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Comments:

I practice employment law and consumer protection law (mainly Fair Debt Collection Practices Act cases), representing plaintiffs, in the federal courts. I oppose the proposed changes to the FRCP, specifically Rule 26(b)(2) permitting a party to withhold electronic discovery that is not reasonably accessible. In many cases, the paper record produced by companies (especially debt collection agencies in FDCPA cases) is obviously lacking important information that the company would reasonably be expected to possess. Those are the cases where e-discovery is most important. Electronically-stored data that are not capable of being produced on paper by clicking "print" on a computer are by their very nature "not reasonably accessible". In many cases, that is the motivation for the company to delete the information without printing a hard copy. The ability to obtain electronic data from a computer's hard drive after it has been deleted from the computer is a powerful tool - the threat of being able to obtain deleted data, and seek sanctions for spoliation of the deleted evidence, is itself a deterrent to companies deleting incriminating data. The ability to simply claim that the information is not "reasonably accessible" negates this powerful tool. Obtaining deleted information off of a computer's hard drive is, by its very nature, somewhat of a "fishing expedition" because one does not know what information the hard drive contains until after it has been recovered. However, many judges are not willing to permit such a "fishing expedition", and the proposed rule requiring good cause for an order requiring discovery of the information will create an impassible hurdle to discovering the truth buried in the deleted files. Moreover, limiting the threat of sanctions for spoliation through the proposed Rule 37(f) would give companies an incentive to routinely delete information and/or clear their hard drives at regular, and short, intervals to protect themselves from

potential liability. Proving the plaintiff's case when representing an individual against a company that is more sophisticated and has greater resources is already a difficult task. The proposed Rules 26(b)(2) and 37(f) will increase that difficulty and erode the rights protected by federal employment and consumer protection laws.

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