Stephanie A. Middleton
Chief Counsel
Litigation
CIGNA Corporation

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Two Liberty Place
1601 Chestnut St., TL-48E
Philadelphia PA 19192
Telephone 215.761.4936
Facsimile 215.761.5511
stephanie.middleton@cigna.com

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The Honorable Lee Rosenthal
United States Courthouse
515 Rusk Street, Room 11535
Houston, Texas 77002

Dear Judge Rosenthal:

I appreciate the work of your committee and the opportunity to have participated in the excellent conference at Fordham. I would like to comment on two things: (1) Fed.R.Civ.P. 1's mandate that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every case;" and (2) the need for the Rules to provide a reasonable "safe harbor" from sanctions relating to preservation of electronic information.

Federal Rules of Civil Procedure, Rule 1

Why is arbitration fast becoming the means by which parties choose to resolve civil disputes? Why is the number of civil matters actually taken to trial in the federal courts decreasing? In large part the answer is that discovery, as currently practiced in federal courts, impedes, rather than facilitates the "just, speedy and inexpensive" resolution of cases. The burden and expense of discovery have simply driven parties from the courts. Parties find, in arbitration, reasonable limits. If arbitration is not an option, parties often are forced to resolve cases in the form of settlements that are driven not by the merits, but by calculations of what the cost of discovery would be to pursue the case and win. When that cost is in the millions, even the weak and meritless cases get settled for significant amounts. Litigation decisions are no longer based on an analysis of the law and the facts, but upon a calculation of the likely costs of discovery. This is especially so if the courts "liberally construe" Rules 26 and 34.

In "liberally construing," courts, sometimes with little deliberation or understanding of technology or the impact of their order, will order the

preservation of all electronic information. Or courts will order the preservation for the life of the case (often several years) or restoration of information that is on a disaster recovery system (a.k.a. "back-up tapes") or on legacy systems that are no longer used by the company, and which would otherwise be shut down. Companies do not use or store information on these disaster recovery systems in any organized fashion and do not even use any or all of these tapes when there is a "disaster," unless the information is critical and is unavailable somewhere else. Courts, without much deliberation, will order the restoration of information on legacy systems, even though there may be no one at the company who knows how to retrieve the information in the legacy system(s). Knowing that a court might do that, a mid-size company, which typically has hundreds of disputes or lawsuits at any point (ranging from EEOC charges to class actions), in the absence of some rule changes may be well advised to save all back up tapes and preserve all legacy systems, at the cost of many millions of dollars per year. Litigants do not, in the end and in reality, get meaningful information from these back up tapes and legacy systems. Attorneys who say otherwise usually are speaking of some other information that is still available to the business; they are not speaking of true disaster recovery tapes and legacy systems. And all of this is compounded by the new electronic discovery consulting firms who can do extraordinary things, and make millions while they are at it.

Safe Harbor

In-house counsel who become aware of a dispute or a lawsuit are conscious of the need to preserve relevant documents, including electronic information. Contrary to the picture some like to paint, we do not wake up each day with a desire or plan to destroy evidence. We typically determine who might have information and documents, instruct them to preserve potentially relevant information, and speak with our IT unit. In the past few years, however, it has become difficult to provide instructions that one is relatively confident are within the realm of "reasonableness" with respect to the necessary automatic overwriting and discarding of massive amounts of electronic data and information generated by a large or small company, or government entity, each and every day. This is compounded by the fact that hundreds or thousands of employees of those entities are likely to have home computers, PDAs, cell phones, and other repositories of data that are not on the company's system.

Do we err on the side of caution, so as to ensure we will not be subject to sanctions by a judge who may accept opposing counsel's arguments that everything must be frozen until a court orders otherwise -- thereby causing our companies extensive disruption and the spending of millions (literally) in what is probably unnecessary expense -- based on the possibility there is some shred of possibly relevant evidence buried in the data? Do we use our best judgment, knowing that a trial court may

disagree with us since the published decisions offer a wide range of "rules?" There is no clear appellate guidance, and is not likely to be much appellate guidance on such discovery issues or disputes.

I would propose a rule along the following lines:

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

(f) Failure to Preserve or Produce Electronic Information. Absent violation of a court order relating to preservation and production of specific documents or specific electronic information, a court should not impose sanctions on a party for failure to preserve or produce electronic information if the failure resulted from the normal operation of a system that deletes, writes over, or discards electronic information in the normal course of business operations, as long as that operation was adopted and maintained in good faith. No sanctions for failure to preserve or produce electronic information should be imposed absent a finding that a party willfully or recklessly deleted or destroyed electronic information that reasonably should have been preserved as properly subject to discovery.

I thank you and the Committee for all the work you are doing to resolve the issues raised by the technological changes we have seen in the last 10 or 20 years. We are truly in a world we could not have anticipated when the Federal Rules were drafted. I appreciate the opportunity to offer some comments about this world, or my world, in any event.

Respectfully,

Stephanie A. Middleton
Chief Counsel, Litigation
CIGNA Corporation

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