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RECEIVED 1/6/05

04-CV-073
Request to Testify
1/28 Dallas

January 6, 2005

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administration Office of the U.S. Courts
1 Columbus Circle N.E.
Washington, DC 20544

VIA FAX (202) 502-1755

RE: **January 28, 2005 E-Discovery Hearing, Dallas, Texas**

Dear Mr. McCabe:

At the request of the Texas Trial Lawyers Association, I wish to testify before the Judicial Conference Advisory Committee's Hearing on Civil Rules on January 28, 2005 in Dallas, Texas, on behalf of the TTLA. I have personal practice experience in electronic discovery issues, I have taught the Baylor Law School course on Management of Complex Litigation for a number of years, and I have written on the law and practice of electronic discovery. Please advise if anything further is needed in connection with this request to testify. Written comments to supplement the anticipated testimony will be forthcoming.

Thank you for your courtesy.

Yours very truly,

WILLIAMS, SQUIRES & WREN, L.L.P.

By: James E. Wren

JEW:sm
cc: Mr. Peter G. McCabe (via First Class Mail)
Mr. Willie Chapman, CAE, TTLA (via fax 512-473-2411)
Mr. Guy Choate, President, TTLA (via fax 325-655-1250)

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04-CV-073
Testimony
1/28 Dallas

January 27, 2005

Mr. Peter G. McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

RE: **Proposed Changes in Federal Rules of Civil Procedure Regarding Electronic Discovery**

Dear Mr. McCabe:

Many of the proposed rule changes are positive. In the interest of brevity, my comments are confined to three primary issues of concern.

The proposed language of Rule 37(f), as currently worded, enhances the potential for discovery abuse. First, based on my experience, I question the true need for a "safe harbor" provision. Second, if there is to be a "safe harbor" provision, I urge the Committee to consider the following:

1. I am very concerned that the combination of the "safe harbor" provision with the presumed non-discoverability of electronic information deemed by the holder of the information as "not reasonably accessible" invites abuse. A party which has chosen to and taken steps to make data "not reasonably accessible" via encryption, archiving, etc., and thereafter reasonably anticipates future litigation, may be encouraged to conclude that data "not reasonably accessible" which is subsequently destroyed by "routine operation" is not sanctionable conduct. I recognize that the third paragraph of the Committee Note states, "In some instances, it may be necessary for a party to preserve electronically stored information that it would not usually access if it is relevant and is not otherwise available." That sentence is simply not sufficient to thwart the potential for abuse. A reference to data which the party does "not usually access" could easily

be read as distinguishable from data "not reasonably accessible." Furthermore, the added clause "if...not otherwise available" adds even another condition to potentially allow an argument for destruction of the data. It should be clearly stated that **the purported lack of accessibility of data should not be a basis for considering the data to be non-discoverable and therefore subject to a safe harbor rule.**

2. Creating a "safe harbor" for "routine operation" blesses the destruction of data simply on the basis that it is routine without regard to the existence of a business or technological justification. This is clearly an invitation for companies to set up "routine" data purges at short intervals, without regard to the legitimacy of the justification. There are legitimate reasons for data purges, but there are illegitimate reasons as well. The proposed language creates a permanent presumption that will exist without regard to the presence or absence of business justifications or technological advances in storage and retrieval.

3. The issue of sanctions should be connected to a party's knowledge that electronic information should be preserved. When a party knows, or should know, that important electronically stored information needs to be saved due to potential litigation, there should be no encouragement to continue with destruction. The issue of sanctions should be connected to the reasonableness of a party's actions in light of what is known about the need for preservation, not whether destruction is "routine."

4. At a minimum, the language of the "safe harbor" provision should require that the "routine operation" have been in place before the party suspected it might be the subject of litigation.

With regard to the proposed language for Rule 26(b)(2) and Rule 45, I am greatly concerned about the shift in presumption from discoverability of relevant information to a presumption of non-discoverability whenever a responding party asserts that electronically stored information is "not reasonably accessible." This shift in presumption is particularly troublesome because the presumption is triggered by the assertion of the party who has both the superior knowledge at the outset of litigation to put on evidence in support of the claimed inaccessibility, as well as the means to create inaccessibility (for instance, through a decision to archive or encrypt data) at the outset. This protects a company going to lengths to encrypt or bury data without regard to the true business reason for that action. **This issue regarding access to data should be a cost issue, not an issue of discoverability.** The real issue should be one of balancing the cost borne by respective parties in light of the relevance and utility of information. There should not be a "good cause" showing required as a barrier to discovery of relevant information, independent of balancing of costs, when cost is the real issue.

Finally, I am concerned about the new language in Rule 26(b)(5) and Rule 45 regarding assertion of claims of privilege after production. In many cases, the production of material can be

facilitated by the existence of a "claw-back" or "snap-back" provision, but there need to be reasonable limits on how long the privilege can continue to be asserted after production. If there is no definite end point provided by the language of the rules, the potential for problems is increased. For example:

1. Discovery information is routinely shared among experts and other attorneys. Reclaiming that material months after production becomes truly problematic and creates the potential for secondary litigation.

2. Late assertion of a privilege months after production can disrupt trial preparation at a critical time, rewarding the non-diligent party and penalizing the other party.

I would suggest language something to the effect of the following:

> When a party produces information without intending to waive a claim of privilege it may, within 10 days after learning of the disclosure of privileged material (and in any event no later than 90 days after original production) or within such other time as may be established by court order or agreement of the parties, notify any party that received the information of its claim of privilege. ...

Thank you for the opportunity to provide written and oral comments to the Committee.

Yours very truly,

WILLIAMS, SQUIRES & WREN, L.L.P.

By: James E. Wren

JEW:sm

cc: Advisory Committee on Civil Rules, by hand delivery at public hearing on January 28, 2005