

# A Practical Guide to Electronic Discovery Under the New Rules

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**Note:** An electronic copy of this outline is at [http://www.utd.uscourts.gov/judges/nuffer\\_resources.htm#Continuing](http://www.utd.uscourts.gov/judges/nuffer_resources.htm#Continuing).  
That version includes working hyperlinks. Send any corrections or suggestions to [mj.nuffer@utd.uscourts.gov](mailto:mj.nuffer@utd.uscourts.gov).

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## Pre-Litigation

Review your client's retention policy:<sup>1</sup>

Does it consider these essential factors?

Regulatory Compliance

Business Goals: Disaster Recovery, Space Economy, Management  
Information, Information Security, Customer Information

Litigation Duties

Does it have a robust "Litigation Hold" feature?

Ability to suspend and modify retention policy in event of litigation

Does the policy include effective procedures?

Valid design

Dissemination and availability

Communication during operations

Training

Compliance audits and evaluation

Revision

Are your client's management and IT teams competent?

Capabilities

Knowledge

Strategies and risks

Retention obligations

Procedures of electronic discovery

Potential grounds for and scope of sanctions

Behavior

Are you and your consultant(s) competent?

Can you speak tech or do you have a staff member/consultant who will assist you?

Can your preservation and data analysis consultants speak to lawyers, judges and jurors?

Are you paying attention?

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<sup>1</sup> For a basic introduction, see [John P. Hutchins, Esq., Document Retention Basics, 865 PLI/Pat 785, PLI Order No. 8966 June-July, 2006.](#)

## Planning in Litigation

Meet with client IT staff and management

Preservation – Litigation Hold

Ensure it exists and is adequate, clearly understood, communicated, implemented, and monitored.

Understand and inventory systems.<sup>2</sup> Prepare for meeting with opposing counsel and potential 30(b)(6) depositions – defensive and offensive.

Meet with opposing counsel (Rule 16) – and IT staff

[T]he parties must confer as soon as practicable . . . to discuss any issues relating to preserving discoverable information . . . .

A discovery plan must state the parties' views and proposals on:

- (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order . . . .<sup>3</sup>

Discuss deleted data, archival data, inaccessible data, on-going operations.

Preservation letter? – a two-edged sword

Court conference (Rule 26)

(B) Permitted Contents. The scheduling order may:

- (iii) provide for disclosure or discovery of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;<sup>4</sup>

Preservation orders and other extraordinary preliminary relief are met with widely varying receptions depending on the judge.

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<sup>2</sup> David K. Isom, Electronic Discovery Source Checklist for Plaintiffs and Defendants, ABA Commercial and Business Litigation Journal 6 (Spring 2004). Available at [http://www.utahbar.org/cle/springconvention/materials/ediscovery\\_checklist.pdf](http://www.utahbar.org/cle/springconvention/materials/ediscovery_checklist.pdf)

<sup>3</sup> Fed. R. Civ. P. 26(f)(2) and (3).

<sup>4</sup> Fed. R. Civ. P. 16(b)(3)(B).

## Disclosure

[A] party must, without awaiting a discovery request, provide to the other parties . . . a copy of, or a description by category and location of, all . . . **electronically stored information** . . . that the party may use to support its claims or defenses, unless solely for impeachment.<sup>5</sup>

## Discovery

Electronic information is now expressly within the discovery rules.

### Rule 33 – Interrogatories

If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

- (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
- (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.<sup>6</sup>

### Rule 34 – Production

(a) In General.  
A party may serve on any other party a request within the scope of Rule 26(b):

- (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
  - (A) any designated documents or electronically stored information — <sup>7</sup>

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<sup>5</sup> [Fed. R. Civ. P. 26\(a\)\(1\)](#).

<sup>6</sup> [Fed. R. Civ. P. 33\(d\)](#).

<sup>7</sup> [Fed. R. Civ. P. 34\(a\)](#).

## Scope of Discovery

### Rule 26(b)(2)(B) – (two tiers)

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost. On motion to compel discovery or for a protective order, the **party from whom discovery is sought must show** that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.<sup>8</sup>

Note that the Utah rule is different than the Federal Rule:

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.<sup>9</sup>

You must still *disclose* these sources if you may use them. In discovery responses, you must *identify* the sources. It would be wise to state why they are not reasonably accessible and provide factual support.

The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.<sup>10</sup>

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<sup>8</sup> [Fed. R. Civ. P. 26\(b\)\(2\)\(B\)](#).

<sup>9</sup> [Utah. R. Civ. P. 26\(b\)\(2\)](#).

<sup>10</sup> Committee Note, 2006 [Amendment to Fed. R. Civ. P. 26](#).

Rule 26(b)(2)(C) – Reasonableness limitations that govern all discovery:

(C) When Required. On motion or on its own, the court **must limit the frequency or extent of discovery** otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably **cumulative or duplicative**, or can be obtained from some other source that is **more convenient, less burdensome, or less expensive**;
- (ii) the party seeking discovery has had **ample opportunity** to obtain the information by discovery in the action; or
- (iii) the **burden or expense** of the proposed discovery **outweighs** its likely benefit, considering the **needs** of the case, the **amount** in controversy, the parties' **resources**, the importance of the **issues** at stake in the action, and the **importance of the discovery** in resolving the issues.<sup>11</sup>

Argue the fact-sensitive elements of your case.

## Form of Production

Rule 34(b) - – Point / Counterpoint

(1) The request:  
(C) may specify the form or **forms** in which electronically stored information is to be produced.<sup>12</sup>

(2)(D) The response may state an **objection to a requested form** for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must **state the form or forms** it intends to use.<sup>13</sup>

(2)(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the **usual course of business** or must organize and label them to **correspond to the categories** in the request;
- (ii) If a **request does not specify a form** for producing electronically stored information, a **party must produce** it in a form or forms in which it is **ordinarily maintained** or in a **reasonably usable** form or forms; and
- (iii) A party **need not produce** the same electronically stored information in **more than one form**.<sup>14</sup>

<sup>11</sup> [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)](#).

<sup>12</sup> [Fed. R. Civ. P. 34\(b\)\(1\)](#).

<sup>13</sup> [Fed. R. Civ. P. 34\(b\)\(2\)\(D\)](#).

<sup>14</sup> [Fed. R. Civ. P. 34\(b\)\(2\)\(E\)](#).

## What is Metadata and Does it Matter?

assessors.<sup>6</sup> The French collaborative court model, *cour d' assises*, is a variation. During deliberation, the three professional judges collaborate with the nine jurés, but then the jury votes secretly.<sup>8</sup> Several European countries have adopted some variation or combination of the French and/or German systems.<sup>9</sup> Mixed tribunals are also seen outside of Europe in such countries as China.<sup>10</sup> Most countries that use mixed adjudicating tribunals attempt to give the lay judges the same rights and access to information as professional judges.<sup>11</sup> In almost all countries with a mixed tribunal, no matter how much the system attempts to equalize the lay and professional judges, there are reports that professional judges exert too much influence.<sup>12</sup>

**Comment [A1]** Need something on this model. Jackson and Kovales - Lay adjudication and human right in Europe

**Deleted:** mix between the European continental jury and the Schöffen Courts.

**Deleted:** Variations of mixed

**Deleted:** some variation of the

**Deleted:** must

[Marjorie A. Shields, Discoverability of Metadata, 2006 A.L.R.6th 6 \(2006\)](#)

What form do you want?

	Native	PDF Text	PDF Image	TIFF	Paper
Metadata		Negotiate			
Need special software?					
E-Search					
Bates stamped					
Identified to original file/author	Negotiate!				
As kept in ordinary course	Negotiate!				
Identified to requests					
Familiar	Develop expertise				

## Privilege

**(B) Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.<sup>15</sup>

The volumes of information produced in electronic discovery may make privilege review prior to production difficult. While traditional production would contemplate privilege review by the producing party before production is made, alternative methods include:

- a. production of massive unreviewed data, after which the responding party reviews for responsiveness, after which the producing party reviews the identified subset for privilege;
- b. designation of a third party who will review for privilege and responsiveness; and/or;
- c. agreement on application of search terms to electronic data to determine potential responsiveness to reduce the overall volume of material.

When the [privilege] review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. . . . **Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced** in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution. Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production.<sup>16</sup>

**[Proposed amendment of FRE] 502<sup>17</sup>** (Attorney-Client Privilege and Work Product; Limitations on Waiver) is intended to **reduce the risk of forfeiting** the attorney-client **privilege** or work-product protection so that **parties need not scrutinize production of documents** to the same extent as they now do. Under

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<sup>15</sup> [Fed. R. Civ. P. 26\(b\)\(5\)\(B\)](#).

<sup>16</sup> [Comment to 2006 Amendments to Fed. R. Civ. P. 26\(b\)\(5\)\(B\)](#).

<sup>17</sup> [Proposed FRE 502](#) is found at [http://www.uscourts.gov/rules/Excerpt\\_EV\\_Report\\_Pub.pdf](http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf) with more information on <http://www.uscourts.gov/rules/newrules1.html>. Updates on the rule may be found at <http://www.ediscoverylaw.com/articles/federal-rules-amendments/>.

the new rule, the **inadvertent disclosure** of privileged or protected information would **not effect a waiver if reasonable steps were taken** to prevent the disclosure, **and retrieval** of the information is **promptly demanded**. Also, the **disclosure** of privileged or protected information **would not waive** the privilege or protection accorded other information concerning the same **subject matter**, unless fairness so requires. Furthermore, **a confidentiality order entered by the court would bind all nonparties in any federal or state court**. The [proposal includes] a possible provision governing **selective waiver**, which would prevent a general waiver of the privilege or protection for information disclosed to a law enforcement or regulatory agency in the course of an investigation.<sup>18</sup>

The court considers the following five factors in its determination of whether an inadvertent disclosure of documents effects a waiver of the attorney-client privilege: 1) the reasonableness of the precautions taken to prevent inadvertent disclosure; 2) the time taken to rectify the error; 3) the scope of discovery; 4) the extent of disclosure; and 5) the overriding issue of fairness.<sup>19</sup>

## Sanctions

### [Fed. R. Civ. P. 37\(d\)](#) and (b)(2)

(d)(1)(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

- (i) a party or a party's [representative] fails. . . to appear for that person's deposition; or
- (ii) a party . . . after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(d)(3) Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.<sup>20</sup>

(b)(2)(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue **further just orders**. They **may include** the following:

- (i) directing that the matters embraced in the order or other **designated facts be taken as established** for purposes of the action, as the prevailing party

<sup>18</sup> [Brochure Summarizing Proposed Amendments to the Federal Rules \(August 2006\)](#).

<sup>19</sup> [Wallace v. Beech Aircraft Corp. 179 F.R.D. 313, 314 \(D.Kan.,1998\)](#) Ken M. Zeidner , Note Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the [Work-Product Doctrine for Guidance, 22 Cardozo L. Rev. 1315 \( 2001\)](#).

<sup>20</sup> [Fed. R. Civ. P. 37\(d\)](#).

claims;  
(ii) **prohibiting** the disobedient party from supporting or opposing designated **claims or defenses**, or from introducing designated matters in evidence;  
(iii) **striking pleadings** in whole or in part;  
(iv) **staying** further proceedings until the order is obeyed;  
(v) **dismissing** the action or proceeding in whole or in part;  
(vi) rendering a **default judgment** against the disobedient party; or  
(vii) treating as **contempt of court** the failure to obey any order except an order to submit to a physical or mental examination.<sup>21</sup>

#### Inherent judicial authority

It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . . These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.<sup>22</sup>

#### Statutory authority

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.<sup>23</sup>

#### Rule 37(e) "Safe Harbor"

**(f) Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information **lost as a result of the routine, good-faith operation** of an electronic information system.<sup>24</sup>

#### Subpoenas

Note that Rule 45 incorporates e-discovery concepts.

#### Perspective

Don't let the electronic discovery or sanctions sideshow obscure the merits.

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<sup>21</sup> [Fed. R. Civ. P. 37\(b\)\(2\)\(A\).](#)

<sup>22</sup> [Chambers v. NASCO, Inc.](#), 501 U.S. 32, 43 (U.S. 1991).

<sup>23</sup> [28 U.S.C.A. § 1927](#)

<sup>24</sup> [Fed. R. Civ. P. 37\(e\).](#)

## Resources

Federal Judicial Center Materials on Electronic Discovery

<http://www.fjc.gov/public/home.nsf/pages/196>

American Bar Association Legal Technology Center E-Discovery Resource List

<http://www.abanet.org/tech/ltrc/fyidocs/ediscovery.html> (lists many sources, including books with helpful forms)

The Sedona Conference [www.sedonaconference.org](http://www.sedonaconference.org)

[Electronic Document Retention and Production](#)

E-discovery Amendments and Notes

[http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf)

found at <http://www.uscourts.gov/rules/congress0406.html>

Ken Withers' Site [www.kenwithers.com](http://www.kenwithers.com)

Electronic Discovery and Evidence Blog by Michael Arkfeld <http://arkfeld.blogs.com/>

Redline text of the Utah Electronic Discovery Rules is found at

<http://www.utcourts.gov/resources/rules/approved/urcp037/>

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