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Comments:

This is a comment on the proposed change to provide parties with the power to block access to electronically stored information simply by claiming the data is not "reasonably accessible."

Computer systems commonly make retrieval of highly relevant data a snap -- at least for the party that controls, and thus understands, its system. But to an outsider, the computer system is an unknown. Learning how it works involves substantial complexity. Thus, the party who seeks access is often at a big disadvantage from the outset. This proposed change would commonly turn that disadvantage into an insurmountable obstacle.

We currently are seeking computer discovery from Ford Motor Company in wrongful death case. We seek direct electronic access to a small slice of Ford's database on warranty claims. Ford's attorney informed me that the database only could be accessed through a supercomputer at Ford. Later, we found a former Ford warranty database analyst who informed us the database data was regularly supplied to analysts in a database format that could be readily downloaded into an Excel spreadsheet, and analyzed. Ford's claim was misleading nonsense. But we would not have been able to show that had we not been lucky enough to find that expert.

Ford also claimed the database might involve privileged information. But our expert said he had never seen confidential information during the course of about a dozen years of working with it.

Ford was happy to supply all the data -- in pdf format --

pictures of frozen images which we are unable readily analyze as Ford is able to analyze the data in its database. The problem isn't privilege. The problem is Ford's unwillingness to supply the data in usable format.

Lawyers know that games are commonly played in discovery. Particularly in the computer realm, those with insiders knowledge of the system are able to hide relevant data through use of technical mumbo jumbo that makes their systems seem inordinately complex. But when it comes to using the systems for business, they know how to get information fast and simply.

This proposed change would place the burden on the seeking party to show that data is, in fact, reasonably retrievable. But the seeking party commonly doesn't know how the system operates. Meanwhile, the party with the data is readily able to make simple retrievals of data seem inordinately complex. That party has the insider knowledge and the power to obfuscate.

The practical effect of this proposed change would be to make highly relevant computer data inaccessible to opposing parties. Discovery should be about getting to the relevant evidence and sorting out the truth. Computer data can vastly help in that process, which is why those in control of the data want to make sure their power over the information is not shared.

The current system of discovery is workable. Shifting the burden to the parties seeking access to prove that data is reasonably retrievable is not. It will only aid those in control of their computer system in hiding the ball.

As to the spoiliation issue, standardized programs set to destroy e-mails and the like can be reprogrammed in an instant. Those who have been notified of an intent to sue, and who have been told not to destroy evidence, should continue to have the responsibility to prevent spoiliation.

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