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04-CV-237

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

Re: My Opposition To Proposed Changes In Federal Discovery Rules

Dear Mr. McCabe:

This letter expresses my opposition to two proposed changes in the Federal Rules of Civil Procedure regarding electronic discovery.

I am a lawyer with 23 years experience engaged in a private general practice of civil law. My primary subject matter area is in the rights of environmental whistleblowers. I have plenty of work arising from cases where companies get upset that one of their employees has the audacity to help the government enforce environmental laws. The company managers and their lawyers operate under the unlawful belief that they should be able to interfere with government investigations by intimidating their employees to toe the management line. Accordingly, discovery in each of my environmental whistleblower cases is protracted, and fought with an unceasing barrage of objections and evasions as the companies try to get away with unlawful retaliation against whistleblowers.

Already, whistleblowers put their family's economic survival on the line in cases where the company is holding the cards. The company's management has access to and control over all of the information about how their managers communicated about the challenged retaliation. They already routinely object to producing that information on grounds that it is confidential business information, unreasonably difficult for them to collect and produce, or irrelevant (in their minds) to our case (for which they believe the law should not allow any remedy at all). My clients' life savings are often at stake, depending on me to find the evidence that company managers knew about my client's whistleblowing, were upset by it, and then fabricated pretextual grounds for the adverse actions.

It is well established federal law that, "mutual knowledge of the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor* (1974), 329 U.S. 495, 507. With the advance of technology, that relevant information is increasingly in electronic form. Where managers used to write notes or memos, they now put email into a complicated network of messages and information. They control how this information is structured. If the federal government provides any hint of justification for stalling or evading their duty to provide information, they will certainly use it. Moreover, they will be able to structure their information

systems so that they can still have access to the information they need for management purposes, but will also have plenty of pretext to justify withholding information that is "unreasonably difficult" to produce. Yet, this is where the key evidence of deception may lie. "Because of their ubiquitous nature, documents stored in electronic form ... should be specifically targeted by counsel in developing their discovery plans. Failing to do so may not only prejudice their case, but may also constitute malpractice." Michael R. Overly: California Continuing Education of the Bar (1998 3d Ed), Civil Discovery Practice 3rd Ed., Vol.2, §8.24, p. 711.

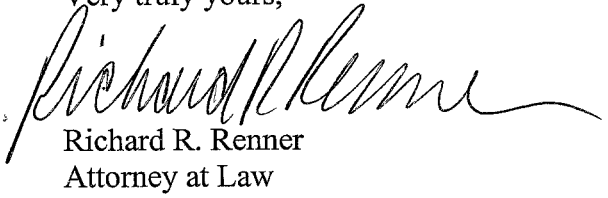
Accordingly, the proposed change to Rule 26(b)(2) would be devastating to environmental whistleblowers. The proposed change would allow companies to withhold information that it claims is "not reasonably accessible." Upon adoption of this rule, companies will establish a variety of procedures to make it look like someone has to jump through hoops to get any information at all. Of course, when management has a need for the information, the systems will provide managers with the access they seek. Enforcement of our environmental laws will depend on both sides having the same access to the same information.

If the proposed rule were adopted, we would still hope that judges would fairly compel production of the information needed to reveal the pretextual nature of the adverse actions that whistleblowers face. Unfortunately, judges are too often reluctant to engage in the nitty-gritty of discovery disputes.

Currently, when it is necessary to engage a judge's attention in a discovery dispute, the judge has a remedy of imposing financial sanctions on the misbehaving party. Direct economic sanctions are effective at deterring misconduct in discovery. Therefore, the proposed change to Rule 37(f) is particularly disturbing. The proposed change would absolve defense counsel of liability of sanctions if they have taken "reasonable steps" to preserve electronic information. Upon adoption of this change, recalcitrant employers will no longer have any incentive to cooperate in resolving discovery disputes. They will face no sanction if they go to the mat, just to see if the judge would be attentive enough to make the right orders in compelling production. This change will not simplify resolution of discovery disputes, but rather encourage polluters to resist. They would have nothing to lose, and the possibility of wearing down the opposing side or the court until they can get away with concealing their secrets.

Please do not let our nation's worst polluters tip the scales of justice. Please reject the propose changes to Rules 26(b)(2) and 37(f). Thank you for your attention in this matter.

Very truly yours,



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