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Nobody
<nobody@uscbgov.ao.dcn>
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To Rules_Support@ao.uscourts.gov
cc
bcc
Subject Submission from http://www.uscourts.gov/rules/submit.html

Salutation: Ms.
First: Donna
MI:
Last: Bader
Org:
MailingAddress1: 412 N. Coast Highway, #355
MailingAddress2:
City: Laguna Beach
State: California
ZIP: 92651
EmailAddress:
Phone:
Fax:
CivilRules: Yes
Comments:

I am writing to express my concern with the recent proposals to the Federal Rules of Civil Procedure. In particular, Rule 26 provides an exemption to producing e-discovery if the party claims it is "not reasonably accessible." This rule would allow a party, usually a defendant or big company, to avoid producing discovery by making its own determination that producing the discovery is "not reasonably accessible." That decision should not initially belong to the opposing party. It doesn't exist with paper discovery. After that claim is made, the burden (and expense) is put on the requesting party to make a motion. If the opposing party has a problem with producing discovery, the burden should be on it to seek the protection of the courts. Having dealt with opposing parties who have denied discovery - armed with boilerplate objections - this proposed amendment offers another opportunity to play games in litigation.

I also have concerns about the proposed amendment to Rule 26(b)(5)(B), which essentially creates a new after-the-fact claim of privilege. Again the burden is placed on the requesting party to prove that there was a waiver of the claim of privilege or that the requested documents were not privileged at all. Again additional hearings on this issue would be required.

Finally, as to the proposed amendments to Rule 37, opposing parties would obtain relief for destroying electronic files through "routine" use of their document retention systems. This amendment would encourage parties to adopt shorter "routines" to destroy documents as soon as practicable. Again, this amendment would seem to benefit big companies that wish to avoid liability by dumping documents within very short periods.

Thank you for considering
these comments.

Donna Bader

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