# TEXAS EMPLOYMENT LAWYERS ASSOCIATION

04-CV-238



February 14, 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 as president and on behalf of the Texas Employment Lawyers Association (TELA) to register our association's forceful opposition to the proposed amendments to the Federal Rules of Civil Procedure relating to electronic discovery. TELA is a voluntary association of Texas-licensed lawyers who primarily represent employees or their representative organizations in legal matters relating to the employment relationship.

As an initial observation, the principal assumption underlying the electronic discovery proposals (*i.e.*, that electronic information is somehow distinct from and must be dealt with differently than all other forms of information because its production entails a greater burden and higher cost) is plainly inaccurate. To the contrary, the experience of our membership (and many of those who have provided testimony to the committee) demonstrates that, in the usual case, the production of such information is most often simpler, swifter and less costly and burdensome than the production and disclosure of information that is not in electronic form. The proposed amendments, however, countenance a distinction where none exists by essentially and unnecessarily establishing a two-tiered system of discovery that treats electronic information as though it were always and inherently more difficult to access than its non-electronic counterparts.

The presence of comparatively sparse anecdotal evidence to support the proposed amendments, which must rely on the exceptional rather than the typical case, hardly justifies the major and expansive overhaul that the proposed changes represent. The evidence

likewise does not justify the undermining of the noble purpose of the federal discovery rules that the proposals will cause if enacted. If electronically stored information indeed enjoys any "distinctive" quality, it enjoys that characteristic only in the atypical case and special requirements should not be imposed in the comprehensive fashion the committee recommends. The current tools available under the federal discovery rules (protective relief, pre-trial conferences and orders) offer substantial and sufficient protection for those parties with cases where electronically stored information is, in fact, a distinctive or dominant feature of the litigation. The current rules allow the parties to tailor solutions to address the unique problems each particular case presents. Put another way, in those cases where special treatment is warranted, the courts and counsel may appropriately deal with any special problems or conditions related to such information, but special rules, if justified in any case, should not be imposed in every case.

In short, the current proposals take a baby-and-bathwater approach to a less than significant problem. They substitute raw expedience and lop-sided strategic advantage for the interests of justice. With that said, we offer the following with regard to two of the proposals.[1]

Proposed Rule 26(b)(2) represents a sea change in the fundamental policy of liberal evidentiary disclosure heretofore embraced by the rules and the courts.[2] Under the recommendation at issue, it is easy to predict that virtually every production request will now be met with the additional objection that the information sought, by virtue of its electronic character, is "not reasonably accessible," thereby precipitating a court battle that will, in practice, prove more costly and burdensome than the production of the information itself.

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[1] Although not specifically addressed in this letter, TELA also questions the need to specially categorize "electronically stored information" as something different from "documents" and "things" for purposes of FED. R. CIV. P. 34. As stated in prior testimony: "Any rule that declares that an electronic document is not a document will quickly prove archaic in a world in which business is increasingly conducted without paper." (Written testimony of D. Summerville, Dallas, Texas, Jan. 28, 2005.) The proposal creates an unnecessary distinction–one that will likely lead to extensive satellite litigation. Likewise, our organization believes that proposed Rule 26(b)(5)(B), which allows a dilatory claim of privilege, is unwarranted. If anything, the accessibility and searchability of electronic information makes a claim of privilege simpler to assess, lodge and defend at the outset.

[2] *See, e.g., Burns v. Thiokol Chem. Corp.*, 483 F.2d 300 (5th Cir. 1973). In describing the error of the defendant's viewpoint there, the *Burns* court appropriately characterized the error of the proposals here: "The point is that open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules. In this case, that focal point has been ignored." *Id.* at 307.

Apart from the absence of any compelling reason to treat electronically stored information differently from any other, the lack of definitional substance to the term "not reasonably accessible" is likewise troubling. While in some cases, certain legacy and backup data may not be reasonably accessible, it most usually will be. With most operating systems, accessories, peripherals and ever-expanding software, backup data maintained for disaster-recovery purposes is easily retrieved and made meaningful. The assumption that such information or data cannot be reasonably had is parochial and erroneous. The term "not reasonably accessible" implicitly (but oddly) assumes that an individual or organization will so wish to store information electronically. (Information that is not accessible, or not reasonably accessible, does not appear to be information at all.) As I discuss further below, this anomaly in the proposed rules, in conjunction with other aspects of the proposed amendments, will give rise to sinister applications.

Indeed, what of the more typical case where the electronically stored information on a terminated employee is placed in an electronic file that is not routinely accessed but is nevertheless easily accessible–at least in comparison to the effort often required to access non-electronic information? Is this information "reasonably accessible" under the proposal? The comments do not appear to answer this question and, if they do, they do not do so clearly. That this is an important question is beyond dispute. In most employment discrimination cases, for example, information about former employees is critical in the proof process. Suppose–as is increasingly the case–that the hard copies of documents relating to the employment of these individuals have been imaged, thereby transforming a "document" case into an "electronic information" case. Because these image files are archived and stored offsite, perhaps at a home office or in a warehouse, does this make the information "not reasonably accessible?" In reality, it does not, but under the proposal it clearly may; and in the context of the comparative ease with which electronic information is created and maintained, is anything more than a few mouse clicks away "reasonably accessible?" The concept of reasonable accessibility in the electronic information litigation context is too shapeless, and thus prone to mischievous manipulation, to be left on its own without further refinement and confinement. In the last analysis, it is doubtful whether in the vast majority of cases parties could legitimately claim that electronic information is not reasonably accessible in the practical sense. The proposal, however, gives them that ability, along with the obvious power and, worse, incentive to manipulate information into a "not reasonably accessible" form.

Our membership is also uneasy with the very concept of "electronically *stored* information." (Emphasis added.) Is some electronic information "unstored?" Does "stored" equate with "archived?" In the non-electronic setting, a file that is an arm's length away is not, in common understanding, "stored," while that same file placed in a box and taken to a warehouse is. Is electronically "stored" information the same as electronically "created" or

electronically "maintained" information? By definition, is all electronic information stored? If so, what is the purpose of the word "stored?" Why not simply use "information contained in an electronic medium?" Imponderables? Perhaps. But those imponderables are a mere motion to compel (or, in the event the changes are approved, countless motions to compel) away.

Equally disquieting in the special treatment of this information is the proposals' failure to account for the common practice of persons or entities who utilize electronic information. Under the current proposals, how should litigants treat (e.g., which tier of the two-tiered discovery systems controls?) information of a hard-copy nature that has been transferred to an electronic medium through imaging? Does that extant hard copy now enjoy lesser accessibility in the discovery process because the information has become electronically stored? What of information that has been created in electronic form and later reduced to a paper medium? Is access to that paper now substantially more difficult because the information is also stored in electronic form? As this non-exhaustive list of questions illustrates, the proposed reasonable accessibility standard does not and will not limit itself to information that is solely maintained or stored in electronic form. To the contrary, the proposal seems all-encompassing and potentially envelops what are now "documents."[3]

Electronic information is fast becoming an ingredient in most litigation. Increasingly rare is the case that does not involve evidence obtained from, for example, electronic communications. These communications often provide critical proof of motive or knowledge in the cases that our members undertake. Whether maintained in a routinely accessed e-mail folder, on a backup tape, disc or deleted file, or in an archived state, such evidence is

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[3] This very communication points up the problem with drawing false distinctions between forms of information based upon the medium in or on which the information is contained. This letter was created in Word Perfect Format, edited, singed with a digital image, converted to Portable Document Format, and ultimately transmitted to the committee as an attachment to a Windows-based e-mail. It was likewise converted to a fax format using Winfax Pro technology and faxed to several individuals. Not once was it reduced to hard copy. This communication will soon be transferred to a special file folder on a networked server, where it will be backed up on a tape drive for disaster-recovery purposes. Thereafter, the communication will also be archived onto a CD and stored. At what point, if ever, in this process does this communication become "not reasonably accessible?" If a hard copy of this communication had been produced in the process, under which set of rules does that copy operate, given that the information contained on it is also "electronically stored?" Arguably, under the proposed amendments, the paper copy enjoys some special protection.

important and almost always easily accessible.[4] Given the evolving technology, the accessibility of such information will undoubtedly increase. Thus, a rule that generally, but perversely, encourages the non-production of such information is unwarranted. Current safeguards relating to burdensomeness are more than sufficient to deal with any specific problems that arise.

It is also short-sighted, if not already archaic, to think of electronically stored information as special or distinct, given that its use is now routine and pervasive. Effectively, the proposed rule encourages and facilitates the non-disclosure of what is, or will soon be, the most prevalent type of information in existence. Rather than recoil from this reality, TELA recommends that the committee acknowledge that electronic information should not enjoy special protection from discovery.

Proposed Rule 37(f) offers a safe harbor from sanctions for the destruction of electronic information where the destruction occurred "because of the routine operation of the party's electronic information system." In practice, this recommendation will encourage the deliberate purging and destruction of evidence through the adoption of a "routine operation" that performs those functions. This is indefensible, particularly given that electronic information is more readily stored and accessed than its non-electronic counterparts. In any event, current law adequately covers the subject matter. No special rule is warranted in the electronic information context, and, certainly, one who destroys electronic information should not be placed in a better position than one who destroys non-electronic information.

Our organization was impressed by the Dallas, Texas, testimony of Darren Summerville of Atlanta, who noted the impact of the proposals on various areas of the law, including employment law. We reiterate a salient portion of that testimony here, as it relates to proposed Rule 37(f):

> [T]he proposed amendment will directly affect the pre-litigation behavior of all but the clumsiest of defendants. The proposed safe harbor provision gives

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[4] In our own practices, electronic information is commonplace. Employees often find their jobs on the internet through the defendant's website, and the applications submitted by them are routinely archived. Employees register for various employment benefits on-line. Personnel polices and benefits information are maintained and accessed electronically. Intra-office communications are accomplished by e-mail, and the days of the hard copy memo are numbered. The employees' evaluation rankings and production statistics are computer-based, as are many of their traditional employment records. What doesn't happen initially in electronic fashion often winds up so, through digitalization. Hard copy information is frequently destroyed.

> a strong incentive for prospective litigants to retool their electronic information retention systems to quickly and comprehensively delete or overwrite data.
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> [T]he proposed amendment to Rule 37, along with the suggested two-tier discovery changes governing accessibility in Rule 26, will signal a need to prospective litigants to reconfigure electronic information systems. Simultaneously, an entity often targeted for litigation will institute a regular and frequent deletion policy, along with a multi-tiered archiving system. The routine deletion policy will eliminate potentially crucial data as a first bulwark against eventual production. The archiving system will then serve as a second shield against discoverability. Both of those layers of protection would be enshrined by the amended Rules, despite an absence of any specific determination of undue burden or the potential relevance of any electronic information that might otherwise be available. That crimped view of discovery flies in the face of the purposes of the Civil Rules, and ill serves the truth-seeking function of the judicial process.

There is no justification for the adoption of proposed Rule 37(f), which will effectively institutionalize an electronic evidence elimination program. Current law can and does adequately deal with the question of the destruction of evidence.

In summary, the discovery of electronically based information should be treated the same as the discovery of any other form of information. Existing law sufficiently protects the interests of information-holders, whether that information is electronic or not. Special rules are not necessary.[5]

In this case, we join with the many others whose opinions are ably characterized by Todd A. Smith, president of the Association of Trial Lawyers of America. The proposed rules

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[5] By treating electronic information differently than other information, the committee is setting the rules on a slippery slope to becoming unwieldy. When Rules 26 and 34 were originally enacted, no one envisioned e-mail or electronic storage on the scale we have today. Nevertheless, those rules have been used, with success, to address and accommodate the discovery of electronic information. The proposals, therefore, target a problem that does not exist. Worse, however, is the committee setting a precedent of addressing, through specific provisions, specific issues that the future may present to us. According electronic information special treatment would seem to require the committee to implement rules governing future specific issues with the unintended result that the discovery rules will become an impediment to economical and efficient litigation.

relating to electronic discovery, he wrote, "are unnecessary, unbalanced in their effect, and represent such bad policy that they cannot be made acceptable through adjustments of language." We also agree that these proposals are not about accessibility or undue burden, which the current rules already address; they are about strategic advantage in the litigation process–advantage that weighs heavily in favor of the largest, most powerful and computer-savvy litigants. Like our sister organization, the California Employment Lawyers Association, "[w]e urge the Committee to adopt rules which will facilitate the search for truth and which will help to 'level the playing field,' a concept that technology should foster rather than frustrate." These proposals fail that test.

TELA thanks the committee for the opportunity to comment on these proposals.

Sincerely,

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