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Via E-mail Only to:
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Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Room 4-170
Washington, DC 20544

Re: Proposed Rule Changes to the Federal Rules of Civil Procedure Concerning Electronic Discovery

Dear Mr. McCabe:

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 Rules and Practice Committee my concern 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.

We are quite concerned that without a safe harbor provision -- permitting businesses to continue their pre-litigation computer back-up, retention and record over-writing practices, absent a showing of good cause and a concomitant court order requiring special preservation – day-to-day regular computer backup overwriting practices could result in unwarranted fraudulent concealment and/or evidence destruction ("spoiliation") claims. 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, absent good cause shown – 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 burdens that a de facto unlimited document data retention Rule would impose on businesses in ADEA, ADA and Title VII lawsuits, when measured against the likelihood of

relevant and material documents being discovered, are heavy and unwarranted. 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 to which employers would otherwise be subject.

For these reasons, the Rules should provide for a safe harbor for routine treatment of electronic material when a defendant continues to create and overwrite backups, to purchase new computers and delete old, then unused programs and files, and for other normal computer practices, absent a court order on good cause for the preservation of those routinely overwritten and discarded files.

Thank you for the opportunity to convey my experience in this difficult area to the Committee.

Respectfully yours,

Steven Gerber

SG/sg