Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 28, 2015 3:56 PM
To: Tracy, Mary
Subject: FW: Comment on Proposed Rule CR 33
Attachments: CR33 Proposed Amendment with Don Horowitz Suggestions 4-27-2015.docx; Position Paper by Mike Katell re amendment to proposed CR33.docx

Do these still just come to you? I don't need to print them do I?

From: Donald Horowitz [mailto:don.horowitz@gmail.com]
Sent: Tuesday, April 28, 2015 3:56 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Comment on Proposed Rule CR 33

Pursuant to the Comment procedure, the following are my comments on Proposed Civil Rule 33.

I have been substantially involved with court rules, technology and equal justice for many years. Relevant to this subject, I have specifically been involved in the updating of civil discovery rules which needed changing as a result of the introduction and growth of use of electronically stored information. I'm pleased to note that substantial collaborative efforts relative to CR 34 resulted in adoption by this Court, effective September 2013, of such an updated amendment, which appears to be working well and without complaint. I hope that a new amended CR 33 will have the same quality and outcome.

CR 33 (c) is the only section proposed for change. The single proposed change as currently published is simple and does most of what it needs to do, incorporating "electronically stored information" into the rule on line 2. However, the proposed rule misses a simple but very important point, and that is the nature of access to electronically stored information, which is very different from the historical access to paper and other tangible items. This requires another simple but very important change, which will add very few words, all of which are constructive and none of which has a

downside.

Electronically stored information is not tangible, and is only accessed by software. Access software, like other software, has been changing, continuing to change, presumably improving, and will doubtless continue to change. The actual storage of the information can also be and is in many intangible locations, recently including the so-called "cloud" (which is of course accessible only by software), and the cloud itself and its software is changing. There have been and are many different access softwares that have been and are being used. Some are software specifically designed for and/or used by specific organizations, groups and people. Some are more general. Many have become and will continue to become obsolete, and are not available for use by a third party. Some may in fact no longer be available to the party which originally owned or used the software.

With the strong and unanimous support of a number of technologists I consulted, I therefore propose the following, also shown in context in the attachment to this e-mail.

In the eighth line of the rule after the word "reasonable" and before the word "opportunity", add the words "information and".

In the same line after the word "to' and before the word "examine", add the word "access".

In the tenth line, after the word "identify and before ",as", add the words "and access".

That's all that's necessary. It addresses the issue properly and equitably to all sides and parties, and there's no reason not to do it. Without those words, given the technology issues, there is no assurance, and perhaps indeed no likelihood, that what should be

learned has the best chance of being learned. Further, a potential ambiguity as to the rule's intent will be avoided. Without these words, disagreement as to the rule's intent can and often will lead to unnecessary arguments, motions, the waste of lawyer, judicial and court time, and increased expense to the parties and the courts.

For your further information, I have also attached to this e-mail a brief essay on this subject by Mike Katell, former Head of Technology at Columbia Legal Services, Former Chair of the ATJ Board's Technology Committee, and currently a Ph.D. candidate at the University of Washington Information School.

Should you want any clarification or have any questions, please contact me.

Thank you for your consideration.

Donald Horowitz

Superior Court Civil Rule 33—Interrogatories to Parties

(a)-(b) [*Unchanged.*]

(c) Option To Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable information and opportunity to access, examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify and access, as readily as can the party served, the records from which the answer may be ascertained.

Access to Electronically Stored Information and Civil Rule 33

By Mike Katell
Former Head of Technology at Columbia Legal Services, Former Chair of the ATJ Board's Technology Committee

As an increasing amount of information held by individuals, institutions, and businesses is stored exclusively or mainly as electronically stored information (ESI) in any of thousands of digital formats, the formats used to store ESI are immensely varied and their usability is highly unstable over time. A spreadsheet created in a 1990s version of Microsoft Excel may not be readable using any currently available software. A payroll database may only be readable by an obsolete, proprietary database program that is no longer for sale or cannot be run on computers manufactured in the last 10 years. Information stored on paper does have its vulnerabilities, but the scale and nuance of the challenges presented by ESI is incomparable and immense. Because humans cannot read digital information directly, all ESI is essentially inaccessible as soon as it is created unless a user has access to a software package or other system that can mediate between the digital code and human-readable language. During the long era in which records were kept in paper format, most litigants needed only patience and literacy in whatever language was used by the record-keepers to access information requested from opposing parties.

In litigation ESI introduces complexities that simply were not a factor when many court rules concerning discovery and evidence were conceived and adopted. In retrospect, the era of paper was a golden age of evidentiary transparency. If a party produced a paper document, the other could probably read it. In the emerging era of ESI, there is no assurance that what is produced by one party can be readily or at all accessed by another. Added to this problem are the vast disparities of so-called "digital literacy" among parties in litigation. Not all litigants have access to the latest (or any) computers and software. Even if they do have such access, many lack the sophistication or training to handle information created with proprietary, complex, or obsolete systems. Software systems are as diverse as humanity. Many large companies create and store records using systems that were custom-built for them and are not available to the general public. Some software packages, while generally available, are expensive, making them unattainable by litigants of modest means. Pro-se litigants are particularly disadvantaged and vulnerable to the challenges of ESI given the lack of professional support available to them as they pursue their claims.

In revising CR 33 we have the significant and necessary opportunity to recognize the tremendous disparity between paper documents and ESI. While there needs to be continuing goal to prevent an undue financial burden from falling upon the producers of information in litigation, the rules need to provide adequate assurances that requestors on any side of a case will be able to actually access,

examine and use the information that is produced, and so will not be shut out of information to which the party is legally entitled to use in pursuing its claims.

The accessibility of information produced as ESI should be a key element in court rules governing discovery, including CR 33, and the simple addition of the word "information" at one place and the word "access" at two places, along with the earlier addition of the words "including electrically stored information" will clearly and without confusion and the need for interpretation accomplish that, and have no negative effects.