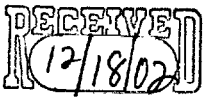
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.



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By Facsimile (415-565-4865 and 202-502-1755) and U.S. Mail

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Mr. Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

Re: **Response to Inquiry from Discovery Subcommittee of Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials**

Dear Messrs. Marcus and McCabe:

Trial Lawyers for Public Justice and the TLPJ Foundation respectfully submit the following response to Professor Marcus' September 2002 open letter requesting public comment on the overarching question of whether changes to the Federal Rules of Civil Procedure (the "civil rules") are necessary to address 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 provide input to the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee").

As we explain below, Trial Lawyers for Public Justice and the TLPJ Foundation believe that civil rule changes directed at electronic discovery – particularly changes that make it harder to obtain electronic discovery – are neither justified nor necessary. Given the proliferation of electronic information in our society, we believe that liberal discovery of such information is essential to allow plaintiffs with valid claims to obtain justice in federal court. Despite a growing chorus of complaints that electronic discovery imposes excessive costs on defendants, no empirical evidence supports that view. Rather, based upon empirical evidence gathered in 1997 and before, it is likely

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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.

I. Interest of TLPJ

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 in which we are involved. It currently has over 2700 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 whether additional rulemaking in the discovery arena is necessary to deal with the relatively recent explosion of digital information in our society.

II. Liberal Discovery of Electronic Information is Essential to Preserving the Civil Justice System

Without question, the ever-increasing, widespread use of computers in this country is revolutionizing the way we work, play, and communicate. According to a

University of California study, 93 percent of all information created during 1999 was first generated in digital form – on computers.[1] In the world of business, up to 70 percent of records may be stored in electronic form,[2] and an estimated 30 percent of all information is never printed on paper.[3] Indeed, many forms of electronic information now routinely generated by businesses cannot be fully reduced to paper form at all.[4] 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 requires a knowledgeable administrator to create a meaningful printed format.[5] Other business records routinely available in hard copy in prior decades may now be available only on computer. Thus, vast amounts of today's business information can be found only in electronic form.

Not surprisingly, our reliance on computers is also changing the way we litigate. Electronic evidence has become increasingly important in cases of all kinds, particularly in cases involving businesses.[6] Notable examples in recent nationwide press reports

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[1] 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)).

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

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

[4] 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).

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

[6] 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.

include federal and state investigations that have uncovered a slew of e-mails tending to support allegations that certain Wall Street firms issued misleading stock analyses so as not to jeopardize possible investment-banking business.[7] Perhaps even more well-known is the fact that electronic evidence played a big part in the government's antitrust suit against Microsoft Corporation. There, government lawyers used company e-mails in part to impeach Microsoft Chairman William H. Gates and relied on sales and pricing evidence from the company's databases.[8] Damaging company e-mails also surfaced in high-profile products liability litigation over the fen/phen diet pill combination and rollover accidents in Ford Explorers.[9] 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.[10] Finally, the experiences of TLPJ and its members confirm that

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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).

[7] *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.

[8] James V. Grimaldi, *The Gates Deposition: 684 Pages of Conflict*, THE SEATTLE TIMES, March 16, 1999, at A1; Kim S. Nash & Patrick Thibodeau, *What's in a Database? Microsoft Sales Evidence. Court Allows DOJ to Check Files in Redmond*, COMPUTERWORLD, Oct. 19, 1998, at 4.

[9] Richard B. Schmitt, *The Cybersuit: How Computers Aided Lawyers in Diet-Pill Case*, THE WALL STREET JOURNAL, Oct. 8, 1999, at B1 (plaintiffs uncovered e-mail from a company employee who complained that she might spend the rest of her career paying off "fat people who are a little afraid of some silly lung problem."); E-mail from Tab Turner, Turner & Associates, counsel to plaintiffs in several accident rollover cases, to Victoria Ni, Staff Attorney, Trial Lawyers for Public Justice (Nov. 14, 2002, 4:52 p.m. PST) (on file with the authors).

[10] 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)

electronic evidence is, more and more, making a difference in litigation and often crucial to the just outcome of a case.

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.[11]

Given that so much information exists in electronic form – and perhaps only in electronic form – liberal discovery access to electronic information must be preserved. Litigants, and especially plaintiffs, must have access in order to assemble the facts they need to prove their cases. Conversely, any amendments to the rules limiting or impeding access to electronic discovery would invariably favor litigants who wish to provide less information, usually defendants.[12]

Current Rule 34 makes clear that discovery of documents "relevant" under Rule 26(b)(1) may include the discovery of electronic data, stating that a party may request the production of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ." Further, the Advisory Committee notes state that document requests may apply to "electronics [sic] data compilations from which information can be obtained only with

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(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).

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

[12] *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).

the use of detection devices . . . ."[13] Courts, in turn, have routinely recognized that electronic information is discoverable pursuant to the rules that govern discovery generally.[14] These rules, as we argue below, provide a flexible framework within which all discovery disputes involving electronic information can be fairly resolved.

III. Rule Changes to Place Limits on Electronic Discovery are Unwarranted Because There is No Empirical Evidence that Electronic Discovery is, on the Whole, Unduly Burdensome

Despite the ubiquity of electronic information and the almost universal recognition that electronic information is and should be discoverable, the corporate community seems largely to have been caught off guard by the impact of the digital revolution on litigation. A 2000 American Bar Association ("ABA") Litigation Section survey reported that 83 percent of respondents said their corporate clients did not have established protocols to deal with discovery requests involving electronic information, and 60 percent said their clients were not even aware that electronic information was discoverable.[15] While many corporations have yet to understand the ramifications of discovery in the digital age, a number of vocal advocates within the corporate defense bar have identified electronic discovery as a galvanizing issue to inspire rule changes designed to further limit the potential for corporate liability.[16] Accordingly, they have sounded the alarm that characteristics unique to electronic information make discovery

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13 FED. R. CIV. P. 34(a) & advisory committee's note (1970).

14 *E.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995), * 1 (computer stored information is discoverable under the same rules that pertain to tangible, written materials); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985) ("It is now axiomatic that electronically stored information is discoverable under Rule 34 . . . if it otherwise meets the relevancy standard prescribed by the rules . . . .").

15 Enos, *supra* note 2, ¶¶ 6-7.

16 *See, e.g.*, Barry Bauman, *E-Discovery and the Opportunity to Reduce Litigation Costs*, METROPOLITAN CORPORATE COUNSEL, Nov. 2002, at 3 (stating that "recent developments suggest that greater opportunities [to reduce corporate defendant liability exposure] lie in the area of procedural rule reform than legislative reform").

of such information particularly burdensome for the responding party and argue that rule changes are needed to prevent abusive and overreaching electronic discovery requests.[17]

However, there is no empirical evidence to support the view that excessive discovery requests for electronic information is a widespread problem. 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, and TLPJ is aware of no empirical studies that show problems with electronic discovery are significantly different in kind or degree from traditional paper discovery.[18] 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

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[17] One such proposed change to limit electronic discovery is a proposed amendment to shift the costs of responding to the requesting party. *See* Memorandum from Richard L. Marcus, Special Consultant, Discovery Subcommittee Advisory Committee on Civil Rules, *Is There a Need for Rule Changes to Address Distinctive Features of Discovery of Electronic Materials?* (Sept. 2002). Cost-shifting proposals for electronic discovery do not differ significantly from previous failed attempts to add to Rule 34 an explicit provision allowing such cost-shifting orders in connection with all document discovery. As TLPJ has argued publicly before, a new cost-shifting provision would be redundant of the current rules, since it is clear that district courts already have the power to impose this sanction upon parties that propound excessively broad discovery requests. Moreover, such a change would send the wrong signal that electronic information is generally off-limits in discovery – an entirely wrongheaded presumption given the prevalence of electronic material – and strengthen the hand of parties who do not wish to produce such information. Finally, it would place too high a price on justice because it "would result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery." *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

[18] *See* Kenneth J. Withers, *Advanced Discovery Issues: Discovery and Protection of Electronic Data*, SG101 ALI-ABA 835, 849 (2002) ("[N]o empirical research directly compares computer-based discovery to analogous conventional discovery . . . .").

respond in a timely manner.[19] Only 15 percent of respondents complained that an excessive number of documents were requested.[20] 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.[21] 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.[22]

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 narrow way possible, and engage in dilatory tactics to delay or avoid production of unfavorable "documents," whether they are in paper or electronic form.[23] For example, 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 and thwarted plaintiffs' efforts to depose the person most knowledgeable about the company's back-up system.[24]

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19 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).

20 *Id.* at 575.

21 *Id.*

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

23 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).

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

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.[25] Similarly, 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.[26] 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.[27]

Worse than the failure to produce electronic information is the all-too-common practice of destroying potentially responsive and relevant electronic information. In one illustrative TLPJ case, a consumer deception class action, two days after the complaint was filed, 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 plaintiffs to prove their case (although we did ultimately succeed in doing so).

Even where unintentional, as one court found, a "haphazard and uncoordinated approach to document retention indisputably denies its party opponents potential

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25 *Id.* at 4.

26 115 F.R.D. 543, 549, 555 (N.D. Cal. 1987).

27 *Id.*; *see also GFTM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP, 2000 WL 335558, at *2 (S.D.N.Y. March 30, 2000) (Wal-Mart falsely asserted that it did not have the computer capability to track the purchase and sale of goods at issue).

evidence to establish facts in dispute."[28] 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 data, even after notice of a filed lawsuit.[29] 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."[30] 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.[31]

In short, TLPJ believes that rumors of the pervasive use of excessive electronic discovery requests have been greatly exaggerated. There is no empirical evidence that electronic discovery has been particularly burdensome when compared to paper discovery, or that the costs of electronic discovery exceed its undeniable benefits. Thus, initial proposals to limit or impede the availability of electronic discovery – such as proposed cost-shifting measures – are unjustified. 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 fact, the ABA survey suggests that widespread unpreparedness and ignorance in the corporate community with respect to electronic discovery may exacerbate the problem of inadequate discovery responses. In any event, until the problems of electronic discovery are well-documented empirically, changes to the civil rules to address electronic discovery are unwarranted.[32]

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28 *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).

29 Enos, *supra* note 2, ¶ 6.

30 197 F.R.D. 463, 482-83 (N.D. Okl. 1998).

31 *Id.* at 483-84.

32 *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) ("[T]his article suggests that reform of federal civil discovery may not have been necessary at all: There is no strong evidence documenting the alleged massive discovery abuse in the federal courts. The rulemakers never established the

IV. Rule Changes are Unnecessary Because Existing Civil Rules Appropriately Allow Courts to Address Discovery Issues on a Case-by-Case Basis

Like the resolution of all discovery disputes, resolution of discovery disputes over electronic information are and should be fact-specific and context-driven. No rule or rulemaking body can predict each and every context in which discovery problems might arise.[33] When they do arise, courts have long been adept at making sure the burdens and costs of discovery are allocated fairly and have explicit rules on which to rely in doing so.[34] Within the framework of the existing civil rules, therefore, judges are fully equipped to exercise their discretion on the basis of the totality of circumstances in each case, even in this age of electronic information.[35] Rule changes should not attempt to curtail judges' abilities to exercise sound discretion on a case-by-case basis.

In some instances, discovery of information in electronic media may be less costly and burdensome than discovery of information from paper files. Keyword

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existence of discovery abuse before embarking on their crusade to revamp discovery. Indeed, existing empirical studies challenged the received notion of pervasive discovery abuse. . . . [T]here must be convincing evidence that a problem exists before any rulemaking group begins the process of rule revision."); *see also* Willging et al., *supra* note 19, at 527 ("Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast . . . , empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally – but with notable exceptions – yields information that aids in the just disposition of cases.")

[33] *See* Stempel, *supra* note 12, at 235-36.

[34] *See, e.g.*, FED. R. CIV. P. 26(b)(1) (limiting what is discoverable to that which is relevant to claims or defense absent "good cause"); FED. R. CIV. P. 26(b)(2) (allowing "proportionality" considerations); FED. R. CIV. P. 26(c) (allowing protective orders to avoid, among other things, "undue burden or expense").

[35] Robins, *supra* note 23, at 449 ("When [discovery] conflicts occur in the electronic medium, there is no reason to believe that the[] tools [in the existing law of discovery] are inadequate to the task, unless and until courts are shown otherwise.").

searches on electronic files may make searches more efficient as compared to a manual search through voluminous paper files conducted page by page.[36] 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.[37] However, cross examination of a State Farm employee revealed that the information was readily available in a computer database, and the court rejected State Farm's claims of burden.[38] 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.[39] In addition, in some cases, greater costs of searching through electronic media may be offset by lower costs of photocopying, transporting, and organizing electronic documents for trial.[40]

The relative burden on the producing party as compared to the benefits to the requesting party will also depend on such factors as what type of electronic data is requested (whether it is active data, embedded data, back-up data, deleted files, etc.), whether the producing party otherwise has reason to retrieve the information (to prepare an expert, for example), the scope and specificity of the request, and whether alternative forms or sources of the evidence exist. 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. [41]

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36 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).

37 824 S.W.2d 747, 750 (Tex. Ct. App. 1992)

38 *Id.* at 751.

39 *See* Marcus, *supra* note 3, at 262.

40 *See In re Bristol Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 442-43 (D. N.J. 2002).

41 *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 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).

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.[42] TLPJ believes that rules cannot be fashioned to accommodate every competing concern that may arise in this area, particularly since technology and ways of organizing and searching for electronic data continue to evolve. We especially worry that, by giving short shrift to individualized determinations, new rules would 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.

V. Conclusion

The widespread use and reliance on electronic information in this country and the world has indisputably changed the way we litigate. Discovery, in particular, has changed because the information we seek to prove our claims is now more likely to be in electronic, rather than paper, form. However, simply because we are embarking on unfamiliar terrain should not, in and of itself, lead us to conclude that rule changes are appropriate or necessary. No empirical evidence suggests that electronic discovery has imposed too great a burden, and nothing suggests that courts are now ill-equipped to handle discovery disputes in the digital age. Today's allegations of runaway costs from electronic discovery are no more supported by evidence than yesterday's allegations that discovery in general was overly burdensome. TLPJ therefore urges the Advisory Committee to reject proposals to change the rules, particularly those which would place additional restrictions on discovery of electronic information.

Please direct any questions regarding these comments to TLPJ Staff Attorney Victoria W. Ni, who can be reached at (510) 622-8150, (510) 622-8155 (fax), or at

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[42] *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. Utah 1985) (weighing four factors to decide same).

vni@tlpj.org, and/or to Staff Attorney F. Paul Bland, who can be reached at (202) 797-8600, (202) 232-7203 (fax), or at pbland@tlpj.org.

Thank you very much.

Sincerely,

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