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04-CV-046
Request to Testify
1/12 San Francisco

December 13, 2004

Via Facsimile and U.S. Mail: (202) 502-1766

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

Re: e- Discovery

Dear Mr. McCabe:

By this letter I am requesting to testify on January, 12, 2005, in San Francisco before the federal rules committee regarding e-discovery. For your information, and in full disclosure, I am on the executive committee of the Association of Trial Lawyers of America and an officer of Trial Lawyers for Public Justice, though at this time I am requesting to testify in my individual capacity.

Thank you very much for you time an attention to this matter.

Sincerely,

SMOGER & ASSOCIATES, P.C.

By: Gerson H. Smoger

GHS/rk

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04-CV-046
Testimony
1/12 San Francisco

January 12, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendments Regarding E-Discovery

Dear Mr. McCabe:

I want to thank the Advisory Committee for this opportunity to speak to the proposed amendments to the federal rules concerning electronic discovery.

Several years ago, this committee held a three day retreat in Boston, Massachusetts. The most significant subject matter of that retreat was whether the committee should amend the discovery rules to limit discovery by narrowing the scope of discovery defined in Rule 26(b)(1) from "the subject matter involved in the action" to "the claims or defenses of any party." At that meeting, I took the position that there was no need for such a limitation because discovery in the coming years would be increasingly electronic, with vastly greater ease of access and ready search tools related to any given subject matter, though not necessarily the peculiarities of "claims" or "defenses." At that time, this committee rejected separate consideration of the topic of electronic discovery. Instead, the proponents of the more limited discovery rule advanced the need for circumscribed parameters of discovery. The rationale for these limitations included many of the same arguments used now to support the discovery amendments being discussed today: excessive costs of production, difficulty of access, and interruption of normal business activities. The mere fact of being sued, however, by its very nature, results in all of these. The question, then, in discussing these proposed rule changes is one of degree, attempting to balance the needs of those bearing the burden of proof against unreasonable burdens placed on those holding the desired information.

This continuing tug of war underlies the electronic discovery rules changes being evaluated by this committee. It is to be noted that two of the most controversial changes now proposed by the Committee regarding electronic discovery would constitute further limitations on the production of documents. I refer specifically to the language to be added to Rule 26(b)(2), which allows by rule an argument against producing discovery which is not accessible, and Rule 37(f), which provides by rule a safe-harbor for destroyed documents – regardless of the fact that the documents not produced or destroyed may be relevant to the claims or defenses of

the parties. These proposals are advocated despite the fact that several years ago it was argued that changes in what was *per se* discoverable would cure the problems now prompting complaints.

Advocates of these changes have stated that these rules are uniquely required by electronic discovery even though, under any permutation, electronic discovery is far easier to assemble, collate and search then the true traditional "legacy" data – paper or microfiche. The availability of electronic data has made discovery vastly easier, less expensive and more accurate. Before the advent of electronic discovery, productions in large cases could encompass entire warehouses. Was it any less difficult in the past to go through each pertinent individual's personal files than it is now to have them readily stored on a searchable disk for review? Was it any less difficult to go through warehoused documents stored at remote locations than archived electronic materials? Can we really compare dealing with millions of pages of microfiche to similar collections available today electronically? Today, when discovery requires review of this type of legacy data, the first thing done by parties is to convert the paper or microfiche into electronic forms. This was done, for example, in the revived Agent Orange litigation where hundreds of depositions previously taken and millions of documents already produced were converted to electronic format. Why is this done? First, discovery in electronic form is readily shared by those needing to review it. Second, it may be converted into a form which is searchable. Indeed, the search capabilities of electronic discovery make it very difficult for that one crucial document to be hidden among thousands of irrelevant pages in far-flung depositories, as was the case before information was kept electronically. As new and more intelligent search technologies have been developed, the need to review documents individually has lessened exponentially. When compared with paper discovery, the question of electronic discovery is then not one of increased difficulty. Instead, it is one of increased simplicity.

While we as lawyers often find the more technical questions regarding electronic discovery daunting when compared to paper and microfiche, these technical questions are readily resolved in litigation through informal means. Technical assistants to both parties routinely resolve the host of small issues that inevitably arise about how to collect, read and interpret data. This is generally found to be a far more efficient means of resolving technology issues. In this sense, I think the Committee's requirement that the parties address issues of the preservation and production of electronic discovery at the earliest possible opportunity, preferably with some technical expertise at hand, to be an important proposal and, therefore, I support the proposed Amendments to Rule 16 and Rule 26(f).

However, I would submit that the proposals embodied by Rule 26(b) and Rule 37(f) are neither required nor necessary. Viewed from the perspective of the totality of all discovery which takes place, truly contentious issues regarding inaccessibility, document destruction, or even the proposed claw back provisions of 26(b)(5) arise only in the extremely exceptional case. It has been my experience that when rules are written to cover rare exceptions, the decisions interpreting those rules tend to result in "codification" for all cases. As

a result, the exceptions then drive the process, including the vast majority of cases where they are neither relevant nor necessary. Limitations upon discovery in accordance with the new decisional framework then occurs regardless of its need in the case at hand. Indeed, will it not be incumbent upon all parties under the proposed rules to attempt to discern through extensive litigation such things as what is truly "inaccessible" or what is "destruction" in the "ordinary course of business?" Will it not become the obligation of diligent representation to attempt to protect a client from discovery by continually testing the waters as to what these amorphous concepts mean?

I would submit to this Committee that the concerns addressed by Sections 26(b)(5) have long been readily handled by courts upon review of the particular facts before them. Courts already understand the burdens of production. They do not need institutionalized case law generated by interpretations of a new rules' accessibility standard which would likely be out-of-date in the non-legal world within months of being reported.

The same is true for the "safe harbor" provision regarding sanctions addressed by 37(f). Sanctions are never imposed without a noticed motion and hearing in which the party's conduct and culpability are fully examined, and even then their imposition is extremely rare. District courts are in the best position to evaluate -- in a particular case – whether sanctions are necessary based upon individual facts presented to the court. As such, there is no need for a rule telling courts when they *cannot* use their sanctioning power. No special exemption is necessary for electronic data. By giving one, it sends the message that such destruction is *per se* permissible.

In conclusion, this Committee has acknowledged that the ever-changing nature of electronic data manipulation and storage and recovery makes it difficult to construct a rule regarding particularized forms of electronic data collection. Yet, in proposing Rules 26(b)(5) and 37(f), the result will only be to add another layer of discovery disputes without any salutary benefit for the vast majority of cases. Moreover, while these unique rules attempt to distinguish themselves by stating that they are 'limited' to electronic discovery, in reality the rules developed for electronic discovery are rules for all discovery. It is believed that now well over 90% of all "written" communication is created electronically and that percentage, even within our own business of law, is ever-increasing. Electronic data collection and creation is clearly then not the exception but the rule. As such, I would submit that the rare exceptions should not drive the rules. Rather, these issues should be treated as they long have been and be left to individual judges to evaluate upon the presentation of a full factual record where the unique circumstances of each case can be assessed.

Sincerely,
SMOGER & ASSOCIATES, P.C.

Gerson H. Smoger

By: Gerson H. Smoger

GHS:mb