

04-CV-216



**Metro-North Railroad**

February 14, 2005

VIA E-MAIL AND REGULAR MAIL: [Rules\\_Comments@ao.uscourts.gov](mailto:Rules_Comments@ao.uscourts.gov)

Peter G. McCabe, Esq.  
Secretary of the Committee on Rules of Practice and Procedure  
Administrative Offices of the United States Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Re: Metro-North Commuter Railroad Co. Comments  
on Proposed Amendments to the Federal Rules of  
Civil Procedure Concerning Electronic Discovery

Dear Mr. McCabe:

Metro-North Commuter Railroad Company ("Metro-North") submits the following comments to the proposed amendments to the Federal Rules of Civil Procedure concerning electronic discovery:

A. RULE 16. Pretrial Conferences; Scheduling; Management

Metro-North supports the proposed amendment to permit the scheduling order to include "provisions for disclosure or discovery of electronically stored information" and "adoption of the parties' agreement for protection against waiving privilege."

B. RULE 26(f). General Provisions Governing Discovery; Duty of Disclosure

Metro-North supports the proposed amendment to require parties, at the meet and confer pre-scheduling conference, "to discuss any issues relating to preserving discoverable information" and, when developing a proposed discovery plan, to address "any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced."

Metro-North opposes requiring the parties "to discuss and include in the discovery plan any issues relating to the protection of privileged information in discovery," though it supports such discussion if it arises during the pre-scheduling conference.

C. RULE 26(b)(2)(C) General Provisions Governing Discovery; Duty of Disclosure

Metro-North believes that the definition of the term "reasonably accessible" should include electronically stored information "routinely accessed or used by the party itself, and easily located and retrieved." Which electronically stored information is "reasonably accessible" should be determined by the steps needed to make it usable. In addition, courts should evaluate the frequency with which the electronically stored information has been accessed in the past when determining whether it is "reasonably accessible."

"Inaccessible" should include "disaster recovery information such as back-up tapes, legacy data, and deleted data."

Metro-North supports the Committee's 2-tiered proposal concerning production of electronically stored information. The Rule should impose cost-shifting presumption for inaccessible records to dissuade unnecessary and/or unreasonable requests, and to eliminate pressure to settle in an effort to avoid electronically stored information retrieval costs.

D. RULE 26(b)(5)(B) General Provisions Governing Discovery; Duty of Disclosure

Metro-North supports the proposed amendment which requires a party, after receiving notification within a reasonable time that it has received privileged information, to promptly return, sequester, or destroy the specified information and any copies.

E. RULE 33. Interrogatories to Parties

Metro-North supports the proposed amendment.

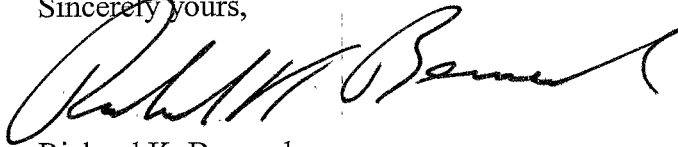
F. RULE 34. Production of Documents

Metro-North believes that unless the requesting party specifically asks for electronically stored information, the producing party should have no burden to search for same.

G. RULE 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

Metro-North supports the safe harbor provision and believes that a party should be eligible for safe harbor from sanctions for spoliation of electronically stored information if it negligently fails to prevent the loss of such information as a result of the routine operation of a computer system. Metro-North encourages the Committee to more clearly define "routine operation."

Sincerely yours,

A handwritten signature in black ink, appearing to read "Richard K. Bernard". The signature is fluid and cursive, with a large initial "R" and "B".

Richard K. Bernard  
Vice President and General Counsel