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Jo Ellen Cline
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Re: Comments re Proposed Amendments to Ohio Rules re E-Discovery
(Rules 16, 26, 33, 34, 36, 37 and 45)

Dear Ms. Cline:

The undersigned, on behalf of Lawyers for Civil Justice (LCJ), respectfully submit these comments on the proposed Amendments to the Ohio rules of Civil Procedure as they relate to the discovery of electronically stored information.

LCJ's membership is composed of in-house counsel for major American corporations, outside defense trial counsel, and the leadership of three major defense bar organizations, the Defense Research Institute (DRI), the Federation of Defense and Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC), which collectively represent over 20,000 civil defense trial lawyers.

LCJ worked closely with the U.S. Judicial Conference Civil Rules Committees throughout the lengthy and deliberate development of the 2006 E-discovery Amendments to the Federal Rules of Civil Procedure (the "Federal Amendments"). The Federal Amendments provided the model for the recent enactments by the states of Arizona, Indiana, New Jersey, Minnesota, Montana, and Utah, and are proving to be influential in discussions in Florida, Kansas, Maryland, Nebraska, New Mexico, North Dakota, Tennessee, Washington, and the District of Columbia, all of which are considering changes in their civil rules.

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Given the close parallel between Ohio's discovery rules and those of the Federal Rules of Civil Procedure, the Federal Amendments are an important starting point, if for no other reason than "when a body of federal decisions begins to emerge, [the state] courts will be able to use that case law as a guide to interpreting its own rules."¹

We note that the current draft proposals embody creative and useful provisions which would be unique to Ohio. We support those changes, subject to the suggestions below, and also offer the following specific suggestions for additional changes.

1. Rule 16. Pretrial Procedure.

Given that Ohio does not have a mandatory "meet and confer" requirement which parallels the provisions of Federal Rule 26(f), we suggest addition of explicit references to "preservation issues" and "form or forms of production" in Rule 16(8), given the importance of early discussion of these key matters. Experience to date has shown that early resolution of the most vexing issues is an appropriate way to avoid expensive and time-consuming post-production disputes. See, e.g. *Kentucky Speedway, LLC v. NASCAR*, 2006 U.S. Dist. LEXIS 92028 (E.D.Ky. Dec. 18, 2006). Thus, we recommend that Rule 16(8), as amended, should require that the following topics be considered at pretrial conferences: "The timing, methods of search, form or forms of production, any unresolved preservation issues and the limitations, if any, to be applied to the discovery of documents and electronically stored information."

2. Rule 26 (B) Scope of Discovery

(A) Identification

We commend the Commission for adopting the "two-tiered" approach to electronic discovery in subsection (4) while omitting the awkward "identification" requirement found in Federal Rule 26(b)(2)(B)(regarding "sources" that a party deems to be inaccessible because of undue burden or cost). The normal Ohio practice of lodging objections to burdensome requests for production provides ample opportunity to state the reasons for failing to produce, including those based on inaccessibility of specific information sought.

(B) Good Cause

We also support the approach of the Commission in expressly incorporating the factors which are relevant to a "good cause" determination in the Rule itself, rather than following the federal approach of simply alluding to them in the Committee Notes. This explicit listing of the factors will help clarify the important considerations involved which apply in determining if "good cause" exists to require production of inaccessible information.

¹ David F. Herr, Reporter to the Advisory Committee, as quoted in "Minnesota mulls e-discovery rules for state courts," 11 Minn. Lawyer No. 15 (April 9, 2007), available at http://www.holsteinkremer.com/pdf/Minnesota_mulls_e-discovery_rules_040907.pdf

(C) Preservation of Inaccessible Information

LCJ believes that in the absence of agreement by the producing party, a duty to preserve information that is not reasonably accessible should not be deemed to arise unless a court has determined its necessity by a prior court order. This requirement could be conveyed by the Staff Notes or by explicit reference in the Rules. It would encourage early discussion and agreement and help reduce excessive and unnecessary preservation prompted by misperceptions as to what information must be retained. Excessive preservation can literally stop a company's business since the deletion and overwriting of information is part of the routine operation of some business critical computer systems.

To implement this proposal, LCJ suggests a Staff Note or a provision in Rule 26 as follows:

“Unless the parties otherwise agree, no duty to preserve information that is not reasonably accessible because of undue burden or cost shall arise unless and until a court enters an order requiring such preservation after reasonable notice to the party from whom preservation is sought.”

(D). Cost Shifting

Finally, LCJ also recommends inclusion of a provision similar to that in Texas Rule of Civil Procedure 196.4, which requires shifting the reasonable costs of any extraordinary steps required when a court orders production of inaccessible information. Such a rule would provide an incentive for parties to meet and agree on prompt production of information that is less costly to retrieve. Thus, the final paragraph of proposed Rule 26(B)(4) could be modified to read as follows:

“In ordering production of electronically stored information, the court may specify the ~~format~~ form or forms of production, extent, timing, allocation of expense, and other conditions for the discovery of the electronically stored information, provided that any order compelling production of information that is not reasonably accessible shall also require the requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. The court may also specify other conditions for the discovery.”

3. Rule 37. Failure to Make Discovery: Sanctions. (F) Electronically Stored Information

LCJ supports the adoption of a “safe harbor” for electronically stored information based on Rule 37(f) of the Federal Amendments. This rule captures the common sense approach needed to deal with the innocent loss of information due to complexities of the operation of computer systems. Courts have begun to cite the federal safe harbor provision as a help in resolving tough issues. *See Escobar v. City of Houston*, 2007 U.S.

Dist. LEXIS 72706 (S.D. Tex. Sept. 29, 2007). LCJ would recommend, however, removal of both the introductory phrase “absent exceptional circumstances” and the reference to sanctions originating “under these rules.” The former phrase invites wasteful motion practice; the latter phrase is not needed in Ohio because, as a sovereign state, Ohio does not have the same concerns about limited rulemaking power that motivated the Federal Advisory Committee to include those words.

We note that the Commission has sought to clarify the “safe harbor” by listing factors to assist courts in determining when sanctions should lie. LCJ recommends the following modifications of the suggested factors in order to reflect more fully the emerging common law on the topic. If a party in good faith believes that information is not likely to be discoverable or is available from other more accessible sources, intervention in the routine operations is not required. *See Cache La Poudre Feeds v. Land O’Lakes*, 2007 WL 684001 (D. Colo. March 2, 2007). The test is one of “good faith” under the circumstances, which is a fact-specific inquiry² dependent upon the intent of the party responsible for preserving and producing the information.³

Revised as we respectfully suggest, Rule 37(f) would read as follows:

Electronically stored information. ~~Absent exceptional circumstances, A~~ court may not impose sanctions on a party ~~under these rules~~ for failing to preserve or produce information lost as the result of the routine, good faith operation of an electronic information system. The Court may consider the following factors in determining whether to impose sanctions under this division:

- (1) Whether ~~and when~~ and under what circumstances any obligation to preserve the information was triggered;
- (2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
- (3) Whether the party's failure to intervene in a reasonable and timely fashion to prevent the loss of information was the result of a good faith belief that the information might be available on other more accessible sources or that no discoverable information would be destroyed by the continued routine operation of the system;

² For a list of some of the considerations which a court could consider, see Stephen G. Morrison, quoted in Transcript (Annotated), “Panel Four: Rule 37 and/or A new Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions,” supra, 73 Fordham L. Rev. at 74 (was the conduct “rational in the industry” and “consistent with other conduct in that particular business in terms of what is saved and what is not saved” etc.)

³ A review of the broad process is preferable to one which simply focuses on whether anything could have been done to prevent the deletion of a particular document or type of information, which is the wrong inquiry. *See Hynix Semiconductor v. Rambus*, No. C-00-20905 RMW, 2006 WL 565893, *20 (N.D. Cal. 2006) (inquiry should focus on whether a particular policy was adopted and implemented for the purpose of destroying relevant information or whether the loss is merely the legitimate consequence of pursuing other objectives).

- (4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
- (5) Any other facts and circumstances relevant to its determination under this division with respect to the presence or absence of the requisite culpability.

* * * *

We and LCJ express our appreciation for the opportunity to submit these comments and suggestions. We hope they are helpful and stand ready to submit further background and comments as needed. The proposed amendments represent an important and necessary step in ensuring fairness, balance, and predictability in the field of electronic discovery as practiced in the state courts of Ohio and should be adopted.

Respectfully submitted,

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