



*International Association  
of Defense Counsel*



02-ED-052  
Part 1

November 18, 2003

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Honorable Lee H. Rosenthal  
United States District Judge  
CHAIR - Judicial Conference Advisory Committee on Civil Rules  
11535 Bob Casey United States Courthouse  
Houston, TX 77002

Re: **Judicial Conference Advisory Committee on Civil Rules**

Dear Judge Rosenthal:

A the President of the International Association of Defense Counsel, I would request the opportunity to attend and offer comments to The Judicial Conference Advisory Committee on Civil Rules at what I understand to be the upcoming Fordham Law School Conference on February 20 - 21, 2004. The points I would like to address on behalf of the defense bar and our business clients include:

1. The Scope of Any New Rules – and specifically the duty of initial production should extend only to electronic information that is reasonably accessible in the ordinary course of business;
2. The Cost of Production – and the allocation of costs to the requesting party if extraordinary efforts are required to access and produce information that is not reasonably accessible;
3. The Duty of Preservation – and the creation of 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; and
4. The Attorney-Client Privilege – and specifically the prevention of any waiver of the same due to an inadvertent disclosure of privileged documents, communications and/or trade secrets, without creating new pressures for premature production.

I will submit a position paper on behalf of the IADC in the next week or so, but I wanted to submit my request at this time for I understand you are currently in the process of formulating the agenda for the conference.

Very Truly Yours,

J. Walter Sinclair  
Stoel Rives, LLP

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02-ED-052

Part 2

November 24, 2003

Honorable Lee H. Rosenthal  
United States District Judge  
CHAIR - Judicial Conference Advisory Committee on Civil Rules  
11535 Bob Casey United States Courthouse  
Houston, TX 77002

Re: **Judicial Conference Advisory Committee on Civil Rules**

Dear Judge Rosenthal:

As per my letter to you of November 18, 2003, enclosed please find a position paper of the International Association of Defense Counsel. This is being sent to you for presentation to the **Judicial Conference Advisory Committee on Civil Rules**. Thank you for your consideration of our position on this important issue and I would like to reiterate my prior request to attend and offer comments to The Judicial Conference Advisory Committee on Civil Rules at what I understand to be the upcoming Fordham Law School Conference on February 20 - 21, 2004

Very Truly Yours,

J. Walter Sinclair  
President - IADC

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November 10, 2003

**IADC POSITION PAPER REGARDING THE E-DISCOVERY RULES:  
THE NEED FOR AMENDMENTS TO THE RULES GOVERNING  
ELECTRONIC DISCOVERY**

The International Association of Defense Counsel (IADC) strongly supports clear, concise, and meaningful amendments to the Federal Rules of Civil Procedure to address several unique issues related to electronic discovery. IADC is the oldest defense bar comprised of members who have been invited to join and who are among the most experienced in their craft practicing civil trial law

The IADC is focused on the following four areas, which are those set forth by the LCJ in it's White Paper:

- 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 Shifting** – allocate costs to the requesting party if extraordinary efforts are required to access and produce information that is not reasonably accessible;
- 3) **Safe-Harbor** -- 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.

**1. Scope of Electronic Discovery**

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. There should be 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.

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 the drafters did not intend to expand the scope of discovery by defining what electronic data is, yet that may be the inadvertent result with the way that the proposed amending Rule 26 reads. By using this definition as the entitled "scope" to Rule 26 electronic discovery, it seems to run the serious risk of confusing what is meant by electronic information with a permissible scope of discovery of such information that would exceed the structure and purpose of the discovery rules, i.e., the scope of discovery as defined by Rule 26 (b), and determined by the Committee's rulemaking power under the Rules Enabling Act.

The IADC would support a common sense approach to the definition of "documents and things" that would be to add a few words to Rule 34(a)(1) to confirm that it covers electronic information, such 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)...."* (5) *Addressing the producing party's burden of retrieving, reviewing, and producing data it does not ordinarily access.*

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 Committee's September 15 draft suggested that a new section (h) be added to Rule 26 entitled "Electronically-stored data." 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 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 accessible in the ordinary course of business."* Such an amendment would parallel the general discovery scope amendments to Rule 26 (b) (1) that took effect on December 1, 2000.

## 2. Cost Shifting:

The rules should also specifically direct the court to order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve 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 shall be shifted because they require "extraordinary steps" to reconstruct electronic documents.

The IADC would support the 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."

The costs should not merely be hardware and search costs, but also include review costs. 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.

## 3. "Safe harbor" for preservation of electronic data.

*Safe Harbor and Sanctions.* There is a great deal of uncertainty concerning the scope of the duty of preservation for electronic materials which 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. 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. A party has a duty to preserve relevant documents, including electronic document, as soon as they know there is litigation on the forefront; however, there needs to be an exception regarding the continued utilization and recycling of electronic back-up tapes, until and unless there is a court order to the contrary.

A three part amendment to Rule 37 of the Federal Rules of Civil Procedure would accomplish this. 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 could 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." See Allman, Comment on Current Electronic Discovery Issues to Judicial Conference Committee on Rules of Practice and Procedure (December 9, 2002)

#### 4. Inadvertent Privilege Waiver.

The difficulties presented by inadvertent waiver of privileges had long been recognized. Designing a solution to the waiver of privilege problem for e-discovery is 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, the IADC would recommend that the method **not** be any mandated procedure such as the "quick peek" approach considered by the Committee in 1999 -- allowing the court to order that a "quick peek" at produced material would not work a waiver. 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.

The concern over the "quick peek" approach is 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. Few, if any, litigants who are regularly involved in litigation would willingly forego reviewing documents for privilege before they are produced. Finally, 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.

A "quick peek" Rule could turn today's risk of forced un-reviewed production into an all too frequent and unacceptable reality.

***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."

The IADC favors the codification in a new rule 34(b)(2)(E) the position that 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.

## CONCLUSION

While the IADC 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, the IADC 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. The IADC 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 would be pleased to present at the Conference if that is a possibility.

RESPECTFULLY SUBMITTED,

INTERNATIONAL ASSOCIATION OF  
DEFENSE COUNSEL

  
J. WALTER SINCLAIR - PRESIDENT