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October 30, 2008

The Tennessee Supreme Court
c/o Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendments to Tennessee Rules of Civil Procedure Regarding Electronically Stored Information

Dear Mike:

I write to offer some comments with respect to the proposed rules dealing with the issue of electronically stored information. These comments take into consideration the significant work done by the Advisory Commission to the Supreme Court on Rules of Practice and Procedure and the Subcommittee formed by the Commission. These comments also take into consideration the extensive work done in preparing the Amendments to the Federal Rules of Civil Procedure as well as the National Conference of Commissioners on Uniform State Laws in the preparation of their proposed Uniform Rules relating to the discovery of electronically stored information. The comments also take into consideration the many decisions interpreting the Federal Rules of Civil Procedure, the experience of parties in litigation in dealing with the discovery of electronically stored information and the current differences between the Tennessee Rules of Civil Procedure and the Federal Rules of Civil Procedure and to some extent the difference in the types of cases generally under consideration in those courts.

The proposed amendments are for the most part modeled after the amendments to the Federal Rules of Civil Procedure. Given the close parallel between the Tennessee Rules of Civil Procedure and the Federal Rules of Civil Procedure, the Federal amendments are an important starting point in crafting the Tennessee Rules. The existence of a shared approach to resolving electronic

discovery issues in the Federal courts and the Tennessee courts can reduce litigation costs by helping litigants properly assess and comply with their discovery obligations. There are currently significant differences between Federal Rules of Civil Procedure 16 and 26 and the Tennessee Rules which bear some thought. For instance, Federal Rule 16 requires the entry of a scheduling order whereas the entry of a scheduling order is discretionary under the Tennessee Rules. The proposed Rule 16.01 takes that distinction into consideration. However, for clarity, it is suggested that 16.01 be broken down into an (a) and a (b) section with the (a) before the words "in any action" and the (b) before the words "the scheduling order may also include." The only other suggestion with respect to 16.01 is that since Tennessee Rule 26 does not contain the mandatory disclosure provisions of Federal Rule 26, the proposed rule should be rewritten as follows: The scheduling order may also include: (2) Provisions for the discovery of electronically stored information.

The proposed Rule 26.02 is very similar to the Federal Rules and includes the Federal "two tier" accessibility rule (Rule 26.02(b)) in a manner that should allow direct use of the Federal decisions to help guide the courts.

There are two suggestions that I would make with respect to Rule 26.02. Where production from inaccessible sources is nonetheless ordered for "good cause," the issue of cost-shifting remains confused, with Federal decisions being quite diverse on the subject. Therefore, I recommend that the state e-discovery rules clarify the issue by mandating that if a court finds good cause to require production of inaccessible information, it should also presumptively order the requesting party to pay the cost of production. Since blanket preservation of electronically stored information that is not reasonably accessible can be extremely expensive, the rules should also clarify that the duty to preserve electronically stored information that is not reasonably accessible does not arise, absent agreement, until entry of an order requiring such preservation. The following language is therefore suggested:

> "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost, and no duty to preserve information that is not reasonably accessible arises, absent agreement or the entry of an order requiring such preservation after sufficient notice to the party from whom preservation is sought. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonable accessible because of undue burden or cost. If that showing is

> made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court shall specify conditions for the discovery. Presumptively, such conditions will include imposing the reasonable cost of production on the requesting party."

The suggested change preserves the duty of the party from whom discovery is sought to demonstrate that the information is not reasonably accessible. With respect to the committee note to the amendment to Rule 26.02, I note that the first sentence seems to track the Federal Initial Disclosure Rules which do not exist in the Tennessee Rules of Civil Procedure and is therefore not really appropriate.

Proposed Rule 26.02(5) tracks the Federal Rule and I submit is appropriate.

The proposed addition to Rule 26.03 is more troubling. The addition is somewhat confusing and in some respects may be inconsistent with proposed Rule 26.02. The language seems to be copied from Guideline 5 of the Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information (The Chief Justice Guidelines). Those guidelines are intended to assist judges in dealing with e-discovery issues, but they were never intended to be written into the rules. That provision is inconsistent with providing a set of simple rules with which the parties can easily comply. It is submitted that the addition is not only unnecessary, but inappropriate and confusing.

The proposed amendments to Rule 26.06 are equally troubling for a number of reasons and again are unnecessary additions in their entirety. Furthermore, the language of subparagraphs (2) and (3), if adopted, should be revised to delete the word "disclosure" since the Tennessee Rules do not have the disclosure requirements of the Federal Rules of Civil Procedure. Subsection (3), if adopted, should contain only the first paragraph. The provisions of 26.06 seem to be a mixture of Standard 3 and Standard 7 of The Chief Justice Guidelines and are simply unnecessary for the Rules of Civil Procedure. Should they be routinely adopted by the trial courts in cases in which they are not appropriate, it would be extremely burdensome, and likely impossible to comply with in some cases. In addition, that language is in stark contrast with the Advisory Commission comments which are much more measured and track the note to Federal Rule 26(f).

Finally, with respect to proposed Rule 26.06(6), if that section is to be adopted, the first sentence should be modified to read as follows: "The shifting of discovery costs to the requesting party or the sharing of those costs between the

requesting and responding party should be considered when electronically stored information sought is not reasonably accessible information and when restoration and production of responsive electronically stored information from a small sample of the requested electronically stored information would not be sufficient." The reason for that suggestion is that the proposed language "should be considered only when" may be too narrow to cover particular situations that might arise and where cost shifting may be equitable. As previously stated, the Federal Courts are just beginning to come to terms with issues involving cost shifting and the rulings to date are very inconsistent.

No comments are offered with respect to the proposed Amendments to Rules 33.03, 34.01, and 34.02.

Proposed Rule 37.06, 37.06(1) I submit is a repeat of the text to Guideline 5 of the Chief Justice Guidelines and is an unnecessary provision. That proposed rule is almost identical to Rule 26.03 and is unnecessary and not appropriate as a Rule of Civil Procedure.

Paragraph 37.06(2) does track Federal Rule 37(e). However, the "absent exceptional circumstances" language has no real meaning and invites litigation over its meaning. Therefore, the following language is proposed: "A court should not impose sanctions on a party for failing to preserve or produce information lost as a result of routine, good faith operation of an electronic information system. Sanctions should not be imposed unless there has been an intentional or reckless loss of electronically stored information." That language provides the court with a much clearer guideline. It is also recommended that a committee note or comment be supplied based upon the note to Federal Rules of Civil Procedure 37(e) and, in particular, that portion that deals with good faith and routine operation of an information system. The proposed change takes into consideration, as the Federal Rules Advisory Committee noted, that computer systems are developed for business efficiency and not for purposes of litigation. No rationally run business would intentionally make computer systems inefficient for the purpose of frustrating discovery in litigation, but making systems efficient of business purposes sometimes requires even small businesses to move electronically stored information to mediums that are not reasonably accessible for discovery. The cost of not doing so would be prohibitive.

Finally, I offer one comment with respect to Rule 45. When dealing with third-party production of documents, parties not involved in the litigation, the cost of producing electronically stored information can be quite expensive and

therefore the cost shifting provisions I have earlier suggested can be even more important. That language could be inserted into paragraph 45.08(d).

Thank you for any consideration the Court may give to my comments and suggestions.

Respectfully yours,

James M. Doran, Jr.

JMD/ecm

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November 10, 2008

The Tennessee Supreme Court
c/o Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Proposed Amendments to Tennessee Rules of Civil Procedure Regarding Electronically Stored Information

Dear Mr. Catalano:

Lawyers for Civil Justice is pleased to express our strong support of the comments submitted to the Court on October 30, 2008 by James Doran of Waller, Lansden, Dortch & Davis LLP of Nashville, Tennessee in response to Proposed Amendments to Rule 16.01, 26, 33.03, 34, 37 and 45 of the Tennessee Court Rules except in one respect. We suggest that the proposed Rules should be clarified and strengthened in addition to the suggestions in Mr. Doran's letter: In Rule 26.06 (3) and (6) cost shifting on a finding of good cause for production of not reasonably accessible electronically stored information should be **"mandatory"**, not merely "presumptive", in order to establish a brightline rule that will deter unreasonable discovery demands.

Lawyers for Civil Justice is a national organization of corporate and defense counsel representing the leadership of the organized defense bar. LCJ members are hands on litigators and litigation managers and the comments are reflective of their views in light of their real life litigation experiences. LCJ is joined in this comment by the corporations listed below and DRI, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel, altogether representing over 20,000 defense counsel nationwide. Our comments included the input of LCJ and the more than 50 attorneys—both corporate and defense counsel – who participate on the LCJ E-Discovery Committee.

LCJ commends the Court for addressing the increasingly frequent and severe problems posed by e-discovery in modern litigation and the efforts to improve the administration of justice by addressing problems and complexities associated with discovery of electronic information. We are delighted to have participated in this process.

Sincerely,

Greg Lederer
President, Lawyers for Civil Justice

cc: James Doran