Foster, Denise

From: dmoran@morankellerlaw.com
Sent: Friday, December 14, 2012 11:18 AM
To: Foster, Denise
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Subject: Comment on proposed amendment to CR 34, ediscovery rules

Please consider the following comments on the proposed CR 34 changes, and e-discovery in general.

1. The proposed changes to CR 34, and the recent federal rule changes to the FRCP's on discovery are not good. They will create more harm than good because they will lead to a lot of bad decisions. They will change the litigation environment, tilting the scales in favor of the large, well-funded law firms and parties at the expense of the little guys and small practitioners. They introduce, or further introduce and support, the civil case defense tactics that attempt to shift the case from the merits of a civil case, in favor of embroiling meritorious but poorly funded litigants into enormously expensive spoliation cases (principally tending towards summary CR 37 dismissal motions rather than trials), which can quickly get so complicated that judges and lawyers can barely understand what they are about, let alone be able understand the merits or make judgments with any real measure of confidence. Judges will end up deciding case-dispositive discovery issues, based on competing forensic computer expert testimony. In doing so, we will be subordinating the Constitutional right to jury trial, to a judicial decision about which forensic computer expert seems more credible on a particular day. This is already going on in the federal system and we should not let it leak into our system if we can avoid it.

2. The fundamental problem is that the rule asks the judges to wade into subject matter that they are not equipped, educationally or experientially, to handle, and the result will be, frankly, judicial guessing, bad decisions and bad justice. You can't write a set of rules about something as complex as electronic information storage, which necessarily involves detailed understanding of computers, how they work, how they store information, how information is retrieved, and expect judges en mass to give anything close to good decisions when they, en masse, don't even understand the subject matter. I don't mean to be disrespectful to the bench with this statement in any way, but it is a fact that very few of us in the legal system, lawyers or judges, have anything close to a technical background to start with, let alone the kind of technical education or deep experience with computer systems that would be necessary to reasonably expect good decisions on the merits of these e-discovery issues. More than lawyers in general, members of the bench tend to have their lawyer experience back in the 90's and 80's, when using computers in the law office, and in cases, was very, very different that the way it is now, or will be over the next 10 years.

3. First, with respect to even understanding what electronic documents and information is and how the rules impact them, it's important to understand that there is a difference between something like a .pdf document, which is locked with metadata and comes pretty close to looking like a piece of paper in normal discovery. If all the rule was addressing was .pdf's then there really is no problem. But its not. Electronic information is in the form of databases, databases usable with commercial and easy to use tools like excel, and more sophisticated databases that are spread out and only usable with more sophisticated software. Frequently we encounter databases that are so convoluted, sophisticated and spread out, indeed databases that are made up of links to other databases, that it's hard to find anybody who really understands what they are, or how they are built, and the best clients can do is find somebody who simply uses them. Then there are backups systems, which make backups , partial backups, offsite backups, onsite backups, cloud backups, essential component backups, etc. and again, it's often hard to find somebody at a client's shop that even understands part of the backup system, let alone the whole system. Often times backup systems overwrite each other, and sometimes the overwritten data is recoverable, sometimes not, and many times it depends on which really expensive, forensic computer group you ask and then even they can disagree.

4. Discovery disputes in this area can be a game of nerd basketball played above the heads of the lawyers and judges, none of whom can understand the structure of these things sufficiently to make good faith arguments, or even address or understand the facts sufficient to make reasoned decisions about them. Thus, we face a situation where we would

be, more and more and certainly more that is comfortable to me, resolving discovery issues based upon opinions of computer forensic experts, on topics that neither the attorneys nor the bench will have much, if any personal knowledge or real ability to decide the merits. How can we reasonably expect to have judges make these kind of discovery decisions, and even hope that they get them right, in this kind of environment? We can't, and the quality of justice will suffer. Well-funded attorneys, often from large firms who have already invested in sophisticated forensic e-discovery system, who can buy the best, or most persuasive computer experts can strike from both directions. They can hide what they want from opposing party discovery, behind a façade of computer forensic gobbledygook that the bench is not going to really understand, but which will often win unless the other side responds with an expensive computer expert with his or her own computer forensic computer gobbledygook. Poorly funded clients will not have the ability to even fund something like that, so just by default the well-funded parties are going to seize the opportunity to turn virtually every case into a discovery battle, alleging electronic document destruction, nonproduction, tampering, etc., and make every case about electronic spoliation, divert the cases from the merits. This is turning into a core defense tactic to otherwise meritorious cases, one which is difficult to defend from poorly funded plaintiffs and the result is that the quality of justice, as well as the access to justice, are suffering.

5. This is already going on in the federal courts, in our Western District, and it is a really big problem. It is going to get worse in the federal system before it gets better, because realistically, the sitting federal court judges are not educationally or experientially equipped to decide complicated computer forensic issues, yet they are doing it on motions based on expert declarations that the judges cannot possibly understand. Without being harsh or offensive, it is important to understand that many of the sitting federal judges practiced law in a time where computers were running dos, or simple windows systems, and the technology for just the practitioner has jumped enormously over the last 10 years. Anecdotally, I have been in discovery hearings where I am absolutely convinced that the judge does not know what the attorneys are even talking about by using terms like "downloading" or "volatile ram storage," "hard disk," "boot sectors" etc. yet the judges ruled on the issues anyway. That is just guessing, and it is going to continue and get worse, the more we inject electronic discovery issues into the courtroom for summary disposition by the judges. Bottom line, the quality of justice is going to get worse, and we in the system are left to sit around and pretend otherwise.

6. The idea of evolving the civil rules to keep pace with the change in technology is a good one, but it can't be done ham handed just to feel good about doing *something.* Treating electronic documents the same as paper, and electronic storage systems the same as binder file systems, may sound fine as a tool to understand what they are, but they are not the same and applying the civil rules to them as though they were, is simply pretending. If the objective is to create a set of rules that will be the perfect tool for large Seattle law firms to absolutely strangle small firms with massively expensive discovery obligations that few if any small firms will be equipped to handle, then these rules are exactly what you want, because that's what they are going to do.

7. If we are going to go down this road with any realistic hope that these rules are going to make things better, then the rules need to be somehow limited to bigger cases where parties are generally better funded on both sides (like is naturally the case in Federal Court) and they need to be accompanied by a structural apparatus that we can reasonably expect will yield better outcomes. Maybe there should be some kind of full time e-discovery master apparatus in the Civil Courts, populated by discovery masters who have the technical expertise to reasonably address the e-discovery issues, who would deal with these issues frequently, keep updated with the evolving storage technology, recovery methods and lawyers tricks in this area of law. Something like this might make sense. But simply writing new rules that charge the existing bench with wading into this field of technology and make dispositive rulings affecting constitutional rights, and expecting them to get it right except by accident, seems Pollyanna.

Yours Truly,

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