04-CV-206

# Krislov & Associates, Ltd.

**Clinton A. Krislov**
**312-606-0500**
**fax:312-606-0500**
**email:clint@krislovlaw.com**

**Suite 1350**
**Civic Opera Building**
**20 North Wacker Drive**
**Chicago, Illinois 60603**

**Hon. Peter G. McCabe**
**Secretary**
**Committee on Rules of Practice and Procedure**
**Administrative Office of the United States Courts**
**Washington, D.C. 20544**

**February 15, 2004**
**Re:Proposed Amendments to federal civil rules**
**regarding discovery practices**
**pertaining to Electronically Stored Information.**

Dear Mr. McCabe,

I appreciate the committee's consideration of these comments regarding the committee's proposed amendments to discovery rules pertaining to Electronically stored information.

**Commenter:** Clinton A. Krislov. I am the senior partner of Krislov & Associates, Ltd. We are engaged exclusively in public interest, class and derivative actions in the state and federal courts nationwide. I have served five terms as chair or vice-chair of the Chicago Bar Association's Class Litigation Committee. Although engaged primarily for plaintiffs, we are committed to the improvement of the judicial system as the fundamental means by which our society adjudicates disputes by the rule of law, and preserving its role as the means by which all persons may obtain justice in our society, regardless of the person's wealth or influence.

**Recommendation**: The Committee should, of course, adopt uniform national procedures for the discovery of electronically stored data in the federal courts nationwide, and disfavor the rise of local rules imposing differing procedures as undoing the whole aim of uniform rules of procedure in the federal courts. To these aims, the proposed rules are a good ""first effort"", but seem based on erroneous conclusions about information systems which are already outmoded, and need more work, input and revisions before being adopted.

First, the idea of requiring separate explicit demands for documents and electronically stored information begins with the wrong premise. To this point, the evolving notion of the term "documents" was broad and flexible, encompassing future formats which were not in existence when the rules were adopted. The committee should explicitly include electronically stored information as "documents" requested, without having to separately request them. This reflects the fact that electronically stored messages, e-mails and other such communications, are in fact regarded by the world as documents. The effort to carve them out, as something different, just encourages the practice of shell game obstruction to disclosure, preventing rather than facilitating the resolution of disputes on their merits.

Second, the notion that electronically stored information presents a *more* difficult storage media from which to locate and retrieve data, let alone to analyze it——is simply wrong. If anything, electronically stored data is vastly *easier* to retrieve and to search and sift, contrasted with the actual physical challenges to dealing with documents in paper format, located in warehouses of ""bankers boxes"" stored in uncontrolled environments, coupled with the vast attorney hours to study their content. Indeed, those documents have become meaningfully studied on efficient methods often by digitizing vast quantities of files at incredible cost, justified only by the fact that the conversion to digital format has made discovery of documents, hard copy, scanned image or purely digital much more efficient and productive.

Indeed, coupling that with the usual practices of daily backups to servers, not just in large corporate enterprises, but even in smaller offices, even lawfirms, presents the problem in a greatly different light. Specifically, as our society shifts to transactions done entirely digitally, the discovery process becomes actually easier, not harder.

In short, most of us who have actually had to deal with warehouse production of mountains of meaningless information in order to find the "smoking gun", the problem with electronically stored media is not that it is harder to deal with. Rather, its "problem" is that its sheer *ease* of production, retrieval and analysis by most computers and users makes it far more likely to produce the information that will decide cases on their merits, rather than which side can devote the most expensive resources to overwhelming the other side with mountains of volume or bodies of human analyzers.

Thus information is becoming almost instantly produceable in vast quantities that can be sorted and picked electronically as well in very short order. What *has* become more difficult for the producer is the abiltiy to pre-screen and stage the production to frustrate its effective use by the recipient. This fact have been demonstrated in the Microsoft antitrust litigation and in the investigations by New York Attorney General Spitzer. In both cases, vast quantities of unscreened emails and similar communications were turned over, sifted electronically and used extremely quickly to evidence the wrongdoing that previously even an army of investigators would have difficulty ever finding.

With all due respect, the committee's focus on providing *excuses* from production, just feeds into the "spin" of those whose purpose is to thwart, rather than faciltate justice. The efforts to throttle back on electronic discovery is not generated by the feeling that it is burdensome. Its "threat" is that it works! In that light, the proposed rule is wrongly directed.

In short, while perhaps well-intended, it strikes us as akin to encouraging the breeding of dogs to eat homework assignments. In the real world, the difficulty in producing all communications containing specific terms, is minimal. The "problem" is that they are so easily produced and searched.

We believe that the term "documents" should, simply, include information in whatever format it may be in, and that electronic media be viewed as a way to facilitate the actual speedy production of meaningfully reviewable information, even without pre-screening. Of course, the rule could provide the ability to make a showing that production is, in a particular case, actually

difficult or overly burdensome. But the burden should be, as the rules contemplate for traditional production, for the producer to bear the burden of limiting discovery.

If the purpose of discovery is to give each side a full opportunity to obtain bona fide information, this process should be expanded, not contracted. If instead, the committee's desire is to have discovery continue as the shell game, as it is often played, that we think is contrary to an honest justice system in which all have a fair opportunity to honestly prevail on the basis of the merits of their claims, rather than on their financial resources and ability to wear down the other side in a battle of attrition, or evidence-hiding played as if it was ""skillful lawyering"". That approach can only exacerbate a system which is already too expensive for all but the most financially strong litigants.

**Attorney-Client Privilege**. The one situation in which the producer may legitimately claim that unscreened speedy production may indeed be unfair, lies in the privilege issue. In that respect, the ""quick peek"" or ""claw back"" procedures, to facilitate production without waiver of privilege we think is an excellent idea, and one that actually should be applied as well for hard documents, too; in light of the fact that numerous attorneys have made honest mistakes in inadvertently producing items that were used against the person''s clients, and unfairly impacted the result in a case. Even so, the matter may be put in a realistic perspective by recognizing how easy it is, in a server search, to quickly tag all communications to or from inside or outside counsel as potentially privileged.

**Document Concealment and Destruction**. A problem that the committee should address, as an urgent problem, is the concealment and destruction of documents for strategic litigation purposes. Once the Committee made mandatory only the discovery that a party intends to submit in its own favor, it invited the shell game that exists in current discovery practice. We believe that the committee should, at its earliest opportunity, consider returning to the mandatory discovery of all relevant information, and eliminate the system gaming that routinely occurs.

Overall, we think that a set of rules might be necessary for dealing with electronically stored data, but that it should recognize the true situation of that media, as an opportunity to open up, rather than further shut down the process of full and fair discovery disclosure.

Very truly yours,

**Clinton A. Krislov**