LAWYERS FOR CIVIL JUSTICE

1140 Connecticut Avenue, N.W. • Suite 503 • Washington, D.C. 20036
Phone: (202) 429-0045 • Fax (202) 429-6982

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*Member of the Executive Committee

November 14, 2003

Honorable Lee H. Rosenthal
United States District Judge
11535 Bob Casey United States Courthouse
Houston, TX 77002

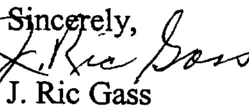
Dear Judge Rosenthal:

Lawyers for Civil Justice respectfully submits the enclosed *LCJ White Paper: Reshaping the Discovery Rules for the 21st Century: The Need for Clear Concise and Meaningful Amendments to the Rules Governing Electronic Discovery.* LCJ is a nationwide coalition of corporate and defense counsel supporting improvements in the civil justice system. Several members of LCJ's "E-Discovery Study Group", who are listed on the last page thereof, have prepared this paper to assist the Advisory Committee in developing rule amendments that fairly and reasonably address the need for guidance in this complex and challenging area. The Group and most LCJ members are hands on litigators and litigation managers and the paper is reflective of the real life experiences of our members in addressing E-Discovery matters.

We commend the Advisory Committee on Civil Rules and its Discovery Subcommittee for their efforts to improve the administration of justice by addressing the problems and complexities associated with discovery of electronic information. Your continuing effort to identify problems associated with e-discovery and identify solutions to these complex legal issues is of enormous value to all practitioners who have become increasingly aware of the significant problems associated with e-discovery.

We would be pleased to serve as a resource for the Committee during any further study of this issue and would be most interested in participating in the upcoming Conference at Fordham Law School on February 20-21, 2004.

Sincerely,



J. Ric Gass
President, Lawyers for Civil Justice

Attachment: White Paper

CC:

Professor Myles V. Lynk
Arizona State University College of Law
John S. Armstrong Hall
P.O. Box 877906
Tempe, AZ 85287-7906

Professor Edward H. Cooper
Univ.of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Professor Richard L. Marcus
University of California
Hasting College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the U.S.
Courts
One Columbus Circle, NE
Room 4-170
Washington, DC 20544

November 13, 2003

LCJ WHITE PAPER: RESHAPING THE DISCOVERY RULES FOR THE 21ST CENTURY

THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO THE RULES GOVERNING ELECTRONIC DISCOVERY

The Civil Rules Advisory Committee of the U.S. Judicial Conference has been considering, for several years, whether or not to propose further amendments to the Federal Rules of Civil Procedure to deal with the increasingly frequent and severe problems of discovery of computer based information, known colloquially as E-Discovery. Now, the Committee is at the point of debating a "first cut" of specific rule amendment proposals to supply needed guidance to practitioners and litigants.

For the reasons set forth in this paper, Lawyers for Civil Justice ("LCJ") strongly supports clear, concise, and meaningful amendments to the Federal Rules of Civil Procedure to address several issues unique to electronic discovery. LCJ's membership consists of corporate counsel, outside defense counsel, and the leadership of the national defense bar.

LCJ's "E-Discovery Study Group" has prepared this paper to assist the Advisory Committee in developing rule amendments that fairly and reasonably address the need for guidance in this complex and challenging area. It deals with the issues covered in the thorough memoranda discussed by the Committee at its October 2-3, 2003 meeting: A Discovery Subcommittee Report, dated April 14, 2003, prepared by the Subcommittee Chair, Professor Myles V. Lynk, and Professor Richard L. Marcus, Subcommittee Reporter, and a detailed September 15, 2003 memorandum by Professor Marcus to the full Committee that suggested possible "first cut" proposals in each of seven issue areas. We hope this paper will help in "refining" a set of rule amendment proposals that might serve as the focus of discussion at the Fordham Law School Conference on February 20 - 21, 2004, in at least the following four areas:

1) Scope – the duty of initial production should extend only to electronic information that is reasonably accessible in the ordinary course of business;
2) Cost – allocate costs to the requesting party if extraordinary efforts are required to access and produce information that is not reasonably accessible;
3) Preservation – create a "preservation safe-harbor" applicable to business systems involving information that is not reasonably accessible in the ordinary course of business at the time of institution of litigation;
4) Privilege – prevent inadvertent disclosure of privileged documents, communications and trade secrets, without creating new pressures for premature production.

In the following pages, LCJ outlines its views on the draft proposals contained in Professor Marcus's September 15, 2003 memorandum. In reaching the conclusions we have reached, we have tried to keep in mind the underlying purpose of the Federal Rules of Civil Procedure, as set forth in Rule 1: to ensure the just, speedy, and inexpensive determination of litigation. Throughout, our goal is to lend our support to the adoption of reasonable Rules which balance the need of producing parties to obtain relevant information with the need to shield responding parties from discovery obligations which are so unduly burdensome as to impose undue obligations on the responding party. While a responding party should be obligated to make reasonable efforts to locate and produce relevant materials in litigation, the 2000 amendments to Rule 26 made it clear that a producing party need not locate every scrap of information in existence that could possibly be construed to be relevant or to lead to the discovery of admissible evidence.

BACKGROUND

We are confident that, as has been its recent practice, the Committee's action will continue to be informed by substantial and continuing input from the Bar. The Subcommittee's April Report notes that during consideration of the 2000 discovery amendments in the late 1990's lawyers repeatedly told the Committee that problems with discovery of electronically-stored, or digital, information was an area that urgently needed attention, and that the difficulties presented by this form of discovery could, in some cases, dwarf the problems with hard-copy discovery on which the Committee was then focused.

Indeed, during the lengthy process of hearings and comments on the amendments to the discovery rules that ultimately were adopted on December 1, 2000, many comments to the Committee expressed serious concern about growing problems arising from the cost, burden and complexity of electronic discovery. Near the end of that process, the then Chair of the Judicial Conference Civil Rules Advisory Committee recognized that electronic storage and retrieval of information presented new problems that the Committee needed to address. *See* Hon. Paul V. Niemeyer, *Memorandum Re: Comment on Letters on Disclosure and Discovery Proposals* (September 1, 1999). However, for a variety of reasons, no effort was made to include E-Discovery proposals in the package of amendments that were adopted in 2000.

Since that time, the growth in electronic discovery has been staggering and many practitioners have supplied the Rules Committee with in depth guidance in identifying the many problems associated with such discovery and specific suggestions for rule amendments that would help solve those problems. *See, e.g.*, Cortese & Wolfe, *Electronic Discovery: Problems and Solutions*, The Metropolitan Corporate Counsel (Vol. 8, No. 4, April 2000); Allman, *Comment on Current Electronic Discovery Issues to Judicial Conference Committee on Rules of Practice and Procedure* (December 9, 2002); *LCJ Letter to the Committee on Rules of Practice and Procedure in response to Inquiry from Discovery Subcommittee*, (December 10, 2002) attached hereto as an Appendix..

As both the frequency of significant E-discovery disputes and the expressions of concern about such disputes increased, and continuing education and practice programs on the subject became more frequent, the Discovery Subcommittee undertook an in-depth study of the nature of the issues raised and the range of possible solutions, culminating in its April 14 Report and Professor Marcus' "first cut" proposals of September 15. We now turn to a discussion of those proposals in the following seven areas:

DISCUSSION

(1) Definition of the subject.

This proposal was included in the September 15 draft so that a single phrase could be invoked throughout the discovery rules to avoid confusion. Any of the three alternatives proposed would serve the purpose: "Electronically-stored data [Digital data] {Computer-based data}", although the phrase "electronically stored *information*" might be an improvement over "*data*". Existing Rule 34 refers to "data compilations" and it is probably unnecessary to do any more than add the phrase "electronically stored *information*" at an appropriate place in that Rule. Of course, what to call the subject is obviously not as important as how it is defined, where any definition is placed in the rules, and, most important, how it affects the scope of discovery, issues discussed below under issue (3).

(2) Including discussion of E-Discovery issues in the early discovery planning –Rule 26(f), Rule 16(b), and Form 35.

Rule 26(f) requires that counsel confer before formal discovery commences and develop a discovery plan (Form 35) that is submitted to the judge before entry of the Rule 16(b) order. The Report noted that "there seems to be widespread agreement that thoughtful attention at this early point to the likely needs of discovery of digital information can reduce or eliminate a number of problems that might otherwise arise later." We agree. There appears to be general support for straightforward amendments to Rule 26(f) and Form 35 that could improve the handling of E-Discovery problems such as the form of production, retention and preservation of digital material, and privilege waiver; and, as well, on an amendment to Rule 16(b) adverting to inclusion of directives about these topics in the initial scheduling order.

Although early drafts contained considerable detail about topics to be discussed at the conference, we believe that the more general description of the topic of the September 15 draft is more appropriate. That proposal would, for example, add a new subparagraph (C) to Rule 26 (f) (3): *"whether any party anticipates disclosure or discovery of electronically-stored data, and if so what arrangements should be made to facilitate management of such disclosure or discovery"*. Corresponding additions would be made to Rule 16 (b) (3) and Form 35. The details as to the topics should be addressed in the Note.

Such additions should serve to signal to the judiciary that, more so than conventional paper discovery, electronic discovery often requires active judicial management and that the meet and confer discussions should be coordinated with and based on the substantive standards, presumptions and "safe-harbor" provisions that we hope will be adopted to guide electronic discovery. For example, the Note might refer to the need to consider, in appropriate cases, among other topics, a specific preservation order where necessary and appropriate, tailored to the unique needs of the case and based on the parties' then current knowledge of the potentially relevant electronic documents and establishing the areas of dispute between them.

Such an approach would avoid the unnecessarily prescriptive "cart before the horse approach" of, for example, a new Local Rule adopted on October 6 by the New Jersey federal District Court that imposes extensive duties "to investigate and disclose" ... computer based information" on counsel before any request for such information has been made. *See* U.S. District Court for the District of New Jersey Local Civil Rule 26.1(d) at http://pacer.njd.uscourts.gov/ Rules tab.

We trust that the Advisory Committee, will adhere to its subcommittee's recommendation, NOT to expand any initial disclosure obligations under Rule 26(a)(1). Although some have argued that detailed disclosure of information about computer systems would serve a useful purpose in framing discovery requests, most lawyers and litigants are likely to oppose additional disclosure obligations, which are particularly inappropriate for E-Discovery. Such obligations would impose significant burdens on litigants without providing correspondingly useful information, since generalized disclosures of information about computer systems, in the absence of specific discovery requests, do not provide much in the way of useful information.

(3) Definition of document -- Rule 34.

Rule 34, "Production of Documents and Things", states that a request may seek "data compilations from which information can be obtained." Rule 26(a) (1) (B), "Initial Disclosures", similarly refers to "data compilations." Although there is no disagreement that these descriptions include electronically stored information, the Committee is considering amending the rules to include a more modern and accurate definition of the various types of digital information that can be sought through discovery.

The September 15 draft suggested that Rule 26 be amended to add a new subparagraph: *"(h) Electronically-stored data. (1) Scope of electronically-stored data. Electronically-stored data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers."* It seems to us that adding such a broad definition entitled "scope" to Rule 26 runs the serious risk of confusing what is meant by electronic information with the permissible scope of discovery of such information that would exceed the structure and purpose of the discovery rules, the scope

of discovery as cabined by Rule 26 (b), and the Committee's rulemaking power under the Rules Enabling Act.

Surely the Committee does not intend to expand the scope of discovery by whatever amendments may be adopted, merely to deal with electronic data. And, in fact, a separate definition of the "scope" of electronic information would create more problems than it would solve. The proffered definition makes the point that electronic information can permeate and appear in all sorts of unexpected places. This type of concern is not new.The Rule 34 "document" concept has worked quite well even though, for example, Xerox machines and electronic typewriters were unknown in 1938. If someone wants to push the envelope to get at, for example, the information on FEDEX delivery pads, that person can request the information and the discovery procedures (including objections) will be used to resolve the issue. Simply amending Rule 34 by using something like the phrase "information maintained in electronic form" wherever specificity is needed, should suffice.

Therefore, a common sense approach to the definition of "documents and things" that should be acceptable to most lawyers and litigants would be to add a few words to Rule 34(a)(1) to confirm that it covers electronic information, perhaps as follows: *"...any designated documents (including writings...and other* **data or** *data compilations from which information* **in electronic or any other form** *can be obtained ... which constitute or contain matters within the scope of Rule 26(b)...."* (New words in **bold**.)

One area the Committee has explored is excluding from the definition of document "meta data" and "embedded data" (electronic items created by software that do not appear on the printed page), which the user may not know is coming into existence. We do not think that this is an area that can or should be dealt with in the Rules by definition. The Rules probably should not contain specific provisions for the production of metadata and embedded data, which raise very difficult and technologically complex definitional and preservation issues. There is simply no clear, uncomplicated, or agreed definition of "metadata" or "embedded data" As to preservation, must every version of a document, including "metadata" and "embedded data," be preserved? How? When? Why, if it serves no business purpose and is unrelated to a specific preservation order in a particular case? Such requirements would go far beyond the appropriate reach of the Federal Rules of Civil Procedure and should be left to determination in specific cases.

(4) Form of production.

(a) Documents. The Committee is also considering a rule amendment that would serve as an alternative to (or in addition to) directing the parties to discuss the form of production in their Rule 26(f) conference. The September 15 memorandum put as the first question in this area: "...whether it should be mandatory that the party requesting production specify the form of production it desires?" We would favor a mandatory approach that required the requesting party to specify the form of production as a better way to set up discovery and to focus on the information that is relevant and material in the case at issue. The proposal in that memorandum does the job: *"Rule 34 ... (1) Form of the*

Request.... (D) specify the form in which electronically-stored documents are to be produced. Additional amendments to Rule 34 should explicitly provide the producing party the opportunity to object to the requested form, and to produce the electronic materials in the form in which they are ordinarily created **or** stored **or** in any other reasonably useable form. The rule amendment should also state that the materials need be produced only in one form unless the requesting party shows good cause for production in multiple forms.

Such amendments should minimize satellite litigation over the form of production of electronic information and reduce the cost and burden of often duplicative discovery requests. Compare, *e.g., McNally Tunneling v. City of Evanston,* No. 00 C 6979, 2001 WL 1568879 *4 *5 (N.D. Ill. Dec 10, 2001) (denying motion to compel production of computer files already produced in hard copy because only vague assertions supported need for electronic versions) with *Anti-Monopoly v. Hasbro*, No. 94 Civ. 2120, 1995 WL 649934, *2 (S.D. N.Y. Nov. 3, 1995) ("production of information in 'hard copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form").

These amendments also would satisfy the need of the court and litigants to resolve form of production issues early on before costly and burdensome production is made. In addition, since the form in which documents are stored often dictates the form in which they are produced (particularly for smaller litigants) these amendments recognize the producing parties' right to exercise discretion to store electronic information in multiple formats and not be required by the rules of procedure to store electronic documents in the same format as used in the documents' creation.

The April 14 Subcommittee Memorandum raised another significant issue: Should TIFF or PDF or some other technique be employed in the Rules as a "starting point" for form of production? Fortunately, the Committee seems to have answered that question in the negative. We agree that there should be no attempt to specify a "standard" default form of production (such as TIFF or PDF) in the rules, because there is, in fact, no "standard" and, because such an approach could significantly increase production costs without producing any real benefit. Resolution of these issues should be left to the discretion of the parties and the court in individual cases. Rules of civil procedure should not prescribe litigants' conduct beyond the four corners of particular litigation.

(b) Interrogatories. The Committee also is considering possible amendment of Rule 33 that would permit the option of producing electronic information in response to an interrogatory and that would require "giving the requesting party sufficient information to enable it to derive or ascertain the desired information." Such an amendment might clarify that the current option to produce paper documents in answer to interrogatories applies to electronic information. However, there is probably no need for a separate provision in Rule 33 on this topic. A simple amendment to Rule 33 would suffice to make it clear that the general provision permitting production of "business records **[in electronic or any other form]**" from which "the answer to an interrogatory may be

derived or ascertained" applies to information maintained in electronic media (Bracketed material added to Rule 33 in bold.)

The April 14 Subcommittee Memorandum raised another significant issue: Should hard copies only or electronic versions thereof including proprietary software be produced? The Committee appears rightly to have rejected a proposal that the option to make records available automatically requires turning over software. For various reasons, such as proprietary rights issues and the broader issues of the scope of the Rules themselves and the rulemaking power under the Rules Enabling Act, whether or not software should be produced should be resolved as a question of whether the producing party has or has not made the information available in individual cases within the scope and protections of Rule 26.

(5) Addressing the producing party's burden of retrieving, reviewing, and producing data it does not ordinarily access.

Getting to the heart of the concerns expressed in numerous comments to the Committee, the April 14 Report and the September 15 draft recognized that automatic computer backup systems routinely preserve large amounts of data that: are not intended to be used absent a catastrophic event; are not organized in a way that facilitates locating materials on a specific topic without the use of sophisticated technology not typically used by litigants in the ordinary course of their business; may be very costly to retrieve and review without yielding information of significant value.

The Committee is considering specific rule amendments to deal with the specialized aspects of "extraordinary efforts" production, beyond the generalized requirements of Rule 26(b)(2), which addresses such concerns by directing the court to limit or forbid discovery if its cost is disproportionate to the likely value of information that would be generated. This is the area of perhaps greatest concern in E-discovery, of vast dimension and huge importance, particularly to multinational litigants. Numerous separate systems located in all parts of the world dump enormous amounts of data daily on to back up systems, which may be exceedingly difficult and extremely costly to restore and search. Moreover, the vast majority of information contained on such tapes will be of marginal or no relevance in all but a handful of cases. The direction should be quite clear – there is no need to get at electronic information unless it is reasonably accessible in the ordinary course of business and within the scope of Rule 26(b) -- and unless the requesting party can make the appropriate showing of need and a court orders the responding party to do so in a specific case.

Therefore, we believe that it is very important to establish specifically in the Rules, the principle that the duty of production does **not** ordinarily extend to electronic materials available only through "extraordinary steps" on the part of the producing party. A producing party should ordinarily be required to produce only those electronic records within the scope of Rule 26 that are reasonably available (or accessible) to that party in the ordinary course of business, provided that the concept of physical or technical accessibility is judged within the context of the business in which the producing party

operates. And, if extraordinary steps, such as forensic reconstruction of backup tapes or hard drives are sought (including requests for deleted materials), there should be a mechanism for the Court to review the "good cause for" and necessity of those steps being undertaken. The party seeking discovery of electronic information that would require "extraordinary efforts" to produce should be required to make a specific, affirmative showing in the case at issue, of either misconduct by the responding party or a particularly strong showing of materiality, need, and proportionality for the electronic information being sought.

The September 15 draft suggested that a new section (h) be added to Rule 26 entitled "Electronically-stored data." As indicated in part (3) above, we do not believe that there is any need for a complex, stand alone definition of "electronically-stored data" such as that proposed for addition as Rule 26 (h) (1) and that inclusion of electronic information within the sweep of the pertinent discovery tools can easily be accomplished by adding a few words to Rules 33 and 34.

The primary problem, dealt with in the draft by adding a new section 26 (h) (2), also can be solved by a straightforward addition to either Rule 34 or 26. We would suggest a more positive provision such as the following: *"Parties may obtain discovery of information stored in electronic form that is reasonably available [accessible] in the ordinary course of business and is relevant to the claim or defense of any party. For good cause, upon a showing of substantial need, the court may order discovery of electronically-stored information within the scope of Rule 26 (b) (1) [that is otherwise producible and] that is not reasonably available [accessible] in the ordinary course of business."* **[Alternative formulations in brackets.]** Such an amendment would parallel the general discovery scope amendments to Rule 26 (b) (1) that took effect on December 1, 2000.

The rules should also specifically direct the court to order that the requesting party pay the reasonable expenses of any extraordinary steps required to store, retrieve, review, and produce electronically stored information. One of the most effective ways to keep electronic discovery within the scope mandated by Rule 26 (b) may be a rule amendment that specifically enforces, by "cost shifting", the notion of proportionality in the Rules and requires litigants to tailor that discovery to the needs of the specific dispute. Thus the rules should differentiate between those costs which a party must ordinarily accept and those which may be shifted because they require "extraordinary steps" to reconstruct electronic documents.

Among possible approaches are Texas R. Civ. P. 196.4, which mandates shifting the costs of such production if the electronic data is not "reasonably available to the responding party in its ordinary course of business" and ABA Discovery Standard 29(b) (iii) which says that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing requested information." Id. at 13-14.

There is a great deal of support for adoption of the "Texas" principle under which the initial production obligations of a producing party extend only to electronic material

which is specifically sought and which is reasonably accessible in the ordinary course of business. Then, if extraordinary efforts are required to access and produce information that is not reasonably accessible in the ordinary course of business, such costs may be allocated to the requesting party. Adopting a principle such as this one appears to have broad support. *See, e.g.*, Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 Defense Couns. J. 206 (2001). (counseling adoption of cost-shifting model set forth in Texas Rule of Civil Procedure 196.4); Association of Trial Lawyers of America, *Discovery of Computerized Materials: The Things We've Heard!*, Winter 2002 ATLA-CLE 317 (2002) ("It could be possible to recognize these concerns [about unreasonable E-discovery requests] by building in a standard for discovery similar to Texas Rule 196.4: "Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably useable form... On a showing of good cause a court might order more expensive or extensive retention, but there might be some cost shifting in such an event.")The Texas approach offers an elegantly simple and effective model for regulating electronic discovery and preventing abuses and appears, in practice, to have been an effective deterrent to overbroad demands unrelated to the needs of the specific case.

As indicated by the heading of this section, "Addressing the producing party's burden of retrieving, **reviewing**, and producing data it does not ordinarily access," the Committee should also consider the nature of the costs to be shifted. The anecdotal evidence to date indicates that the costs are not merely hardware and search costs, but also include review costs. Accordingly, there should be a reference in the rules that directs the court to consider all costs necessary for the production and content review by the producing party in the assessment of burden and expense or in any cost shifting analysis. This type of guidance would be helpful to achieve the objective of providing certainty to the Courts and the parties.

In three recent opinions, Judge Schira A. Scheindlin has articulated a sophisticated, discretionary version of the Texas principle that focuses on the "accessibility" of electronic material to determine, if an adequate showing of relevance and need has been made to justify production, how to allocate the extraordinary costs of that production. *See* Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 (S.D. N.Y. 2003) ("Zubulake I") (ordered production of a small sample of requested tapes and articulated a seven factor test to determine how costs of production of the "relatively inaccessible" material should be allocated); Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D. N.Y. 2003) ("Zubulake III") (applying the seven factor test and allocating the costs of restoring backup tapes 75% to defendant and 25% to plaintiff); and Zubulake v. UBS Warburg, LLC, No. 02 Civ. 1243, 2003 WL 22410619 (S.D.N.Y. October 22, 2003) (Zubulake IV) (denying sanctions for routine destruction of backup tapes, but shifting costs of additional depositions to defendant).

Such thorough and painstaking analysis may be necessary and appropriate in certain cases, but is no substitute for a clear, direct, and straightforward procedural rule on the subject, such as some variant of the Texas rule, to guide litigants in most cases.

(6) Addressing inadvertent privilege waiver.

(a) The "Quick Peek" Approach. The Report and the Draft noted that the difficulties presented by inadvertent waiver of privileges had long been on the Advisory Committee's agenda, alternative drafts having been prepared during consideration of previous discovery rule amendments. The drafts would have authorized the court to enter an order based on the parties' stipulation that would insulate mistaken production, but were not acted on because of federal statutory limits on rulemaking in the area of privileges. Designing a solution to the waiver of privilege problem for E-discovery is even more complex and the Committee should proceed with caution. There is some valid concern about whether or not privilege issues should be addressed in the Rules at all, beyond a specific reference in Rules 16 (b) and 26 (f). But, if privilege issues are addressed, we trust that the method will **not** be any mandated procedure such as the "quick peek".

The solution that the Committee had considered in 1999 -- allowing the court to order that a "quick peek" at produced material would not work a waiver – will not work. Overriding concerns are that a federal rule may not adequately protect against waiver of a state law privilege and that the existence of such a rule might be utilized to force premature production.

There is a long history of concern over the federal courts' power to affect what are mostly state law privileges that is heightened in the context of the Rules Enabling Act and which caused the Advisory Committee to shelve earlier "quick peek" proposals. Moreover, although such a procedure is happening in practice, it occurs by agreement pursuant to stipulation and it may not be possible or appropriate for the rules to require it. And, in fact, even a stipulation does not offer much protection against privilege waiver.

There is grave concern among practitioners over "quick peek" for several reasons: The issue of privilege waiver is substantially different than it was even a few years ago, because of the explosion in the amount of information that is produced in discovery today. Such a provision would accelerate the pressure to make production without reasonable and adequate review. Few, if any, litigants who are regularly involved in litigation would willingly forego reviewing documents for privilege before they are produced. Moreover, the privilege itself is sacrosanct and should not be treated as a mere evidentiary rule and, although the documents may be returned, it is difficult, if not impossible, to disregard important privileged information received inadvertently.

Even today "quick peek" procedures are being interpreted by courts as a license to order parties to turn over documents without affording them the opportunity for reasonable review. Accordingly, even so astute a jurist as Judge Scheindlin has stated, contrary to our experience, that: "many parties to document-intensive litigation enter into so-called 'clawback' agreements that allow the parties to <u>forego privilege review altogether</u> in favor of an agreement to return inadvertently produced privileged documents." *Zubulake III*216 F.R.D. at 290 (emphasis added.) A "quick peek' Rule could turn today's risk of forced un-reviewed production into an all too frequent and unacceptable reality.

(b) Inadvertent Production. The Committee is quite correct in attempting to come up with a sound rulemaking approach to inadvertent production. The pressure on the system of the high cost of privilege review under ordinary circumstances has been amplified by the huge increase in the volume of electronic data. Return of documents and maintaining confidentiality simply do not offer adequate protection once the "cat is out of the bag," in addition to increasing the pressure for "un-reviewed production."

Inadvertent waiver of privilege in discovery has been a serious concern to parties in litigation for a long time, but there should be no doubt that privilege waiver problems for electronic discovery are qualitatively different from the issues raised in hard copy discovery. From the viewpoint of many practitioners, particularly those representing large multinational corporations, there is no question that the issue of waiver of privilege is substantially different than it was ten or even five years ago, and that difference is attributable exclusively to electronic discovery.

The basic difference concerns the sheer amount of information that is produced in discovery today compared with the past when paper discovery predominated. For example, when a "large" document production was 100 banker's boxes of documents (approximately 250,000 pages), it was costly, but feasible for attorneys to review the entire production to identify privileged communications. Now, when a production of 100 banker's boxes (or its electronic equivalent) can be commonplace in even the simplest litigation, and "large" document productions involve the review of terabytes of data in a variety of forms, it is literally not feasible to have attorneys, billing at rates of several hundred dollars an hour, reviewing electronic files page by page to determine if they contain privileged communications.

An example of the cost associated with such reviews is contained in the recent opinion in *Medtronic Sofamor Danek v. Michelson*, No.01-2373-MIV, 2003 WL 21468573 (W.D. TN. May 13, 2003), which concerned the review and production of responsive files from about 1,000 backup tapes. The Court determined that the cost of retrieving and processing potentially responsive files was $4.4 million, a large sum to be sure, but dwarfed by the estimated cost of the privilege review by attorneys of between $16.5 million and $70 million, depending on the number of responsive files located. The District Court modified the protective order in the case to provide that "Medtronic waives no privilege for documents or subject matter produced through any of the discovery protocols in this order,"...in recognition of the fact that the volume of data would make it difficult for the producing party to identify with certainty every potentially privileged document prior to production." Id at*13.

Therefore, we strongly favor what has been characterized as a more aggressive approach to privilege waiver that would codify in a new rule 34(b)(2)(E) the majority view on inadvertent production. This position recognizes the burdens of discovery and the reality that lawyer errors can in some instances waive client privileges. Such a rule amendment would summarize the factors most courts apply in deciding whether to hold that a given

disclosure should be regarded as waiving the privilege that would otherwise attach to the materials produced. *See* 8 Fed. Prac. & Proc. § 2016.2 at 242-45.

(7) Adopting a "safe harbor" for preservation of electronic data.

Safe Harbor and Sanctions. An amendment specifically addressing these issues would be welcome and important news to the many litigants plagued by the threat of sanctions for spoliation of evidence resulting from the normal operation of back up computer systems. At present, there is a great deal of uncertainty concerning the scope of the duty of preservation for electronic materials that are not accessible in the ordinary course of business and a lack of clear standards applicable to determining whether sanctions are appropriate for failure to preserve and produce such information. Many commentators have suggested that the rules be amended to address this serious problem. *See, e.g.*, Thomas Y. Allman, *The Case for a Preservation Safe Harbor and Requests for E-Discovery*, 70 Defense Couns. J. 417 (October 2003); LCJ Comment; *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* at 18-24. *Cf.* Arent, et al., "Ediscovery: Preserving, Requesting & Producing Electronic Information," 19 Santa Clara Computer & High Tech L. J. 131 at 175 (2002) ("[Where] volume of back-ups may be very large given the size of the company [a] . . . strategy entailing an ongoing thorough search for, and preservation of, pertinent electronic data. . . could minimize or eliminate the need for discovery of back-up tapes.").

The rules should provide a "safe harbor" for the routine treatment of electronic documents pursuant to business systems operated in good faith after commencement of litigation where no court order requiring the party to take additional steps to preserve specific electronic information is in effect. The nature of electronic evidence raises serious concerns not present in paper discovery over when and how producing parties must alter or suspend their normal business systems upon commencement of litigation. If the producing party has implemented a reasonable process of notifying key personnel and sequestering their electronic documents on a going forward basis, there is no "spoliation." *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561, 621 (2001). Thus, no order of sanctions should be issued against a producing party for the continued good faith operation of business systems absent a specific order which was willfully disregarded.

Allman proposes a three part amendment to Rule 37 of the Federal Rules of Civil Procedure. *See* Allman, *The Case for a Preservation Safe Harbor*, 70 Def. Couns. J. at 423. First, "provide that a responding party need not automatically suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or business systems absent a preservation order based on a clear showing of need justifying the expense and disruption inherent in such an order." Second, the Rule "could then provide that no sanctions predicated upon a failure to maintain or preserve electronic information should issue unless a discovery request or preservation order describes with particularity the specific documents or data sought to be preserved" and there was evidence of willful

failure to preserve the information. Third, the Rule "should include a presumption that the undertaking of reasonable steps to notify custodians of electronic information of the need to preserve such information constitutes prima facie compliance with the standard of care." Id. at 423.

Preservation Obligation.

Creating a preservation obligation for electronic documents where one does not now exist in the rules for any documents would create more problems than it would solve. There is, however, a real need for a safe harbor provision that might be as direct as the following: *"Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other electronic data systems unless the court so orders for good cause."*

We trust that the Committee is sensitive to the fact that the Rules of Procedure are not intended to require an automatic suspension of computer operations – or to regulate conduct beyond particular litigation – but to leave room for individualized court-ordered suspension in a specific case upon showing of substantial need.

The obligation to preserve relevant evidence in a particular case must be balanced against the right of a party to manage its electronic information in the best interest of the enterprise even though some electronic information is necessarily overwritten on a routine basis. If such overwriting is incidental to the operation of the systems, it should be permitted to continue after the commencement of litigation. *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561, 621 (2001) ("(1) Electronic evidence destruction, if done routinely in the ordinary course of business, does not automatically give rise to an inference of knowledge of specific documents' destruction, much less intent to destroy those documents for litigation-related reasons, and (2) to prohibit such routine destruction could impose substantial costs and disruptive burdens on commercial enterprises."). Striking that balance in the context of routine operating systems which are intended to operate continuously presents special problems which should be addressed with care. Only where specific restrictions upon operating systems are sought and, if objected to, required by order should the court impose sanctions for non-production. *But see Linen v. A.H. Robins*, No. 97-2307, 1999 WL 462015 (Mass. Super. Ct. June 15, 1999) (obligation to cease recycling of backup tapes arose by inference after *ex parte* order governing same was lifted).

We are quite concerned about the creation of an open ended "preservation obligation" suggested by the September 15 memorandum. There are substantive concerns – serious questions whether the rules should dictate such obligations. And, practical concerns as well, that any "preservation obligation" must be tied to service of a request for production of material information, i.e., what is material to the claims and defenses in a particular case. Otherwise, such an obligation could exceed the rulemaking power and constitute "regulation by litigation." Another suggestion in the September 15 memorandum that conditioned a "safe harbor" provision on preservation of "a single day's full set of ...backup data" is totally impractical and quite objectionable. With multinational litigants

facing new case filings every day and case dockets numbering in the thousands, this requirement -- whatever it refers to – likely would require the creation and storage of electronic copies of everything created anywhere by anyone in the company.

We hope that the Committee will conclude that because there is no "preservation obligation" in the current Rules, that to adopt one now for electronic documents would not be advisable for many reasons. There is, however, a real need for a clear and straightforward safe harbor provision.

CONCLUSION

While LCJ recognizes that there is necessarily much work that remains to be done before the Rules can be amended to address issues unique to electronic discovery, LCJ congratulates the Committee on an excellent beginning. Amending the Rules as outlined above would contribute to the conduct of fair and reasonable discovery without impinging upon the truth-seeking function of the discovery process. LCJ looks forward to providing whatever support it can to the Committee as it goes forward to prepare refined proposed amendments for discussion at the Committee's Fordham Law School Conference to be held on February 20 - 21, 2003. We are confident that the Committee's efforts will result in clear, concise, and straightforward rules to guide practitioners and litigants in dealing with the many complex and difficult issues involved in discovery of electronic information.

RESPECTFULLY SUBMITTED,

THE LAWYERS FOR CIVIL JUSTICE
E-DISCOVERY STUDY GROUP:

Thomas Y. Allman
Senior Vice President & General Counsel
BASF Corporation
3000 Continental Drive - North
Mount Olive, NJ 07828-1234
Phone: (973) 426-3200
Fax: (973) 426-3213
Email: allmant@basf-corp.com

Charles A. Beach
Coordinator, Corporate Litigation
Exxon Mobil Corporation
5959 Los Colinas Blvd.
Irving, TX 75309-2298
Phone: (972) 444-1466
Fax: (972) 444-1435
Email: charles.a.beach@exxonmobil.com

Alfred W. Cortese, Jr.
Cortese PLLC
113 Third Street NE
Washington DC 20002
Phone: 202-637-9696
Fax: 202-637-9797
Email: awc@corteseplic.com

David Dukes
Nelson Mullins Riley & Scarborough
P.O. Box11070
Columbia, SC29211
Phone: (803)255-9231
Fax: (803)255-9472
Email: ded@nmrs.com

Gary L. Hayden
Office of General Counsel
Ford Motor Company
1400 Parklane Towers West
3 Parklane Blvd.
Dearborn, MI 48126
Phone: (313) 248-6867
Fax: (313) 325-5687
Email: ghayden@ford.com

James L. McCrystal, Jr.
Brzytwa, Quick & McCrystal
900 Skylight Office Tower
1660 W. 2nd Street
Cleveland. OH 44114-1411
Phone: (216) 664-6900 X 231
Fax: (216) 664-6901
Email: mccrystal@bqmlaw.com

Stephen G. Morrison
Nelson Mullins Riley & Scarborough
P.O. Box 11070
Columbia, SC 29211
Phone: (803) 733-9410
Fax: (803) 255-9472
Email: sgm@nmrs.com

Ashish Prasad
Mayer Brown Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
Phone: (312) 701 -8438
Fax: (312) 706-8680
Email: aprasad@mayerbrown.com

Edward C. Wolfe
General Motors Legal Staff
General Motors Corporation
MC:482-207-720
New Center One
3031 West Grand Blvd
Detroit, MI 48202
Phone: (313) 974-1801
Fax: (313) 974-0542
Email: edward.c.wolfe@gm.com

ATTACHMENT TO LCJ WHITEPAPER:

December 10, 2002

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-170
Washington, D.C. 20544

Re: Inquiry from Discovery Subcommittee Regarding Discovery of Electronic Materials

Dear Mr. McCabe:

I am writing in response to Professor Richard L. Marcus's September 2002 invitation for comments on the appropriateness of an amendment to the Federal Rules of Civil Procedure (the "Rules") to address issues unique to the discovery of electronic and computer-based information. For the reasons set forth in this letter, Lawyers for Civil Justice ("LCJ") supports an amendment to the Rules to address several unique issues related to electronic discovery.

I would like to begin by providing background information on LCJ. LCJ's membership consists of in-house corporate counsel, outside defense counsel, and the leadership of the Defense Research Institute, Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel. LCJ has long promoted consideration of issues which directly impact the problems confronting corporate and defense counsel, and has always sought to achieve solutions that fairly and reasonably address the needs of the defense bar. LCJ has worked with the U.S. Judicial Conference Advisory Committees and has testified before Congress on issues such as class action reform, tort reform, and case management. LCJ is committed to working with other members of the legal community to appropriately address issues of imbalance in the civil litigation system. Accordingly, LCJ feels it is imperative to address the questions relating to electronic discovery raised by Professor Marcus.

I will now discuss LCJ's position on the issues raised in Professor Marcus's September 2002 invitation for comments. Professor Marcus first asks whether the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee") should consider Rules amendment. LCJ believes the answer to this question is a resounding "yes." The past several years
have brought a variety of judicial opinions from the federal courts relating to electronic discovery, and the result is an inconsistent jurisprudence which is often highly fact-specific and fails to provide sufficient guidance to corporate defendants confronted with electronic discovery issues. Compare, e.g., McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D. D.C. 2001) (restoring all backup tapes not necessary in every case), with Linen v. A.H.

Robins, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct., June 15, 1999) (obligation imposed to cease recycling of backup tapes). Rules amendments are necessary now because, without Rules amendments, corporate defendants and the defense bar will continue to lack a clear sense of how to treat electronic evidence and what to do with it in civil discovery.

Professor Marcus next asks what form those amendments should take. In order to answer that question, it is necessary to examine some of the problems litigants have encountered under the current Rules. LCJ has conducted an informal survey of its membership as well as counsel for other corporations, and we have learned of a number of incidents involving electronic discovery that we wanted to share with you in this letter.

- One company had to review 13 gigabytes of electronic documents to comply with a discovery request. The company paid more than $340,000 to electronic evidence consultants who helped the law department collect and process this data and put it in reviewable form. The company was then required to pay more than $750,000 to a group of contract lawyers to review each individual electronic document, including attachments to e-mails.
- One company was required to preserve backup tapes at 9 different data centers for a period of 13 months. The number of tapes produced at these locations exceeded 1600 each month. The cost of purchasing new tapes exceeded $120,000 per month, or more than $1.57 million for a 13-month period (storage, labor, and other related costs are not included in this amount).
- One company, upon receipt of a broad subpoena and document request, was faced with considerable uncertainty as to its preservation and production obligations with respect to electronic materials such as backup tapes. The company did not use backup tapes as a filing or records retention system, but rather primarily to restore computing environments and business data in the case of a disaster. The uncertainty was compounded by the large volume of electronic materials available: some of the company's data centers took up multiple floors of buildings that covered entire city blocks; thousands of backup tapes accumulated each month in the ordinary course of business; and the cost of purchasing tapes alone sometimes exceeded $100,000 a month.
- One company discovered upon departure of one of its executives that he had saved over 80,000 e-mails over a 5 year period. Many of these e-mails contained attached imaged documents, which were often long and difficult to open, read and print. These 80,000 e-mails, which were not searchable electronically, had to be evaluated for content and privilege during discovery. It took a paralegal 1.5 months just to print the e-mails. The privilege review was complicated by a number of factors: some of the recipients were attorneys while others were not; the e-mail addresses did not always identify who is an attorney, what client the attorney represents and the type of information being shared. In order to determine whether variations of a single e-mail (e.g., the sent copy, response, forwarded copy, etc.) needed be produced, the company had to engage in a word-by-word review of each variation.
- One company agreed with plaintiffs' class counsel to a reasonable preservation order designed to preserve the documents relevant to plaintiffs' claims. Subsequently, plaintiffs sought to expand the preservation order to require preservation of a broad class of electronic documents. The preservation order proposed by plaintiffs would have imposed enormous costs on the company. After spending substantial time and resources

over a period of months arguing over the scope of what was properly subject to preservation and discovery, the parties finally agreed on the contours of an amended preservation order.

- One company was asked in a subpoena to produce electronic records of interactions with over 2 million of its customers. Records of interactions with over 1.5 million customers were available only through archives. The company determined that, in order to access the active records, it would need to retain a consultant, who would have to work for approximately seven weeks. To access the archived data, the consultant would have to work an additional six weeks to prepare the archived materials to be restored. The company would then have to take its computer systems offline for a period of 1600 hours in order to restore the archived materials. Finally, the company would have to spend an additional seven weeks to index and review the restored materials. After the company invested substantial time and expense to prepare a motion to quash the subpoena, a limitation to the subpoena was negotiated.
- One company was the subject of a temporary restraining order entered at plaintiffs' request shortly after the commencement of the lawsuit. The plaintiffs were individuals and therefore did not have reciprocal electronic discovery obligations. The order was broadly worded; it prohibited the company from altering or erasing any electronic materials relating to the subject matter of the lawsuit, and it required the disabling of any automatic provisions for the deletion or overwriting of electronic information.
- One company was the subject of a preservation order entered during discovery in a class action. The plaintiffs were individuals and therefore did not have reciprocal electronic discovery obligations. The order was broadly worded and required, among other things, that the company preserve all existing backup tapes and set aside on an ongoing basis monthly backup tapes of its entire e-mail system. The company was required to spend over $1 million to comply with the preservation order, and the plaintiffs did not request any of the preserved materials.

These examples are by no means exhaustive, and represent only a selection of the problems encountered by the in-house corporate and outside defense counsel to whom LCJ spoke. In addition, I understand that several LCJ members and other defense counsel intend to write separately to you to share some of the experiences with electronic discovery. Together, they underscore the very real need for Rules amendment and provide some guidance on the form such amendment should take. LCJ believes that Rules amendment should take the following form:

1. Rule 16 and Rule 26(f) should be amended to include discussion of electronic evidence in the pretrial conference process.
2. Cost-shifting rules should be added to Rule 26 in order to differentiate between costs which a party must ordinarily bear and costs which arise solely because extraordinary discovery has been permitted.
3. The Rules should provide a "safe harbor" for the routine treatment of electronic documents pursuant to business systems operated in good-faith where no court order or discovery demand is in effect.

First, Rule 16(b) and Rule 26(f) should be amended to specifically include electronic discovery as a mandatory topic. The text can be minimal, with comments and the model forms developed in a "key issue" checklist format. The meet and confer discussions –

some of which are already occurring in certain Districts (see U.S. Dist. Ct. Ark. R. 26.1; U.S. Dist. Ct. Wyo. R. 26.1(d)(3)(a)) – can and should be coordinated with and based on the substantive standards, presumptions and "safe-harbor" provisions discussed herein. This could require consideration of, among other topics, a specific preservation order, tailored to the unique needs of the case and based on the parties' then current knowledge of the potentially relevant electronic documents and establishing the areas of dispute between them. Such an amendment would also serve to signal to the judiciary that, more so than conventional paper discovery, electronic discovery often requires active judicial management.

Second, cost-shifting rules should be added to Rules 26(b)(2) or 26(c) that differentiate between those costs which a party must ordinarily accept and those which may be shifted because they require "extraordinary steps" to reconstruct electronic documents. See, e.g., Tex. R. Civ. P. 196.4; ABA Discovery Standard, 29(b)(iii). This should be done in conjunction with a rule establishing the principle that the duty of production does not ordinarily extend to materials available only through extraordinary steps on the part of the producing party. A producing party should ordinarily only be required to produce those electronic records which are reasonably available to that party in the ordinary course of business, and if extraordinary steps, such as forensic reconstruction of backup tapes or hard drives are sought (including requests for deleted materials), there should be a mechanism for the Court to review the necessity of those steps being undertaken. This would require an affirmative showing by the party seeking discovery of either misconduct by the party required to do the search or a strong need for the material being sought. Such a rule would enforce the notion of proportionality that is present throughout the Rules by reminding litigants and courts that discovery should be tailored to the needs of the specific dispute. Thus, for example, in a case in which a party seeks damages of a few hundred thousand dollars, a court should be reluctant to permit electronic discovery which would cost the producing party hundreds of thousands or even millions of dollars, and if such discovery is permitted, the court should consider shifting the costs to the requesting party.

The decision in Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al., 205 F.R.D. 421 (S.D. N.Y. 2002), is a classic example of the types of factors that go into a decision to shift the costs of electronic discovery. While it has been suggested that the Rowe approach simply represents a codification of the best decisions under existing Rule 26, it would be more valuable for courts and litigants to have a rule that explicitly and uniformly sets forth guidelines on the burden of production and cost shifting.

Finally, the rules should provide a "safe harbor" for the routine treatment of electronic documents pursuant to business systems operated in good faith after commencement of litigation where no court order or discovery demand is in effect. LCJ has found that the greatest concerns of producing parties arise in regard to when and how they must alter or suspend their normal business systems upon the commencement of litigation. The nature of electronic evidence makes this a major problem not present in paper discovery. For example, the continued recycling of the "backup tapes" of a computer system to which a computer is linked means that some fragmentary evidence of changes is also gone. Is the failure to cease recycling a justification for sanctions? If the producing party has implemented a reasonable process of notifying key personnel and sequestering their electronic documents on a going forward basis, LCJ would argue that this would not

constitute "spoliation." See Martin C. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L. J. 561, 621 (2001). Indeed, under those circumstances, it seems clear that there should be a presumption in the Rules that the obligations of preservation have been met.

The problem is, though, that a producing party must "guess" as to the answers to these questions since the evaluation of the propriety of its actions with respect to electronic discovery occurs much later, in retrospect. This is grossly unfair in the context of those business systems that are maintained without the purpose of hiding or destroying evidence (if they are so established and have that effect, they are clearly sanctionable). Thus, LCJ proposes that no order of sanctions could be issued against a producing party for the continued good faith operation of business systems absent a specific order or unobjected discovery demand which was willfully disregarded. In evaluating that compliance, LCJ would favor giving great weight to the use of a system of notification calculated to achieve preservation. This would encourage the development of "best practices" among producing parties which focus on complying with that obligation while clarifying the intent of the sanctions provisions is not to force unnecessary alteration of business systems which are operated in good faith.

While LCJ recognizes that there is necessarily much work that remains to be done before the Rules can be amended to address issues unique to electronic discovery, LCJ feels the time is right to begin the process of Rules amendment. Amending the Rules as outlined above would contribute to the conduct of fair and reasonable discovery without impinging upon the truth-seeking function of the discovery process. LCJ looks forward to providing whatever support it can to the Discovery Subcommittee of the Advisory Committee as it further considers the issues raised in Professor Marcus's September 2002 invitation for comments.

Sincerely,

Rex K. Linder
President, Lawyers for Civil Justice

cc: Professor Richard L. Marcus