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Nobody
<nobody@uscbgov.ao.dcn>
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bcc
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Salutation:
First: Brian
MI: R
Last: Huddleston
Org:
MailingAddress1: PMB 160
MailingAddress2: 5103 S. Sheridan Ave.
City: Tulsa
State: default
ZIP: 74145
EmailAddress: hudweiser@cox.net
Phone: (918) 636-3015
Fax:
CivilRules: Yes
Comments:

The proposed language is:

"Rule 26(b)(2). A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonable accessible. If that showing is made, the court may order discovery of the information for good cause."

COMMENT: 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.

"Rule 26(b)(5)(B). When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court."

COMMENT: 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 like the ATLA Exchange and the Attorneys Information Exchange Council. 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.

"Rule 37.
(f) Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system."

COMMENT: 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.)

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