**FINAL REPORT**

**OF**

**STUDY COMMITTEE ON ELECTRONIC DISCOVERY**

**June 17, 2005**

**prepared by**

**Rex Blackburn, Chairman**

## INTRODUCTION AND STUDY COMMITTEE'S RECOMMENDATION

The Study Committee on Electronic Discovery ("Study Committee") is ultimately responsible for recommending to the Committee on Scope and Program ("Scope and Program") whether the National Conference of Commissioners on Uniform State Laws ("NCCUSL" or "Conference") should form a Drafting Committee on Discovery of Electronic Records ("Drafting Committee"). *See,* Minutes of Second Meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, dated August 3, 2004.

The Study Committee is comprised of the following Commissioners:

Rex Blackburn, Committee and Division Chair
Paul W. Chaiken
Stephen Y. Chow
James M. Concannon
Peter J. Dykman
Charles W. Ehrhardt
Theodore C. Kramer
Ann I. Park
Mark H. Ramsey
Larry Stagg
Karen Roberts Washington

The Study Committee conferred telephonically on February 10, 2005, before and after which the Study Committee members exchanged extensive information and numerous e-mails regarding discovery issues associated with electronic discovery.

The Study Committee has considered the NCCUSL Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts (January 13, 2001), and in recognition of these criteria recommends that the NCCUSL form a Drafting Committee to draft an Act relating to the discovery, in civil litigation in state courts, of potential evidence maintained in electronic form. While making this recommendation, the Study intends to invite further comment from, *inter alia,* Commissioners serving as legislative liaison in the various jurisdictions regarding the need for such legislation in their respective jurisdictions. The Study Committee will elicit such comment prior to the 2005 NCCUSL Annual Meeting, and will report thereon to the Scope and Program at the 2005 Annual Conference.

The Study Committee concludes that NCCUSL's criteria for proposal of the Act are satisfied in that:

- The subject matter – discovery of digital and computer-based information ("e-data") – is appropriate for state legislation (or in certain jurisdictions where adoption of substantive rules governing discovery is within the jurisdiction of the courts, judicial rules). Each of the individual states, and the federal government, has independent judicial systems that must decide discovery related issues. Various state and federal jurisdictions have recently adopted, or are in the process of adopting, rules governing discovery of e-data. (*See* Section 6, below.) The adoption of these rules is occurring on a jurisdiction-by-jurisdiction basis, with no formal attempt at uniformity. Legal commentators recognize the need for more comprehensive, uniform rules governing discovery of e-data. In an article entitled *Electronic Evidence in the 21st Century* (77 Wisconsin Lawyer 7, July 2004), William C. Gleisner III wrote: "The bench and bar have for the most part elected to deal with electronic evidence by subjecting it to rules that were created to solve the problems of a paperbound world. . . . [W]e must fundamentally modify our procedural and evidentiary rules so that they are responsive to our electronic world. . . . [A] piecemeal approach to making the needed changes will not do. We also should not wait for the common law to afford solutions. . . . We must have uniform and consistent rules that are developed after thoughtful deliberation by respected institutions that understand the legal issues and can afford to retain the needed technical advisors. The rules that are adopted should be based upon and informed throughout by sound technical analysis." In support of his view, Mr. Gleisner quotes Wisconsin Supreme Court Chief Justice Shirley Abrahamson's concurring opinion in *Custodian of Records for the Legislative Tech. Servs. Bureau v. State,* 2004 WI 65, pp. 60-62, ___Wis. ___, ___ N.W.2d ___ (2004), where she states: "I also write to comment on the issue of production of electronic information. ... In 2004, most information is kept in digital form, and discovery, preservation, and production of electronic information is one of the leading legal issues facing not only corporate America but also government. Reform in discovery, including electronic discovery, is a priority.... This court has not previously confronted the issue of discovery of electronic data. ... The volume, number of storage locations, and data volatility of electronically stored information are significantly greater than those of paper documents. In addition, electronic information contains non-traditional types of data including metadata, system data, and 'deleted' data. Furthermore, the costs of locating, reviewing, and preparing digital files for production may be much greater than in conventional discovery proceedings. ... The majority opinion does not recognize the special problems [regarding the] production of electronic information or give guidance to the judge or the parties about these unique issues."

- The adoption of uniform rules governing discovery of e-data would obviously "promote uniformity" in state judicial proceedings, and in the opinion of the Study Committee would do so with regard to a subject where uniformity is "desirable and practicable". With the emergence of electronic technology, the extent to which individuals and institutions store or maintain information in an electronic form has clearly increased since the adoption of rules governing discovery generally. The adoption by various courts of "local rules" of procedure governing discovery of e-data (*see* Section 6, below), the creation of a committee to consider amendment of federal discovery rules relating to e-

data (*see* Section 9, below), and numerous court decisions attempting to apply traditional discovery rules in the context of e-data – at times with inconsistent results – evidence the desirability of rules that uniformly govern discovery of e-data. These efforts also demonstrate, at a minimum, that an Act would minimize the diversity of non-uniform rules and decisions.

- The adoption of uniform rules governing e-data would produce significant benefits to the public. The retention and maintenance of data in electronic form has proliferated in our society. Individuals and institutions would be served by uniform rules governing the discovery of those data in a litigation context. For example, a business that operates in several states is subject to potential litigation in each state in which it does business. The adoption in those states of uniform rules governing the duty to retain potentially relevant electronic information would not only enhance the preservation of such evidence for legitimate use in litigation, but also would reduce the likelihood that such evidence is lost, thereby subjecting the party once possessing such evidence to potential sanction by a court. *See e.g., Minnesota Mining & Mfg. v. Pribyl,* 259 F. 3d. 587 (7th Cir. 2001) (adverse inference instruction issued for spoliation of computer files). Moreover, to the extent that the procedural rules governing discovery of e-data are uniform among applicable jurisdictions, parties to litigation and the courts would benefit by reduced litigation costs and increased awareness and understanding of applicable rules. *See e.g., Jicarilla Apache Nation v. United States,* 60 Fed. Cl. 413 (Fed. Cir. 2004) (Court sets protocol for production format of electronic evidence). Finally, uniform rules governing discovery of e-data would afford the courts and litigants, in cases of first impression in a particular jurisdiction, the benefit of decisional law of other jurisdictions whose courts have considered a particular issue.

The Study Committee has considered the following issues, and makes the following recommendations.

## 1. SCOPE – FORMS OF ELECTRONIC INFORMATION.

The breadth of e-data exceeds that involving more traditional informational media such as paper. Hard drives, tape back-ups and other storage media contain substantial, sometimes duplicative, information in various forms. Moreover, since e-data may be configured differently incident to different applications or software, issues arise regarding whether discovery may reach differently formatted data (*e.g.*, image (PDF or TIFF) files with or without removal of original formatting; metadata or revision history; or executable files).

The Study Committee recommends that a Drafting Committee's charge include the development of rules governing the primary forms of currently known, and reasonably foreseeable, forms of e-data.

The Study Committee also recommends that a Drafting Committee consider whether the discovery of e-mail should be treated differently from other forms of e-data because, at least in the context of organizational e-mail, it may contain informal communications by employees or agents that are arguably not authorized by the employer or organization.

## 2. SCOPE – CIVIL AND CRIMINAL DISCOVERY.

The Study Committee carefully considered whether a Drafting Committee's charge should include the drafting of rules applicable to discovery of e-data in both civil and criminal cases. The Study Committee recommends that the Drafting Committee's charge be limited to drafting an Act relating only to civil litigation. The Study Committee reached this conclusion for the following reasons. First, considerable variance exists between discovery, generally, in civil and criminal contexts. From a practical standpoint, charging a Drafting Committee with responsibility for developing rules governing discovery of e-data in both contexts would be unduly ambitious and likely undermine the focus of the Committee. Second, and perhaps more importantly, an Act that attempts to govern discovery of e-data in both civil and criminal contexts would complicate, if not disadvantage, the enactment of an Act. The criminal and civil bars are, in most jurisdictions, uniquely distinct. Enactment of an Act that deals with discovery in both civil and criminal contexts would require interaction with separate constituencies having potentially different concerns. Moreover, in a number of jurisdictions the rules of discovery are within the primary province of the courts rather than the legislature. In these jurisdictions the adoption of substantive rules governing electronic discovery will require that the substance of the Act take the form of judicial rules of procedure or evidence, rather than legislation. Seeking adoption of judicial rules governing discovery of e-data in both contexts would, in the opinion of the Study Committee, be unnecessarily difficult.

While the Study Committee recommends that the Drafting Committee draft rules applicable to discovery of e-data in only civil cases, the Study Committee recognizes that certain of the principles relating thereto would presumably be applicable in a criminal context as well and that the Conference should consider the eventual adoption of rules in the criminal context. For this reason, the Study Committee recommends that a Drafting Committee also be charged by the Executive Committee to report, during the Drafting Committee's tenure, regarding the advisability of the Conference undertaking the development of rules governing discovery of e-data in criminal litigation.

## 3. COST OF DISCOVERY.

Retrieving e-data can be technically complex and relatively expensive. *See e.g., Linnen v. A.H.Robbins Co., Inc.,* 1999 WL 462015 (Mass. Super. June 16, 1999) (litigant paid more than $1.1 million to search backup tapes). The Study Committee recommends that a Drafting Committee consider, and if appropriate develop rules governing, which party must bear the expense of accessing and retrieving e-data. *See e. g.,* Texas Rule of Civil Procedure 196.4, Electronic or Magnetic Data (only responsive information that is "reasonably available to the responding party in the ordinary course of business" must be produced. The responding party has an opportunity to object to any request calling for information that cannot be produced by "reasonable efforts." If the court then orders production, it must order that the requesting party pay costs of "extraordinary steps" required for production.). *See also, Zubulake v. UBS Warburg,* 217 F.R.D. 309 (S.D.N.Y. 2003) (Court sets forth seven-factor cost shifting test for inaccessible data).

## 4. PRESERVATION AND SPOLIATION.

E-data may exist in dynamic forms subject to expansion, elimination or change – caused by the normal function of the system in which the data are maintained, technical or other failures, or intentional human intervention. The Study Committee recommends that a Drafting Committee consider and, if appropriate, establish rules governing: (1) a party's duty to preserve e-data; and (2) the appropriate remedies for failure to preserve e-data.

## 5. PROCEDURAL ISSUES.

The Study Committee recommends that a Drafting Committee consider the following procedural issues and, if appropriate, establish rules regarding whether to require or, as applicable, permit:

a. Federal Rules of Civil Procedure ("FRCP"), Rule 26-like initial disclosures requiring mandatory disclosure of: (1) a person or persons with knowledge regarding the client's information management systems with the ability to facilitate reasonably anticipated discovery (an e-discovery "liaison"); (2) categories of e-data and information systems which the client maintains in the ordinary course of business; (3) proprietary limitations on the reproduction of e-data; or (4) extraordinary costs or technical difficulties associated with the retrieval or production of e-data.;

b. FRCP, Rule 16-like scheduling conference, or FRCP Rule 26-like conference, requiring the parties to attempt to reach agreements to eliminate issues regarding electronic discovery, such as those involving: (1) items a.(1) through (4), above; (2) preservation and production of digital information; (3) procedures for dealing with inadvertent disclosure of digital information; (4) whether restoration of deleted digital information may be necessary; (5) whether backup or other historical or legacy data is within the scope of discovery; (6) the media, format and procedures for producing e-data; (7) who will bear the cost of preservation, production and restoration (if necessary) of any e-data; and (8) the scope of e-data, including e-mail discovery and agreed search protocols.

c. meet and confer requirements incident to discovery disputes;

d. utilization of special masters in certain circumstances;

e. on-site inspections;

f. preservation of the privileged character of certain e-data inadvertently produced incident to "wholesale" data production; and

g. the mandatory exchange of electronic versions of interrogatories, requests for admission and requests for production.

*See* Proposed Amendments to the Federal Rules of Civil Procedure; U.S. Court of Appeals (Ninth Cir.) Proposed Model Local Rule on E-Discovery; U.S. District Court, Eastern and Western Districts of Arkansas, Local Rule 26.1; U. S. District Court, District of Kansas,

Electronic Discovery Guidelines; U. S. District Court, District of Delaware, Default Standard for Discovery of Electronic Documents; U.S. District Court, District of Florida, Local Court Rule 3.03(f); U. S. District Court, District of New Jersey, Local Rule 26.1(d); U.S. District Court, Southern and Eastern District Courts of New York, Local Civil Rule 26.3(c)(2); U. S. District Court, District of Wyoming, Local Civil Rule 26.1(d); Proposed California Rule of Court, C.R.C. Rule 332 Facilitation of E-Discovery; California Code of Civil Procedure Section 2017; Illinois Supreme Court Rules 201(b)(1) and 214; Maryland Rule of Civil Procedure 2-504.3; Supreme Court of Mississippi Rule 26(b)(5); Texas Rule of Civil Procedure 196.4.

## 6. POSSESSION AND CONTROL.

The Study Committee recommends that a Drafting Committee consider and, if appropriate, establish rules governing whether a party has "possession and control" of potentially discoverable e-data when the data are ostensibly held by a third party, such as a web site log stored by an Internet Service Provider.

## 7. DISCOVERY AGAINST THIRD PARTIES.

The Study Committee recommends that a Drafting Committee consider and, if appropriate, establish rules governing discovery of e-data pursuant to subpoenas directed by a party to third parties.

## 8. CONSISTENCY WITH CURRENT CHANGES TO FRCP.

The Study Committee recommends that a Drafting Committee be mindful of, and consider whether to attempt to develop rules that are consistent with, the Civil Rules Advisory Committee's current consideration of changes to the Federal Rules of Civil Procedure. *See,* "National Dialog On Electronic Discovery" found at www.kenwithers.com/rulemaking/civilrules.

## 9. OTHER RESOURCES.

The Study Committee has identified the following additional resources that may be of assistance to a Drafting Committee:

- *The Sedona Principles:* Best *Practices, Recommendations & Principles for Addressing Electronic Document Production* (January 2004) (www.thesedonaconference.org)

- *Special Issues Involving Electronic Discovery,* 9 Kansas Journal of Law & Public Policy 425 (2000)

- *Navigating the Perils of Discovery in the Electronic Information Age,* Michigan Bar Journal (September 2002)