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Date sent: Sat, 28 Jun 2003 01:37:06 -0400
From: Michael Aylward <maylward@mail.mm-m.com>
Subject: Proposed Federal Rules Governing Electronic Discovery
To: marcusr@uchastings.edu

Professor Marcus:

I understand that the Advisory Committee on Civil Rules is contemplating possible amendments to the FRCP that would govern the discovery of electronic evidence. I concur that there is an urgent need for appropriate action in this area and applaud your initial efforts. At the same time, it is vital that any rule that may be adopted create an appropriate safe harbor for parties to such disputes and prevent the sheer cost of electronic discovery from being manipulated as a club to force defendants to settle claims simply to avoid the cost of dealing with such demands.

I serve as outside counsel to several large insurance companies that are increasingly confronted by discovery demands for electronic evidence. In many bad faith cases, for instance, plaintiffs are demanding evidence concerning the manner in which insurers have handled similar claims around the country for years back. Many insurers are now "paperless" and maintain all their file activity notes and records in an electronic format. These are dynamic databases that are often maintained in an inter-active format so that claims representatives can work in a "virtual" electronic partnership with outside counsel. The demands for electronic production of such data can be intrusive and expensive as defendants do not know whether they can change the form or content of these media while claims or suits are pending. Creating some sort of "safe harbor" would at least allow defendants to deal with their obligations in a responsible manner.

Given the expense of these demands, I would also urge the Committee to develop a rule that would require the party seeking the material to bear the cost of heroic efforts necessary to develop or create evidence beyond what is ordinarily maintained in the course of the defendant's business.

Again, I wish the Committee all success and wisdom in your ongoing efforts. Please feel free to contact me if you have any questions concerning the attached.

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