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Comments:

Proposed change regarding discovery of electrtonic documents.

I have been practicing for nearly 20 years and have dealt with the evolution of the discovery of electronic documents from the very beginning. My practice is primarily in federal court and is mixed, defendant vs. plaintiff. During this 20 years, I have seen every conceivable roadblock to such discovery thrown into my path. At each juncture, the general rules regarding the scope of discovery have been more than sufficient to protect all parties. I find it absolutely amazing that any practitioner would think that any changes are needed.

First, why do electronic "papers" need more protection than real papers? Second, anyone who says that it is more difficult to search for and/or review electrtonis documents is either a computer illiterate or has never done such discovery. Simply put- there is a computer program for everything----including searching for such documents. Compare the task of manually reviewing a warehouse full of documents or a few key strokes on a data base on a computer network. This is a no brainer!!!!!! Both the attorney reviewing to protect attorney client priv. to the person seeking discovery, the task is much easier.

One of many examples of cases I have dealt with such issues involved a commercial contract dispute and the intent of the parties during the formation of the contract. As expected, the party I was opposing had one interpretation which, upon review of their internal e-mails, did not hold water. The case was settled after the discovery of the e-mails. Moreover, the discovery motion over the production of these documents adequately addressed every concerned raised by these proposed amendments.

Now for the specific rule changes- Rule26 (b)(2)- "reasonably accessible". Oh please give me a break!!!!! A few computer key strokes shows the clear fallacy of such a needless change. Unless the committes to going to specifically define what is "reasonable" in the rule, you are going to have hundreds of different interpretations which will vary widely depending on the magistrate. Equally as important, paper documents are not subject to such a restriction so why should electronic documents be any different?????

Rule 26 (b)(5)(B) Please explain to me the difference between an attorney's obligation to review paper documents which can number in the thousands of pages and the review of electronic documents??? Simply put, there is no difference. All you are doing by this proposed change is to shift the burden to the party seeking discovery. After they have reviewed the documents and discovered, the opposing party can raise an objection.

Rule 37(f)Once again, why treat electronic documents different from paper. In all of the proposed changes, there is a more than adequate body of case law to protect everyone. Certainly, none of the concerns I have read show any reasonable justification for these proposed changes. For example, most competent companies have already addressed the document retention issue by establishing a standard for reviewing electronic files before destruction.

Finally, I find all of the proposed changes to be offensive to the long and well established general priciple of allowing discovery of ALL INFORMATION. Here, these changes seem to suggest that we can start carving out exceptions to this general principle. Let's face it--- in a few years --- all documents will be electrronic. In that case, why should this new form of documents be treated different from the paper documents of old. The answer is simple- there should be no difference. The amazing thing is the fact that I even need to be sending this comment. These rules should not have even been proposed in the first place. My suggestion-- get back out in the trenches and see what today's litigation is really about

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