04-CV-104
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Ian J. Wilson
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January 5, 2005

Mr. Peter G. McCabe
Secretary, Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, D.C. 20554

Re: Advisory Committee on Civil Rules Public Hearing on January 28, 2005

Dear Mr. McCabe:

Please accept this letter as my request for an opportunity to testify before the Advisory Committee on Civil Rules at the January 28, 2005 hearing in Dallas. If you need additional information, please let me know at your earliest convenience.

Very truly yours,

Ian J. Wilson, Esquire
President

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Testimony
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January 28, 2005

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure: Electronic Discovery; Written Statement

Dear Mr. McCabe:

Thank you for the opportunity to provide comments regarding the proposed amendments to the Federal Rules of Civil Procedure. I would like to applaud the Committee for it careful and insightful work on this very important issue facing litigants, lawyers and courts.

To provide a reference to understand my comments, I will provide a brief summary of my background and experience. I am and attorney licensed to practice law in the Commonwealth of Virginia. I began my legal career serving as a judicial law clerk to Justice A. Christian Compton of the Virginia Supreme Court. I had an active commercial litigation practice for thirteen years, and experienced first-hand the growing challenges associated with electronic discovery. In October of 2003, I assumed the position of Chairman and CEO of Servient, a company engaged in the development of technology solutions to address electronic discovery and related data management issues. I have been involved for over a year now in the technology development process.

I want to use my time to highlight one point that I submit should be considered.

1. **What impact will the judicial application of the "reasonably accessible" standard have on the development of future technologies and the implementation of IT protocols that could eventually reduce the burden of production of electronic records and enhance the open exchange of information in discovery.**

The "reasonably accessible" standard adopted by the proposed rules is necessary because of the current state of available technology the IT policies and procedures in place today. It is important to recognize that the current technology and procedures were implemented in large measure without regard to the demands of accessing the data for purpose of production in litigation.

As the draft comment notes, "[t]echnological developments may change what is 'reasonably accessible' by removing obstacles to using some electronically stored information." This is particularly true of the storage and retrieval of data on backup systems.

However, will the proposed rules reduce the likelihood that technology will be developed and deployed to better address the need to preserve and access relevant data while at the same time allowing for the efficient backup of complex systems? In other words, will a party who need not produce data because it is stored in an inaccessible media have any incentive to implement technology that will render formerly inaccessible data accessible?

The opposite result may very well occur – some companies may implement technology that stores more historical data in a way that is not "reasonably accessible" rendering the information beyond scope of discovery, yet available for retrieval if absolutely needed in the course of the business. Such a development would undermine the fundamental policy of full and open exchange of information in discovery.

The best solution to the current dilemma of retrieving inaccessible data faced today by litigants is the development and implementation of technology that makes data more accessible.

We must recognize that the determination of "reasonable accessibility" will be made in the context of a discovery motion. The nature of such a proceeding may increase the chances that a bright-line test may emerge based on the type of storage media in contrast to the difficulties and burdens associated with accessing data.

The scope of discovery should encourage the development and implementation of technology that enhances the accessibility of relevant data. To do so, I submit that certain guidance should be set forth to elaborate on the intended meaning of "reasonably accessible." The following guidance should be considered:

1. The touchstone for the reasonable accessibility test is burden imposed in accessing the data. The storage media alone should not govern the determination of reasonable accessibility.

2. In determining reasonable accessibility, the availability of technology to aid in the accessibility of the data should be considered. Data should not be considered reasonably inaccessible if the burden of accessing the data is a result, in part, of a party's decision to forego implementation of technology that would aid in the accessibility of the data. The concept of reasonable accessibility will change as available technology changes. The rules should be interpreted in such a way as to encourage parties to utilize available technology to aid in the accessibility of the data; therefore, consideration should be given to a party's choice of technology and the availability of other technologies when determining whether data is reasonably accessible. Such an interpretation will further the goal of open exchange of information in discovery.

3. In determining whether good cause exists to require discovery of information that is not reasonably accessible, it is important to evaluate the availability of discoverable, accessible data. A party's implementation of systems and procedures that result in the systematic removal of historical data should weigh in favor of a finding of good cause, as such a technology makes it more likely that relevant data will be found only within the inaccessible data. Also, the more a party is shown to have relied upon an inaccessible storage technology to store its historic data, the more likely the court should find good cause.

Thank you for the opportunity to address the Committee.

Respectfully Submitted,

Ian J. Wilson