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To: <John_Rabiej@ao.uscourts.gov>
cc:
Subject: Electronic Discovery

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Attached are my comments on electronic discovery. I know I was supposed to send them to Peter McCabe, but I do not seem to have his email, and I figured you would get them to him & others.

Nice to see you in NY and thatnks for your continuing help.

Alan

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Electronic Discovery Comments.c

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COMMENTS OF ALAN B. MORRISON
REGARDING POSSIBLE ELECTRONIC DISCOVERY RULES

I have not attempted to cover all of the areas discussed at Fordham on February 20-21, 2004, and so a failure to mention a topic should not be seen as either an acceptance or rejection of the point. I also will not elaborate on my reasons in most cases because they are fairly self-evident based on the discussion. This is more in the way of "What I would do if I were on the Committee."

I would include the topic of electronic discovery in Rules 16 & 26. There is no downside to reminding lawyers of the issue, and it may help movement in the state courts as well.

I would give serious consideration to amending Rules 33 and 34 to remove the anachronistic terminology and use a term such as records, which has a broad and well-defined meaning in places such as the Freedom of Information Act (and its eFOIA amendments); the Federal Records Act; and the Presidential Records Act. You might choose to use a phrase in Rule 34 such as "Documents and other records" to keep some of the current terminology.

The issue of what the Rules can do about requiring preservation is a thorny one. It strikes me as being very close to substantive, especially the farther one gets away from a specific discovery request and even more so, before the case is filed. Once the case has been filed, a judge would have some basis for saying, "defendant you must preserve the following records (assuming enough is known to make a specific order)" but a general order to preserve all records, even in unknown and undesignated locations, seems rather substantive and quite possibly unfair and unwise. This may mean that a court should allow very early discovery of record systems so that a specific order can be made, and if there is substantive spoliation law in the jurisdiction, that may provide a basis for sanctions. Otherwise, I doubt that federal courts have the right to make sweeping preservation orders on the ground that something might be found somewhere.

I am puzzled by the claims for a need for safe harbors on destruction. Because Rule 37 already contains a requirement that sanctions be reasonable, that addition does not seem necessary. The supporters seemed to be willing to accept suggestion (f) on page 39 of the materials, but as I read that, it [(1)] applies only if there has been a specific discovery request, and as I understand the problem, the claimed safe harbor is needed before discovery even starts or the discovery conference is held. I also wonder why it is limited to electronic discovery; while the situation may be more acute in that area, it would seem unwise to write so limited a rule. In short, this does not seem to be a safe harbor at all, or perhaps one in which only very narrow vessels will fit.

My sense is that destruction of records, electronic or otherwise, is a much smaller problem than the defendants claim for at least two reasons. So long as the record

destruction policy is carried out as it is written, and as long as the policy is even-handed, then following it should not cause problems. It may be that the systems in use are badly designed, and should focus less on time and more on whether the record retains any utility, but those problems cannot be fixed by rule makers. Moreover, record destruction can also result in favorable records being lost, as well as damaging ones. Thus, courts should have fewer difficulties with even-handed systems, and no rule should be promulgated unless there are significant actual problems – and not just once in a while.

My sense of the problem of waiver through inadvertent disclosure is that it does not require (or perhaps even permit) the attention of the Committee. As several defense counsel admitted, most documents are not vital and even fewer for which there is an arguable waiver fall into that category. It is not that a privilege is being misused – although there is a fair amount of that also – but that even if most privileges were abolished, the number of key documents that would be turned over would be quite small. Moreover, no matter what the rules on waiver are, no lawyer will fail to read the general counsel's file on the issue very carefully and figure out who else might be in the loop and review those files as well, thereby further minimizing the likelihood of significant privileged documents being surrendered to the other side.

Please keep me informed of the Committee's work and let me know if I can be of assistance.