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04-CV-101

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

Re: Electronic Discovery

Dear Mr. McCabe:

I respectfully submit this letter with respect to the proposed changes to the federal rules concerning electronic discovery. Based upon my 27 years of experience as a trial lawyer, I believe that these rules will harm the search for truth and increase the expense of litigation. The majority of my practice has been in federal court, primarily handling business litigation, including securities cases. Most of the time, I am on the plaintiffs' side, but I have also often been on the defense side.

Electronic discovery has become a crucial means of approving or disproving a case. I have been involved in several securities fraud cases where the fraud likely would not have been proved absent electronic discovery. For example, as I understand it, the whole securities analyst conflict issue was made public due to a plaintiff's lawyer obtaining e-mails in discovery. Similarly, much of our In re Southern Pacific Funding Corporation Securities Litigation case was proved by e-mails that the defendants resisted producing until well into the case. Certainly, electronic discovery was a key factor in promoting settlement of the lawsuit because the facts were extremely evident from the contemporaneous electronic documents. Thus, having electronic discovery helped to avoid the expense of trial.

Any rules that are specifically directed at electronic discovery will serve only as a mechanism that will set up roadblocks to obtaining complete discovery. The only practical results of more discovery rules are that (a) there will be more expense and (b) parties will be able to avoid producing more information, which serves primarily to hide the truth. Furthermore, additional rules will only promote discovery battles. Counsel will engage in more disputes and make more motions simply because the new rules "are there." The provision that a party can assert that information is not "reasonably accessible" will be raised in every case.

As the Committee is well aware, there already are many rules governing document production and other things. These rules are applicable to electronic discovery just as they are relevant to hard copies of the documents. These rules already provide all the mechanisms the courts need to evaluate issues concerning electronic discovery requests and to manage all forms

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of discovery. I have yet to be involved in a case where the electronic discovery was any more difficult than paper discovery issues.

Furthermore, by its presumption that electronic data was not improperly destroyed if it has happened during "routine operation," the proposed rule makes destruction of electronic evidence more likely. The fact of the matter is that this evidence is among the easiest and least expensive to preserve, and our rules should never countenance more destruction of evidence. There is no similar protection for routine destruction of paper documents.

Making electronic discovery a matter separate from other forms of discovery is in itself a red herring. Electronic discovery is no more burdensome or expensive – and may be even less burdensome and expensive – than other forms of discovery that require production of thousands or millions of pages of documents. Attorneys who handle major litigation, whether they represent the party producing the documents or are reviewing the documents on behalf of the opposing party, have developed many mechanisms that permit the efficient production and review of the documents. The same is true in the case of electronic discovery. Electronic discovery is not a special problem, and the district courts have done an excellent job in resolving issues concerning electronic discovery.

Finally, I note that e-mails are now the primary form of business correspondence. For example, many days I may receive at most one letter. The same is true in the other businesses, ranging from food distributors to securities and real estate firms, with which I have had recent involvement in my cases. Yet, the proposed rules make electronic communications a unique class of communications, which they are not.

I respectfully ask that the Committee not impose any further rules that will exacerbate discovery disputes and provide the potential that the truth will be hidden.

Very truly yours,

Gary M. Berne

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