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COMMENTS OF

TRIAL LAWYERS FOR PUBLIC JUSTICE AND THE TLPJ FOUNDATION

TO THE ADVISORY COMMITTEE ON THE CIVIL RULES

ON THE PENDING PROPOSALS TO AMEND RULES 26(b)(2) AND 37(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO ELECTRONIC DISCOVERY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Trial Lawyers for Public Justice and the TLPJ Foundation respectfully submit the following comments on the proposed changes to the Federal Rules of Civil Procedure (the "civil rules") relating to the discovery of electronic information. We believe the ongoing debate over issues presented by the advent of electronic discovery is extremely important to the nation's civil justice system and appreciate this opportunity to submit this written testimony to the U.S. Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee").[1]

As we explain below, Trial Lawyers for Public Justice and the TLPJ Foundation oppose two of the proposed civil rule changes directed at electronic discovery because they would make it more difficult for persons harmed by corporate wrongdoing to obtain justice for their claims.

First, the proposed amendment to Rule 26(b)(2) would essentially create a presumption that electronic information that can be characterized as not "reasonably accessible" need not be produced absent unusual circumstances. The most prominent illustrations given of such information are back-up tapes and legacy data. This is an enormous change from the current state of the law, which provides that such information is discoverable unless the responding party establishes that it would be an "undue burden" to produce this information. As these Comments will establish, there are quite a few important cases where governmental bodies or injured parties proved their cases only through electronic and digital information. If the proposed rule is adopted, corporations potentially

[1] We are also grateful that we were permitted to have a representative testify at the public hearing that the Advisory Committee held in Dallas on January 28, 2005.

facing legal challenges will have a huge incentive to put as much evidence as possible into media that they can plausibly designate as not "reasonably accessible." Creating this incentive could easily hamstring important litigation.

Second, the proposed amendment to Rule 37 would create a new "Safe Harbor" provision protecting responding parties from sanctions for the destruction of digital and electronic information due to the "routine operation of the party's electronic information system." While we acknowledge that the proposed rule seeks to mitigate the sweep of this provision by carving out several exceptional circumstances where sanctions would be available (such as cases where a party destroyed evidence in violation of a court order), we believe that the proposal is likely to encourage the use of systems that routinely destroy electronic information at short intervals.

In any case, we do not believe that there is any compelling evidence that federal courts are currently unfairly forcing large numbers of responding parties to produce non-essential electronic information in settings where it is unduly burdensome for the parties to do so. Despite a number of complaints by corporate representatives that electronic discovery imposes excessive costs on defendants, no empirical evidence supports those complaints. Rather, based upon empirical evidence gathered in 1997 and before, it is likely that the more common form of discovery abuse in the context of electronic discovery is the practice of responding parties to evade legitimate discovery requests. In any event, current rules give judges ample tools and flexibility to address discovery abuses, even where electronic information is involved, as they should be addressed: on a case-by-case basis. Accordingly, we strongly encourage the Advisory Committee to make no changes to the civil rules at this time.

INTEREST OF TRIAL LAWYERS FOR PUBLIC JUSTICE AND THE TLPJ FOUNDATION

Trial Lawyers for Public Justice is a national public interest law firm dedicated to using trial lawyers' skills and approaches to advance the public good. Litigating throughout the federal and state courts, Trial Lawyers for Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The TLPJ Foundation is a non-profit charitable and educational membership organization that supports the activities of Trial Lawyers for Public Justice and educates the public, lawyers, and judges about the critical social issues its litigation addresses. It currently has over 3000 members, who are primarily plaintiffs' trial lawyers and law firms. The TLPJ Foundation's members regularly represent plaintiffs in a broad range of personal injury, commercial, civil rights, tort, and other cases in the federal courts. For ease of communication, we will hereafter refer to Trial Lawyers for Public Justice and the TLPJ Foundation collectively as "TLPJ."

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has monitored and commented upon a number of proposed changes to the Federal Rules of Civil Procedure over the years, including proposed amendments to Rules 23, 26, 30, 34, and 37. Because the discovery rules govern a crucial part of our civil justice system, we welcome the opportunity to comment on the new proposed amendments.

I. ACCESS TO ELECTRONICALLY STORED INFORMATION IS EXTRAORDINARILY IMPORTANT TO PERSONS WITH CLAIMS IN THE CIVIL JUSTICE SYSTEM, AND NARROWING THAT ACCESS WILL HARM VICTIMS AND ENCOURAGE CORPORATE WRONGDOING.

A. In the Modern Corporate World, Nearly All Information Is Kept and Stored In Electronic Forms.

In America's economy today, electronic information is ubiquitous and central. Without question, the ever-increasing, widespread use of computers in this country is revolutionizing the way we work, play, and communicate.

> According to a 2003 study by the Meta Group, 80% of business people say e-mail is more valuable than the telephone. . . .
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> The statistics are stunning. In 2000, fewer than 10 billion e-mail messages were sent per day worldwide. By 2005, the number of e-mails sent per day is projected to surpass 35 billion, according to industry analyst IDC. A recent study from the University of California, Berkeley, concluded that as much as 93% of corporate information today is in digital format.[2]

The information that is stored in digital or electronic form is not merely a restatement of information that is also maintained in paper form. Increasingly it is the **only** format in which crucial information is stored. According to a University of California study, 93 percent of all information created during 1999 was first generated in digital form – on computers.[3] The trend towards maintaining data in electronic form has greatly accelerated in the more than five years that have elapsed since that study was completed, and will surely accelerate even more in the coming years. In the world of business, up to 70 percent of

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[2] Skip Walter, *Plaintiffs' law firms no longer as disadvantaged; Technology, legal rulings are leveling playing field between large, small firms*, The National Law Journal, July 5, 2004, § 3.

[3] John J. Hughes, *One Judge's View of Electronic Information in the Courtroom*, THE FEDERAL LAWYER, August 2002, at 41 (citing Kenneth J. Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence*, Address at the National Workshop for Magistrate Judges (July 2001)).

records may be stored in electronic form,[4] and an estimated 30 percent of all information is never printed on paper.[5] Indeed, many forms of electronic information now routinely generated by businesses cannot be fully reduced to paper form at all.[6] Electronic databases, for example, have no exact paper counterpart because a print-out cannot capture the formulas defining cells and fields in the database, and often require a knowledgeable administrator to create a meaningful printed format.[7] Other business records routinely available in hard copy in prior decades may now be available only on computer.[8] Thus, vast amounts of today's business information can be found only in electronic form.

B. Electronic Information Has Repeatedly Been Crucial In Exposing Egregious Corporate Abuses.

Again and again across the U.S., crucial evidence of serious corporate misbehavior – often intentional misbehavior – is only discovered through electronic documents. In many cases, these electronic records contradict the happy stories offered to the public in connection

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[4] Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000, ¶ 1, *at* http://www.ecommercetimes.com/perl/story/3339.html.

[5] Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64-SUM LAW & CONTEMP. PROBS. 253, 280-81 (2001) (citations omitted).

[6] As one federal court has noted, "electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record." *Public Citizen v. Carlin*, 2 F.Supp.2d 1, 13-14 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C.Cir. 1999).

[7] Alan F. Blakley, Differences and Similarities in Civil Discovery of Electronic and Paper Information, THE FEDERAL LAWYER, July 2002, at 32.

[8] *See, e.g.*, Daniel T. DeFeo, *Unlocking the door to automaker databases*, TRIAL 26 (Feb. 2003) ("computerized databases may contain important information – such as design, simulation, and modeling programs that demonstrate how a vehicle or its components perform in crash situations – that appears neither on hard copies nor on computer printouts.").

with those events. Electronic evidence has become increasingly important in cases of all kinds, particularly in cases involving businesses.[9]

In case after case in recent years, courtrooms have been rocked by revelations from electronic materials proving that major national corporations broke the law and abused their power. Literally scores of illustrations could be marshaled, but a quick review of a few should provide a flavor of the extent to which electronic materials have been the leading proof in important cases:

- **Merrill Lynch Investment Scandal.** A number of shocking e-mails established that this huge Wall Street firm issued misleading stock analyses so as not to jeopardize possible investment-banking business.[10] For example, an e-mail "from a Merrill Lynch analyst called the stock of a certain Internet company 'a piece of junk' and 'a powder keg.' At the same time, Merrill Lynch was giving the company – a Merrill Lynch client – the firm's highest stock rating. That e-mail, and others like it, led Merrill Lynch to announce the $100 million settlement of civil enforcement proceedings last year."[11] These revelations led not only to the return of millions of dollars to wronged investors in successful litigation triggered

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[9] One survey of case law examining only one type of electronic evidence – e-mail – found that between 1997 and the first half of 1999 there were more than 375 judicial decisions in which e-mail played a significant role in resolving the issue. Samuel A. Thumma & Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L. J. 1, 12 (1999); *see also* Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 329 n.12 (2000) (listing cases involving incriminating e-mail).

[10] *See, e.g.*, Randall Smith, *E-Mails Link CSFB Research with Banking*, THE WALL STREET JOURNAL, Nov. 27, 2002, at C1; Erik Portanger, *Now, Goldman Analysts Have E-Mail Issues*, THE WALL STREET JOURNAL, Nov. 26, 2002, at C1.

[11] Lesley Friedman Rosenthal, *Electronic Discovery Can Unearth Treasure Trove of Information or Potential Land Mines*, 75 New York State Bar Ass'n Journal 32 (Sept. 2003)

by the Attorney General of New York, but also led to industry-wide reforms to prevent future recurrences. If the revealing e-mails had never come to light – either because they had been put on back-up tapes or overwritten after 30 days – then it's entirely possible that these abuses would have gone undetected.

- **Microsoft Antitrust Litigation.** The landmark litigation initiated by the Department of Justice and numerous state attorney generals depended very heavily upon information stored in digital formats. For example, when Microsoft Chairman William H. Gates offered self-serving explanations of the corporation's conduct, government lawyers relied heavily on Microsoft's own e-mails to refute his remarks and to challenge numerous convenient failures of memory.[12] The cases of the state and federal governments also relied heavily on electronic materials. Importantly, this crucial evidence was only produced after the court rejected Microsoft's vigorous claims that it would be too burdensome to do so.[13]
- **Fen/phen diet pill products liability litigation.** "Some of the most embarrassing evidence against American Home, meanwhile, emerged in internal e-mail exchanges among company employees, unearthed by computer consultants for the plaintiffs. One included the lament of a functionary concerned about spending the

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[12] James V. Grimaldi, *The Gates Deposition: 684 Pages of Conflict*, THE SEATTLE TIMES, March 16, 1999, at A1.

[13] Kim S. Nash and Patrick Thibodeau, *What's in a database?*, ComputerWorld (Oct. 19, 1998) ("As the government opens its antitrust case against Microsoft Corp. this week, state and federal lawyers will bring to court sales and pricing evidence fresh from Microsoft's own databases. Lawyers for the U.S. Department of Justice and 20 states visited the vendor's Redmond, Wash., headquarters last week with a court order allowing them to examine about 4 G bytes of sales data stored in Microsoft's own SQL Server databases. Microsoft had earlier said the databases were too complicated and proprietary to reproduce, as the government requested several weeks ago.").

rest of her career paying off 'fat people who are a little afraid of some silly lung problem,' an apparent reference to a rare but often fatal condition that some of the diet-pill users developed.[14]

- **Numerous Employment Civil Rights Claims.** In litigation over employment practices the significance of e-mail evidence has grown exponentially, with plaintiffs often offering evidence of discrimination, harassment, or retaliation in the form of e-mail correspondence.[15]
- **Vioxx Products Liability Litigation.** "By 2000, one email suggests Merck recognized that Vioxx didn't merely lack the protective features of old painkillers but that something about the drug itself was linked to an increased heart risk. On March 9, 2000, the company's powerful research chief, Edward Scolnick, e-mailed colleagues that the cardiovascular events 'are clearly there' and called it a 'shame' . . . But the company's public statements after Dr. Scolnick's e-mail continued to reject the link between Vioxx and increased intrinsic risk."[16]

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[14] Richard B. Schmitt, *The Cybersuit: How Computers Aided Lawyers in Diet-Pill Case*, THE WALL STREET JOURNAL, Oct. 8, 1999, at B1.

[15] Thumma & Jackson, *supra* note 6, at 13-15; *see also, e.g., Knox v. Indiana*, 93 F.3d 1327, 1330 (7th Cir. 1996) (harassing e-mails from supervisor); *Strauss v. Microsoft Corp.*, No. 91 Civ. 5928, 1995 WL 326492, at *4 (S.D.N.Y. June 1, 1995) (e-mails manifesting discriminatory attitude on the part of a supervisor); *Aviles v. McKenzie*, No. C-91-2013-DLJ, 1992 WL 715248, at *2, 10 (N.D. Cal. Mar. 17, 1992) (e-mail messages showing that plaintiff engaged in whistleblowing activity).

[16] Anna Wilde Matthews and Barbara Martinez, *E-Mails Suggest Merck Knew Vioxx's Dangers At Early Stage*, Wall Street Journal; Nov. 1, 2004 at A1.

- **Boeing Stock Fraud.** Plaintiffs ultimately received 14,000 back-up tapes in a warehouse that allegedly "showed stock fraud," and led to a "very good" settlement.[17]

- **Marsh & McLennan Bid Rigging.** A Marsh & McLennan executive asked a manager of a big insurance company "in an e-mail message to send someone to a meeting to pretend to make a bid for an insurance policy being sought by a customer – even though Marsh had already decided to steer the business to another insurer that agreed to pay a kickback to Marsh. The e-mail message – written in 2001 and disclosed last week as part of a New York State lawsuit asserting that Marsh, Inc., a unit of Marsh & McLennan, cheated customers – even made a joke about creating an illusion of competition."[18]

- **IBM Age Discrimination.** "E-mails from benefits consultants to top human-resources executives at International Business Machines Corp. in 1999 give a detailed look at how some of the company's pension changes would affect younger versus older workers and perhaps cause thousands of employees to stop building a new benefit for several years. The memos were exhibits in the court case decided last week, in which a federal judge in the Southern District of Illinois ruled that IBM had discriminated against older workers when it changed to a cash balance pension plan in 1999."[19]

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[17] Ashby Jones, *What A Mess! For corporations, pileup of electronic data could be trouble waiting to happen*, The National Law Journal, Dec. 2, 2002 at C-6.

[18] Alex Benenson, *Spitzer's Latest Suit, Like Others, Cites Indiscreet E-Mail*, New York Times (Oct. 18, 2004).

[19] Ellen E. Schultz, *IBM Memos Show Awareness of Pension Moves*, Wall Street Journal, Aug. 7, 2003 at A-3.

The experiences of TLPJ and its members confirm that electronic evidence is, more and more, making a difference in litigation and often crucial to the just outcome of a case.

II. THE PROPOSED AMENDMENTS WILL ENCOURAGE ABUSES THAT WILL MAKE IT HARDER FOR PLAINTIFFS TO OBTAIN IMPORTANT ELECTRONIC INFORMATION.

A. The Data Establishes that Stonewalling – the Concealment, Refusal to Produce or Even Destruction of Evidence Is the Greatest Problem With the Discovery System In Federal Courts.

Despite an intense corporate lobbying campaign to create the impression that excessive discovery requests for electronic information is a widespread problem, TLPJ knows of no convincing empirical evidence to support that view. Rather, previous empirical studies of discovery in general found that "stonewalling" – the failure to respond to discovery requests adequately and in a timely manner – was by far the most common form of discovery abuse in document production. In this crucial respect, TLPJ is aware of no empirical studies that show problems with electronic discovery are significantly different in kind or degree from problems with traditional paper discovery. Historically, the most serious and widespread abuses of discovery were rooted in a core, basic incentive: the desire of wrongdoers not to get caught. A wealth of evidence establishes that this incentive – and the resulting behaviors of concealment and suppression and destruction – are at least as problematic with respect to digital and electronic discovery as they are with respect to traditional paper discovery.

In the context of document discovery generally, a 1997 empirical study on discovery commissioned by the Advisory Committee plainly established that stonewalling, not excessive requests, is the most widespread problem. It found that 84 percent of the attorneys in its sample used document requests in their cases, 28 percent of those complained that a

party failed to respond to document requests adequately, and 24 percent reported that a party failed to respond in a timely manner.[20] Only 15 percent of respondents complained that an excessive number of documents were requested.[21] In other words, nearly twice as many respondents complained of a failure to respond adequately (one form of stonewalling) than complained of excessive requests. Interestingly, even defense attorneys were more likely to complain about stonewalling than excessive requests, by a margin of 24 percent to 19 percent.[22] Earlier empirical studies show that widespread stonewalling has long been a problem. For example, in a survey conducted in the early 1980's, one-half of 1,500 litigators surveyed believed that unfair and inadequate disclosure of material prior to trial was a "regular or frequent" problem.[23]

B. There is Already a Major Problem With Major Corporations Destroying Crucial Electronic Evidence.

Neither empirical evidence nor common sense suggest that stonewalling would tend to be *less* of a problem when it comes to electronic discovery. Indeed, anecdotal evidence in the digital age suggests that responding parties continue to routinely refuse to produce discoverable materials or deny that they exist, construe what is discoverable in the most

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[20] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540, 574-75 (1998).

[21] *Id.* at 575.

[22] Id.

[23] Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 598-99 (1985).

narrow way possible, and engage in dilatory tactics to delay or avoid production of unfavorable "documents," whether they are in paper or electronic form.[24]

It should come as no surprise that corporate defendants sued or investigated in cases of serious wrongdoing have been caught repeatedly destroying or attempting to destroy crucial electronic records. In one illustrative TLPJ case, a party willing to destroy paper documents rapidly graduated to the practice of destroying electronic and digital evidence. Two days after the complaint was filed in this consumer deception class action, TLPJ learned that one of the defendants in the case (a large, well-known financial institution) had placed literally dozens of garbage bags of documents in a dumpster. One of the bags was recovered by an employee of a business neighboring the defendant, who had read about the lawsuit in a newspaper. The bag proved to be filled with documents related to the case. The only sanction visited upon the defendant for this conduct was the entry of an order prohibiting further destruction of documents. Unfortunately, this defendant continued its stonewalling practices with its electronic documents. Several years further into the litigation, a defense witness revealed in a deposition that the defendant had systematically destroyed a great many highly relevant electronic documents, mostly fields of data from a database relating to the transactions at issue. (This revelation contradicted the company's previous sworn interrogatory answers and violated the court's order prohibiting further destruction of documents.) The information was never recovered, and made it much more difficult for the

[24] Mark D. Robins, *Computers and the Discovery of Evidence – A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 424-25 & nn. 58-60 (1999) (collecting cases addressing a failure to produce electronic data or evidence).

plaintiffs to prove their case (although we did ultimately succeed in securing significant relief for our clients).[25]

TLPJ's experience in this case is hardly unusual. Even a casual reader of both the mainstream and legal press has encountered quite a few stories about corporate wrongdoers destroying important digital and electronic evidence for the evident purpose of concealing the truth about their conduct. Here are just a few illustrations:

- **Arthur Andersen.** "Andersen employees destroyed thousands of Enron-related documents, even though it knew of an informal inquiry into Enron by the SEC. Andersen maintained that the shredding was routine compliance with a policy design to protect client confidentiality. In reality, the destruction was initiated by Andersen lawyers and managers with a newfound interest in the firm's thereto fore-ignored document retention policy, only after the SEC inquiry had commenced. Andersen's inconsistently applied policy, and its failure to suspend it when required, was a major factor in the firm's obstruction of justice convention and ultimate demise."[26]
- **Fen/phen Wrongful Death Case.** In a wrongful death action arising out of the use of the diet pill combination known as fen/phen, a defendant corporation repeatedly asserted that it had no back-up tapes containing e-mails relevant to the litigation

[25] We recognize that the proposed Safe Harbor amendment to Rule 37 would not have protected this specific conduct, in light of the fact that a court order had been entered barring the destruction of these documents. Nonetheless, we describe this case to illustrate the broader point that corporations have strong incentives to – and all too often are willing to – destroy important electronic and digital evidence. This is relevant to the extent that we are correct, as we argue below, that the proposed amendments to Rules 26 and 37 enhance these incentives or protect or enable these behaviors.

[26] Rosenthal, *Electronic Discovery Can Unearth Treasure Trove*, supra, at 34.

and thwarted plaintiffs' efforts to depose the person most knowledgeable about the company's back-up system.[27] Nevertheless, more than 18 months after the applicable request for production had been served, the defendant identified thousands of back-up tapes that potentially contained responsive e-mails.[28]

- **CSFB Fraud.** "These [e-mail] messages show that at the time he urged his colleagues to discard documents, Mr. Quattrone already had been told about three investigations of CSFB, including a federal grand-jury probe that had generated a subpoena to the firm, according to people familiar with the situation."[29]
- **Fraud Rollover Case.** U.S. District Judge Robert W. Gettleman commented that "his experience with E350 litigation led him to the conclusion that a deliberate pattern of misrepresentation had been woven into Ford's defense. . . . During a Jan. 21 pretrial hearing, Gettleman found Ford had willfully concealed ["computer modeling"] test data demonstrating that the E350 was prone to rollovers."[30]
- **Rambus, Inc. Patent Litigation.** "In September 1988 Rambus, Inc. began to implement its new 'document retention' program. The program was inaugurated on a day that was proclaimed 'Shred Day' by Rambus's senior executives. Employees were given burlap bags and were encouraged to clean their offices of all unneeded documents. . . . Countless numbers of electronics files, including

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[27] *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, at *2-4 (Mass. Super. June 16, 1999).

[28] *Id.* at 4.

[29] Charles Gasparino, *How a String of E-Mail Came to Haunt CSFB and Star Banker*, Wall Street Journal, Feb. 28, 2003 at A1.

[30] Michael Bologna, *Ford Settles Van Rollover Case After Federal Judge Castigates It's Conduct*, Product Liability (BNA) March 3, 2003 at 180.

e-mails, were destroyed as well. . . . Rambus implemented its document retention program at a time when it anticipated future litigation."[31]

- **Radiation victims challenge to the VA.** In *National Association of Radiation Survivors v. Turnage*, the defendant Veteran's Administration not only undertook to destroy potentially discoverable paper files during the pendency of the litigation, but also persistently failed to produce certain computer data which was clearly responsive to a number of discovery requests propounded by the plaintiff class.[32] Throughout the litigation, the defendant falsely insisted that the information sought by the plaintiffs was not stored on computer but was obtainable only through a manual review of millions of claim files.[33]
- **Walmart Litigation.** In one recent case, a federal court held that Wal-Mart falsely asserted that it did not have the computer capability to track the purchase and sale of goods at issue.[34]

Even where unintentional, as one court found, a "haphazard and uncoordinated approach to document retention indisputably denies its party opponents potential evidence to establish facts in dispute."[35] A startling 68 percent of respondents to the ABA survey in 2000 said their clients rarely or never took steps to stop automatic overwriting of electronic

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[31] M. Sean Royall, *The Art of Destruction*, Am Law Tech 32 (Sept. 2004).

[32] 115 F.R.D. 543, 549, 555 (N.D. Cal. 1987).

[33] *Id.*

[34] *GFTM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP, 2000 WL 335558, at *2 (S.D.N.Y. March 30, 2000).

[35] *In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598, 615 (D. N.J. 1997) (drawing adverse inference and awarding sanctions of $1,000,000 for repeated incidents of document destruction).

data, even after notice of a filed lawsuit.[36] For example, in *United States v. Koch Industries, Inc.*, the defendant in a False Claims Act case destroyed computer tapes "at a time when they should have been preserved as potentially relevant evidence in imminent or ongoing litigation."[37] Although no purposeful evasion could be proven, the court found the defendant negligent in its lackadaisical approach to preserving information for pending litigation which allowed computer tapes to be routinely scratched by company librarians.[38]

C. The Proposed "Reasonably Accessible" Standard Will Encourage Corporations to Make Most Electronic Evidence "Inaccessible."

Under the proposed amendments to Rule 26(b)(2), a party would not have to provide electronically stored information in response to a discovery request if it decides that the information is not "reasonably accessible." The Note accompanying the proposed rule explains that this rule is required because of the staggering volume of electronically stored information and the variety of ways in which such information is maintained. It goes on to say that "reasonably accessible" electronic information would include information the party routinely uses – sometimes called "active data." The Note also gives examples of information generally not considered to be reasonably accessible: information stored solely for disaster-recovery purposes that may be expensive and difficult to use for other purposes (*e.g.*, back-up tapes); "legacy data" retained in obsolete systems that are no longer in use; and information deleted in a way that makes it inaccessible without resort to costly and uncertain computer forensic techniques.

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[36] Enos, supra note 2, ¶ 6.

[37] 197 F.R.D. 463, 482-83 (N.D. Okl. 1998).

[38] *Id.* at 483-84.

Under the proposed rule, if the requesting party moves to compel the discovery of this information, the responding party would have to demonstrate that the information is not reasonably accessible. Once that showing is made, the court may still order the party to provide the information at issue if the requesting party shows good cause.

TLPJ and many of its members are concerned that the fact that the responding party can self-designate what's "accessible" or not gives responding parties the opportunity to throw up obstacles to discovery. We are also troubled by the fact that it would change the existing presumption in the FRCP – that *all* non-privileged information relevant to the claim or defense of a party is discoverable. Instead, under the new rule, electronic information that is not "reasonably accessible" would be presumptively outside of the scope of discovery. This differs from the approach in leading case law which applies a multi-factor test to determine whether cost-shifting is appropriate when dealing with a discovery request for inaccessible electronic data, but assumes that such data, to the extent relevant under Rule 26(b)(1), is at least discoverable. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318, 322 (S.D.N.Y. 2003).

We would suggest that technology evolves to meet the desires and needs of the customers who need it. If large corporations have strong incentives to be able to label large bodies of data "inaccessible" – because doing so will shield them from scrutiny and avoid the kinds of scandals described above when they commit wrongdoing – then technologies will adapt. Systems will be developed whereby experts can plausibly insist that all kinds of data are "inaccessible," and thus non-discoverable. If the current rule continues, however, that such materials must be produced except in cases of undue burden, corporations will have

strong incentives to develop systems that make it cheaper and easier for them to search media such as back-up tapes and legacy data.

It is also hard to see where the logic of this proposal might lead. The proposed rule could pave the way to future adoption of a rule presumptively excluding from discovery paper documents that are not "reasonably accessible" because, for example, they are stored in a giant warehouse in some remote location among millions of other irrelevant documents.

D. The Proposed "Safe Harbor" Provision Will Encourage Corporations to Regularly Destroy Electronic Information At Short Intervals.

The proposed amendment to Rule 37 would create a new subdivision (f) to protect a party from sanctions under the FRCP for failing to provide electronically stored information lost because of the "routine operation of the party's electronic information system." This "safe harbor" would not be available if the party violated a preservation order issued in the action, or if the party failed to take reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. The Note accompanying the proposed rule explains that the new section is intended to address the contention that suspension of the automatic recycling and overwriting functions of most computer systems can be "prohibitively expensive and burdensome." The proposed rule does *not* attempt to define the scope of the duty to preserve, and does *not* address the loss of electronically stored information that may occur before an action is commenced.

We are concerned that this "safe harbor" would encourage corporations to set up computer systems that "routinely" overwrite or purge data at very short intervals in order to thwart discovery in litigation. The illustrations given in Part II-A above show how significant this change would be. Few if any of the e-mails that exposed major corporate wrongdoing had been drafted within one month of coming to light. If corporations are

encouraged to (and do) destroy e-mails and other data that quickly, this kind of crucial evidence will be lost forever. This is particularly important with respect to cases that take many years to litigate. Within the last few years, TLPJ has settled two consumer class action cases (one against an HMO, and one against a sub-prime finance company) that took nine (9) years to litigate, and that involved several trips to appellate courts. No discovery (much less class-wide discovery) had been permitted for the first five years in either case, as the courts had been initially concerned with questions of law. If the corporate defendants in those cases had been permitted to overwrite all of their electronic data without any consequence, then the plaintiffs would have been unable to identify the cheated class members and would not have been able to provide a remedy to them.

Some of the advocates of the proposed safe harbor amendment have argued that companies adopting aggressive policies of overwriting computerized data are merely engaged in good business practices. Several committee members have posed questions to the effect of "Why should a corporation keep e-mails longer than a month?" In many cases, however, corporate employees would choose to keep materials that help them to remember and keep track of work. In other words, if employees were permitted to go about their work purely from the standpoint of conducting business, they would retain these records. Nonetheless, in many cases employees have been (or will be) directed not to do so because high-ranking corporate officials are concerned about revelations emerging in some future litigation. A particularly direct communication to this effect came to light in a recent lawsuit involving Microsoft:

> Microsoft Corp. developed policies stressing the systematic destruction of internal emails and other documents crucial to lawsuits it has faced in recent years, a California software company alleges.

> Burst.com, in court papers unsealed this week, also accuses Microsoft of destroying e-mails crucial to Burst's lawsuit against the software giant even after the trial judge ordered it to retain the documents. . . .
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> The Motion mentions an e-mail on Jan. 23, 2000, in which Jim Allchin, a Microsoftt senior vice-president, told the Windows Division to purge e-mails every 30 days: **"This is not something you get to decide. This is company policy. . . . Do not archive your mail. Do not be foolish. 30 days."**[39]

This exchange is exceptionally revealing. Many Microsoft employees would clearly have liked – in the routine performance of their work – to retain e-mails for some normal period of time. Instead, corporate higher-ups are directing them to destroy these materials. In light of the fact that many of Microsoft's serious legal troubles in the past were only exposed due to the existence of electronic evidence, this corporate policy can hardly be hidden under a veneer of good business practice that is unrelated to issues of litigation.

TLPJ also suspects that the proposed Safe Harbor provision will likely inject a new layer of complexity into the preliminary stages of cases. Because the rule protects corporations that overwrite and thereby destroy electronic and digital information unless (among other things) there is a court order prohibiting such destruction, plaintiffs will likely begin each case with a motion asking the Court to order the defendant not to overwrite information likely to prove important in a case. This will add a new step into an already event-laden discovery process, and delay discovery in many cases by some significant period of time. It is currently not necessary to file such a motion in many jurisdictions, because the law of spoliation in many states already prohibits the destruction of such materials.

As the foregoing makes clear, TLPJ strongly believes that no "safe harbor" rule should be created. If the Committee does decide to proceed with some such rule, however,

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[39] Foster Klug, *Microsoft Accused of E-Mail Scorched Earth Policy*, The Associated Press, Nov. 18, 2004 (emphasis added).

TLPJ urges the Committee not to adopt any rule that reduces the obligation of parties to preserve evidence. Under the proposed rule, it appears that no obligation to preserve evidence arises until after litigation formally commences. Under the leading case setting forth current law in this area, however, Judge Scheindlein's thoughtful and influential decision in the *Zubulake* case, the duty to preserve electronic evidence may attach at the moment that litigation is "reasonably anticipated."[40] The *Vioxx* case discussed in Part I above gives one illustration of the importance of this point: in that case, the pharmaceutical manufacturer knew of evidence that the medicine might cause serious side-effects well before any potential victims knew of these issues. Under the "reasonably anticipated" rationale of *Zubulake*, it would presumably have been improper for the manufacturer to destroy this key evidence at this point. If a safe harbor rule is to be adopted, it should certainly not remove such an obligation.

E. Narrowing the Discovery of Electronic and Digital Information Will Make It Harder, If Not Impossible, for Many Plaintiffs to Pursue Valid Claims.

Litigants, and especially plaintiffs, must have access to evidence in order to assemble the facts they need to prove their cases. Given that so much information exists in electronic form – and often only in electronic form – liberal discovery access to electronic information must be preserved. Because we believe, as set forth in Part II above, that the proposed amendments to Rules 26 and 37 will limit or impede access to much electronic discovery, we believe that these proposals will favor litigants who wish to provide less information, which is usually defendants.[41]

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[40] *Zubulake v. NBS*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[41] See Jeffrey W. Stempel, Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform," 64 SUM LAW & CONTEMP PROBS. 197, 198 (2001).

Thus, civil rules permitting the liberal discovery of electronic information are both appropriate and necessary to preserve access to the civil justice system. As Magistrate Judge Schenkier wrote in a decision involving electronic discovery:

> Our [judicial] system is premised on the view that through th[e] clash of competing stories [presented by lawyers], judges and juries will have the information they need to make a fair decision. In our system of civil litigation, the discovery process is the principal means by which lawyers and parties assemble the facts, and decide what information to present at trial.[42]

IV. THE PROPOSED AMENDMENTS ARE UNCESSARY.

A. The Current Rules Provide District Courts With Plenty of Discretion to Fashion Fair and Reasonable Solutions to Discovery Issues.

Under the current rules, responding parties are entitled to protection from excessive discovery requests if those requests would pose an "undue burden" on them. This protection is more than adequate to meet the concerns of those who assert that parties sometimes unreasonably request electronic and digital data.

This is particularly true, since it is often unclear whether discovery in a given context will be easier or harder with electronic and digital data. Technology created to monitor the substance of e-mails to ensure company e-mail policies are followed may someday be an easy way to find e-mails relevant to litigation. In some instances, discovery of information in electronic media may be less costly and burdensome than discovery of information from paper files. Keyword searches on electronic files may make searches more efficient as compared to a manual search through voluminous paper files conducted page by page. In addition, in some cases, greater costs of searching through electronic media may be offset by

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[42] Danis v. USN Communications, Inc., No. 98 C 7482, 2000 WL 1694325at *1 (N.D. Ill. Oct. 23, 2000).

lower costs of photocopying, transporting, and organizing electronic documents for trial.[43] And, in some cases, the burden and costs a producing party faces when confronted with an electronic discovery request may be the result of a peculiarly cumbersome computer system employed by the producing party, a cost not within the requesting party's control.[44]

Under existing rules, courts are permitted to take into account these and other circumstances when asked to resolve what electronic discovery should and should not be allowed. Courts, in fact, have begun to develop multi-factored analyses by which to balance the costs and benefits of electronic discovery in each case. [45]

TLPJ believes that by imposing broad new presumptions, the proposed amendments to Rules 26 and 37 might give short shrift to individualized determinations, and thus actually undermine the fair administration of justice and the successful prosecution of meritorious claims. Therefore, we believe that new rules for electronic discovery are unnecessary at best and harmful to the civil justice system at worst.

B. The Claims of Burden From Electronic Discovery Are Often Greatly Exaggerated.

TLPJ believes that rumors of the pervasive use of excessive electronic discovery requests have been greatly exaggerated. There is no empirical evidence that electronic

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[43] Stephen Bird, Electronic Discovery: Technology's Growing New Role in Litigation, LAWYER'S PC, Sept. 1, 2002 (describing new technology that facilitates keyword searches of virtually any kind of text-based file).

[44] See, e.g., In re Brand Name Prescription Drugs Antitrust Litig., Nos. 94C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. 1995); Toledo Fair Housing Ctr. v.Nationwide Mut. Ins. Co., 703 N.E.2d 340, 354 (Ohio Ct. Common Pleas 1996).

[45] E.g., Rowe Entm't, Inc. v. The William Morris Agency, Inc., 205 F.R.D.421, 429 (S.D.N.Y. 2002) (using eight-factor balancing test to decide whether to shift costs of electronic discovery); Bills v. Kennecott Corp., 108 F.R.D. 459, 464 (D. Utah1985) (weighing four factors to decide same).

discovery has been particularly burdensome when compared to paper discovery, or that the costs of electronic discovery exceed its undeniable benefits. In particular, we know of no broad evidence – or even any significant body of anecdotal evidence – to suggest that federal judges are currently tyrannizing corporate defendants by requiring them to disclose excessive amounts of electronic and digital data. We also know of no indication that there is a widespread problem of federal judges entering unjustified sanctions awards against corporations for reasonably failing to produce electronic and digital data.

Extrapolating from prior empirical studies about discovery generally and anecdotal evidence, moreover, we believe that the stonewalling problems rampant in traditional discovery are also widespread in the context of electronic discovery. In any event, until the problems of electronic discovery are well-documented empirically, changes to the civil rules to address electronic discovery are unwarranted.

In TLPJ's experience, many of the estimates that have been offered are greatly exaggerated. A scenario that has been repeatedly played out in courtrooms across America is for a corporation to claim that it could not review various types of electronic materials without spending tens or hundreds of thousands of dollars, and for individual plaintiffs to produce computer experts who then demonstrate that the search can be done for a small fraction of those estimates. A number of reported cases bear witness to this dynamic. In *State Farm Mutual Auto. Ins. Co. v. Engelke*, for example, State Farm claimed that providing information about similar lawsuits from the previous five years would impose on it undue burden because it would require the full-time effort of 27 people for one year to find the information in its paper files.[46] However, cross examination of a State Farm employee

[46] 824 S.W.2d 747, 750 (Tex. 1992).

revealed that the information was readily available in a computer database, and the court rejected State Farm's claims of burden.[47] Even lawyers with large corporate defense firms have acknowledged that the difficulty of tapping into e-data is often exaggerated. *See, e.g., Treasure Trove*, supra at 33 ("Sometimes, a large volume of information on back-up tapes is a 'red herring,' fooling judges (or even an uninformed adversary) into thinking that the amount of data to sift through is unmanageable.")

C. The Proposed Amendments Would Rapidly Become Obsolete.

To say that computer technology has evolved rapidly in recent years would be a huge understatement. Business practices have changed dramatically, as have the capabilities of information technology systems and the media which they employ. Nonetheless, much of the testimony in support of the proposed amendments has focused upon estimates of the current cost of storing and retrieving materials such as back-up tapes and legacy data.

These cost estimates could change in a very short time. If corporations find that they want to be able to access and search data found on back-up tapes and legacy materials, the capability to do so inexpensively would surely rapidly develop. TLPJ urges the Committee not to enshrine specific modifications to the long-standing current rule that discovery should be had except where it would cause an "undue burden," based upon particular cost estimates of specific technologies that are at best snap shots of the current state of a rapidly changing technological environment. "Because this topic is still in its infant stages and because of the rapid and constant changes of the technology, it may be difficult to draft substantive rules today that would still be appropriate five years from now." National Center for State Courts, *Electronic Discovery: Questions and Answers*, Civil Action 7 (Summer 2004).

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[47] Id. at 751.

CONCLUSION

TLPJ strongly urges the Committee not to adopt the proposed amendments to Rule 26(b)(2) and Rule 37(f). In our experience, the greatest problems with electronic discovery (like discovery generally) are stonewalling and efforts to conceal or destroy crucial evidence. We believe that the proposed amendments would encourage these abusive practices, without providing countervailing benefits that would justify the amendments.

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Respectfully Submitted,

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