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To "'Rules_Comments@ao.uscourts.gov'" <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Request to Testify on Electronic Discovery in the proposed ...

04-CV-081
Request To Testify
2/11 DC

Dear Proposed Federal Rule changes Committee,

I am requesting an opportunity to provide testimony on the proposed Electronic Discovery changes in the Federal Rules of Civil Procedure. I am planning on attending the hearing in Washington, DC on February 11th and would ask to be selected to provide such testimony. I am preparing my written comments and would like to deliver them by in person so that I may answer any questions my testimony raises. I plan on speaking about how the proposed rule changes would impact the way in which an Electronic Discovery project would be carried out under the proposed changes.

Thank you for your consideration and time. Please feel free to contact me at the information below if you need further detail or clarification.

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04-CV-081
Testimony
2/11 DC

February 3rd, 2005

Civil Rules Committee
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Committee Members,

Enclosed are my written comments for your Hearing on the Proposed Amendments to the Federal Rules of Civil Procedure on Friday February 11th, 2005. I intent to limit my comments to five (5) minutes and will be available to answer your questions after that.

I would like to also offer my expertise to you in the area of Electronic Discovery and if the need arises, I would be willing to become a resource for the committee if requested.

Thank you for the opportunity to speak with you on this important subject.

Sincerely,

Kelly J. "KJ" Kuchta, CPP, CFE
President

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Civil Rules Committee Members,

I appreciate the opportunity to provide both written comments and oral testimony on the Proposed Amendments to the Federal Rules of Civil Procedure that you are now considering. First I would like to offer some general comments on legal, business and technical issues that lay before us with respect to the changes you are considering.

I have worked on the legal, business and technical issues of Electronic Discovery for the last six years and have come to realize that there are no silver bullets to solve the complex challenges we face. The legal aspect of Electronic Discovery is the most rigid of the three; however, the old rules have a certain amount of flexibility which has kept Electronic Discovery decisions pliable. Conversely, the keeper of the electronic data has exclusive control of the business and technical aspects of Electronic Discovery by choosing the type and level of technology deployed and the Return on Investment required.

My primary concern in regards to the legal aspects of Electronic Discovery is that the rules remain flexible enough to accommodate the advances we will see in electronic information technology in the next three to five years. The changes currently being contemplated could make rigid legal rules obsolete within just a couple of years.

To help understand the other two variables that drive many of the issues facing Electronic Discovery we must consider the exponential growth in the amount of information we create and store as a society. On the other side of the equation is the significant expense of retrieving, organizing, and processing the vast amount of electronic information that was created and stored so cheaply.

On September 17th, 2003 I delivered a presentation to the Legal-Tech Conference on Cost Containment v. Electronic Discovery. My staff conducted statistical research, which provides a very unique understanding of exactly this issue. I have provided a slide, which visually depicts the issue in Figure 1.

As the slide depicts, storage space for electronic data has become exponentially larger as the cost of creation and storage has decreased. As a result of the decrease in cost we produce more, save everything, and exercise little prudence in how we manage our data. It is only when the necessity of performing electronic discovery occurs that the full implications of our "data gluttony" are realized.

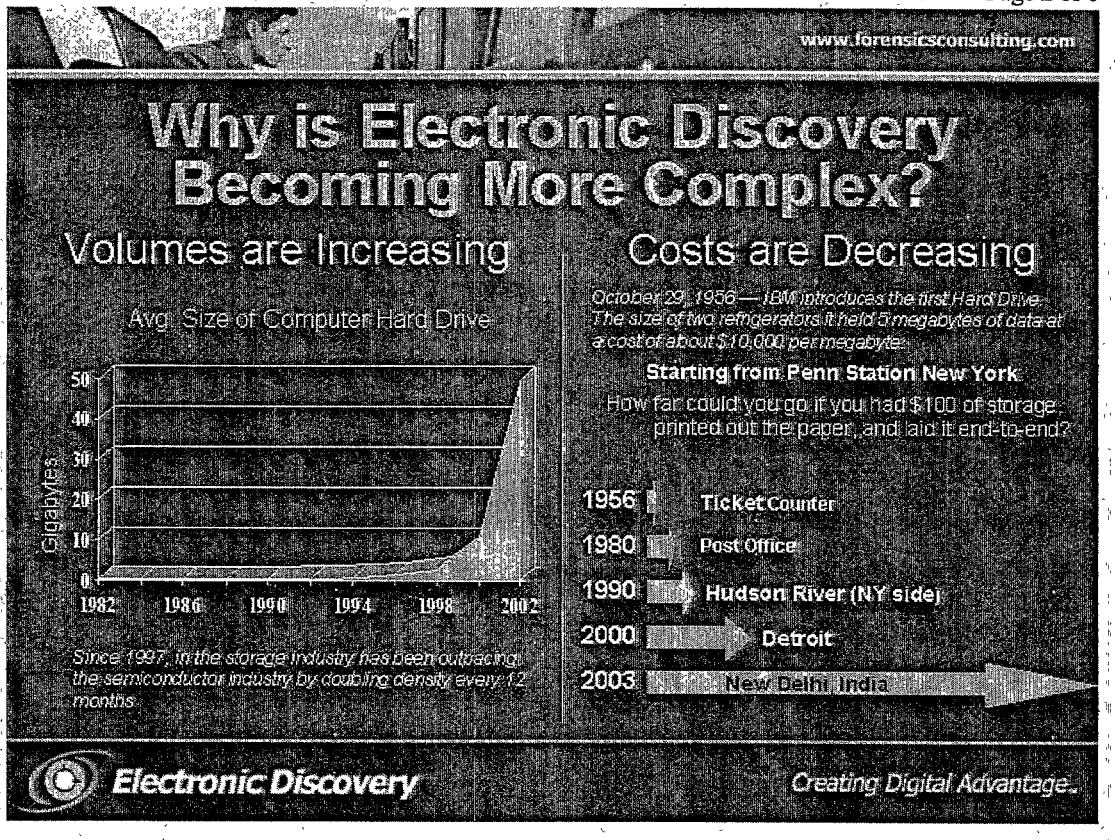

Figure 1

After working in the trenches of Electronic Discovery, I suggest that a majority of the issues you face are really business and technical in nature. I have included specific comments on each of the changes you are considering but would first like to provide some additional information about the business and technical aspects of the electronic information environment.

Any changes that you suggest should consider the data retention practices that society utilizes or can reasonably utilize. Because storage space is so inexpensive the attention that was paid to document retention in the paper based world has faded. For example, early in my career working for financial institutions microfiche was introduced to help deal with the organizational and physical limitations of paper storage.

To help understand the phenomenal strides we've made in storage in just a few years consider the fact that one Gigabyte of text (Word or WordPerfect) data when printed generates a stack of paper eighty-five feet tall. The height will vary slightly depending on the type of data, but please consider that the average hard drive in consumer computers today is 60 Gigabytes of data. In other words, if the entire hard drive is filled with text data, it would create 60 stacks of paper 85 feet tall. The next unit of measurement after Gigabytes is Terabytes. Each Terabyte contains 1,024 Gigabytes. The average organization in America can realistically retain over One Terabyte of data, the

equivalent of 1024 stacks of text data, each 85 feet tall when printed to paper. There are organizations in America that are now in possession of Petabytes of data, which is the equivalent of 1024 Terabytes, a nearly unfathomable amount of data.

The bottom line, storage space is so inexpensive that it is an easy business decision to simply buy more storage space than activcely manage their documents and incur the associated cost. Those organizations that have not been involved in Electronic Discovery often have no idea how expensive the "store more" method can be in the end. Through effective records management and control custodians can substantial limit the cost of electronic discovery. The technology and methodology exists today and continues to be developed to address this issue. Organizations should now take greater control of how they manage their most valuable asset, information.

In regards to the technical aspects of the Proposed Rule Changes, I am continually amazed at the number of sophisticated organizations that fail to take advantage of existing technology to make electronic discovery less expensive and more manageable. They commonly go through the expensive process of converting all documents involved in electronic discovery from their native programs to TIFF's and reviewing each document in the same way that it has been reviewed for the last 50 years. In reality, technology is available to significantly reduce the bulk of those costs and significantly reduce the time required for attorney review.

An excellent example of this can be found in Medtronic v. Michelson, 01cv2373, U.S. District Court, Western District of Tennessee. In 2002, the declaration filed by Plaintiff outlined a $300 million electronic discovery effort, using a process similar to the one described above, with one real notable suggestion, that the documents be reviewed in paper format. Instead, utilizing more current technology, costs were reduced significantly. While the final cost of the electronic discovery on this case has not been disclosed, it is a reasonable assumption that only 10 – 15% of the $300 million was spent by the parties on the electronic discovery issues of the matter. Since then, the technological improvements have demonstrated an even greater efficiency.

The point here is simple, new technology is being introduced on an almost daily basis. We cannot simple continue to use old technology and methods of producing responsive information pursuant to an electronic discovery request without incurring excessive expenses and inefficient results. New technology has the capability to reduce the cost of electronic discovery on the same volume of data by 80 – 90 %. Unfortunately, many decision makers on Electronic Discovery projects have not embraced the new methods and technologies to overcome these challenges. Ultimately, practice management, utilizing technology and proper business management is the key to addressing a majority of these issues.

I believe that your challenge is to provide some relief to genuine legal concerns and to also curtail some of the wrongful liberties that some parties are using when it comes to Electronic Discovery issues. The remainder of this document is focused on these concerns.

Rule 16 (Pre-Trial Conferences; Scheduling; Management) and Rule 26 (General Provisions Governing Discovery; Duty of Disclosure)

In my experience with parties involved in Electronic Discovery disputes, a large part of the conflict occurs because one or both parties do not have good information about the corpus of potentially responsive data. In addition, there is often a lack of trust in the credibility of the process used by the responding party. The proposed changes in Rule 16 and 26 are an excellent step in addressing the two reasons mentioned above. In addition, please consider the following suggestion.

The Ninth Circuit Advisory Board of the U.S District Court in the Ninth Circuit has suggested a model for e-discovery. One key provision they have included is that the both parties in litigation must identify and designate to the requesting party both a Document Retention Representative and an Electronic Discovery Liaison. My experience confirms that having a single person who is knowledgeable, responsible and accountable on these two positions results in better information on the electronic data of interest found and adds credibility in the Electronic Discovery Process. Ultimately, these individuals should be accountable first and foremost to the court, adding further credibility to the process.

Rule 26(b)(2)(C)

I strongly recommend that you reconsider the attempt to distinguish whether data is accessible or inaccessible. I believe that most parties and Judges define "reasonably accessible" as how much time and money will it take to render the data "easy to use". In the example of Medtronic v. Michelson, a magistrate deemed that a $4,888 per tape charge to restore and search for key information was reasonable. Indeed, in 2002 this amount may have been reasonable; however today technology has become the great enabler and the cost to restore and identify that same tape could be well under $1,000. Without a doubt, future technology will continue to get better and the cost to control and produce data will continue to decline. Finally, if the data is important enough to save to media and preserve, isn't it important enough to produce for discovery?

Rule 26(b)(5)(B)

I am not qualified to address the legal implication of Waiver of Privilege however there is one issue that should be considered with regard to technology and electronic information. Even with the best technology and methods it is almost impossible, when dealing with millions of documents to guarantee that documents, which have attorney client privilege, will not be inadvertently disclosed. Even with the best tools and technology it is difficult to be 100% correct on assertion of privilege documents. This is a key provision of your changes and I would urge you to address this issue.

Rule 34

Your suggested changes to Rule 34 allowing the requesting party to state how they would like documents to be produced is positive, but the proliferation of databases (which do not convert into an adequate searchable format) and redaction of native files will make this a continuing issue even in light of proposed changes. I believe your suggestions get us to the place we need to be in order to address this issue at a later time.

In addition, I suggest that any changes in the definition of what electronically stored information can be declared "discoverable" be made carefully. Specifically, the process to change this definition is substantially longer than the time that will be required for new technology (and new data formats) to emerge. It would be difficult to realistically tighten the definition of the exact data, which is discoverable. The current definition is sufficient. Unless there are reasons that I am not aware of, I see no reason to amend the definition.

Rule 37

The Safe Harbor provision of your proposed rule change is a noble one. However, I fear that this provision provides a substantial opportunity for abuse in a party's responsibility to sequester and preserve relevant data. I believe the provision implies that no extra steps to preserve data are necessary and so no effort will be made to prevent the destruction of potentially responsive data.

I hear from many producing parties who wish to be compliant that they are fearful of the unreasonable judge who will hand down a harsh ruling of spoliation of evidence. Many feel that they can never decommission electronic information even when their Document Retention program requires destruction. As suggested early in my comments, I believe these issues should be address with an active data management program.

Anecdotally, I have observed that sanctions for spoliation occur most often due to a failure to do something, rather than for acting proactively and reasonably. Therefore, my recommendation is that the proposed changes be removed from consideration.

I appreciate the opportunity to be present here before you and extend my offer to assist you in this very worthwhile pursuit to improve the Federal Rule of Civil Procedure in any way that I can. Please contact me if I can be of assistance.

Thank You.