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.

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.
What Does ESI Mean In The Healthcare Setting?

- Rule 34 covers production of ESI.
- Includes documents, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.
- Your electronic records.

Examples in the Healthcare Setting

- Digital dictation
- Digital imaging
  - All forms of electronic medical records
  - All electronic information related to employees, claims, files, billing records.
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.

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.

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

• Take physical possession of information.

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.

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.
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.

• 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.