04-CV-004
Request to Testify
1/12 San Francisco

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08/26/2004 05:42 PM

To <Peter_McCabe@ao.uscourts.gov>
cc
Subject FW: E-Discovery -- Request to Testify

Dear Mr. McCabe:

I am the immediate past president of the International Association of Defense Counsel and have been involved in the e-discovery issue for them for a number of years. I also represent a number of corporations who are very interested in this issue. I would request the opportunity to testify at the upcoming hearings on the proposed civil rule amendments on January 12, 2005 in San Francisco, CA. I could, if need be, rearrange my schedule to attend the January 28, 2005 hearings in Dallas, TX, if for any reason that would be preferable.

If there is something additional I need to do to obtain an opportunity to attend and present at one of these hearings, please let me know at your earliest opportunity.

Very truly yours,

Walt Sinclair

J. Walter Sinclair, Esq.
Immediate Past President
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04-CV-004
Testimony

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December 28, 2004

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

I am writing from several perspectives. As a partner of Stoel Rives, LLP, a large West Coast law firm, as outside counsel for several Idaho corporations, including Micron Technology, Inc., as immediate past President of the International Association of Defense Counsel and as the President-elect of the Lawyers for Civil Justice. From those many perspectives, I have been able to see multiple abuses with electronic discovery which I would like to share with The Judicial Conference Advisory Committee on Civil Rules, to support my upcoming presentation on January 12, 2005 in San Francisco, CA. I also enclose a copy of an article I recently published in the Idaho Advocate, the official publication of the Idaho State Bar. The points I would like to address are the following:

1) The Scope of The New Rules – and specifically the duty of initial production of documents, limiting it in regards to "electronic data" which 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) A "Safe Harbor" for the business 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.

I would like to start with the need to limit the obligation to preserve and produce electronically stored information that is "not reasonably accessible" without a court order. As a litigator working with many of my corporate clients, large and small, it is essential that we deal

differently than we normally do with electronic information that is "not reasonably accessible." The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. In contrast, where one must resort to disaster recovery or backup tapes and other sources of data and documents, it becomes extraordinarily expensive and time consuming for both my clients and my firm to retrieve, review and produce such information. I would suggest that the court should require the requesting party demonstrate it's need and the relevance of such data and documents, and then determine whether the need outweighs the cost, burden and disruption of retrieving and processing the data from such sources. And even when it does, the court's need the obligation to address cost shifting.

Rule 26(b)(2) leaves it to the discretion of the Court to decide whether or not to shift any costs of retrieving and producing information that is "not reasonably accessible". Why? I would strongly recommend the committee reconsider accepting something more similar to the Texas approach, or mandatory cost shifting. The Court can still not shift costs, but it shifts the burden for this very burdensome production. This approach has reportedly been successful in reducing unreasonable demands for production of electronic information. This is a very valuable result for all involved, the courts, the litigants and even the counsel who should not be having to spend hundreds of hours on this type of production. In my firm's experience, our clients have incurred tremendous expense, which we do not believe they should have had to bear, due to the discovery requests of others that made my clients and I access data and documents that were not readily accessible. I am in the middle of two such cases as I prepare these comments. The cost of production has exceeded $1,000,000 in one such case and we are just beginning our discovery efforts. It is my belief that the allocation of costs would be the most effective deterrent against overbroad, marginally relevant discovery, while not being a bar to us litigators from obtaining all the information we need.

My next point is the requirement to preserve certain data and documents. It is essential to identify appropriate "litigation hold" practices, and provide a reasonable "safe harbor" (under Rule 37 (f)) for document preservation. The lack of clarity on this issue presently is causing my clients to ask me to tell them when they have to preserve what, and it is impossible to know the true boundaries of that requirement under the various court decisions on this issue. The focus of preservation obligations should be on taking reasonable steps to preserve "reasonably accessible information", not back-up tapes or disaster recovery systems. The cost of putting a hold on the systematic business destruction practice, or the reuse of back-up tapes can be astronomical. Without some showing of extraordinary need, my clients should not be forced to incur this process nor the incumbent expense. One of my clients, a small commercial developer, has had to almost suspend its operations in order to reply to the document requests with which it has been served. If this is to occur, at all, there should first be a showing of good cause, and second, the cost of this should initially be borne by the moving party absent a showing of extraordinary facts

and good cause as to why the requesting party should not bear this expense in obtaining the data it has requested.

In business there is a need to have continuity of operations and to avoid the repeated necessity of suspending and/or shutting down my clients' business systems and processes due to the potential possibility that some piece of information in a disaster recovery system might possibly be relevant to some issue involved in some litigation. A party should have the responsibility to provide in discovery any "reasonably accessible information." In addition, if upon request of one of the parties, the court were to enter an order to preserve certain additional data or certain data systems, after a showing of good cause, then the party ordered would have to preserve the same. Then, to accomplish this, I recommend the following wording: "A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information."

I have inadvertently produced documents in several cases in the last several years, due to the volume of document with which I have had to deal with. I had an opposing counsel advise me of an inadvertent production she did to me just last week. I have had counsel cooperate in returning such documents, and others refuse to do so without a court order. I would support the proposal that the "form" of production and the treatment of inadvertently produced privileged information be subjects of early discussion. Both of these items can be important in controlling costs and reducing unnecessary confusion. With the tremendous amount of data and documents that can be requested, and then electronically recovered and produced, it is essential that with an inadvertent production of a document(s) the attorney-client privilege and/or attorney work product not be waived, and be protected. I recommend that a party who receives a notice that privileged material has been produced should be required to certify that the material identified as privileged has been sequestered, destroyed, or returned to the party originally producing the same. This is the practice I personally follow, but many don't! Certification should also be required because it is so easy with today's technology to circulate electronic information almost universally, and immediately, with adverse consequences to the assertion of privilege as well as the client.

Very Truly Yours,

J. Walter Sinclair
Partner – Stoel Rives LLP

Photo copies to:

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Amending the Federal Rules of Civil Procedure for Electronic Discovery Issues

By J. Walter Sinclair and Nicole C. Hancock

Proposed amendments to The Federal Rules of Civil Procedure are under consideration, to take specific account of electronic documents and information and the unique issues that arise with electronic data.

While laws are generally known to withstand the test of time, the Federal Rules of Civil Procedure (the "FRCP") are finally giving way to technological advances. The FRCP are being amended to accommodate for the discovery of information generated by, stored in, retrieved from, and exchanged through computers ("E-Discovery"). Although the long and arduous process is well underway, it is far from over.

The Civil Rules Advisory Committee of the United States Judicial Conference (the "Advisory Committee") has proposed amendments to the FRCP to deal with the increasingly severe discovery problems that arise with digitally based information, commonly referred to as E-Discovery.

On June 18, 2004, the Standing Committee on the Rules of Practice and Procedure (the "Standing Committee") unanimously approved the proposed amendments (the "Proposed Amendments") to the FRCP. The Standing Committee published the Proposed Amendments in August 2004, allowing judges and lawyers a six-month period to review and comment on the proposed changes. This is where each of us becomes part of this all-important process. We, as practitioners, have an opportunity to affect the amended rules that will ultimately be implemented. Practitioners who deal with E-Discovery on a regular basis and who have the experience and knowledge to understand the effect the Proposed Amendments will have on the practice of law will have an opportunity to comment on how they foresee the rules affecting their practice—the good, the bad, and the unexpected effects. Thus, this period for review and comment is possibly the most important part of the process—one in which each of us should become involved.

Formation of the Proposed Amednments

The process began with the Advisory Committee's recommendations, which were formed with considerable input from the bench and the bar. Many lawyers related their experiences and problems with the discovery of digitally or electronically stored information. It became apparent E-Discovery was an area that needed immediate attention. Many professionals expressed serious concern with the growing problems arising from the cost, burden, and complexity of E-Discovery.

The Advisory Committee formed a "Discovery Subcommittee," which did most of the research and fact-finding. The Discovery Subcommittee drafted the Proposed Amendments, which were submitted for consideration by the Advisory Committee, and then the Standing Committee.

Over an extended period of time, many lawyers supplied the Discovery Subcommittee with in-depth guidance to identifying problems associated with E-Discovery and specific suggestions for amendments to the rules that would help solve the discovery problems. On April 14, 2003, the Discovery Subcommittee issued a report of its findings (the "Report"). The full Advisory Committee endorsed the Report at its May 2003 meeting and authorized the Discovery Subcommittee to develop proposed rule language in the following seven problematic areas identified in the Report: (1) improving E-Discovery during early discovery planning; (2) altering the initial disclosure requirement to include E-Discovery; (3) redefining the term "document" to include electronic forms of documents; (4) changing the form of production of documents; (5) addressing the producing party's burden of retrieving, reviewing, and producing data it does not ordinarily access; (6) addressing inadvertent privilege waiver; and (7)adopting a "safe harbor" for preservation of electronic data.

From these problematic areas, the Discovery Subcommittee formulated five main areas in the FRCP for amendments: (1) addressing E-Discovery issues early in the discovery process; (2) modifying requests for production and interrogatories to apply to E-Discovery; (3) addressing E-Discovery that is not readily ascertainable; (4) asserting privilege after inadvertent production; and (5) limiting the sanctions for failure to disclose E-Discovery information. Although the Standing Committee has not yet approved the Proposed Amendments, it has published them for review and comment by the bench, bar, and public. The review period and comment period will close February 15, 2005.

Proposed Amendments

1. Early Discovery Planning for E-Discovery Issues: FRCP 16(b) and 26(f) and Federal Form 35

FRCP 26(f) requires counsel to meet and confer before formal discovery commences, to develop a discovery plan that is submitted to the judge before the judge enters the FRCP 16(b) scheduling order. The Discovery Subcommittee recognized the importance of identifying at this early stage the E-Discovery issues presented by the parties' claims. The Report noted "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." Accordingly, the Proposed Amendments to FRCP 26(f) are designed to improve the handling of E-Discovery problems such as the form of production, retention and preservation of digital information, and privilege waiver.

Before a scheduling conference is held, the Proposed Amendments require the parties to discuss "any issues relating to disclosures or discovery of electronically stored information, including the form in which it should be produced[, and] whether, on agreement of the parties, the court should enter an order protecting the right to assert privileges after production of privileged information." In other words, the parties are not only required to discuss potential E-Discovery issues that may arise, but they are also required to formulate a plan protecting them

against inadvertlently waiving their attorney-client privileges, which may inadvertently occur in the mass production commonly associated with E-Discovery.

One potential problem with the amendment to Rule 26(f) is it requires parties "to discuss any issues relating to preserving discoverable information." Adoption of such a rule would be the first reference in the federal rules to a preservation obligation, which could exceed the rulemaking power.

Form 35 was also revised to add the parties' E-Discovery issue to the list of items included in the report submitted to the court. Addressing these issues up front will assist the parties in proactively avoiding unnecessary problems that may arise with their E-Discovery.

Additionally, the Discovery Subcommittee recommended an amendment to FRCP 16(b) that requires the scheduling order to provide for these E-Discovery issues. Under the Proposed Amendments, federal courts are required to enter a scheduling order that includes "provisions for disclosure or discovery of electronically stored information." This change is designed to alert the court, at the early stages of litigation, to E-Discovery issues that may arise during the course of discovery.

2. Discovery Production & Interrogatories

a. Expanding the Definition of "Document": FRCP 34

FRCP 34 states that in a request for production during discovery, a party may seek "data compilations from which information can be obtained." FRCP 26(a)(1)(B) similarly refers to "data compilations" in the list of items that must be included in the initial disclosures. The Proposed Amendment to FRCP 34 expands the scope of production to include "electronically stored information or any designated documents" including data compilations, stored "in any medium."

The clarification in amended rule 34 to define 'documents' as separate from 'electronically stored information' may change prior usage. The Standing Committee is particularly interested in comments on whether Rule 34 itself or the Note should specifically state a responding party should not avoid reviewing and producing electronically stored information because a production request did not separately seek it, and—if so—what language would be the most helpful and appropriate.

Although there was little disagreement that the original FRCP 34 description included E-Discovery, the Proposed Amendments acknowledge the more modern and accurate description of the diverse mediums in which information that may be sought through discovery is stored. In other words, production is not limited to physical or tangible documents, and the Proposed Amendments make it clear discoverable information includes electronically stored information.

b. Form of Production: FRCP 34

The Proposed Amendments provide a "default" rule for the form of production: unless the parties agree otherwise, parties are required to produce items in the same means as they are stored. For example, if a manual is stored in hard-copy form, the producing party must make the hard copy available for copying.

Under the Proposed Amendment to FRCP 34(b), the requesting party is permitted to designate the form in which it wants electronically stored information produced, including having it produced as a hard copy. If the requesting party does not specify the form in which the E-Discovery is to be produced, the producing party may elect a form of production. If there is no request for a specific form for producing electronically stored information, and if the parties do not agree to a particular form and the court does not order one, the producing party has two options: to produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The Standing Committee is particularly interested in receiving public comment on whether the proposed options for production of electronically stored information are suitably analogous to the existing options for production of hard-copy materials.

The Report recognized that trying to deal with the form of discovery production in a rule was "challenging" because "every case is different," and concluded that "[p]erhaps the best thing is to prod people to discuss these issues up front, rather than trying to specify what to do with them." This election form of discovery may be a correct approach in light of the law requiring the producing party determine what is responsive and the form in which production should be made. *See Williams v. Owens-Illinois Inc.*, 665 F.2d 918, 932-33 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982); *cf.* Scheindlin & Rabkin, *Electronic Discovery in Federal Civil Litigation: Is FRCP 34 up to the task*, 41 B. C. L. Rev. 327, 372 (2000). Attempting to specify a "standard" default form of production when there is, in fact, no "standard" could significantly increase production costs without producing any real benefit.

The Proposed Amendment to FRCP 26(b)(2) gives the producing party a little relief from the uncertainty of the requesting party's election of form of production: the producing party need not provide E-Discovery that is not reasonably accessible unless the court orders the discovery for good cause. As it stands, it appears this area is designed to invite comments from practitioners who have experience in handling E-Discovery requests. Commentary from the Bench, Bar, and public should help flush out further concerns in this area.

c. Producing and Answering Interrogatories

The Proposed Amendments clarify in FRCP 33 that an interrogatory inquiry with respect to business records includes the electronically stored information. A responding party can answer an interrogatory seeking E-Discovery by granting the requesting party *access* to the electronically stored information rather than producing the information if derivation of the answer would otherwise be too burdensome. The responding party electing to grant access, however, must ensure the interrogating party can locate the electronically stored information. Situations may arise wherein the responding party must provide technical support, information on how to operate the software, or assistance to the inquiring party. In other words, if the responding party is merely going to grant access, the access must include all avenues to facilitate the inquiring party's ability to locate and learn the information. The responding party cannot be a hindrance to the requesting party's ability to obtain the information.

The proposed amendments to Rule 33 clarify that an answer to an interrogatory involving review of business records should also involve a search of electronically stored information and permit the responding party to answer by providing access to that information. But, the key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party. Further comment should be directed to how these provisions might be clarified so they are not interpreted to permit direct access to confidential, proprietary databases.

3. Addressing the Producing Party's Burden of Retrieving, Reviewing, and Producing Data It Does Not Ordinarily Access

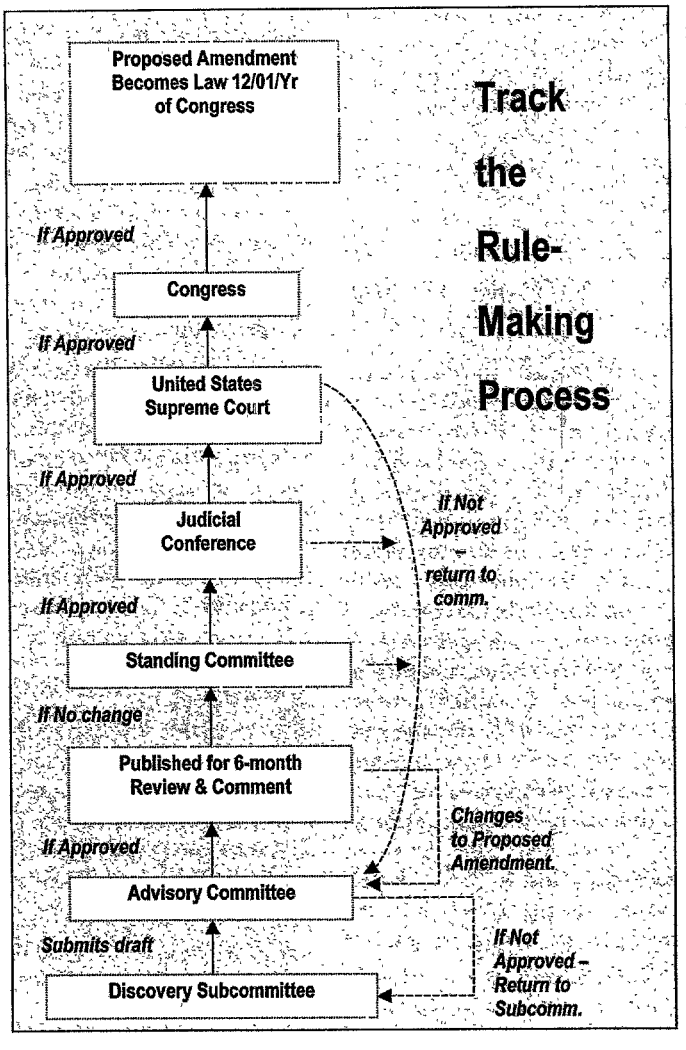
The Discovery Subcommittee recognized that automatic computer backup systems routinely preserve large amounts of data its owners do not ordinarily access. The issues identified include the information (1) was never intended to be used absent a catastrophic event; (2) was not likely to be organized in a way that facilitates locating materials on a specific topic; (3) will be costly to review while faced with no guarantee the review will yield information of significant value; and (4) was meant to be destroyed, notwithstanding the fact the information may be retrieved by forensic computer operations, but at great cost to the producing party.

The producing party's only protection from this very expensive form of discovery was that afforded by FRCP 26(b)(2). Rule 26(b)(2) gave the court discretion to limit the scope of discovery if the "burden or expense of the proposed discovery outweighs its likely benefit." However, the producing party had to fight a court battle before it could get such protection from E-Discovery.

The Proposed Amendments address the specialized aspects of "heroic efforts" production, beyond the general protections of the cost/value balancing tests required by FRCP 26(b)(2). Among approaches considered by the Discovery Subcommittee was the approach used in Texas: the costs of production are shifted to the requesting party if the E-Discovery data is not "reasonably available to the responding party in its ordinary course of business." Tex. R. Civ. P. 196.4.

There appears to be 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 that is specifically sought and reasonably accessible in the ordinary course of business. Then, if extraordinary efforts are required to access and produce information not reasonably accessible in the ordinary course of business, such costs may be allocated to the requesting party. *See, e.g.*, Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 78 Defense Couns. J. 206 (2001).

The Proposed Amendments attempt to answer these concerns and to provide much-needed guidance to the bench and bar. Although the Proposed Amendments to FRCP 16(b)(6) and 26(f)(4) and Form 35 provide for the parties to attempt to reach an agreement in the very early stages of discovery, the Discovery Subcommittee had to go further to address the issue of costs associated with producing legacy data. The Proposed Amendment to FRCP 26(b)(2) provides a two-tier answer: (1) the producing party must provide all relevant and reasonably accessible electronic data; and (2) if the requesting party deems the E-Discovery is deficient, the producing party must make a showing that the information is inaccessible, which will shift the burden to the requesting party to demonstrate good cause for needing the information. If good cause is shown, the court has discretion to order as much discovery as it believes is necessary based on the good-cause showing. The rules provide examples in which the court may limit discovery to a sampling of information to determine whether the production is in fact useful.



The Standing Committee is particularly interested in comment on whether further explanation of the term "reasonably accessible" would be helpful; and if so, what additional information should be included. Moreover, the Standing Committee also is particularly interested in receiving public comment on whether proposed Rule 26(b)(2) and its Note give sufficient guidance to litigants, lawyers, and judges on determining the proper limits of electronic discovery and on appropriate terms and conditions, including allocating the costs of such discovery. Another issue is the extent to which a producing party must "identify" information it regards as "not reasonably accessible."

4. Addressing Inadvertent Privilege Waiver

The Discovery Subcommittee notes that the method of production of E-Discovery can make it difficult and extremely cumbersome to determine whether such a production includes privileged data. Rather than frustrate the process of production by requiring the producing party to review each item, the Proposed Amendments allow a producing party some leeway in production.

The Proposed Amendment to FRCP 26(b)(5) establishes a procedure for the producing party to assert that it has produced privileged information without waiving the privilege. Provided the producing party acts within a reasonable time, it can require return, sequestration, or destruction of the privileged production. One option for the Proposed Amendments requires the requesting party certify the material has been sequestered or destroyed, although it is not clear whether this provision will make its way into the final amendments.

The proposed amendment to Rule 26(b)(5) sets up a proce-

dure to apply when a responding party asserts it has produced privileged information without intending to waive the privilege, but does not set out the standards for making this decision. The Standing Committee is particularly interested in receiving comment on whether the proposed amendment should include a requirement that a party who receives notice that privileged material has been produced must certify the material has been sequestered or destroyed if it is not returned. This is yet another opportunity for the bench, bar, and public to comment on the Proposed Amendments.

5. Adopting a "Safe Harbor" for Preservation of Electronic Data

Not only is preserving electronic information costly, but the sheer volume of information may make the task nearly impossible from the producing party's perspective. Much electronically stored information is automatically deleted and overwritten. The Proposed Amendment to FRCP 37 provides a "safe harbor" to a party who fails to provide electronic information due to deleted or overwritten data, if the failure was due to specified conditions. For example, the safe harbor applies if the electronic information was lost during the routine deletion of the electronic information. However, the safe harbor does not apply if the producing party violated an order, such as the FRCP 16 scheduling order, requiring the producing party to preserve the information, even if the information was accidentally lost.

The requesting party is not without burden. To obtain sanctions against a producing party, the Proposed Amendment to FRCP 37 requires the requesting party take reasonable steps to preserve electronically stored information at the beginning of discovery, when the party knew or should have known there was E-Discovery information in the action.

A protected safe harbor would be a welcome and important change to the many litigants plagued by the threat of sanctions for spoliation of evidence resulting from the normal operation of backup 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 the FRCP be amended to address this serious problem. *See, e.g.*, Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 Defense Couns. J. 417 (2003). Finally, such protection appears to be making its way into the FRCP, although the proposed amendments raise a number of questions on which comment will be necessary.

The Standing Committee is particularly interested in receiving comments from the bench and bar on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system. To focus comment on this issue, the footnote to proposed Rule 37(f) sets out an example of an amendment framed in terms of intentional or reckless failure to preserve electronically stored information lost as a result of the ordinary operation of a party's computer system.

The Standing Committee is also particularly interested in public comment on whether the proposed Rule and Note adequately and accurately describe the kind of automatic computer operations, such as recycling and overwriting, that should be covered by a safe harbor. The Standing Committee intends that the phrase, "the routine operation of the party's electronic information system," identify circumstances in which automatic computer functions that are generally applied result in the loss of information. The Standing Committee is concerned that there be adequate guidance as to the aspects of an electronic information system that are within the proposed rule, without being limited to existing technology

Conclusion

The Proposed Amendments are ready for public comment. If you are among the many practicing lawyers who believe that problems with E-Discovery could be alleviated if the FRCP contained more specific guidance with regard to any of the above areas, you are encouraged to make your views known to the Standing Committee before February 15, 2005. You can do so by sending your correspondence to Secretary of the Standing Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments may also be sent electronically to www.uscourts.gov/rules.

J. Walter Sinclair is a partner of Stoel Rives LLP in Boise, Idaho. He graduated from Stanford in 1975 with a BS in economics and the University of Idaho College of Law in 1978 with a J.D. He serves on the Lawyers for Civil Justice E-discovery subcommittee and attended the Fordham University Forum on E-Discovery sponsored by the Civil Rules Subcommittee in February of 2004 as President of the International Associate of Defense Counsel. He has a business, corporate, and complex litigation practice with trial experience in products liability, agricultural losses, aviation litigation, mass tort litigation, personal injury, contract claims, insurance coverage disputes, real estate disputes, and probate disputes.

NICOLE C. HANCOCK is an associate in the Stoel Rives LLP in Boise, Idaho and practices in the field of litigation. She was a law clerk to the Honorable Thomas G. Nelson of the U.S. Court of Appeals for the Ninth Circuit (2002-03). She graduated from Western Oregon University in 1998 with a B.S. and Willamette University College of Law in 2002, magna cum laude, where she was Editor-in-chief of the Law Review.