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September, 2002

INQUIRY FROM DISCOVERY SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
REGARDING DISCOVERY OF ELECTRONIC MATERIALS

Dear E-discovery Enthusiasts:

This letter invites reactions that would be helpful to the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules as it considers whether to develop proposals to amend the Federal Rules of Civil Procedure to address special features of discovery of electronic, or computer-based, information. At the outset, however, it should be emphasized that the Subcommittee has not considered any specific amendment, and may determine it is not appropriate to do so.

This letter is being sent to you in hopes that you can provide helpful advice to the Subcommittee about some of the issues introduced in this letter and the enclosed memorandum. Any responses should be sent to Peter McCabe of the Administrative Office of the United States Courts at the address set forth at the end of this letter. We would appreciate receiving a response by December 10, 2002.

Some to whom this letter is being sent have already assisted the Subcommittee in its consideration of this area. That assistance has been invaluable; this letter seeks to elicit further insights and to determine whether ongoing developments regarding electronic discovery have changed previous opinions expressed to the Subcommittee. The recipients' list is intended to include many with experience and views on this topic, and is not meant to be exclusive. Thus, if you are aware of others whose views might be of assistance to the Subcommittee, please feel free to send a copy of this letter and the enclosed memorandum to them.

This inquiry is the latest part of an ongoing consideration of the issues presented by discovery of computer-based materials.

In recent years the Subcommittee has monitored the issues presented by this form of discovery, including hosting two mini-conferences on this subject in 2000. In addition, it has obtained research assistance from the Federal Judicial Center, which is completing a two-year project on electronic discovery. Interest in the topic has continued in the bar; since January 1, 2001, there have been at least 120 continuing legal education programs focusing mainly or in part on this form of discovery.

Reviewing this material, the Subcommittee has learned that there are several possibly distinctive characteristics of discovery of electronic materials, including: (1) increased volume of responsive material, but perhaps also increased ability to search for responsive items where electronic material can be searched by computer; (2) increased concern about alteration of these materials, but also increased potential access to interim drafts and other items thought to be discarded; (3) issues related to disclosure of embedded data and difficulties encountered in trying to access legacy data; and (4) possibly heightened privacy concerns.

Assessing the significance of these differences in regard to litigation in federal courts raises questions on which your response would be informative. For example: Does the volume of electronic materials actually require discovery response efforts that are qualitatively different from those necessary to respond to requests for voluminous hard copy materials? Has the advent of computers sometimes eased the burden of responding to discovery? How often is discovery of embedded data actually important? How often is access to legacy data actually ordered? Are difficulties some litigants encounter in responding to this form of discovery the result of their choice to employ certain systems rather than others, and if so should the courts accommodate those choices by relieving parties of discovery response responsibilities?

Potentially significant legal developments have begun to emerge. Besides caselaw, there have been some statutory and rulemaking developments. Texas has a civil rule specifically keyed to discovery of electronic materials. See Tex. R. Civ. P. 196.4. At least two districts have local rules keyed to this form of discovery. See E. & W. Dist. Ark. L.R. 26.1(4); D. Wyo. L. R. 26.1(d)(3)(B). Meanwhile, the American Bar Association has adopted discovery standards including provisions directed toward electronic discover. See ABA Discovery Standards 29 and 30. Copies of these materials should be attached to the enclosed memorandum for your information. Other similar statutory or rulemaking efforts may well exist; if you are aware of any, please bring them to our attention.

For the Subcommittee, the overarching question is whether the time has come to give serious consideration to rulemaking on

a national level to address discovery of electronic materials. The issues raised by that possibility are explored in greater detail in the enclosed memorandum, which itself raises a number of questions to which we would appreciate receiving responses. In brief, there seem to be alternatives to national rulemaking -- judicial education, relying on caselaw, and the alternative of a manual -- that might be sufficient or more fruitful. And the volatility of technological change in this area may make rulemaking, which takes a minimum of three or four years, a poor tool.

Rule amendments might take a number of forms. As suggested in the enclosed memorandum, they might include (1) directing the parties and the court to consider electronic discovery in the discovery planning process, (2) prescribing preservation obligations, (3) conditioning the duty to obtain information from back-up media or unearth deleted material on a showing justifying the effort, (4) amplifying rule provisions regarding costs, (5) regulating the form of production of computer-based material, or (6) addressing privilege waiver problems. Questions about these possibilities are raised in the enclosed memorandum.

As noted at the outset, it would be most helpful if responses to this inquiry were received by December 10, 2002. They should be sent to:

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

In closing, it is important to reiterate that neither the Discovery Subcommittee nor the Advisory Committee on Civil Rules has begun considering specific rule changes in this area, and that they may determine that no changes are appropriate. But whatever decisions they make will be informed by the responses they receive to this letter. We therefore look forward to hearing your views.

Sincerely,

Richard L. Marcus
Special Consultant,
Discovery
Subcommittee

Encl.: Memorandum "Is There A Need for Rule Changes to Address
Distinctive Features of Discovery of Electronic
Materials?"