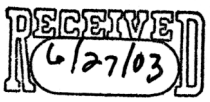
02-ED-042



Date sent: **Fri, 27 Jun 2003 16:22:00 -0400**
From: **Steven Gerber <sgerber@gerberlaw.com>**
Subject: **Electronic Discovery - Fed. R. Civ. P.**
To: **marcusr@uchastings.edu**
Send reply to: **sgerber@gerberlaw.com**
Organization: **GERBER & SAMSON, L.L.C.**

Dear Professor Marcus:

Attached in MS Word format in a letter submitted to the Dicovery Subcommittee of the Civil Rules Advisory Committee on Electronic Discovery.

Kindly confirm your receipt of this email and the attachment.

Respectfully,

Steve Gerber
Attorney at Law
GERBER & SAMSON LLC
155 Willowbrook Blvd.
Wayne, NJ 07470
tel: 973.256.9000
fax: 973.256.9001
direct email: sgerber@gerberlaw.com
website: www.gerberlaw.com

Steven Gerber *
Linda H. Samson
Mary Pat Gallagher

Richard P. Weiss*∝
Of Counsel

Patti A. Scott *
N. Noelle Letcher
John C. Hegarty
Michelle N. Johnson*
Karen R. Dallow*

* also member of New York Bar
∝ also member of Florida Bar

GERBER & SAMSON, L.L.C.

Attorneys at Law
155 Willowbrook Boulevard
Wayne, New Jersey 07470
Telephone 973. 256.9000
Facsimile 973.256.9001
WEBSITE: WWW.GERBERLAW.COM

PLEASE REPLY TO:
NEW JERSEY OFFICE

NEW YORK OFFICE
11 East 44th Street
17th Floor
New York, NY 10017
Telephone 212.867.0601
Facsimile 212.661.9790

June 27, 2003

Professor Richard L. Marcus
Reporter
Discovery Subcommittee, Civil Rules
Advisory Committee
Hastings Law School
San Francisco, California

Re: Amendments to Federal Rules of Civil Procedure
On Electronic File Discovery

Dear Professor Marcus:

I am the managing partner of this firm, and frequently litigate and defend employment law and discrimination matters in the federal courts, principally in the District of New Jersey, on behalf of corporate clients, both privately-held and publicly traded. I am writing to you to relate to the Discovery Subcommittee our concerns that without amendments creating a "safe harbor" for corporate clients regarding electronic data production (and retention once litigation is threatened and/or filed), our business clients will continue to be subject to unfair burdens and potentially, unnecessary and unwarranted sanctions.

Without a "safe harbor", businesses may also be unfairly subjected to spoiliation claims for operating in the ordinary course of business. A "safe harbor" amendment to the Federal Rules of Civil Procedure – specifically, a clear delineation of a party's obligations to preserve, search for and produce in mandatory disclosure or in response to Rule 34, Fed. R. Civ. P. requests, only those documents, electronic or otherwise, which that business maintains in the regular course of its business – would provide a fair balance to the needs of one party to obtain discovery without turning "E-discovery" into yet another "satellite" litigation component of civil practice.

The importance of a "safe harbor" in employment litigation is not unique, I suspect, but the burdens that unlimited document data retention impose in ADEA, ADA and Title VII

lawsuits, when measured against the likelihood of relevant and material documents being discovered, may be illuminating. In a single employee Title VII discrimination suit, absent a safe harbor, open-ended discovery demands requiring the defendant employer company to search all hard drives of fellow employees and all "zip" and removable storage devices are incredibly burdensome. In our global economy, with many employees working remotely ("on the road" or at home), the ability of in-house or outside counsel to satisfy "E-document" demands without a safe harbor is a logistical and litigation nightmare. Limiting a responding party's obligations to produce and make available for inspection and/or copying only those electronic files which a business defendant maintains in the ordinary course of its business is the only fair response to the open-ended e-document demands we face, e.g., "in producing electronic documents and data in response to this document demand, you are required to search your electronic files, including all computers, servers, laptops, home computers utilized by employees in the course of the your business, personal communication devices, text messages distributed by cellular communication devices, remote email transmittal systems and programs, and all back-ups of such electronic files, wherever located."

I appreciate the opportunity to provide the Discovery Subcommittee with these comments.

Respectfully submitted,

Steven Gerber

STEVEN GERBER