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February 4, 2005

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
One Columbus Circle, N.E.

Washington, DC 20544  
Dear Mr. McCabe:

I have been in private practice as a civil attorney for more than 27 years. Please count me as strenuously opposed to certain rule changes now under consideration.

**Proposed rule:**

"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."

This rule change would result in the courts being overburdened with discovery motions. As it is there is too much stonewalling on discovery. Now you want to give parties another sanctioned method to jerk the other side around? Who's kidding who here? Further electronic discovery is generally even more accessible than paper.

**Proposed Rule**

"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."


This is absolutely preposterous. We are going to reward sloppy lawyering? Doesn't the party who sends out documents have an obligation to look at what they're doing? Why are we penalizing the innocent party? Why isn't the burden of making a motion on the party who made the "mistake?"

Proposed Rule

"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."

If this rule passes, the routine document retention time will be as long as the tapes on Mission Impossible. It's hard for me to believe that serious fair minded and intelligent people are coming up with these ideas.

Very truly yours,



Alex B. Scheingross