04-CV-095
Request to Testify
2/11 DC

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Susan Hackett
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To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Request to appear at the February 11 hearing

Re: Request of the Association of Corporate Counsel (ACC) to offer Testimony on the Proposals for e-Discovery Rule Reforms: Feb. 11, 2005

Dear Mr. McCabe:

I write to request a time for testimony at the February 11/Washington DC hearings for my organization to present comments on the e-discovery proposals before the Committee. The ACC board meets at the end of this month, at which time they will hopefully ratify the position we have drafted; thus, I cannot submit written comments before that time. But since we plan to have a finalized position at the end of the month, I did want to put the committee on notice as early as possible that we'd like a time to testify so that you can prepare your calendar.

I have also heard that there may be a second day added to the Washington hearings schedule, which would be most welcome. The 11th is a date on which several of our leaders who'd be most likely to represent us before you were previously scheduled to address an ABA Presidential Task Force holding hearings in Utah (at the ABA mid-year meeting) on efforts to preserve the attorney client privilege in the corporate context, which is also a significant concern for my members. We can, of course, find additional leaders to present comments before both committees that day if need be, but if there is a choice available, we'd like to consider the second day added if one is included.

Please let me know that you've received our request, and any particulars you can share on the logistics (times, location, preferred length of comments, preferred formats for written submissions, etc.) of the hearings. I will submit written comments for your Committee's review as soon as my board ratifies our position at the end of the month.

Many thanks for your assistance. Please feel free to call if you have questions or comments, or if I may be of assistance.

-Susan Hackett

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February 3, 2005

Mr. Peter McCabe
c/o Judy Krivit
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, NE, Suite 4-170
Washington, DC 20544

Re: Submission of the Association of Corporate Counsel (ACC) on the Proposed e-Discovery Rule Changes Under Consideration.

Dear Mr. McCabe:

On behalf of the Association of Corporate Counsel (ACC), please accept the attached submission which provides ACC's position on the proposed e-discovery rules your Committee is considering. Please include this submission in the record, as it will be more fully explained and referred to by our representative, Mr. Lawrence J. La Sala, the Associate General Counsel for Litigation for Textron, Inc., who will appear on February 11th to deliver our testimony and position. Mr. La Sala is not member of the ACC staff, but a volunteer representative of our membership.

Thank you for the opportunity to testify and submit our concerns for your Committee's consideration. Please feel free to contact me if I can be of any service, or if you have any questions.

Sincerely,

Susan Hackett

Susan Hackett
Senior Vice President and General Counsel

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Policy of the Association of Corporate Counsel Regarding e-Discovery

Statement

In regard to proposals to amend the Federal Rules of Civil Procedure to establish rules on electronic discovery in litigation, ACC supports proposals that presumptively limit the need to preserve and produce information that is otherwise inaccessible (allowing clients to establish and follow reasonable and predictable records retention and disaster recovery policies). Additionally, ACC strongly supports the enactment of proposals to provide a "safe harbor" from sanctions for the routine loss of information that can occur despite good faith operation of a conventional records system.

New discovery rules are needed to ensure that records retention and document discovery systems fulfill the Rules' original objectives, especially in light of the unique burdens and potential for abuse that can result from electronic discovery requests gone awry. Except for the most resourceful litigant, effective access to the judicial system for the resolution of civil disputes will be denied in the absence of such reforms.

Background

Because the Federal Courts' Standing Committee on Rules of Practice and Procedure is engaged in a diligent review of e-discovery evidentiary rules and issues, and has scheduled public hearings on proposed revisions that are generally consistent with ACC's members' concerns, we wish to officially submit our support for the adoption of reforms which will balance the need for reform with the practical issues involved.

The Civil Rules Advisory Committee (of the Standing Committee on Rules and Practice Committee, Judicial Conference of the United States) has proposed, in its revised August 3, 2004 Report (available at http://ww.uscourts.gov), amendments to the Federal Rules of Civil Procedure. These amendments are intended to help litigants navigate the discovery process in an age of electronic files, communications, and records.

The current rules, written in an era of paper documents and ill-adapted to electronic media, offer unpredictable and inconsistent guidance to litigators, clients, and courts, and thus often increase or create additional costs, delays and excessive consumption of time and resources that are largely disproportionate to the evidentiary value of the data sought or information discovered, and frequently to the "value" of the underlying litigation. Indeed, many believe that e-discovery is now one of the most effective weapons in the plaintiff's arsenal to coerce settlement of non-meritorious claims. Threats to require production of the company's entire electronic library, as well as requirements to retrieve records, email, and other communications that were already properly purged or

recycled under reasonable corporate records retention or disaster recovery policies, drive companies to consider settlement of non-meritorious suits as an alternative to ensuing expensive and intrusive discovery procedures.

ACC members routinely manage the discovery process in their respective organizations, and have indicated that they strongly support measured reforms needed to address the undue burdens and costs associated with electronic discovery. ACC members include those who may simultaneously demand production of electronic files in one case and decry the vagaries of the electronic production process in another. Nevertheless, they generally agree that the current system is not functioning well, and that court opinions rendering piecemeal precedents often attached to bad fact patterns, provide inconsistent and unreliable guidance to records managers, and do not create good law or predictable, functional and fair rules. This is especially true in an era when technology advancements are so common as to change presumed retrieval capabilities on an almost daily basis.

Modern corporations house vast computer and communication networks creating staggering amounts of information every minute, and records retention programs to manage information and communication systems are crucial. Unfortunately, it is not possible to design a records program with any degree of confidence that it will anticipate tomorrow's potential liabilities. While business considerations should drive the development of records retention and destruction programs, incorporating features that allow companies to respond to litigation holds when needed, today's litigious environment puts that equation on its head, forcing managers to design records retention systems so that crucial business needs take a back seat to potential litigation concerns. Clear rules regarding litigation demands on a company's records retention program are needed – detailing what is permissible, articulating reasonable restrictions and accommodations, including a safe harbor for inadvertently deleted documents – all of which will allow companies to create records retention programs that meet the companies business needs AND future litigation demands with confidence, fairness and predictability.

Without a "safe harbor" provision, and without concrete guidance as to appropriate e-discovery standards, companies are uncertain as to how to create good records programs. At the back of their minds is the ever-present threat that some court somewhere at some point in the future may not like the choices they made today, even if those choices are based on current best practices, the current state of the law, and the best of intentions.

Because it is impossible for us to ascertain a consensus opinion on the plethora of provisions under consideration, and because we have been advised that the Advisory Committee would be most appreciative of a focus on a few important, universally-favored provisions, we have limited our comments to safe harbors and the production of inaccessible information. We trust the Task Force to integrate our concerns with others', and adopt overall rules that create a fair and predictable playing field for litigants engaged in discovery.

ACC supports the adoption of the amendments proposed by the Advisory Committee as an admirable step in the right direction for all parties to litigation.

Adopted by ACC's Board of Directors, February 1, 2005

For more information, contact Susan Hackett, ACC's General Counsel, at 202/293-4103, or hackett@acca.com.