04-CV-135

Nobody
<nobody@uscbgov.ao.dcn>
01/21/2005 11:46 AM

To Rules_Support@ao.uscourts.gov
cc
bcc
Subject Submission from http://www.uscourts.gov/rules/submit.html

Salutation: Mr.
First: Michael
MI: B.
Last: Ganson
Org:
MailingAddress1: 2306 Park Ave., Suite 101
MailingAddress2:
City: Cincinnati
State: Ohio
ZIP: 45206
EmailAddress: Gansonlawoffice@aol.com
Phone: 513-721-2220
Fax: 513-721-5109
CivilRules: Yes
Comments:

Dear Sirs:

I am writing to comment on the proposed changes to the Civil Rules. It is my professional opinion that the current Civil Rules are working just fine and no change is necessary. The proposed changes will not promote the fair exchange of information to avoid "trial by ambush" as the current rules provide. We should not return to such an archaic system of jurisprudence. My specific comments follow.

1) Defendants will not have to produce information that they unilaterally claim is not "REASONABLY ACCESSIBLE." The proposed amendment to Civil Rule 26 apparently provides producing parties an initial exemption from their current obligation to turn over e-discovery material if they claim that it is "not reasonably accessible." Under the present rules, relevant requested information must be produced even if its custodian claims that it is difficult to access. No exemption like the one this amendment would create is available for paper discovery—and electronic information is usually more accessible than are paper records. A number of consumer-side lawyers believe that this change would even more stonewalling than they already encounter. They are also concerned that requiring the requesting party to obtain the information through an extra hearing before an already-overburdened federal judge is oppressive—and that it could be an intermediate step toward establishing similar requirements for all discovery requests, not just e-discovery.

2) Defendants will get an extra chance to assert claims of privilege. Under the proposed change to Civil Rule 26, it would be further amended to create a previously unheard-of right to recover

already-produced material that a party later claims is "privileged." If adopted, this amendment would apply to all discovery, not just e-discovery. It would create a new substantive right with regard to privileged material. If the claim of privilege is contested, it would set a high standard for a requesting party to meet: proving that the information was not privileged, or that the party "intended" to waive its privilege. It would preempt some existing state law that declares privilege non-existent once disclosure is made, even inadvertently, or that requires lawyers to use all information that will advance their clients' interests. This change could require return or destruction of liability-proving material forwarded to cooperative programs. And, like other proposed amendments, it would require extra hearings, with the inevitable expenditure of lawyers' time and judicial resources, to overcome the privilege claim.

3) Defendants will get a free pass through the spoliation gate. Under the proposed change to Civil Rule 37, it would be amended to exempt parties from sanctions in some cases when they destroy electronic files through "routine" use of their document retention systems—even those systems set up with short time periods for destruction. Under the present rules, entities that may become parties to litigation are deterred—by the potential for charges of spoliation—from destruction of discoverable electronically stored information. Many trial lawyers believe that giving them a "safe harbor" when they destroy information through the "routine" operation of their document retention system will invite them to set up systems in which data are "routinely" purged at very short intervals. In one recent notorious example, this strategy appears to have been used by a tobacco company that set up a system that purged its email messages frequently, making them unavailable for production in the present fraud litigation with the federal government! Fortunately, the judge on the case fined the companies $2.75 million for their misconduct last summer.

In conclusion, I respectfully request that the proposed changes not be made.

Sincerely,

Michael B. Ganson

submit2: Submit Comment
---
HTTP Referer: http://www.uscourts.gov/rules/submit.html
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 6.0; AOL 9.0; Windows NT 5.1; SV1; .NET CLR 1.1.4322)
Remote Host:
Remote Address: 10.213.201.7
---