04-CV-166

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A LEGAL PROFESSIONAL ASSOCIATION

Paula J. Fisco
(1953 – 1999)

February 3, 2005

Peter G. McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Changes in Federal Rules Discovery

Dear Mr. McCabe:

Our firm engages in a civil practice focused on employment discrimination and civil rights claims in the Cleveland, Ohio area. I am writing on behalf of our small firm to oppose the proposed changes to the Federal Rules of Civil Procedure regarding discovery of electronic files and data.

Proposal #1: "Rule 26(b)(2). A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause."

Under the present rules, relevant requested information must be produced even if the producing party claims that it is difficult to access. No exemption like the one this amendment would create is available for documentary discovery, and electronic information is usually more accessible than paper records. In employment cases, discovery documents make or break many cases. By allowing employers to claim that important documents maintained in electronic form are not "reasonably accessible," would create false or misleading responses on important topics. This proposed change would give employers who discriminate against and/or harass employees more protection from plaintiff's lawyers actually seeing important documents that may prove violations of civil rights laws. It is no exaggeration to say that many civil rights plaintiffs will lose or find their cases jeopardized as a direct result of this change, if the proposed change goes into effect.

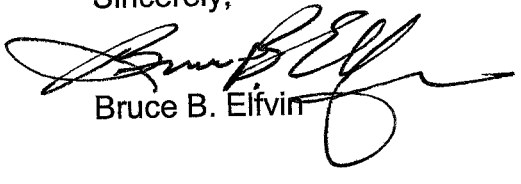
Proposal # 2: "Rule 37. (f) Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the

party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system."

Under the present rules, entities that are or may become parties to litigation are deterred by the potential for charges of spoliation from destroying discoverable electronically stored information. The proposed rule change allows and undoubtedly will encourage companies to purge data routinely and at very short intervals, thereby eliminating possibe sources of proof to show that the company unlawfully discriminated against and/or harassed employees. Once again, such a change would be fatal to many employment and civil rights plaintiffs who largely rely on a paper trial to prove discrimination when company officials, and oftentimes scared and/or intimidated employees do not testify forthrightly about events in issue.

For these reasons, I strongly oppose these two changes to the Federal Rules of Civil Procedure. Please ensure that these proposed changes are not passed, for they would serve as an injustice to the clients we serve.

Sincerely,



Bruce B. Elfvin

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