DISCOVERY SUBCOMMITTEE REPORT
ON ELECTRONIC DISCOVERY

To: Advisory Committee on Civil Rules
From: Myles Lynk and Rick Marcus
Date: April 14, 2003
Re: Proposal for effort to draft possible rule changes to address the problems of electronic discovery

This memorandum introduces the Discovery Subcommittee's proposal that it undertake to draft possible amendments to address seven issues raised by discovery of digital data, and identifies some of the concerns associated with those issues.

I. Initial introduction of these issues

In 1996, when the Advisory Committee launched its Discovery Project and the Discovery Subcommittee was first appointed, the Subcommittee undertook to determine which issues might warrant rule changes. One method of evaluating this question was to convene conferences of lawyers and learn their views on which changes might prove useful. A mini-conference was therefore held in San Francisco in January, 1997, and a full Committee two-day conference followed at Boston College in September, 1997. These and related activities produced a long list of possible changes that were considered by the full Committee at its October, 1997, meeting, leading to instructions to the Discovery Subcommittee to attempt to draft actual amendment proposals in a number of specified areas. Some of those drafting efforts did not bear fruit, but the overall effort led to the 2000 amendments to the discovery rules.

One topic arose repeatedly during the various interactions with the bar in 1997 that had not been raised before -- problems with discovery of electronically-stored, or digital, information. Repeatedly, lawyers told the Committee that this 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 had focused in light of previous episodes of rule amendment.

It was thought impossible to give sufficient attention to this new subject during the 1997-99 period for a variety of reasons. First, the subject was new and the dimensions of the problems, if any, were not clear. Second, it was not clear whether these discovery problems were so distinctive as to justify special treatment in the rules. Third, there were few, if any, models for responding by rule to these issues. Fourth, it seemed that the terrain was constantly shifting, and that a rule amendment might be overtaken by technological or other developments. Accordingly no effort was made to include rule change proposals about this topic in the package of amendments ultimately adopted in 2000.

II. Subcommittee's study of problem in 2000

The frequent expressions of concern about digital discovery did not abate, and the Subcommittee began to attempt to gain a fuller appreciation of the nature of the issues raised and the range of possible solutions in 2000. David Levi and Rick Marcus attended a meeting of the ABA Section of Litigation in January, 2000, which included an open-mike session on electronic discovery. In March, 2000, the Subcommittee hosted a mini-conference in San Francisco devoted to initial evaluation of the issues, and in October, 2000, it held another mini-conference, in Brooklyn, to give further consideration to the issues and, specifically, to consider the possibility of beginning work on amendments in a number of areas to respond to these concerns.

The returns were mixed. Although there were strong assertions that the problems urgently required attention, there

was also considerable uneasiness about using the rule process to respond to these issues. After these conferences, materials about these questions were circulated to the full Committee. Largely as a consequence of the mixed response, the Subcommittee did not proceed then to attempt to frame possible amendments. Instead, the topic was kept on the Subcommittee's calendar in order to monitor developments.

One set of developments was the emergence in a few places of rules or recommended practices to deal with this set of issues. Texas adopted a civil rule specifically keyed to discovery of electronically-stored materials. See Tex. R. Civ. P. 196.4. At least three district courts adopted local rules addressing this form of discovery. See E. & W. Dist. Ark. L.R. 26.1(4); D. Wyo. L.R. 26.1(d)(3)(B). And the ABA adopted Discovery Standards that, in part, addressed the issues raised by this form of discovery. See ABA Discovery Standard 29. Copies of these various provisions are attached to this memorandum. In addition, we understand that the District of New Jersey has a local rule under consideration, but the fate of that possible amendment effort is not currently know.

Over time, a body of caselaw began to appear, dealing with these questions on an ad hoc basis under the current rules.[1]

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[1] See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. Rules Serv. 3d 168 (E.D. La. 2002); Rowe Ent. v. William Morris Agency, 205 F.R.d. 421 (S.D.N.Y. 2002); In re Bristol-Myers Squibb Securities Litigation, 205 F.R.D. 437 (D.N.J. 2002); Simon Property Group L.P. v. MySimon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000); United States ex rel. Koch v. Koch Indus., Inc. 197 F.R.D. 488 (N.D. Okla. 1999). Please note that these cases are cited as illustrative, and not as embodying rules that the Subcommittee might urge be adopted by amendment.

III. More recent review of these issues

The Subcommittee's activities over the past year have been prompted by a number of developments.

(1) Frequent CLE events and articles: Concern in the bar about this set of issues has continued. One illustration of this concern is the frequency of continuing legal education and similar events that focus on this topic. The Federal Judicial Center has begun monitoring these events, and has logged nearly 250 of them since January 1, 2001 -- more than two per week. The FJC has set up a database with information on these CLE events that can be accessed by Committee members using a protocol that can be obtained from Ken Withers of the FJC. Articles about the questions presented -- often focused on the difficulty of handling these new problems -- have also frequently appeared in the legal press.[2] At the same time, various developments have emphasized the importance of access to electronically stored information to illuminate issues in litigation. Repeatedly, for example, important investigations concerning possible misconduct in the securities or other industries have depended on e-mail and other electronically stored material.[3]

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[2] See, e.g., Ballard, Digital Headache: E-Discovery Costs Soar Into the Millions, and Litigants Seek Guidance, Nat. L.J., Feb. 10, 2003, at A18; Nimsger, Digging for E-Data, Trial Magazine, Jan. 2003, at 56; Mariano, Missing Links: Lawyers Discover an Internet Time Machine that Resurrects Old Web Pages, Calif. Lawyer, Jan. 2003, at 27; Krause, Discovery Channels: Electronic Documents Are Vital to Building a Case, So Don't Get Papered Over, ABAJ, July, 2002, at 49; Noble, Dangers in E-Discovery, Legal Times, June 3, 2002, at 35. These are cited as illustrations, not necessarily as sources of guidance for the Committee.

[3] For illustrations, see Cassidy, The Investigation: How Eliot Spitzer Humbled Wall Street, New Yorker, April 7, 2003, at 54, 57 (reporting that "[s]ince 2001, the Securities and Exchange Commission, Wall Street's primary overseer, has required firms to save all their e-mails for at least three years, in case

(2) The Sedona Conference: In addition, in October, 2002, the Sedona Conference, in Arizona, devoted its session to consideration of issues presented by discovery of electronically-stored materials. This initial examination led to further analysis of the questions presented and produced the publication in March, 2003, of a draft of The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, 40-page document. This document is now in a period of "peer review" that is to be completed by June, 2003, and lead to ultimate publication of a revised set of principles.

(3) The Discovery Subcommittee's invitation for comment: Prompted by these ongoing concerns, the Discovery Subcommittee returned to consideration of the issues presented by electronic discovery in early 2002. In mid-2002, it was decided that an effort should be made to invite input from the bar about the nature of the issues and the utility of various possible solutions. As reported during the Committee's October, 2002, meeting, a letter and companion memorandum were mailed to about 250 lawyers identified as having a prior involvement in addressing these issues in September, 2002, inviting responses by mid-December, 2002.

About a dozen responses were received.[4] A high percentage

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regulators want to inspect them"); Smith, Wall Street Has E-Mail Problems, Wall St. J., Aug. 2, 2002, at C-1; Craig, When Brokers Erase the Past, Wall St. J., May 2, 2002, at C-1; Gasperino, Spitzer Staff Gathers Salomon E-Mails Criticizing Grubman, Wall St. J., July 16, 2002, at C-1; McGeehan, Wall Street Banks May be fined for Discarding E-Mail Traffic, New York Times, Aug. 2, 2002, at C-1; Smith, E-Mails Link CSFB Research With Banking, Wall St. J., Nov. 27, 2002, at C-1.

[4] The reason for saying that "about a dozen" were received is that a total of 12 responses were logged, but it is not clear that all of them were actually directed to the questions raised by the Subcommittee's invitation to comment. One, for example, directed attention to the sender's web page, which contains

of the responses were from organizations. On the basic question whether difficulties with electronic discovery warrant current rulemaking action, there was a considerable division that seemed somewhat to be along plaintiff/defendant lines. Thus, organizations associated with the plaintiff side (the Assoc. of Trial Lawyers of America, the National Assoc. of Consumer Advocates, the Trial Lawyers for Public Justice, and the San Francisco Trial Lawyers Assoc.) urged that rule changes were not warranted. Organizations associated with the defense side (the Defense Research Institute and Lawyers for Civil Justice) argued that rule changes are needed, and that the developing caselaw does not provide sufficient guidance. The Federal Bar Assoc., meanwhile, urged that more local rules be developed to address these problems.

(4) The 2003 ABA Section of Litigation Leadership Meeting: In addition, David Levi and Ed Cooper attended the January, 2003, meeting of the ABA Section of Litigation leadership and participated in an open mike session like the one that occurred in January, 2000. A variety of issues were raised and examined, such as expanding the Rule 26(f) discovery-planning session to include consideration of this form of discovery, expanding initial disclosure under Rule 26(a)(1) to include some information about a party's electronic storage of data, revising the definition of document in Rule 34, developing a system for regulating and promoting preservation of data (perhaps by some sort of safe harbor for those who follow certain practices), addressing the form of production through discovery, and responding in the rules to the problem of privilege waiver.

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information about his set of aggressive proposals to address a host of discovery issues. Another transmitted two lengthy memoranda about related issues that the sender's law firm had drafted before receipt of our inquiry. Both these people were urged to submit responses more focused on the Subcommittee's concerns but did not do so.

IV. Current proposed mode of proceeding

Having reviewed the commentary received and considered other developments, the Discovery Subcommittee met by telephone conference to discuss how to proceed. It appeared that the nature of the responses thus far would neither compel nor preclude rulemaking in the area. The obviously distinctive features of this variety of discovery, and the widespread and continuing interest, showed that the topic warranted serious attention. Controversy and concern about this topic were ongoing and had not abated since the Subcommittee began to study the topic three years ago. And discussion of actual amendment possibilities could not be pursued much longer without undertaking the task of trying to devise actual rule language. With amendment proposals in hand, the Subcommittee (and the full Committee) could more realistically assess the desirability of pursuing certain goals through rule amendment.

Accordingly, the Subcommittee resolved that the most productive approach would be to focus on seven areas and attempt to devise rule language that would be helpful in those areas. This did not constitute a resolution also that rule changes should be made; that issue remains open. But it would be considerably more reasonable to consider that question after confronting the difficulties of devising concrete rule language. The Subcommittee therefore requests authorization from the full Committee to proceed to attempt to develop proposed rule language addressing in the following seven areas, on the understanding that this effort implies no commitment of the Subcommittee or the Committee actually to propose amendments along these lines.

(1) Including discussion of these 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 that is submitted to the judge before entry of the Rule 16(b) order. 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. As one of the Subcommittee reported, this "comes up in every case." Indeed, it was also suggested that including this sort of amendment in a package of amendments directed to e-discovery would be a "no brainer." Already a directive that this consideration occur as part of the discovery planning process has been included in the local rules of three districts (E. & W. Dist. Ark., and D. Wyo.). There may be case management practices in other districts that routinely call for consideration of these topics. Altogether this suggests that the time may have arrived for considering a national rule.

Such an amendment might serve to minimize problems related to several of the other areas on which the Subcommittee has focused. To some extent, it might be preferable to have the parties themselves devise solutions to these other problems -- the form of production, retention and preservation of digital material, and privilege waiver -- rather than prescribing solutions in the rules themselves. And even if the rules prescribe a default rule for such problems, the early planning event might be a good occasion for the parties to customize these directives for their case.

Thus, an amendment to Rule 26(f) (and possibly Form 35) could improve the handling of these problems. Additionally, an

amendment to Rule 16(b) adverting to inclusion of directives about these topics in the initial scheduling order might be useful.

(2) Expanding initial disclosure -- Rule 26(a)(1)

Either in addition to, or instead of, adding electronic discovery to the list of topics for consideration at the Rule 26(f) conference, expansion of Rule 26(a)(1) to require disclosure regarding each party's electronic data storage and communication systems might be productive. To some extent, exchange of this sort of information might be essential to meaningful discussion of the issues during the Rule 26(f) conference, but the timing for current Rule 26(a)(1) disclosure (after the Rule 26(f) conference) might not be suitable for that purpose.

More generally, early and fairly detailed disclosure of information of this sort might be beneficial whether or not there is a requirement in the rule that this topic be considered during the Rule 26(f) conference. To the extent it is desirably to encourage more precise discovery requests for digital information, for example, this sort of disclosure should serve a useful purpose in framing discovery.

In addition, early disclosure on these subjects might also serve a valuable purpose in forcing parties to think about what electronic material the possess early in the litigation. Repeatedly, cases arise in which the failure of a party to attend to its electronic information early in the litigation causes later problems about inappropriate destruction or discarding of data. Lawyers -- particularly outside lawyers -- may find it difficult to persuade clients to focus on these topics early in the litigation. Even officials of the client may not be fully

aware of what does and does not exist. There is at least one reported case in which an officer of a party assured outside counsel (who in turn so informed the court) that certain data no longer existed. Later, however, the deposition of the company's information technology head revealed that the data actually had existed when this representation to the court was made, but thereafter been erased. Avoiding this sort of contretemps would be desirable.

(3) Definition of document -- Rule 34

Since 1970, Rule 34 has stated that a document request may seek "data compilations from which information can be obtained." Rule 26(a)(1)(B) similarly refers to "data compilations." Although courts and parties have been managing to operate with this description, it could be improved. Both these rules might be revised to include a more modern and accurate definition of the various types of digital data that can be sought through discovery.[5] And it might be desirable to include some such expression in Rule 45 as well.

Subcommittee discussion identified a number of possible issues that could be addressed by such an effort to improve the definition of document with regard to electronic data. One point is that some view e-mail as a special category that should be handled in a distinctive way. Another is that deleted data constitute an important issue with digital data although no similar issue is found in the hard copy world. Embedded data -- electronic items created by software that do not appear on the printed page -- constitute another definitional perplexity unique to digital data. Some lawyers propose limiting the definition of

[5] We might also take this opportunity to revisit the definition of "phonorecords" in Rule 34(a).

document to things created intentionally, thus excluding embedded data, which the user probably does not know is coming into existence. Yet another perplexity results from the growing importance of data collections that don't really have an existence in the traditional "document" sense. This issue also arises in relation to form of production. These "dynamic" databases constantly change and yield information only in response to specific queries or directives.[6]

There was consensus that efforts to draft a definition seemed worthwhile, but cautions that devising one will be difficult. One way might be trying to devise a new Rule 34.1 to deal with all aspects of e-discovery, but it is not clear that would be the way to go. Another way might be to focus on the "normal course of business" idea in the Texas Civil Procedure Rule 196.4, and to treat as documents within the rule those things accessible during the normal course of business. But that could raise difficulties should there be a strong reason for investing the effort to unearth items not accessed during the normal course of business.

(4) Form of production

As an alternative to directing the parties to discuss the form of production in their Rule 26(f) conference, or in addition

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[6] Rule 34 also authorizes requests for production of "things." That might be interpreted to cover discovery regarding whatever is on a hard drive or backup tape even if the electronic impulses stored on these media were not called documents. But Rule 34 could be interpreted to distinguish between documents and "things," such as the automobile airbag that allegedly malfunctioned, and to treat "things" that are relevant only because they contain some information we would describe as a document as within the definition of "document" rather than "thing."

to such a requirement, the rules might provide a "default" rule for the form of production.

We have frequently heard about disputes regarding the form of production of electronic material. Hard copies may leave out important data, and they are not searchable unless input into the discovering party's system. But electronic versions of data may be impossible to use without refined (and perhaps proprietary) software. Developing a "starting point" for form of production might, in the view of the Subcommittee, be a useful thing if possible. One might, for example, focus on whether TIFF or PDF or some other technique should be employed, although care would be necessary to avoid embedding a possibly transient technology in the rules. One concern would be whether the materials can be searched in the format in which they are produced. It might be possible to devise a default rule.

Another issue might be handling databases that really don't exist except in response to specific computing directives that produce outputs. On this subject, the goal may be to ensure a relatively specific discovery request. Similar concerns affect discovery of materials connected to computer-aided design. In some sorts of product liability litigation, this is central. And the various models used probably still exist, where with hard copies they would likely have been discarded. The problem with trying to deal with this in a rule is that "every case is different." Perhaps the best thing is to prod people to discuss these issues up front rather than trying to specify what to do with them.

The Subcommittee's consensus was to recommend trying to draft rule provisions on form of production, keeping in mind the various challenges mentioned above.

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

The capacity to store electronic data dwarfs the capacity to store hard copy materials. Therefore, one could argue that, if the sole concern were storage space, there would never be a reason to discard any electronic data. It is clear that automatic backup systems routinely preserve large amounts of such data that is never intended to be used absent a catastrophic event. But backup systems are not likely to be organized in a way that facilitates locating materials on a specific topic, and the effort to review them may be very costly without yielding information of significant value. Similarly, "deleted" materials may be retrieved by forensic computer operations that can be quite costly. In addition, as software and other aspects of computer systems change, data that were once accessible no longer are (this is the problem of "legacy data").

Often delving into this hard-to-get data requires what are sometimes called "heroic efforts." This form of heroism can be very expensive.[7] And it may produce little or nothing of value to the case. At a general level, Rule 26(b)(2) addresses this

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[7] For example, in McPeek v. Ashcroft, 212 F.R.D. 33, 35 (D.D.C. 2003), the court rejected plaintiff's argument that the mere possibility that a search of backup tapes might yield relevant material was sufficient to justify the cost of the search. The court explained its views:

> The frustration of electronic discovery as it relates to backup tapes is that backup tapes collect information indiscriminately, regardless of topic. One, therefore, cannot reasonably predict that information is likely to be on a particular tape. This is unlike the more traditional type of discovery in which one can predict that certain information would be in a particular folder because the folders in a particular file drawer are arranged by subject matter or by author.

sort of concern by directing the court to limit or forbid discovery that if its cost is disproportionate to the likely value of information that would be generated. But the specialized aspects of digital discovery, and the recurrent problems it can cause, may warrant special provision for these issues in the rules.

Already, the Texas rule suggests one possible approach -- looking to whether electronic data "is reasonably available to the responding party in its ordinary course of business." See Texas R. Civ. P. 196.4. ABA Discovery Standard 29(b)(iii) says that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing requested information." Devising a suitable provision for the Civil Rules would be a challenge. But given the great importance of this question, the Subcommittee concluded by consensus that the effort of trying to do so was justified.

(6) Addressing inadvertent privilege waiver

The difficulties presented by inadvertent waiver of privileges were raised during the 1997 review of discovery issues in regard to hard copy discovery. The Subcommittee has from time to time considered the privilege waiver issues raised by hard copy discovery, and developed two alternative drafts of a possible new provision for Rule 34(b) that would authorize the court to enter an order based on the parties' stipulation that would insulate mistaken production against the waiver consequence. That topic was last discussed by the full Committee during its October 1999 meeting. One concern on this subject is that 28 U.S.C. § 2074(b)[8] limits the scope of rulemaking in the

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[8] 28 U.S.C. § 2074(b) says: "Any such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect

area of privileges. At the same time, some rulemaking that affects the consequences of discovery on privilege protection, such as Rule 26(b)(5), would be proper.

Whether or not the privilege waiver problems for electronic data are qualitatively different or more important than the issues raised by hard copy discovery is not clear. Perhaps the time has come for addressing privilege waiver problems for all types of discovery, not just this one. And it is similarly not clear whether the sort of solution that the Committee has previously discussed for hard copy discovery -- allowing the court to order that a "quick look" at produced material would not work a waiver -- would also work for electronic data. But the topic arises with such frequency in discussions of problems caused by digital discovery that the Subcommittee concluded that it should try to address it.

Texas Rule 193.3(d) (included in Appendix A) offers a possible model of a an alternative approach, but there may be difficulties pursuing such an approach in a Civil Rule due to 28 U.S.C. § 2074(b). If so, it might be desirable enough to request congressional action to accomplish the change. The goal would be to ease the burden and delay of discovery review of documents and electronic data before production.

In the alternative, or additionally, there could be a provision added to Rule 26(f) calling for the parties to discuss this problem at the outset of the litigation, and perhaps to Rule 16(b) authorizing the court to act to relieve these problems from the outset.

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unless approved by Act of Congress."

Given the recurring importance of these issues, and recognizing the difficulty of doing so, the Subcommittee concluded that there was a justification for attempting to draft rule provisions in this area.

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

The concept behind this proposal for drafting is to deal with two kinds of concerns in a creative way. One concern is that all to often important data seem to have been deleted or lost by the time that they are sought for litigation purposes. This is a concern for parties seeking access to their opponents' data, frequently plaintiffs. The other concern repeatedly emphasized comes from entities from which data are sought through discovery (usually defendants) that say they can't foresee what methods of data preservation will be deemed sufficient by a court.

The goal, then, is to devise a rule provision that would adopt a preservation protocol and thus provide assurances with regard to both sorts of concerns. It is not clear where such a provision should be placed -- perhaps in Rule 37, as a limitation on sanctions against a party that has adhered to the prescribed protocol -- and the contents of the protocol would obviously need to be considered with great care. Despite the challenges, the Subcommittee concluded that an attempt to draft rule language was justified. As one member put it during the conference call, "You hear about this at every turn."

Goals of the drafting effort

It is important to emphasize again that the Subcommittee is not certain that promising rule language can be drafted to

accomplish all (or most of) the objectives listed above. It is aware that there is disagreement in the bar about the need for rule changes at all. There is no unanimity in favor of specific kinds of changes. Accordingly, the Subcommittee is proceeding with caution and is not committed to proposing any specific rule change.

The goal, however, is to attempt to determine whether a package of rule changes can be devised that would improve the handling of this sort of discovery and also offer beneficial features to the various litigation constituencies affected. Should the initial drafting effort be successful, the Subcommittee expects to present proposed rule language for discussion at the Committee's Fall meeting. The full Committee will then be able to review the Subcommittee's work product and consider whether to proceed with development of amendment proposals. If the Committee then feels that the work should proceed, proposed amendments could be presented during the Committee's Spring 2004 meeting. After more than three years of considering these issues, the Subcommittee believes that the time for more concrete action has arrived.

Appendices

Appendix A: Texas Rules of Civil Procedure 193.3(d) and 196.4
Appendix B: E.D. Ark. Local Rule 26.1
Appendix C: D. Wyo. Local Rule 26.1
Appendix D: ABA Civil Discovery Standard 29