Subj: **Proposed Amendments Regarding Electronic Discovery**
Date: 2/15/05 4:55:32 PM Central Standard Time
From: JJohn esq
To: Peter_McCabe@ao.uscourts.gov

04-CV-202

Dear Mr. McCabe:

Enclosed in pdf format please find the views of the undersigned, attorney Janette Johnson on behalf of my clients, employment discrimination plaintiffs, regarding the committee's proposals relating to electronically stored information. I will also Federal Express a "hard copy" for the Committee's consideration by overnight mail.

Please place me on record as opposed to such proposed changes.

Thank you for your consideration of these comments.

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February 15, 2005

Mr. Peter G. McCabe
Secretary, Administrative Office
of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Civil Rules Amendments Relating to the Discovery of Electronically Stored Information

Dear Mr. McCabe:

I write to comment on the opposition to the proposed amendments to the Federal Rules of Civil Procedure relating to electronic discovery. As a lawyer in practice for twenty five years I have seen the chances resulting in electronic discovery and believe that the suggested changes will do more harm than good to the discovery process.

1. Electronic Communication Has Supplanted Written Communication:

I have just recently concluded an employment discrimination trial with six days of testimony in federal court in Dallas representing the Plaintiff. The vast majority of communication conducted by the principals and agents of the Defendant company were done by email and by voice mail. Indeed, one of the critical pieces of evidence in the case was an email that the decision maker sent to the Human Resources department giving his "take" on the Plaintiff and his estimate that she only had a 25% chance to succeed.

In many employment cases, Plaintiffs are completely unaware of internal email that relates to them and their career and may not even of known to ask for that email. Any rule making that places further restrictions -- including cost shifting expenses -- will result in the lack of effective enforcement of the Civil

Rights laws of this country including Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.

At this juncture many companies are relying primarily on e-mail as an internal communication measure. Such emails often are sent to multiple parties within the same company and often generate "e-mail threads." This email discovery is critical to the case of many plaintiffs and any rule requiring additional hurdles to obtain everyday communication will impede enforcement of our nation's civil rights laws.

2. It is fundamentally unfair to allow searches of electronic databases to be controlled by the searcher and then have the expense shifted to the requesting party. In addition such searches can be manipulated:

In addition, with respect to electronic searches of databases, the requesting party -- most often the Plaintiff -- must have input into the search parameters of the database search. In a race discrimination case in federal district court, the requested party -- the Defendant -- had a paralegal perform the search and design the search guidelines for an electronic search of its database to comply with Plaintiff's Request for Production.

Instead of seeking input from the opposing party as to what search terms would be relevant, the paralegal merely did a search for the individual's first and last name. Plaintiff whose first name was Tony was then required to pay over $1,000 for this search which yielded over 1,000 documents only about 25 of which were relevant to the dispute at hand. Plaintiff was left with emails congratulating folks on their new baby, referring to different individuals named Tony within the company and generally containing irrelevant information. Thus with no control over the search parameters, no effective search was done. Yet the cost was borne by the Plaintiff. This is fundamentally unfair.

More importantly, clearly relevant e-mails had been contained in the data based and were not accessed. Plaintiff was not able to obtain the necessary information and lost his case on summary judgment.

3. Companies should be required to maintain better control of their electronic databases:

Lastly, the requested party should be required to maintain better control of its electronic record database. Many emails are stored in personal computers that are changed out on a yearly basis and no apparently record is kept of such emails. This constitutes spoilation of records by indifference to record

keeping obligations.

Countless times I have deposed a company official to find out that the computer that he had used a few years prior had been sold by the company and no effort had been made to keep its hard drive or other stored electronic information. This constitutes spoiliation of evidence.

Thank you for your attention to these comments. At this juncture, on behalf of my clients, I am opposed to the proposed changes in the federal rules.

Very truly yours,

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