04-CV-214

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02/15/2005 10:41 PM

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Subject Comments of Wachovia Corporation To Committee on Rules of Practice and Procedure Regarding Proposed Amendments to Federal Rules Concerning Electronic Discovery

To the Secretary of the Committee on Rules of Practice and Procedure,

Attached please find Wachovia Corporation's comments to the Committee regarding the proposed amendments to the Federal Rules of Civil Procedure concerning electronic discovery. Thank you.

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WACHOVIA

TO: COMMITTEE OF THE FEDERAL JUDICIARY ON RULES OF PRACTICE AND PROCEDURE

FROM: DAVID O'BRIEN ON BEHALF OF WACHOVIA CORPORATION[1]

SUBJECT: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE REGARDING ELECTRONIC DISCOVERY

DATE: FEBRUARY 15, 2005

Wachovia Corporation respectfully submits to the Committee of the Federal Judiciary on Rules of Practice and Procedure the following comments concerning the proposed amendments to the Federal Rules of Civil Procedure concerning electronic discovery.

I. INTRODUCTION

Wachovia Corporation appreciates the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure (the "Rules" or "Federal Rules") concerning electronic discovery. We believe that the changes will provide much needed improvements to an important component of modern litigation. As businesses rely more and more on electronic data, and as the ways in which it can be generated multiply, the volume of such data grows exponentially. As a result, electronic discovery plays an increasingly crucial but challenging role in the litigation and resolution of disputes. At the same time, the Federal Rules are not particularly well designed to accommodate electronic information, much less the vast expansion of electronic information that the business world has experienced.

We think the amendments, if drafted properly, can address at least three growing problems that affect electronic discovery. First, the costs of electronic discovery are enormous. This includes not only the cost of preserving, extracting and producing data in any particular case, but also the ongoing cost to businesses of maintaining unnecessarily extensive infrastructures (e.g. policies, systems, personnel, software and hardware) to be prepared to deal with unreasonable electronic data requests that could come up in any current or future litigation. The costs associated with preserving and producing most electronic data are extremely high and often out of proportion with the potential litigation value of such data. Second, the ease with which virtually limitless volumes of electronic information can be created by a company's employees each day means that it can be impossible for many corporations to track and effectively manage all electronic information generated within their confines. The only electronic information companies can be expected to reasonably manage and produce in litigation, is the official electronic data routinely used on a day to day basis to operate their businesses in active format or stored in a searchable and retrievable format for future business use. However, the Federal Rules as currently drafted, do not account for these realities. Third, many

[1] David O'Brien is Chief Litigation Counsel of Wachovia Securities, LLC's Retail Brokerage Group. Wachovia Securities, LLC is a partially owned subsidiary of Wachovia Corporation.

litigants recognize these enormous costs and problems and utilize them as leverage to extract settlements from businesses, and achieve results out of proportion with the merits of the case or the value of the information potentially contained in such data. This is inconsistent with the central purposes of the Rules as reflected in Rule 1 which provides that they "shall be construed and administered to ensure the just, speedy, and inexpensive determination of every action." Reform is, therefore, needed.

Our comments below address the five basic areas affected by the proposed amendments: (1) early attention to electronic discovery, (2) scope of electronic discovery, (3) form of production of electronic discovery, (4) privilege issues, and (5) sanctions.

II. EARLY ATTENTION TO ELECTRONIC DISCOVERY

We believe that the proposed changes to the Rules relating to early attention to electronic discovery (e.g. proposed changes to Rules 16 and 26(f)) would have a salutary effect by causing parties and courts to focus on electronic discovery issues early in the case. In our view, the proposed amendments relating to this issue are appropriate as drafted, and we propose no modification to them.

III. SCOPE OF ELECTRONIC DISCOVERY

The proposed amendment to Rule 26(b)(2) adds the following language:

"A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery."

In our view, this amendment is beneficial to the extent that it attempts to introduce reasonable and sensible limits to the scope of electronic discovery, but we believe that it needs to be modified to achieve its intended effect. As currently drafted, the purpose of the proposed amendment could be frustrated by the following problems. First, the amendment fails to account for the fact that one of the main problems with much electronic data that is not "reasonably accessible" is that it can be extremely difficult, if not impossible, to identify. By placing the onus on the producing party to identify data which is not reasonably accessible, it creates a trap for producing parties which may allow requesting parties to demand inaccessible data. The producing party is placed in a kind of "catch 22" by which a party will be required to produce inaccessible data it cannot identify due to the data's very inaccessibility.

The second concern we have with this proposed amendment is that the term "reasonably accessible" is indefinite and could create inconsistent standards among federal courts across the Country. Furthermore, it could be interpreted to require such a rigorous standard (*e.g.* requiring the production of any extant data that can be extracted regardless of expense) as to be little improvement over the current situation.

Third, if a party can be required under some circumstances to produce data that is not reasonably accessible, this still leaves open the possibility that requesting parties will use this as improper leverage over the producing party to extract settlements by demanding production of massive amounts of information, at enormous monetary expense and disruption to business – regardless of the intrinsic value of the information. However, if the rule expressed a preference for shifting the cost of producing electronic information that is not reasonably accessible on the requesting party,

than parties would be incentivized only to seek such information when its value merited the extraordinary effort and cost required to obtain it. All incentive to abuse the process would be removed.

In order to address these concerns, we propose the following three modifications. First, delete the requirement that a party must "identify" data which is not reasonably accessible in order to place it in the category of electronic information presumptively exempt from discovery. Second, define "reasonably accessible" (either in the Committee notes or in the text of the rule) in accordance with Sedona Guidelines Principle Number 8 which states that: the "[p]rimary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval."[2] Also, consistent with Sedona Principle Number 8 "disaster recovery backup tapes and other sources of data" should be excluded from the definition. Third, the proposed amendments should establish a presumption for shifting the costs of the production of information which is not reasonably accessible onto the requesting party.

IV. FORM OF PRODUCTION OF ELECTRONIC DISCOVERY

Proposed amendments to Rule 34 (b) provide in part:

"*The request may specify the form in which electronically stored information is to be produced.*"

This modification would allow a party serving document requests to have presumptive control over the form in which electronic discovery must be produced. At the same time another proposed amendment to Rule 34(b) places the burden of objecting "*to the requested form for producing electronically stored information*" on the producing party. We believe this proposed amendment should be revised. As currently drafted, this amendment empowers the party with the *least* knowledge about the nature of the electronic data, *i.e.* the requesting party, to specify the form in which it should be produced. The risk here is that the requesting party will create unnecessary expense and burden by demanding a format into which the data might not easily be converted. Again, this invites the opportunity to use the rules of discovery for improper leverage over another party.

To address this problem, we believe that this rule should simply specify that the producing party has the obligation to produce electronic data in a "reasonably useable form." This gives the producing party the flexibility to produce the data in the most sensible, cost effective way in light of the nature of the data, while at the same time protecting the requesting party by requiring that the data be transmitted in a form that can be "reasonably" used. In addition, the rule should be clarified to make sure it is not interpreted to require conversion of hard copy documents into "electronically searchable form." Perhaps language to the following effect would be sufficient here: "This Rule shall not be construed to require a producing party to convert hard copy documents into electronically

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[2] The Sedona Principles, which are probably familiar to this Committee, were created by a non-profit organization called the Sedona Conference. They propose well thought out solutions to the problems of electronic discovery that "vex corporations, litigants, and the courts alike. *See* The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (January 2004 Version) at http://www.thesedonaconference.org/publications_html. The Sedona Conference is a "nonprofit [ ]research and educational institute, dedicated to the advanced study of law and policy in the areas of antitrust, intellectual property, and complex litigation." *See* www.thesedonaconference.org/aboutus_html. Contributors to Sedona Conference efforts have included "judges, lawyers, consultants and others from 47 states[,] the District of Columbia, and 6 countries, [and] [o]utput from The Sedona Conference has been cited in cases, reports, articles, bibliographies, and commentary, both domestic and international." *Id.*

searchable form." Finally, the proposed amendments (or Committee Notes thereto) should specify that the producing party does not have an obligation to provide software or hardware necessary to review produced electronic data. The burden should rest on the requesting party to pay for necessary software and hardware if it wishes to seek electronic information that is not useable on current, commonly available systems. Without this protection, the opportunity for abuse of the rules again arises.

V. PRIVILEGE

Proposed amendments to Rule 26(b)(5)(B) add the following provision:

(B) Privileged information produced. *When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.*

The intent of this proposed provision is a good one. One of the challenges of electronic discovery is the cost and delays associated with painstaking, time consuming, and hence costly review done to avoid producing privileged documents and waiving protections. Reviewing electronic discovery for privilege is especially daunting given the shear volume of information and the ease with which privileged communications can be replicated outside the control of the original transmission. Thus, if the Federal Rules were to provide meaningful protection against the use of inadvertently privileged documents by opponents as well as privilege waiver, the rules would likely allow litigants to produce information more quickly and at lower cost. The problem, however, is that the amendment as drafted provides little actual protection. The requirement that the producing party must notify the other side within a "reasonable time" after production (in order to avail itself of the benefits of the rule), means that in most cases, this rule may do little to protect parties that unintentionally produce privileged data. Given the shear volume of electronic information in most cases, as well as the difficulty of finding all potentially privileged information (e.g. meta data, work product drafts, etc.), the party may not discover that it has produced privileged data "within a reasonable time" after production.

Also, the rule says nothing of the receiving party's obligations if it discovers that the producing party inadvertently produced privileged information, and the producing party is unaware of the inadvertent production. If a requesting party finds privileged information, does it have an obligation to notify the producing party? Does it have an obligation to maintain the confidentiality of the information until it notifies the producing parties? By leaving these questions unanswered, and by limiting the protection of this rule only to circumstances in which the producing party realizes it has produced privileged information within a finite time period after production, this proposed amendment will likely do little to help parties that mistakenly produced privileged documents, and, therefore, will not likely reduce the costs and delays associated with pre-production privilege review that the rule attempts to prevent.

In order to address this problem, the rule should specify that the producing party can comply with the rule if it notifies the requesting party within a reasonable time after the producing party "first learns" it has produced privileged information. In addition, it should place an obligation on receiving parties to notify producing parties whenever they discover that the other side has produced privileged documents and require the receiving party to maintain the confidentiality of the documents until the producing party notifies it as to whether it intends to demand return or destruction of the documents.

VI. SANCTIONS

Proposed amendments to Rule 37 add the following provision on sanctions:

> *"**(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:*
>
> *(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and*
>
> *(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system"*

This limited "safe harbor" for inadvertently destroyed electronically documents is well intended, but in many, if not most cases, the express exception carved out of it for preservation orders will "swallow the rule." This is because in many actions a court will likely create a broad discovery order, especially in light of the changes to Rules16 and 26, that will require parties to preserve all or most electronic information. Thus the safe harbor may be inapplicable to the majority of actions. In other words, the exception to the rule is too broad because the preservation order it contemplates in many cases will be far reaching and generic, perhaps not recognizing the realities of accessible versus non-accessible information. To address this potential problem, we believe the following language would better achieve the rule's intended effect:

> *"**(f) Electronically Stored Information.** A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information systems, unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified electronically stored information."*

Without this or a similar revision, the proposed amendments may leave open a tool for imposing undue leverage on producing parties by exposing producing parties to sanctions for unintentional loss of electronic discovery through routine backup operations.

VII. CONCLUSION

Wachovia Corporation again thanks the Committee for the opportunity to comment on the proposed amendments and hopes that the Committee will consider the preceding comments in making its final recommendations.