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Subject Submission from http://www.uscourts.gov/rules/submit.html

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Comments:

I appreciate the Judicial Conference Committee's efforts to address the issues related to Electronic Discovery. However, I am concerned that the proposed changes will have a significant negative impact on individuals engaged in litigation with Corporate Defendants. I think the changes which are being proposed will have an impact far beyond the courthouse. I think Corporations will change the manner in which they hold data to better protect themselves against disclosure if and when litigation arises. With these thoughts in mind, my comments are as follows:

-- The rules should state affirmatively that the rules presume that all electronically held data is held in a reasonably accessible manner due to the nature of modern technology. This presumption is appropriate because even the most basic data related software (ie: Word, Access, Excel, Wordperfect, etc...) have "find" functions that allows for the identification of relevant data.

-- The rules should not only require a defendant who claims the data is not reasonably accessible to object, but also to file a motion seeking a Court Order for protection.

-- Subsequent to the filing of a motion by a Defendant seeking protection for data that is not reasonably accessible, a Plaintiff should be permitted to take a Rule 30(b)(6) deposition for the limited purpose of evaluating a Defendant's claim. Otherwise, a Plaintiff has no manner of factually evaluating such a claim.

-- A provision should be added to Rule 37 prohibiting a Defendant from intentionally

storing data in a manner that is not reasonably accessible to avoid its production in litigation.

-- The Rule 37 Amendment for systems that over-write data will only encourage the use of such systems. In addition, there is currently an entire industry that has the ability to recover portions of data that has been over-written. Accordingly, I think the committee needs to consider how to deal with the right of a party to seek to recover data alleged to be over-written.

I would like to share one practical example for the committee. I was engaged in litigation with Wal-Mart over a shooting that occurred in their store with an air gun (ie: BB Gun/Pelet Gun). I requested that they perform a database search for similar incidents. Wal-Mart objected, in part, on the basis that it was unduly burdensome. The U.S. District Court awarded fees and Ordered the database search. Once the search was completed, the database indicated over 100 air gun shootings in Wal-Mart stores.

Such information was highly relevant and persuasive evidence held electronically. If the current proposed rules had been in place, I think that Wal-Mart would have been in a far better position to oppose this production. The hurdles should be high for a Defendant seeking to block the production of relevant electronic data.

I would encourage the Committee's consideration of one of the case's I cited in support of Plaintiff's Motion to Compel. In Fears v. Wal-Mart Stores, Inc. 2000 WL 1679418 (D. Kan. 2000) in which the District Court held "... even if answering this interrogatory would cause great labor and expense or even considerable hardship and the possibility of injury to Defendant's business, Defendant would still be required to establish that the hardship would be undue and disproportionate to the benefits Plaintiff would gain from the information."

In the end, I think the rules encourage rather than discourage the hiding of highly relevant electronic data. Simply put, the rules need to make objections to and the hiding of electronic data the exception and not the rule.

I appreciate your consideration of these comments. Sincerely, Rob Katz

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