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Request To Testify
1/12 San Francisco

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Secretary of the Committee on Rules
Of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: January 12, 2005 Hearing

Dear Committee Members:

In connection with the hearing scheduled for January 12, 2005 in San Francisco, I request the opportunity to testify briefly. At present, there is some doubt whether other events will prevent my appearing. Should it be necessary to cancel, I will of course let you know, and plan to submit written comments by the deadline. Thank you for the opportunity.

Very truly yours,

Charles R. Ragan

Charles R. Ragan, Esq.

Statement for the Civil Rules Committee

On Proposed Amendments to the Federal Rules of Civil Procedure

Concerning Electronically Stored Information

San Francisco – January 12, 2005

I. INTRODUCTION

Thank you for the opportunity to comment on the important package of proposals to amend the Federal Rules of Civil Procedure as they relate to what has been called "electronic discovery" or "e-discovery" ("Proposals"). These are important proposals, whose time, in my view, has clearly come.

I would also be remiss if I failed to thank and applaud the Committee for the comprehensive materials that accompany the Proposals and preceded them. These several reports and symposia have permitted an airing and encouraged a dialogue of issues that affect the health and future of the federal judicial system and the administration of justice.

II. PERSPECTIVE

So that you may have some basis for evaluating the comments that follow, some remarks about my background may be in order. I have been with one law firm, now known as Pillsbury Winthrop, since entering the practice.

Before that, I served as a clerk to Judge Ruggiero Aldisert, and assisted with the preparation of the first edition of his Cases and Materials on The Judicial Process. Once in San Francisco, I worked extensively with the federal courts, notably on the pioneering ADR programs developed by the late Chief Judge Peckham, and, for seven years, on programs of the Ninth Circuit Judicial Conference.

I have been an advocate in contentious proceedings involving electronic discovery, and I have also been an advocate in very significant international arbitrations where there has essentially been no discovery – simply a pre-hearing exchange of exhibits. While my firm's reputation has long been that of counsel to some of the largest corporations in America, and I

have represented several of them, I also have spent a number of years working with start-up and emerging companies in Silicon Valley, where the economics of litigation are far different.

As some of you may know, I have been associated with the work of The Sedona Conference, specifically its Working Group on Electronic Document Retention and Production since its inception in 2002; I am a Managing Editor of the Annotated Version of its production Principles, and a co-editor-in-chief of its retention Guidelines.

Stemming in part from this (last) work, I have also been involved with many companies – some with hundreds of thousands of employees, and some with no more than 50 – and their efforts to rationalize their information and document management and retention policies completely independent of any litigation context.

I emphasize that my comments today and the positions asserted are solely my own. They are not made for on or behalf of any firm, client, group, or organization.

III. COMMENTS

A. Overarching

My first comment is that the Committee is correct in several of its premises:

- Electronic discovery does exhibit several *distinctive features* that warrant treatment in the Federal Rules of Civil Procedure ("Rules");
- The *exponentially greater volume* of electronic information, and its "stickiness", carries the potential for defeating the goals of Rule 1 (the "just, speedy, and inexpensive determination of every action"); and
- Because of the *dynamic nature* of many systems that are critical for modern enterprises, an approach to preservation that required "preserving all" would be expensive and burdensome to litigants, and potentially damaging to the economy and society as a whole.

B. Time for changes and clearer guidance

While some have suggested that the current Rules are substantially sufficient to deal with electronic discovery issues, I respectfully disagree and urge that changes are appropriate -- and now!

The "data compilation" language was added to the Rules in 1970 – when computers were still substantially driven by punch cards. Not to acknowledge the revolution in information technology that we have witnessed in the last 10-20 years is to blind oneself to reality.

More important, as the Committee has recognized, litigation is costly and we simply cannot afford the cost that trial-and-error, or incremental case law evolution of rules for e-discovery would entail. The Committee has had the benefit of some local rule experimentation in the area of e-discovery, but clients cannot afford the costs of experimentation with even modestly different regimes in the multiple federal districts in which they may have cases. Moreover, a change in the "big Rules" should advance the goal of ensuring that more practitioners are aware sooner of the important e-discovery issues. If that goal can be achieved, then there may in fact be less satellite litigation over alleged spoliation, and more attention can be turned back to the merits of disputes. In short, this is a quintessential example of where guidance and leadership must come from the top.

C. Issues of principal concern

Three issues relating to electronic information that may bear on litigation concern me. These are (1) the breadth of many requests and the consequent expense, much of it unproductive; (2) privilege issues; and (3) form of production issues. In the section (D) that follows, I provide suggestions for how these concerns might be addressed in the Committee's current Proposals. In advance, however, some further illumination of my concerns may be appropriate.

1. Breadth of discovery requests.

As the draft Notes and certain case law makes clear, the scope of information that is "relevant" to litigation may change over time. The Committee's Proposal to amend Rule 26(f) to require an early discussion of any issues relating to preserving discoverable information is therefore an excellent first step.

In recent years, an examination of advance sheets and unpublished opinions may lead one to the conclusion that e-discovery has become a game of "gotcha" – where the requesting party, be it plaintiff or defendant, conducts satellite litigation geared to determining if some electronic information has been lost during the course of the case, such that an argument for sanctions can be made. I do not have a proposal to avoid such gamesmanship, but offer the following observation. Since the 1991 amendments to the Rules, Rule 45(c)(1) has provided:

> A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

I recognize that some of the origins and antecedents of the Rule 45 obligation do not track directly to party discovery under Rules 26-37. On the other hand, it seems well established, through Rule 11 for example, that counsel for a party propounding discovery requests has similar obligations not to increase the costs of litigation unnecessarily.[1] Some reflection of this obligation in the Notes would seem healthy.

2. Privilege issues.

The Committee has grappled with the very difficult issue of privilege, particularly with respect to inadvertent waiver of privilege. Much of the discussion seems to be driven by a belief that, if parties can agree to production without waiver, discovery of electronic information can proceed more quickly and less expensively. This analysis is fair, but only to the extent of possible privilege waiver in case *A*. The parties will be in a better position than the court to determine whether privilege issues may extend beyond case *A*, for example, to case *B, C, D* or agency proceeding *X or Y*.

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[1] Rule 11 provides in pertinent part:

"By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

"(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation".

3. Form of production.

When one first considers electronic discovery issues, one recognizes that sorting through electronic information can be done far more quickly than through hard copy documents. A natural tendency, when one is looking for quick, speedy and inexpensive solutions, might therefore be to require production in electronic and even "native" format (as one court in this district recently ordered). But, that tendency, I respectfully submit, overlooks two important considerations:

- Not every case requires production in electronic format; some cases that raise federal questions can still be handled effectively the old-fashioned way; and
- As the Committee recognizes, electronic information may include embedded data (such as attorney "track change" comments) which may not be visible in one view, but which would be obtained through a native format production; how privilege might be protected where production is in native format is not at all clear (e.g., attempted "redactions" would modify files and/or metadata).

These concerns drive my comment, below, in response to the Committee's particular question on form of production.

D. Comments on issues of particular interest to the Committee

1. "Reasonably accessible" information.

The Committee has expressed a particular interest in whether the term "reasonably accessible" should be further explained. Others with more technical expertise should address whether there are examples that might be added to the Committee Notes. I offer two small comments:

- There is some inconsistency in the Notes at pages 12-13. On page 12, the Committee focuses on the referent as to whether the party "routinely accesses or uses the information". On page 13, the Notes indicates that a party must provide discovery if it "has actually accessed the requested information". The latter articulation seems undesirable, as it would put within the scope of production backup tapes if they were *ever* actually accessed; but, of course, if there were a disaster from which recovery was needed, the backup tapes would actually be accessed. This circumstance should not make the backup tapes subject to production.

Suggestion: At page 13, in the last sentence of the first full paragraph, make it read: "responding party has routinely accessed the requested information ..."

- The Proposal contemplates that some information that is relevant need not in the first instance be produced if it is not reasonably accessible. For all the reasons given by the Committee, this is a sound proposal. As indicated above, I am of the firm belief that some discovery requests are simply far broader than necessary or appropriate. The Proposal to amend Rule 26(b)(2) *assumes* that motions for information that is identified as not readily accessible will be limited to such information as is "relevant", as defined in Rule 26(b)(1). This assumption should be affirmatively reflected in the Proposal and the Notes.

  Suggestion: Insert the word "relevant" into the Proposal to amend Rule 26(b)(2) twice – in the first sentence to be added before "electronically stored information" and by substituting "such relevant" before "information" in the last sentence of the proposed amendment.

  Further, in the Notes at page 13, in the last full paragraph, insert "relevant and" into the second sentence before "reasonably accessible".

Before leaving this subject, I should add that I endorse the sentiments of Mr. Thomas Allman to the effect that the issue of preserving inaccessible information is a great source of angst to parties with large volumes of electronically stored information and substantial litigation. (To that, I would add – and underscore – the subject of preserving information in dynamic databases that change constantly.)

2. Proposals addressing privilege.

The Committee has identified two areas relating to Proposals addressing privilege in which it is particularly interested (see Introduction, pp. 10, 14), *viz*, whether a less restrictive rule should be provided in Rule 26(f)(3), and whether certification of destruction or sequestration would be appropriate.

As stated above, the issue of privilege waiver is often complex and not confined to a specific case. For example, if information relevant to one case includes a set of information that is relevant to a second case, and the information is disclosed in the first case subject to the kind of agreement contemplated by Rule 26(f)(3), regardless of what determinations are made about waiver in the first case, the court in a second case might find that a voluntary waiver had

occurred. As presently drafted, the Proposal for Rule 26(f)(3) contains a bias, however slight, in favor of non-waiver stipulations and orders. I would personally be in waiver of a less restrictive rule.

Suggestion: The Proposal for Rule 26(f)(3) be "any agreement of the parties addressing the right to assert privilege after production of privileged information".

With respect to the question about certification of destruction or sequestration, I personally would be in favor of such a requirement. My view is tempered by an experience in which an adversary stated that it was returning documents inadvertently produced, and agreed, as our state rules require, not to make further use of the information. At the trial, however, another member of the same firm made a substantial argument which, we were able to show after substantial pain and aggravation, could only have been made as a result of using the concededly privileged and presumably returned information. If certification of destruction or sequestration were required, there would be heightened awareness of and attention paid to the issue. For example, if required to certify, an attorney who had been in possession of privileged information would presumably have to undertake an investigation to determine where the privileged information had been copied, disseminated or stored. Doing so could help prevent improper use, and unnecessary satellite litigation.

3. Rule 33 proposal.

The proposed revisions are intuitive.

As a practical reality, there will be many instances in which speed and efficiency concerns would lead a responding party to refer to data maintained in a database. However, many databases are customized for individual clients, contain proprietary information and many fields of information which would be neither relevant or pertinent to issues in litigation. The latter concerns may make responding parties reluctant to invoke the provisions of the Proposed Rule 33(d), because of the requirement that, if the responding party specifies records from which an answer may be derived, the requesting party shall be afforded an opportunity to examine, audit or inspect such records. Technology does admit to a practical solution: Relevant information from databases can often be extracted into other formats (e.g., elements of an Oracle database can be exported to an Excel spreadsheet), which would seem perfectly acceptable and

compatible with the drafters' intent. I regret having no specific language suggestion to offer at the moment.

4. Rule 34 proposal

The Committee has asked for comment on two specific aspects of the Proposal: whether specific language should be included concerning the responding party's obligation if the request does not differentiate between electronically stored information and other documents, and with respect to the form of production.

With respect to the first question, the Note as drafted underscores that a request shall be deemed to include electronically stored information, even if such is not specifically identified. For avoidance of doubt, I suggest:

> *Suggestion:* Add to the Note, at the end of the first paragraph concerning Subdivision (a): ", and, absent such a distinction, the response should address both 'documents' and electronically stored information."

With respect to the form of production, as indicated above, I question whether the default in the Proposal as drafted is warranted. Production "in the form in which it is ordinarily maintained" may well implicate substantial privilege issues, which could only be determined by meticulous examination, the costs of which the drafters seem desirous of avoiding. Concomitantly, there will be many instances in Federal court where it will suffice to produce electronically stored information in hard copy or searchable image (e.g., pdf) formats. The Proposal clearly -- and appropriately -- contemplates that the parties may agree on a form of production. In my view, absent agreement, the rule ought to be that production occur "in a form reasonable to the circumstances."

> *Suggestion:* Change the concluding language in Rule 34(b)(ii) before the last sentence to read: "produce the information in a form reasonable to the circumstances." Also, in the penultimate paragraph of the Note, revise the concluding thoughts to read: "If they cannot agree, the court will have to resolve the issue, and may consider whether a form is electronically searchable in resolving objections to the form of production."

Obviously, I would endorse corresponding modifications to the Proposals with respect to Rule 45(d)(1)(B).

5. Comments on Safe Harbor proposals.

As mentioned above, subjects of particular angst for modern enterprises – regardless of size -- are the scope of preservation obligations with respect to electronic information, including dynamic databases, in its multiple formats and proliferating locations. For that reason, because (as the Committee recognizes) what is discoverable depends on the circumstances of a case *which may change* and because I firmly believe that guidance can help reduce second-guessing and satellite litigation, I endorse the concept of a safe harbor provision. I also appreciate the very substantial consideration and debate that preceded the Proposals. For the present (without having had an opportunity to review all the recent submissions to the Committee), my vote would be in favor of the threshold (more than negligence) set forth in the footnote proposal. My rationale is quite simple and driven substantially by my experience in counseling clients on management of electronic information: whatever merit a negligence standard may have as a matter of legal theory, the Rules are designed to govern the practice of law in federal courts and, the Committee must establish a higher threshold in order to have a meaningful, curative impact on the current calculus of opportunity that has fueled the recent spate of satellite litigation.

Again, I thank the Committee for the opportunity to comment.

Dated: January 12, 2005

Respectfully submitted,

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