

Haystack Information Discovery
877.9.HAYSTACK
info@haystackid.com

CHEAT SHEET FOR FEDERAL RULES OF CIVIL PROCEDURES

On December 1, 2006 the Federal Rules of Civil Procedure ("FRCP") were revised to address numerous eDiscovery issues. Rules 16,26,33,34,37 and 45 require attorneys to pay specific attention to electronic discovery issues. eDiscovery practices and strategies need to be reviewed and aligned with the updated rules to ensure compliance. Below is a brief description and what it means to you.

FRCP Rule 16 (b)

Allows the court to establish rules around disclosure, privilege, methods and work product prior to electronic discovery commencing.

Intent: Save court and attorney time by pre-establishing rules & process for managing discovery.

Reality: Legal must understand IT environment for all federal cases within first 120 days, more motion practice around ED very early in case; court order higher stakes than party agreement.

FRCP Rule 26 (a)

Adds "electronically stored information" (ESI) as own category.

Intent: Remove ambiguity around the words "document" and "data compilations."

Reality: No more wiggle room for instant messaging, Voice over IP, databases, PDA's.

FRCP Rule 26 (b)(2)

Sets up two-tier discovery for accessible and inaccessible data; provides procedures for cost shifting on inaccessible data.

Intent: Remove uncertainty about who pays for requests for restoring backup tapes, forensics; make sure Zubulake remains a one circuit precedent.

Reality: Will require more work and costs for defendants very early in a case to account for the backups and what data is on them; codifies Zubulake for entire US.

FRCP Rule 26 (b)(5)

Clarifies procedures when privileged ESI is inadvertently sent over to the requesting party (retrieval of that information).

Intent: To allow "clawback" of privileged information; allow parties to push the cost of review to the requestor.

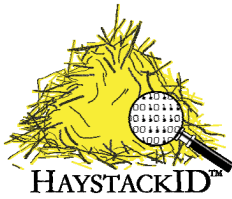
Reality: Still huge risks involved; will not be able to capture/retrieve all sensitive data (e.g. trade secrets and other IP), embarrassing e-mails, waiver of privilege for other cases.

FRCP Rule 26 (f)

Requires all parties to sit down together before discovery begins to agree on some form of protocol.

Intent: Rule encourages uniformity, structure and more predictable motion practice.

Reality: Opportunity to shift preservation costs if prepared for these discussions; otherwise opportunity to get painted into a corner.



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FRCP Rule 33 (d)

Includes ESI as part of the business records related to interrogatories.

Intent: To reduce time spent gathering and analyzing data to answer interrogatories.

Reality: Can provide transaction detail in electronic form in answer to interrogatories; may need to provide direct access or decent tools.

FRCP Rule 34 (b)

Establishes protocols for how documents are produced to requesting parties.

Intent: Stop arguments about the form of production, decide early to save costs.

Reality: Requesting party gets to choose form of production; most advantageous form is native files which are more difficult to review and have potentially damaging metadata or track changes.

FRCP Rule 37

Provides "safe harbor" when electronic evidence is lost and unrecoverable as a matter of regular business processes.

Intent: Help calm fears (and avoid sanctions) when data is lost or overwritten in the normal course of business (gut Zubulake).

Reality: Puts GC on notice to ensure litigation holds and data destruction policies are legally defensible; hard to prove without third-party validation (codifies Zubulake).

FRCP Rule 37 (f)

Allows for sanctions against parties unwilling to participate in the 26(f) discovery conference planning process.

Intent: Bring collaboration and agreement to the discovery process in the early stages of litigation.

Reality: Places a greater requirement on both parties to be prepared for the "meet and confer" negotiations.

FRCP Rule 45

Subpoenas to produce documents includes ESI.

Intent: Clarifies rules for subpoenas to ensure consistency.

Reality: No more arguing whether ESI is a "document."

FRCP Form 35

Standardizes discovery agreements.

Intent: Avoid downstream delays and motion practice around discovery.

Reality: Automatic reminder to include ESI where it is often overlooked.