P.G. Lewis & Associates LLC
DATA FORENSICS

RECEIVED 1/10/05

04-CV-082
Request to Testify
2/11 DC

January 10, 2005

Committee on Rules of Practice and Procedure
Attn: Mr. Peter G. McCabe, Secretary
Administrative Office of the United States Court
Washington, DC 20544

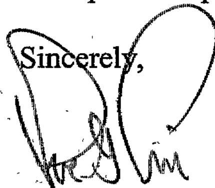
Re: Request to Testify in Electronic Discovery Hearing on 2/11/05

Dear Mr. McCabe:

I write to request the opportunity for myself, and my Partner, Carole Longendyke, to testify before the Advisory Committee on Civil Rules at its February 11, 2005 public hearing in Washington, DC, with regard to the proposed rules relating to electronic discovery.

We are both partners at PG Lewis & Associates, a national data forensics firm, which has been involved in hundreds of civil and criminal matters in which data forensics played a significant role. We plan to prepare and submit written comments regarding the existing rules prior to appearing at the hearing.

Sincerely,



Paul G. Lewis
Partner
PGL/cjz

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P.G. Lewis & Associates LLC
DATA FORENSICS

RECEIVED 2/1/05

04-CV-082
Testimony
2/11 DC

January 31, 2005

Committee on Rules of Practice and Procedure
Attn: Mr. Peter G. McCabe, Secretary
Administrative Office of the United States Court
Washington, DC 20544

Re: Electronic Discovery Hearing on 2/11/05

Dear Mr. McCabe:

I represent P.G. Lewis & Associates, a data forensics firm in Whitehouse Station, New Jersey with more than two years experience in the preservation, recovery, and analysis of electronic evidence. Our firm's perspective is based on our knowledge and understanding of relevant technology, as well as our experience with that technology in a variety of civil litigations and criminal matters. Since significant focus is being placed upon "inaccessible" information and the relative costs associated with producing it in discovery, I would like to address a few points relating to these topics specifically.

The hazards of labeling data "inaccessible": It has been our experience that data can not be "inaccessible," in that it either exists or does not exist, and if it exists, it can be preserved and recovered. We therefore feel that the term "inaccessible" should be excluded from the rules, and emphasis placed instead upon the varying levels of accessibility relative to cost and complexity. Furthermore, the ease with which an individual can render a document "inaccessible" is such that a blanket definition can have serious consequences. Consider as an example documents sent to a computer's recycle bin. For all intents and purposes, this document has been discarded and is no longer an "active" discoverable document. The document can very easily be recovered, however, at any time and for whatever purpose determined by the user. We are concerned that an over-generalized term, such as "inaccessible," might provide an incentive for the manipulation of data across the varying levels of accessibility. Discovery that is limited to that which is perceived as "accessible" has, in the past, encouraged willful destruction of responsive information, and rules written with such limitations will likely provide similar incentive in the future.

Relative value of Tier 1 and Tier 2 Discovery: The value of less accessible information in litigation can not be discounted merely because it is available in lesser quantities and in less accessible locations. The notion that the sheer volume of data from the most accessible sources somehow negates the value of the smaller proportions in the less-accessible locations is invalid.

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As an example, I provided data forensic services to both the defense and the prosecution in the recent Enron/Merrill Lynch Nigerian Barge trial in Houston, Texas. Numerous legal teams sifted through thousands of documents produced from "accessible" sources, but it was the recovery and analysis of documents previously deemed "inaccessible" that proved to be of greatest benefit on a particular issue of culpability. Certainly the search for truth should never be limited to that which is in greater volume and most easily accessible.

Tier 2 Discovery is not disproportionately expensive: Regarding the cost burden that is perceived to be associated with the production of "inaccessible" information, we have found the cost to be far less than most who are unfamiliar with the process may realize. Technology as it exists today, irrespective of the inevitable advancements, is such that production of "inaccessible" information is fast, reliable, thorough, and cost-effective. As mentioned previously, a user has immediate options for document recovery after deleting a document, and many machines are configured for document recovery even after the recycle bin has been emptied. With the use of existing data forensic tools, even documents far beyond the reach of the operating system can be identified and recovered with simplicity comparable to a user clicking an icon in the Recycle Bin folder. The notion that forensic recovery of deleted data is as complex, costly, and cumbersome as recovering and reassembling a shredded document from a landfill is ludicrous. Producing information through Tier 2 forensic methods is different than the process used to produce information at the Tier 1 level, but the differences are not necessarily in expense and complexity.

Forensic imaging of entire devices does not jeopardize privilege: In order to maintain the forensic integrity of a computer hard drive or other media, a forensic technician will typically clone (or "image") the entire hard drive. The concern for compromise of privilege is therefore understandable. However, two points address this concern: First, data is not visible during the imaging process. Imaging preserves the data bit-for-bit, not file-for-file. Additionally, the use of exclusionary keywords in a targeted forensic search mitigates the issue of accessing privileged data. The likelihood of privileged information being recovered and produced is not nearly as great as one might believe, and furthermore, the ease and cost-effectiveness of electronic forensic exclusion of privileged information far exceeds that of individual pairs of eyes reading and searching hundreds, perhaps thousands of documents.

Added value exclusive to Tier 2 Discovery: The less accessible data is frequently intrinsically valuable to a case, but sometimes the fact that particular information has been deleted or made less accessible is valuable in and of itself. As mentioned previously, it has been our experience that individuals who desire to conceal information can easily do so, and the forensic recovery and analysis of electronic media is the only way to confirm this action. Tier 1 Discovery will obviously not produce that which has been willfully excluded. Tier 2 Discovery is therefore a very important step to a complete discovery process.

In summary, we would like to reiterate that electronic information comes in various forms and in various levels of accessibility. The extreme example of least accessible might be data stored on back-up tapes from legacy systems no longer in existence. Certainly these extremes should be considered at the time of the discovery request, but should not be given the same weight in the rules amendment process as the more likely scenario of "less accessible" data that can quickly, efficiently, and cost-effectively be preserved and recovered from the vast majority of computers, servers, and other data storage devices.

We are grateful for the opportunity to provide input to the committee on this very important issue, and remain available for further discussion if warranted.

Respectfully submitted,

Carole Longendyke, Partner
P.G. Lewis & Associates, LLC