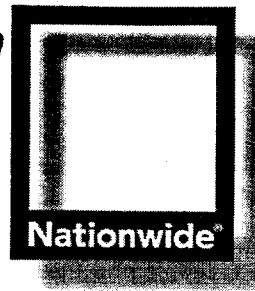


July 1, 2003

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Memorandum

The Office of General Counsel

To: Professor Richard L. Marcus, Reporter, Discovery Subcommittee, Civil Rules Advisory Committee, marcusr@uchastings.edu

From: Peter J. Oesterling, Assistant General Counsel, Office of General Counsel, Nationwide Insurance Companies, oesterp@nationwide.com

Re: E-Discovery- Proposed Amendments

Professor Marcus, As you are aware, Nationwide Insurance ("Nationwide") provided comments to Peter McCabe regarding the key issues you raised in your September 2002 *Inquiry From the Discovery Subcommittee Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials*. Nationwide would like to take this opportunity to reiterate that the Federal Rules of Civil Procedure should include clear and specific guidance relative to E-Discovery. Discovery requests for electronic data are demanded as a matter of course in most all litigation filed against Nationwide. The cost of such discovery is high and growing steadily as demands become more aggressive and sophisticated. The courts have shown little regard to the cost of such discovery or the true benefits that may be realized as a result of responding to these requests.

After consideration of the recent Zubulake decision, we feel the courts may be trending to a more realistic and fair evaluation of the burdens of E-discovery and in particular, the retrieval of electronic mail but solid Federal Rules related guidance is essential. The District Court defined what might be considered the proper cost-shifting analysis. Modifying the Rowe test, the court added factors included in the Federal Rules and balanced the various factors against the total cost of production. Nationwide has pending litigation and requests for some form of electronic data in nearly every state and federal jurisdiction in the country. Cost-shifting, clearly defined and presented within the Federal Rules, will provide a more equitable situation and consistency for parties where E-discovery is concerned.

A "Safe Harbor" provision within the Rules would also be essential to insure the ongoing security of Nationwide's data and its normal business routine. Failure to provide ongoing backup and maintaining standard data retention and recovery protocols can create significant problems for Nationwide and other responding parties. Nationwide maintains approximately 500 separately maintained and independent databases within its various business units all of which could be the subject of an E-discovery request. The Federal Rules should include a "Safe Harbor" provision to protect a responding party from inadvertent destruction of data as a result of normal business practices.

Nationwide once again appreciates the opportunity to provide input into the Rules making process.

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We would be happy to provide additional comments or answer any questions you may have.

Peter J Oesterling, Assistant General Counsel

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