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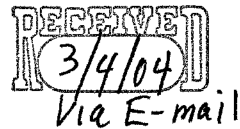

Cortese PLLC

Alfred W. Cortese, Jr.
ATTORNEY AT LAW
113 THIRD STREET NE
WASHINGTON DC 20002

202 637 9696 TEL
202 637 9797 FAX
AWC@CORTESEPLLC.COM

MEMORANDUM

MARCH 2, 2004

TO: Peter G. McCabe (peter_mccabe@ao.uscourts.gov)
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts

FROM: Alfred W. Cortese, Jr.

RE: COMMENTS TO THE CIVIL RULES ADVISORY COMMITTEE:

FORDHAM CONFERENCE DEMONSTRATES NEED FOR MEANINGFUL E-DISCOVERY AMENDMENTS

I would like to express my gratitude to the Committee for organizing the E-Discovery Conference at Fordham Law School and for arranging the participation of so many distinguished judges, academicians, and practicing lawyers. In my view, the Conference set a new standard for informed discourse on issues that have been and will continue to be <u>the</u> most important which the Committee must resolve. In sum, I believe the Fordham Conference established that there is a real need to amend the procedural rules to establish clear and concise guidelines for discovery of electronic information and pointed the way toward the rule amendments that would supply the necessary guidance.

A TSUNAMI OF DATA SPIRALING UP LIKE A TORNADO. Please forgive the mixed metaphor, but these were the words used by two different technical experts to describe the information explosion that has and will continue to create enormous e-discovery problems. And, there appeared to be no dissent from the view that technology and the amount of information are exploding and making discovery problems much worse with each succeeding year. Many agree that discovery remains too costly, too slow, too burdensome, and produces too little, notwithstanding attempted directional corrections in the 1983, 1993, and 2000 FRCP amendments.

WHAT TO DO? The U.S. legal system and discovery in particular are unique in the world, but some of those unique attributes should be further refined to meet the real needs and demands of individual litigants and those engaged in multinational commerce. As discovery continues to drive litigation costs skyward, more claimants are driven out of the judicial system and the system serves far fewer of the purposes for which it was designed. These developments have made a travesty of the command of Rule 1 that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

MEANINGFUL AMENDMENTS ARE FEASIBLE AND PRACTICAL. If the current rules cannot be "construed and administered" in accordance with the dictates of Rule 1, then the rules should be amended. Although the spokesman for ATLA proudly proclaimed that plaintiff lawyers are happy to wield their "weapons of mass discovery" without restraint or restriction and, as usual, stated the organization's opposition to any meaningful change, many trial lawyers on both sides of the "v" suggested several practical and feasible amendments that would supply needed guidance to plaintiffs and defendants. Such amendments should deal directly with the core problems in e-discovery. Tinkering at the periphery, for example, by merely amending the definition of document or inviting discussion of the problem among counsel, may be worse that doing nothing, because it will delay real relief for at least another 7 to 10 years. Fortunately, there is significant support for clear and concise amendment of the rules to address several issues unique to e-discovery.

REDUCE COSTS AND BURDENS BY FOCUSING ON RELEVANCE and NEED. The e-discovery information explosion exceeds our processing capabilities and requires narrowly focused, "smart" discovery targeted to information that is relevant and material to the claims and defenses and necessary to the disposition of the action. A straightforward addition to either Rule 34 or 26 such as the following would apply the 2000 discovery amendments' "two tier architecture" to help discourage unnecessary and costly e-discovery by clearly limiting automatic production responsibilities: "Parties may obtain discovery of information stored in electronic form that is reasonably available in the ordinary course of business and that is relevant to the claim or defense of any party. For good cause, upon 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 and that may not be reasonably available in the ordinary course of business."

COST SHIFTING FOR EXTRAORDINARY STEPS. Specific application of the current rules' "two tier architecture" and "cost benefit analysis" to e-discovery would substantially reduce the costs and burdens of indeterminacy on the producing party if enforced by cost shifting in appropriate circumstances as under the "Texas Rule". Therefore, 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. One of the most effective ways to keep electronic discovery within the scope mandated by Rule 26 (b) would be a rule amendment that specifically enforces, by "cost shifting", the notion of proportionality in the Rules and that requires litigants to tailor that discovery to the needs of the specific dispute.

SAFE HARBOR. The needs of businesses to keep records for business purposes, not litigation purposes, should be accommodated by adopting a safe harbor from sanctions

provision that permits parties to continue the operation of routine electronic data systems in the normal course of business unless the court orders otherwise for good cause. No sanctions should be predicated upon a failure to maintain or preserve electronic information unless a discovery request or preservation order describes with particularity the specific documents or data sought to be preserved and there was evidence of willful failure to preserve the information. Moreover, there should be a presumption that undertaking reasonable steps to notify custodians of electronic information of the need to preserve such information constitutes prima facie compliance with the standard of care.

PRIVILEGE. "Quick Peek" will not work for many reasons, but a proper procedural rule could be crafted to incorporate the majority view on inadvertent production. A general principle should be stated in the Rule to the effect that when a party inadvertently produces documents that are privileged and a claim of waiver is asserted, the court must consider all of the circumstances to determine whether or not waiver of any applicable privilege or protection is fair, reasonable, and in the interests of justice. The Note to the Rule could then summarize and explain 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.

A few amendments embodying the above key concepts are all that is necessary to guide bench, bar, and litigants through the extremely unfair, slow, and expensive procedure that discovery of electronic information has become for most parties.

Respectfully submitted,

Alfred W. Cortese, Jr.