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"David Shub"
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01/05/2005 10:52 AM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject FW: Comments on Proposed Amendments to the Federal Rules of Civil Procedure

A few minutes ago I sent you the comments below, but I did not put a Subject line on the email. So I thought I should re-send the comments along with an appropriate Subject line.

-----Original Message-----

From: David Shub [mailto:dshub@dtiglobal.com]
Sent: Wednesday, January 05, 2005 10:36 AM
To: 'Rules_Comments@ao.uscourts.gov'
Subject:

Dear Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,

I would like to share some comments regarding the proposed amendments to the Federal Rules of Civil Procedure.

First, I have concerns about the effectiveness of proposed Rule 37(f). The language of the amendment precludes a judge to impose sanctions "under these rules" unless the sanctionee has "violated an order in the action." The language of proposed Rule 37(f) is problematic for 2 reasons. (1) there is no limitation placed on a court's inherent authority to sanction a party outside of the rules, so the protection of the "safe harbor" is severely diminished. I do not expect, however, that any language would successfully limit courts' inherent authority; so it seems that a true "safe harbor" can only be created judicially. (2) Rule 37 sanctions are available only when a person has violated an order in the action. Therefore, *de facto* a court already cannot impose Rule 37 sanctions unless the sanctionee has violated an order in the action. Proposed Rule 37(f) therefore does not add any protection that is not already guaranteed by the FRCP.

Second, to the extent that proposed Rule 37(f) *does* offer some protection, I am concerned about the temporal limitation of proposed Rule 37(f). Why should proposed Rule 37(f) be limited to restricting sanctions with respect to actions taken after the civil action commenced? That is, once a civil action commences and the FRCP apply, wouldn't the FRCP be able to limit sanctions with respect to a civil action for actions or omissions committed at any time? Indeed, Rule 27 specifically authorizes depositions before an action commences under appropriate circumstances. Any "safe harbor" provided by proposed Rule 37(f) is much less valuable if it applies only once an action commences, leaving an entity that has reason to believe an action is reasonably likely to be commenced against it in the same quandary in which current authority leave it enmeshed.

Third, the Rule 37(f) terminology "routine operation of a party's electronic information system" is ambiguous and difficult to interpret without the Committee Note. Rather than explain the meaning of the Rule in the Committee Note, it would be better to add the relevant language to the Rule itself, so that the rule read something like: "routine operation of the party's electronic information system, including any way in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that specific information."

Fourth, proposed Rule 34(b) allows a producing party to produce in "an electronically searchable form" where the requesting party has not requested a particular production format. The language should insist on "a *reasonable* electronically searchable form," to give a party grounds to dispute certain formats of production, such as an undifferentiated data dump, which, while electronically searchable, may present data in an incomprehensible form (as when underlying data from a form report is presented without being formatted according the form's settings). Unlike hard-copy documents, whose formatting is immutable,

electronic documents include coding to format the data into a display that makes sense to a reviewer of the final document; simply providing the information in an electronically searchable form may sometimes result in an unintelligible collection of data.

Thank you for your consideration of these comments.

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