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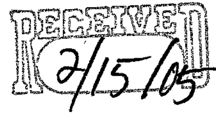

February 15, 2005

04-CV-182

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Court
Washington, D.C. 20544

Re: Proposed Rule Changes Relating to Electronic Discovery

Dear Mr. McCabe:

Please convey the following comments to the members of the Advisory Committee on Civil Rules. I am an attorney with the U.S. Equal Employment Opportunity Commission who has litigated employment discrimination cases in federal court for over twenty-five years. These comments are submitted in my private capacity; no official support or endorsement by the EEOC or any other agency of the United States Government is intended or should be inferred.

I applaud the proposed changes to Rules 16 and 26(f) which will better focus the courts and the litigants on electronic discovery early in the litigation. However, I am troubled by the proposed change to Rule 26(b)(2), creating a two-tier system based on "reasonable accessibility." In my view, this change will make it more difficult to obtain necessary data from defendant employers. The existing rules already allow district courts to balance undue burden and the evidentiary significance of requests for electronic data. Cf. Zubalake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

Because payroll and personnel records were computerized long before the recent technological explosion, the Equal Employment Opportunity Commission has been obtaining electronic discovery for over thirty years in its litigation enforcing the federal statutes prohibiting employment discrimination. Frequently, the only usable data on employment decisions at issue in our cases are contained in backup tapes or on legacy systems, and almost invariably employers claim that this data is inaccessible. I note that backup tapes and legacy systems are precisely the examples of material thought to be inaccessible – and therefore no longer discoverable as of right – mentioned in the committee notes. Of course, under the proposed rule the Commission could obtain the data by moving to compel and showing good cause. Yet, the fact that the new rules could be applied consistent with current practice is no argument for changing the rules.

It would appear that much of the fear of unmanageable electronic discovery relates to huge, unorganized collections of word processing documents and email and not to structured databases. However, I submit that this is an historical anomaly that recent technological developments are rapidly overcoming. Storage hardware developed in advance of retrieval software, but in the last year more sophisticated search methods have started to come on line. For example, until recently to retrieve email at my agency from a backup tape required a complete restoration of the tape on a separate server, but the latest version of the email software now allows searching for content on

the tape. My concern is that the proposed rule will not adjust for technological improvements as the current balancing rule does, but will tend to freeze understanding to the state of affairs of recent past. I am also concerned that the proposed rule will act as a disincentive to adoption of these software advances

The "reasonably accessible" concept simply does not improve on the status quo and the change to Rule 26(b)(2) should be withdrawn.

Sincerely,

/s/

Jeffrey C. Bannon