

06-EV-034



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12/26/2006 07:30 PM

To <rules\_comments@ao.uscourts.gov>

cc

bcc

Subject Federal Judicial Conference Rules Hearing (Evidence) on  
January 29, 2007 in New York

History:

✉ This message has been replied to.

Dear Mr. McCabe:

I am requesting an opportunity to testify at the Evidence Hearing in New York on January 29, 2007. If there are any questions, please contact me at your convenience. My contact information is below. Thank you for your help.

Sincerely,

Keith L. Altman  
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Testimony

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January 14, 2007

Mr. Peter McCabe, Secretary  
Committee on Rule of Practice and Procedure  
Judicial Conference of the United States  
Washington, DC 20544

Dear Mr. McCabe,

First, I would like to take this opportunity to thank the committee for allowing me the opportunity to speak in New York on January 29, 2007. I respectfully submit the following comments that represent the essence of my testimony. As to my background, I have been involved in most of the major pharmaceutical litigations for the last ten years on behalf of the plaintiffs. I have helped develop the preservation and production protocols for these litigations. Furthermore, I am often responsible for the development of the document review and document management infrastructures for these cases. Much of the materials produced in these cases originally existed in electronic form. In the past, I have testified in front of the committee concerning the December 2006 changes to the rules with respect to electronic discovery. I have reviewed the proposed changes to F.R.E. 502 as well as the committee notes and have several concerns not addressed within the materials. My comments focus on the practical implications of the new rule changes with respect to managing the litigation materials.

The committee notes raise the increase in the volume of electronic discovery and the associated cost with reviewing these materials as one of the driving forces for change. I agree with this premise. Unfortunately, the rules and the commentary are very much presented from the perspective of the producing party and do not consider the impact on the requesting party trying to comply with a demand for the return of a document. Since I am mostly a requesting party, I am obviously very interested in how the new rules would affect the cases in which I participate.

Electronic discovery has been the cause of much concern and debate over the last several years. One of the subtle reasons for these difficulties is rarely discussed - the propagation of duplicates. In a paper world, when someone received a document, it was time consuming and costly to make copies. Storage space was always at a premium, so there was strong pressure to minimize the amount of material maintained by individuals and corporations. People would generally only distribute copies to those that truly needed a document. Often, only a single copy of a document may have existed.

Electronic documents and e-mail have changed all of this forever. It takes virtually zero effort to distribute multiple copies of an electronic document within and without an organization. Unless

the material is highly confidential, we rarely concern ourselves with how many people receive copies of a document. Storage costs are effectively negligible. For example, on a hard drive costing \$300, I can store 1,200 filing cabinets of paper documents or 12,000 filing cabinets of electronic documents.

Because of the minimal cost to make copies, it is my practice to copy an entire electronic document production so that each firm working on the case has a complete copy of the production. Many experts are given complete copies of the production. As a result, it is common for there to be 20 or more copies of a document production used in locations around the world.

Irrespective of the mechanism, when a producing party demands the return of a document, this creates a very difficult situation for the party in possession of the document. First, it is necessary to eradicate the image from each location. This could require that each hard drive containing documents be sent to a central location and then returned once the documents in question are removed. If a litigation support application is in use, the index may need to be deleted as well as full text versions of the documents. Beyond the electronic versions, there may be paper copies of the documents that would need to be located. Attorneys frequently make copies of the documents as they prepare for depositions.

Because of the potential cost associated with the return of a document, the producing party requesting the return of one or more documents should be responsible for reimbursement of these costs. I estimate that return of even a modest number of documents in a complex, multi-firm case could cost \$5,000-\$10,000. Why should the requesting party bear this expense? Aside from the potential for abuse, if a producing party is willing to bear reasonable non-negligible costs, this problem goes away. Short of this, the rules should require a party requesting the return of documents to bear the associated reasonable costs.

Interesting questions are: what happens if the requesting party is unsuccessful in locating every copy of a document that is to be returned? If a producing party cannot guarantee that all of the documents it produces are non-privileged, how can a requesting party guarantee that all copies of a document have been returned? Does this lack of a guarantee of return negate the whole spirit behind the proposed changes to 502? If a requesting party fails to take reasonable steps to return all copies of a document that is requested back and the privilege has been found to be waived, what liability does the requesting party have to the producing party?

In conclusion, I am concerned about the impact that any new rule may have upon the requesting party trying to comply with a producing party's demand for the return of a document. I believe that the rule does not adequately address these issues and that the committee should carefully review this impact.

Once again, I thank you for the opportunity to testify before the committee. If there are any questions in advance, please contact me at your convenience.

Sincerely,

Keith L. Altman  
Director of Adverse Event Analysis  
Finkelstein & Partners