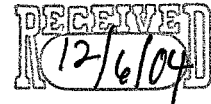


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04-CV-030

November 23, 2004

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

Re: Proposed Amendments to Federal Rules of Civil Procedure

Dear Mr. McCabe:

Please accept these comments regarding the proposed amendments to the Federal Rules of Civil Procedure.

1. Rule 26(b)(2). The proposed amendment provides that a party need not provide electronically stored information that the party identifies as not reasonably accessible. The term "not reasonably accessible" makes no sense to me because searches of electronic information can be conducted very quickly. Where a company has gone to lengths to encrypt or hide its data, or where data has been overwritten by ongoing business operations, it is still relatively easy and quick for a computer expert to make a copy of the data. Opposing parties should be allowed to copy this data so that it can be analyzed without affecting a party's ongoing business. I am concerned that the rule is inviting stonewalling and litigation around an issue that should be fairly straightforward.

2. Rule 37(f). The proposed amendment would prohibit the court from sanctioning a party that destroys electronically stored information if the party took reasonable steps to preserve it or the loss resulted from routine operation of the party's electronic information system. These two qualifications make no sense. The issue of sanctions should be connected to a party's knowledge that electronic information should be preserved. If a party knows, or should know, that important electronically stored information needs to be saved then this data can be copied quickly and cheaply. Businesses often routinely do this through the use of back-up disks. If a party knows, or should know, that important electronically stored information needs to be saved, and does not do so, then the loss of data by the "routine" operation of the party's electronic information system should not be a defense to sanctions. A compromise rule would prohibit the court from sanctioning a party that destroys electronically stored information if: (1) the party took reasonable steps to preserve it; and (2) the loss resulted from routine operation of the

Peter McCabe
Administrative Office of the U.S. Courts
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party's electronic information system **before a party knew or should have known that such electronically stored data needed to be saved.** This would still not directly address the issue of companies that "routinely" purge their system over short intervals of time to eliminate important data.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis M. Gerl", with a stylized flourish at the end.

Dennis M. Gerl

DMG/ds