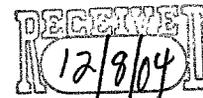


04-CV-035



"Steve Flexman"
<sflexman@flexmanlaw.com>

12/08/2004 03:24 PM

To <Rules_Comments@ao.uscourts.gov>

cc

bcc

Subject electronic discovery rules

Dear sirs,

I believe that the rule changes will destroy the use of electronic discovery and actually encourage attempts to conceal and destroy electronic information.

The changes in 26(b)(2) will only encourage companies to make their electronic information inaccessible. In the age of computers the goal should be, and the technology is present to allow for, easy access. The world's knowledge is available at a keystroke on the Internet. Surely a company's computers should be able to make information accessible. Instead, by allowing for allowing a company to protect its "not reasonably accessible" data, this rule encourages a company to take information off their computers, putting it into a warehouse, etc.

A good example of how a rule/law can actually cause corporations to act differently than intended comes from Illinois. A couple of years ago Illinois enacted a law, 735 ILCS 5/8-2006, to make a person's medical records available at a reasonable cost. The cost per page for photocopies was a \$.75 for the first 25 pages, .50 for the next 25, and \$.25 for all pages thereafter. An exception was placed for records stored on microfiche. The cost there was \$1.25. So what was the result? Within a year hospitals started putting records on microfiche. In fact most recently one hospital began refusing to give photocopies of records they have in paper form, because they said the records are waiting to be put microfiche!

The same example should be considered with regards to Rule 37. If new Rule 37 is enacted we will see an immediate effort to change to data storage systems that do frequent purges of electronic mail. Further those frequent purges will be done much closer to the time e-mails are sent. Such frequent purges will be acceptable under this rule, because the rule refers to routine operation of the party's e-mail system.

Shouldn't the new Rules have a purpose of preserving evidence instead of destroying it? Shouldn't the Rules be designed to encourage protection of electronic documents. Shouldn't the rules encourage easy access to electronic documents instead of encouraging companies to make the documents inaccessible?

How many times have we read lately of corporate fraud coming unraveled due to e-mails? How many times have we read of prosecutions that depend on e-mails to prove their cases. Do we really want to encourage the loss of this great evidentiary resource?

I heartily object to these new Rules. Please reconsider them carefully.

Sincerely submitted,

Steven J. Flexman
847-397-4440

1821 Walden Office Square
Suite 447
Schaumburg, IL