Nobody
<nobody@uscbgov.ao.dcn>
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Salutation:
First: Dahlia
MI: C.
Last: Rudavsky
Org: Messing, Rudavsky & Weliky, P.C.
MailingAddress1: 44 School Street
MailingAddress2: Suite 1000
City: Boston
State: Massachusetts
ZIP: 02108
EmailAddress: mail@mrwemploymentlaw.com
Phone: 617-742-0004
Fax: 617-742-1887
CivilRules: Yes
Comments:

Messing, Rudavsky & Weliky, P.C.
44 School Street,
Suite 1000
Boston, MA 02108

February 15, 2005

Peter G.
McCabe, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United
States
Thurgood Marshall Federal Judiciary Building
Washington,
D.C. 20544

Dear Sir:

We are a Boston law firm that represents employees in labor and employment matters. A large part of our practice involves representing individuals who have been discriminated against on account of race, gender, age, or disability, who have been victims of sexual harassment, or who have been wrongfully discharged in violation of public policy. In all our work, we endeavor to protect individuals' civil rights and promote workplace justice.

We are writing in response to your request for comments on the rules relating to electronic discovery in the proposed amendments to the Federal Rules of Civil Procedure. We are prompted to submit this comment by some troubling aspects of these proposed rules.

In the ordinary course of our work,

discovery always presents a challenge. In employment law, unlike many other fields of civil litigation, most if not all of the evidence the plaintiff needs is held and controlled by the opposing party, typically a business or other organization. Most such organizations store information electronically, and accordingly, our experience has revealed to us the importance of electronically-stored information in pursuing our clients' claims. Finding and obtaining evidence of discrimination, harassment or other forms of unlawful conduct in the workplace is difficult, as the courts have routinely recognized. However, we have discovered that the electronically-stored information generated in the ordinary course of business potentially contains the truth we seek on behalf of our clients.

We have found that e-mail, in particular, is a valuable source of important information. The relative informality of this mode of communication leads to far greater candor than is typically found in formal office memoranda.

The proposed rules on electronic discovery present a real danger that these important sources of relevant and oftentimes crucial information will be lost, and that the information and evidence they hold will never be revealed. Two rules in particular concern us: the rule excluding the obligation to produce evidence deemed to be "not reasonably accessible"; and the provision of a "safe harbor" for parties that engage in what amounts to spoliation of electronically-stored information, so long as destruction of the evidence is accomplished through routine purgation of files.

The proposed rule on "reasonably accessible" electronic information

Under the proposed amendment to Fed. R. Civ. P. 26, a party need not provide discovery of electronically-stored information that it deems not to be "reasonably accessible." We fear that such a drastic change in our current discovery rules would have a devastating effect on our ability to find and obtain information and evidence necessary in the representation of our clients.

Under the current rules, there is no such limitation on the discovery of records. A party must produce discoverable information even if it is difficult to access, unless its production is unreasonably burdensome. The Note to the proposed amendment claims that the limitation on electronic discovery is required because of the voluminous nature of electronically-stored information. We note, however, that traditional discovery also often required searching through voluminous paper records for relevant information, and was done without the aid of computer programs or other electronic tools that facilitate searches of electronically-stored records. In fact, electronically-stored records are usually more easily accessible than paper records, undoubtedly prompting the shift from the maintenance of hard

copies to electronic media in the first place.

We fear
that the proposed rule would interpose an additional obstacle to the discovery of relevant materials, undercutting the potential effectiveness of discovery and further delaying what is already a long, drawn-out litigation process. Although the amendment includes a provision for challenging an opposing party's determination that materials are "not reasonably accessible," the availability of a claim of inaccessibility will no doubt become a routine defense to production, leading to routine challenges and ultimately additional motion practice, adding delay and frustration to litigants' attempts to establish the existence or absence of a valid claim. This scenario would also inevitably drive up litigation costs and overburden an already taxed judicial system.

We
feel that such a limitation is unwarranted and counter-productive. We urge the rulemakers to re-consider the effects of this proposed amendment, and hope they see that any benefit these changes may generate would be overshadowed by the additional burdens. At the very least, we strongly urge the rulemakers to provide a much more thorough explanation of the phrase "reasonably accessible," and allow for more public comment once they have done so. As it stands, the proposed rule gives the producing party too much power to arbitrarily decide whether or not to produce discoverable information. The potential for abuse cannot be ignored.

The proposed rule
against sanctioning parties for non-production due to loss of electronically-stored information

We are also
concerned by the proposed amendment that would provide a "safe harbor" to parties that delete and therefore destroy discoverable information that is stored electronically. Under the current rules, parties may be subject to sanctions under Fed. R. Civ. P. 37 for not taking steps to preserve discoverable information. The proposed amendment includes a provision that prevents a court from imposing Rule 37 sanctions against a party when the destruction of electronically-stored information resulted from the "routine operation of the party's electronic information system." Like the proposed rule limiting electronic discovery to materials that are "reasonably accessible," this rule would frustrate attempts to find and obtain important and potentially crucial information regarding our clients' cases.

Also
like the rule on reasonable accessibility, this proposed rule presents an unacceptable risk of abuse. Some might treat the proposed rule as an incentive to put in place a routine practice of quickly purging electronic records. Short time intervals between such purgings would ensure that there would be no extant evidence of misconduct for potential future litigation. In contrast to

the current rule, where the possibility of sanctions for spoliation serves as a deterrent to the destruction of evidence, the proposed rule would have the opposite effect.

A hard and fast rule barring sanctions against a party with a routine practice of destroying electronically-stored information is unwarranted and counter-productive. Discovery rules are meant to make litigation fairer and more efficient. The effects of the proposed amendments would frustrate these goals.

We urge the rulemakers to re-consider these effects and the need for such a "safe harbor." At the very least, we strongly urge the rulemakers to further explain the types and character of routine deletions which would fall under the contemplated "safe harbor" and allow another opportunity for comment. The rule presents an unacceptable risk of abuse.

Very truly yours,

Dahlia C. Rudavsky, Esq.
Ellen J.
Messing, Esq.
James S. Weliky, Esq.
Joseph K. Kenyon,
Esq.
Paul H. Merry, Esq.
Karl P. Evangelista, Esq.
Messing,
Rudavsky & Weliky, P.C.

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