexibility to reach a fair and reasonable result on a claim of waiver under the particular facts of a given case.

I appreciate your willingness to consider comments from the bar, and I hope that the Committee will favorably consider these limited amendments to guide the courts, attorneys and parties in this area of electronic discovery that is currently quite muddled.

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