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04-CV-023

10 November 2004

Peter McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed changes in Fed. R. Civ. P. regarding electronic discovery

Dear Sir:

The proposed change to Rule 26(b)(2) is neither necessary nor reasonable. It is not necessary because the situation it addresses is already addressed in 26(b)(2)(iii). If garden variety computer records that appear unlikely to yield anything useful would be very burdensome to search, the rule already gives the court the power to either shift the burden or prohibit discovery altogether. The proposed rule is unreasonable because it assumes that computer records are unusually hard to search. The opposite is true. It would make much more sense to excuse someone from having to search boxes and boxes of poorly indexed paper records than it would to excuse him from searching computer disks or even back up tapes.

Proposed new Rule 37(f) also unreasonably distinguishes between electronic records and all others. It protects the party that periodically purges electronic records but not the party that periodically does the same thing to paper records. Furthermore, since electronic records take up much less space than paper records, there is no point in requiring people to keep the latter but letting them discard the former. The "routine operation" clause is also troublesome. At the very least, the rule should require that the "routine operation" have been in place before the party suspected it might be sued.

Finally, the proposed addition to Rule 37 could be made to read better by putting all the conditions in one place. How about

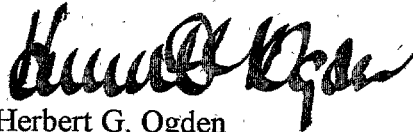
A court may impose sanctions under these rules when a party fails to preserve electronically stored information if (1) the party violates an order in the action requiring it to preserve the information, (2) the party fails to take reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action, or (3) the failure resulted from loss of information because the party's electronic information system was

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not operated in a routine fashion.

The above comments rest on my experience with discovery of electronic records both as counsel for plaintiff and as counsel for defense. I have 19 years of experience overall in federal and state courts.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Herbert G. Ogden". The signature is written in a cursive style with a large, stylized initial "H".

Herbert G. Ogden

HGO/jkm