

## The New Rules of Electronic Discovery:

(and you thought *paper* documents were hard to find)

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## History of Rule Changes

- Fall of 1999 Civil Rules Advisory Committee began discussions related to discovery issues with electronic information.
- In 2004, a conference was held and a draft of rule changes were published.
- Public comments were taken until February 15, 2005.
- Rules submitted to U.S. Supreme Court in September of 2005.
- Rules became effective December 2006.

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## Electronically Stored Information (ESI)

### What is it?

- Digital information created by a computer that resides in electronic or digital storage systems.
- Can include emails, spreadsheets, metadata, backup tapes, drafts, letters, digital photos, etc.
- ESI can exist on mainframes, servers, hard drives, laptops, cell phones, copiers, scanners, etc.

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## Accessing Information

- Counsel will need to learn your IT system-and potentially your parent company's system.



- IT staff will become very involved in discovery and may be witnesses.

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## Document Retention Policies

- You must have *reasonable* policies for managing your information or records.
- The parties should be *reasonable*. Do not create a standard that you cannot meet.
- You do *not* need to keep everything. (example: overwriting of backup tapes).
- Must suspend your policy as necessary to preserve data.

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## Litigation Holds

- The duty to preserve attaches when litigation is reasonably foreseeable.
- Applies to evidence that is relevant to future proceedings.
- Be familiar with your corporation's document/information retention policies and IT personnel.

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- You will need to suspend routine document destruction to preserve information. (examples: incident reports)



- Take physical possession of information.

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### Rule 26(f) conferences

- At onset of case, parties must meet to discuss any issues related to producing discoverable information.
- Will have to outline any issue related to production including form in which it will be produced and privilege issues.
  - Peer review/quality
  - UR
- Inadvertent disclosures and clawback agreements.

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### Reasonableness Standard

- Duty only attaches when litigation is foreseeable and for evidence relevant to future proceedings.
- Gives the court discretion to limit scope of discovery.
- Rule 26(b)(2) allows the court to consider the burden/expense of discovery against likely benefit.



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## Safe Harbor

- Rule 37(f): Electronically stored information. Absent exceptional circumstances, a court may **not** impose sanctions under these rules on a party for failure to provide electronically stored information lost as a result of a routine, good-faith operation of an electronic information system.

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- Rule broadened to allow protection for parties that contract with an outside firm to provide electronic information storage.



- Exceptional circumstances added to protect innocent party.

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