

# The Form of Production Battle of the Bulge: Scanned PDF's Not a Reasonably Useable Form

By Joshua C. Gilliland, Esq., D4 LLC

*“In the court’s experience, scanned PDFs, as opposed to electronically-produced PDFs, are not reasonably usable.”*

Magistrate Judge Paul M. Warner

In *Accessdata Corp. v. Alste Techs. Gmbh*, 2010 U.S. Dist. LEXIS 4566 (D. Utah Jan. 21, 2010), a United States based company that produces forensic software used in e-Discovery, entered into a contract with a German company. Litigation ensued when a contract dispute broke out and e-Discovery turned into a war.

## The Form of Production Einwand und Angriff



The German Defendants produced electronically stored information as hard copies and converted the scanned images to PDF's. The Plaintiffs claimed the production was not reasonably searchable. *Accessdata Corp.* at \*16.

The Defendants claimed the production was in a “reasonably useable form,” because they printed all the ESI as paper and had it scanned as PDF's. *Accessdata Corp.* at \*17. Adding insult to injury, the Defendant further claimed it

would be unduly burdensome and expensive to somehow “fix” the ESI so it was searchable. *Id.*

The Plaintiff, perhaps feeling a little like General Patton, cited Federal Rule of Civil Procedure Rule rule 34(b)(2)(E)(ii), which states that electronically stored information should be produced “in a form or forms in which [they are] ordinarily maintained or in a reasonably useable form.” *Accessdata Corp.* at \*17.

## e-Discovery Untergang

The Court channeled General Eisenhower in its ruling.

The Court ruled the Defendant was required to produce its electronically stored information “...in a form or forms in which it is ordinarily maintained or in a reasonably usable form.” *Accessdata Corp.* at \*18. citing Fed. R. Civ. P. 34(b)(2)(E)(ii).



The Court stated the previously produced electronically stored information was ordinarily maintained in an electronic format. *Accessdata Corp.* at \*18. Converting ESI to paper and then scanning to PDF's destroys searchable features of the inherently searchable electronically stored information.

The Court noted that the option to produce in a "reasonably useable form" does not give a party free rein to destroy the searchable functions of the e-Discovery. *Accessdata Corp.* at \*18. If ESI is ordinarily maintained in a searchable form, the information "should not be produced in a form that removes or significantly degrades this feature." *Accessdata Corp.* at \*18, citing Fed. R. Civ. P. 34(b) Advisory Comm. Notes to 2006 Amendment.

As the Court concluded, "In the court's experience, scanned PDFs, as opposed to electronically-produced PDFs, are not reasonably usable." *Accessdata Corp.* at \*18-19.

The Defendant was thusly ordered to re-produce electronically stored information in native file format or an electronically-generated PDF format. *Accessdata Corp.* at \*19.

### **Bow Tie Thoughts**

Producing electronically stored information as scanned paper in PDF format is about as defensible as the Maginot Line (especially when your opponent makes electronic evidence software). Parties are ill-served by playing such discovery games, unless they want to be on the losing end of a motion to compel that reads like the Treaty of Versailles.