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To: <peter_mccabe@ao.uscourts.gov>
cc:
Subject: E-discovery

Mr. McCabe - attached is a letter from me as the President of the International Association of Defense Counsel in follow up to the Fordham Conference on electronic discovery. Thank you very much for your time and effort on this important issue.

Walt Sinclair

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IADC Comments 3 6 04.d



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One Columbus Circle, NE, Room 4-170
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Re: Request for Comment on Current Electronic Discovery Issues

I would like to thank you, Judge Rosenthal and the Civil Rules Committee for organizing a very productive conference with a wide range of distinguished participants. Thank you very much for including me and the International Association of Defense Counsel (IADC) in that group.

It became apparent to me while listening to the comments at the Fordham Conference that there truly is a need to amend the procedural rules to establish clear and concise guidelines for discovery of electronic information.

From both my personal experience and in discussions with members of the IADC, the current information explosion regarding electronic information is creating significant discovery problems. Most of our members represent the smaller litigants, not the large multinational corporations. These problems exist just as much for our clients as for the large companies. Furthermore, this seems to be increasing exponentially, every year. In many instances, discovery is simply becoming too costly, too slow, too burdensome, and too unproductive.

I believe that any amendment must deal directly with the core problems in e-discovery to have beneficial effect.

It appears to me that an addition to either Rule 26 or 34, developing a two tier approach to e-discovery, would help discourage unnecessary and costly e-discovery. That could be something like the following:

Parties may obtain discovery of information stored in electronic form that is reasonably available in the ordinary course of business and is relevant to the claim or defense of any party. Upon good cause shown, and 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 relevant and producible but is not reasonably available in the ordinary course of business.

I have paraphrased this wording from that of others who attended the conference, but it demonstrates the essence of a common sense approach to this issue. This then ties itself into the concept of Cost Shifting. The ability of the Court to Shift



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Costs may in and of itself provide the best and most appropriate approach to curbing discovery abuses. The appropriate allocation of costs could substantially reduce the costs and burdens of voluminous production requests in appropriate circumstances. The rules should specifically direct the court to order that the requesting party pay the reasonable costs of any extraordinary steps required to store, retrieve, review, and produce electronically stored information, unless there is a substantial showing of a good cause basis not to do so.

The area of inadvertent production of documents is of particular concern to me. With the huge volume of documents being produced in litigation today, it is almost impossible to avoid inadvertent productions. I had to go to court on this issue twice last year to regain documents my opposing counsel refused to return. And I succeeded, but with great cost and time. I do not believe the "Quick Peek" proposal works. I do not believe that anyone is realistically going to turn over their file to opposing counsel without reviewing the same first. Even if an inadvertent production does not waive a privilege, the information has been produced. The Conference materials dealing with the "Claw Back" agreements is a much preferable method of approaching this issue in my opinion. It is a procedure that is practical and in use fairly generally via case management orders in my practice. I think the rule proposed in footnote 12, along with the factors listed on page 32, would provide a valuable tool to counsel and court. Otherwise, a Note to the Rule could explain and 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.

Finally, it appears to me that the inclusion of a discussion of electronic discovery at the Rule 26 conference would (and has in the states utilizing this process like Arkansas and New Jersey) eliminate a lot of the potential problems. I support a simple approach like New Jersey's.

Again, thank you for your time and interest on this subject. I enjoyed participating in the conference and offer any further assistance you might request.

RESPECTFULLY SUBMITTED,

J. Walter Sinclair
President – International Association of Defense Counsel