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Subject: Comments on E-Discovery

Professor Marcus:

I am General Counsel for Altec, Inc., and serve as Chair of the Corporate Counsel Committee of the International Association of Defense Counsel. I support the proposed rule set forth below.

E-discovery is a frightening specter for in-house counsel. Little or nothing can be done prior to litigation to effectively prepare my client for the inevitable requests for e-discovery in future litigation. And once litigation begins, I daily run the risk of sanctions because potential evidence is being "destroyed" every second as today's back-up tape over-writes the 60-day old back-up tape no longer of use to my company. For a company that at any given time has at least one matter in litigation, my only alternative would be to abolish the practice of over-writing back-up tapes and, instead, create a warehouse of tapes of use only to plaintiff's in future litigation.

In the case of hard-copy documents, it is relatively simple to determine where to search for documents responsive to a discovery request. That "business records" are kept in the "ordinary course" suggests an organization of and pattern for retention. Not so with electronic documents, for electronic data can be stored in an unknown place, without conscious decision by the recipient. There are documents on my company's network or on my hard-drive that I would state, under oath, did not exist, because I could search and search, and never find them. But a computer expert might be able to find them. In responding to discovery, a party should not be required to retain a computer expert.

I presently am embroiled in a fight to avoid sanctions for failing to produce a spreadsheet of electronic information relevant to pending litigation. In attempting to respond, I contacted all those individuals I thought might have information responsive to the request. In a deposition, however, a former employee testified about the spreadsheet she kept while working for us, a spreadsheet never disclosed to her supervisor or to anyone I believe I should have contacted in an effort to respond to the discovery request. Unknown to anyone employed by my company at the time of the litigation, the spreadsheet was on our network. I do not think I should be sanctioned for failing to produce the spreadsheet. If I had it to do all over again, I would do nothing different.

I believe the proposed rule, set forth below, satisfies the concerns I've expressed. Corporate Counsel should be able to know that by taking reasonable steps to preserve, locate, and produce electronic documents in litigation, they are in compliance with the rules of discovery and their obligations as officers of the court.

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PROPOSED MODEL RULE REGARDING PRODUCTION; COST-SHIFTING AND SAFE HARBOR

[Electronic Discovery; Provisions for]

(a) General. To obtain discovery of data or information that exists in electronic, digital or magnetic form, a requesting party must specifically request production of such data or information and specify the form in which it should be produced. The responding party must produce the data or information that is responsive to the request and is reasonably available to the responding party in the ordinary course of business. If the responding party cannot ? through reasonable efforts ? retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules.

(b) Cost-Shifting For Extraordinary Steps. A court may order, upon showing of substantial need, production of data or information that is otherwise subject to production but is not reasonably available in the ordinary course of business. If the court orders production of such data or information in the requested or other form, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) Safe-Harbor; Sanctions. Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met. No sanctions or other relief predicated upon a failure to maintain or preserve documents or data shall be entered in the absence of a discovery request or preservation order that describes with particularity the specific documents or data requested and evidence that the party upon whom the request or order was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance with obligations under such discovery requests or preservation orders."