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Comments:

I am writing as I am very concerned about the proposed Federal Rules of Civil Procedure amendments for electronic discovery. What the proposed amendments will do in their entirety is even further institutionalize obstruction of discovery and increase the need for Court intervention in the discovery process. (However, if you feel that the Courts don't have enough to do, maybe the proposals are a good idea.)

The proposed change to Rule 26, allowing parties not to produce documents that are not "reasonably accessible" is very troubling. Have you ever had a client that thought that the records requested in discovery by an opposing party were reasonably accessible? I haven't. You have to arm-twist them into producing those incredibly hard to find documents. (Most of the time it turns out after the fact that locating the documents wasn't so hard after all.) Now if this proposed change is enacted, what happens? You tell your client they only have to produce electronic records that are reasonably accessible? You're not going to get one electronic record.

The proposed change to Rule 26, allowing a party to retroactively claim privilege, appears to me to be huge change from the current law. I am not smart enough to envision all the problems that this change would create, but I have a feeling they would be enormous. There is no doubt that this will also lead to a multitude of additional hearings. This is not a small change and needs to be carefully considered.

The proposed change to Rule 37 regarding spoliation is a beauty. It will make the electronic version of the Arthur Anderson/Enron shredding party okey-dokey. This is a very, very

bad idea.

The future is electronic records. Both large and small companies are going paperless at an incredible rate. Make no mistake, these proposed amendments are not just changes to some niche area of electronic records discovery, they are changes to the entire discovery process. And they are radical changes. Rather than adopting radical changes, I hope that we take a much more conservative approach.

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