

# New Rules for E-Discovery: Find Your Blind Spots & Reduce Exposure

ARMA Utah Chapter  
March 20, 2008 (2:25 – 3:30 p.m.)

Presented by John Isaza, Esq.  
Howett Isaza Law Group, LLP



## Course Goals

- Provide history of Federal Rules in six key areas
- Discuss practical effects on e-discovery
- Discuss strategies for RIM professionals to make headway in each of the six key areas

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## Agenda

### Overview

- Part I: Early Meet and Confer - Rules 26(f) & 16(b)
- Part II: Redefining "Document"- Rules 33(d), 34(a) & 45
- Part III: Form of Production - Rules 34(b) & 45(a), (c), (d)
- Part IV: Dual Discovery - Rules 26 & 45(d)
- Part V: Safe Harbor – Rule 37(f)

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# Overview

Rules Status &  
High Level Overview



# History of the Revised FRCP

- Circulating since 8/15/04
- Draft approved on 9/20/05 to go to Supreme Court
- April 12, 2006, Supreme Court approved
- Became effective December 1, 2006

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## States Following Suit

As of January 2008, 23 states and D.C. have either adopted or are in the process of developing ESI rules. Enacted examples include:

- Arizona [Rule 16]
- Idaho [Rules 33(C) and 34(a)]
- Illinois [Sup. Ct. Rules 201(b)(1) & 214]
- Mississippi [Rule of Civ. Pro. 26(b)(5)]
- New Hampshire [Rule 62(A)]
- New York (Sup. Ct. Rule 8(b), Sec.202.70)
- Texas [Rule of Civ. Pro. 196.4]
- Local court guidelines issued in Dist. Kansas and Maryland
- Go to [www.lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp](http://www.lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp) for a comprehensive list and status

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## Utah - Effective November 1, 2007

- Utah R. Civ. P. 26. General provisions
- Utah R. Civ. P. 34. Production of documents
- Utah R. Civ. P. 37. Failure to make or cooperate in discovery
- Utah R. Civ. P. 45. Subpoena

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## Overview of the following general concepts:

- Under Rule 16, all counsel are to conduct early “meet & confer” on e-records, which means that the parties must essentially try to reach agreement from the outset on how to manage requests and responses to electronic discovery.
- Under Rule 26(a), parties are to disclose, without a discovery request per se, and via copy or via a description by category “all documents, [including] electronically stored information” that the disclosing party may use to support its claims or defenses.
- Under Rule 26, a responding party must evaluate its own capacity to comply with discovery demands (i.e., what documents are not reasonably accessible without undue burden or cost and which are privileged).
- Under Rule 34, a responding party may specify the form or forms that would be necessary to properly comply with an electronic discovery demand.
- Under Rule 34, electronically stored information is definitively discoverable.
- Under Rule 37, sanctions limits set for routine good faith operations.

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## Part I Early Meet and Confer Rule 26(f), Rule 16(b)



## Rule 26(f)

### Conference of Parties; Planning for Discovery.

[...] the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), [...], *confer to discuss* any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

- (3) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.
- (4) Any issues relating to claims of privilege or protection as trial-preparation material, including –if the parties agree on a procedure to assert such claims after production –whether to ask the court to include their agreement in an order.

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## Rule 16(b)

### Rule 16(b) Pretrial Conference; Scheduling; Management

[The court's scheduling order may include:]

- (5) Provisions for disclosure or discovery of electronically stored information.
- (6) Any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production.

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## High Level Practical Effects

- Not all cases are Federal cases.
- Not all cases involve electronic discovery.
- Addressing electronic discovery at outset will minimize risks of sanctions and procedural complexities.
- RIM is an essential participant in the process.
- The duty of preservation does not change.
- Retain the assistance of an IT specialist.

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## Preparing for the Rule 26(f) Meeting

- Understand your own electronic information systems.
- Identify the types and location of relevant information.
- Take immediate steps to preserve said relevant information.
- Identify all persons who might have relevant electronic information.
- Determine what electronic information you want from the opponent.
- Put the opponent on notice of its preservation obligations.

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## Meet and Confer Topics

- Exchange information regarding
  - Information Systems
  - Steps taken and to be taken to preserve information
  - Any burden (cost) shifting arrangements
  - Records management policies
  - Form in which information is to be produced
  - Information that will be sought
  - Preservation of privilege

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## RIM's Contribution to Meet & Confer Process

- Collect all current policies and procedures, including the electronic communications policy, records management policy, records management procedures, records retention schedule, and legal holds policy with procedures.
- Be prepared to thoroughly explain the history of each of the above noted policies and procedures, including implementation history and a candid discussion of implementation weaknesses, if any.
- Discuss likelihood of electronic information being critical in the discovery process of the case at hand, as not all cases will hinge on electronic discovery.

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## RIM Contribution (cont'd.)

- If determined likely need to produce electronic records, discuss an inventory of all the possible sources where responsive electronic information could be found (e.g., the digital haystack).
- Help identify the best candidate in IT to participate, especially to discuss the “form or forms in which it [discoverable information] should be produced” per Rule 26(f)(3).
- RIM needs to be prepared to discuss and educate counsel and IT on what has been considered a Record for retention schedule purposes, versus all other information stored in the electronic systems.
- Per Rule 26(b), be prepared to address what it would take to access potentially responsive information, including cost estimates and tools needed. Both IT and RIM may bring different perspectives on this latter issue. For instance, do not expect IT to be familiar with the latest records management applications and discovery solutions.

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## RIM Contribution (cont'd.)

- Give counsel the tools to defend the company's records retention program.
  - Show systematic and consistent approach to the records management program.
  - If the electronic records have been in disarray, explain the steps that have been taken to address the problem or the interim system that has been applied. Though most companies think their e-records are in disarray, it is likely that some methodology has arisen over time.
  - Talk with IT beforehand about archiving and back-up systems to see if patterns of retention can be identified.

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## RIM Contribution (cont'd.)

- Help counsel identify the persons or departments that are likely to have responsive information.
  - RIM needs to be thoroughly familiar with the company's organization chart and have the latest employee contact information readily available.
- Help counsel identify the likely sources of records, including electronic information, to obtain from the opposing side.
- Help counsel see where the skeletons of the opposing side could be buried, in addition to pointing out potential flaws in the opposing side's records and information management system.

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## Part II Redefining “Document” Rule 33(d) & Rule 34(a)



## Rule 33(d): Redefining Business Records

- Definition of “business records” now includes “electronically stored information.”
- Therefore, the practical effects are:
  - Requesting party may examine and copy electronic business records.
  - Responding party may have to provide technical support or direct access to its electronic information systems.
  - Responding party may choose to craft the answer if there are confidentiality concerns.

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## Rule 34(a)

- Adds “electronically stored information” as a category subject to production.
  - Includes information stored in any medium.
  - Parties no longer have to wordsmith “document” to include electronic information.
- Therefore, the practical effects are:
  - Allows parties to test and sample electronic information.
  - Can be intrusive, burdensome and raise issues of confidentiality and privacy.

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## RIM Contribution under Re-defined “Document”

- Be the point-person to help manage and produce electronic business records.
  - “IT owns the tools; RIM owns the rules.”
- Help counsel identify & produce confidential and privileged records.
  - Keep a list of the company’s most critical confidential and privileged records.
- Create list of all mediums where records could be found.
  - Once that list is compiled, identify which sources will house the official records. This exercise will allow you to assign shorter retention to all the information contained in secondary media.

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## Part III Form of Production Rule 34(b), Rule 45(a), (c), (d)



## Rule 34(b)

- Requesting party can specify the form or forms in which it wants electronic information produced.
- Responding party can object to the specified form, but ...
  - If object to the form, must state the form in which information will be produced.
  - Otherwise, if no form specified, provides default forms for production as either:
    - Form ordinarily maintained in business or
    - Reasonably usable form.

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## Rule 45(a) & (c)

- A subpoena to produce documents includes “electronically stored information”.
  - Can specify the form of production.
  - Can object to providing electronically stored information in the form or forms requested.
  - Electronic information can be inspected, copied, tested or sampled.
- Do not have to be a party to lawsuit to receive a subpoena (e.g., government agencies).

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## RIM Contribution re: Form of Production

- Be conversant and comfortable with discussions regarding formats for production (e.g., native, TIFF, PDF, etc.).
- Know all vendors who offer copying and/or responsive technologies.
- Know and understand the company's formats used for everyday business.
- No need to be IT expert – just conversant.

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## Part IV Dual Discovery Rule 26 (a)&(b), Rule 45(d)



## Dual Discovery – Rule 26(a) – Self-Disclosure

### Rule 26(a) Required Disclosures; Methods to Discover Additional Matter.

**Initial disclosures...** a party must, without awaiting a discovery request, provide to other parties:

- The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses.
- A copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

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## Dual Discovery – Rule 26(a)

In other words:

Under Rule 26(a), parties are to disclose, without a discovery request per se, and via copy or via a description by category “all documents, [including] electronically stored information” that the disclosing party may use to support its claims or defenses.

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## Dual Discovery – Rule 26(b)

(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 terms and conditions for the discovery.

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## Dual Approach of Rule 26(b)(2) – In other words:

- If the information is accessible, information must be produced.
- If the information is not reasonably accessible due to undue burden or cost
  - Information from the inaccessible source does not need to be produced, but
  - The source that is inaccessible must be identified.

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## Dual Discovery (cont'd.)

- If the requesting party persists in seeking discovery from the inaccessible source,
  - The responding party must show the reasons why the source is not reasonably accessible.
  - The requesting party responds by showing that there is good cause for requiring the information to be produced notwithstanding the undue burden and cost.
- The Court then decides whether the information should be produced or not and may specify conditions for the discovery such as cost shifting, limitations on scope, etc.

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## Rule 45(d)

- If no form specified, produce in ordinarily maintained form or reasonably usable form.
- Need not provide discovery of electronic information that is not reasonably accessible because of undue burden or cost.
  - Practical effect on third parties (e.g., government entities) is to be relieved from having to identify **source** of inaccessible information.

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## What is “inaccessible?”

- “Undue burden or cost”
- Examples include:
  - Non-indexed back-up tapes.
  - Legacy information from obsolete systems.
  - Deleted data in fragmented form.

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## RIM Contribution re: Accessibility

- Create a thorough list of inaccessible information, including:
  - Type of media (e.g., non-indexed back-up tapes, legacy information from obsolete systems, deleted data in fragmented form).
  - Location.
  - Reasons for inaccessibility.
  - Estimated costs to recover.
- Re: self-discovery, RIM should bring to table the same skills and tools noted for meet and confer conference.

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## Part V Safe Harbor – Rule 37(f)



## V. Safe Harbor – Rule 37(f)

- Rule 37 (f) would limit sanctions as follows:
  - Absent exceptional circumstances, **a court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine good faith operation of the party's electronic information systems.**



## What is good faith?

- Current law?
  - *Zubulake IV*, 220 F.R.D. 212 (SDNY2003): inaccessible material need be preserved only if known to be uniquely available.
  - But no general requirement to preserve (“would cripple large corporations”).
- Draft Committee Note (August 2004)
  - No obligation exists to preserve inaccessible information since it is not “discoverable” without a court order.
  - Unless party knew the inaccessible information was discoverable and “cannot be obtained elsewhere”.
- Draft Committee Note (July 2005)
  - “Good Faith” may require intervention to modify or suspend features to prevent loss of information subject to a preservation obligation - pursuant to a “litigation hold”.

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## What is “Routine”

- Alteration or overwriting in databases
  - “dynamic databases”
    - Deletion to promote better storage, load management or disaster recovery
    - Recycling of magnetic disaster recovery tapes
    - Automatic deletion of stale email not subject to litigation holds
    - Manual and automatic systems to limit mailbox size
    - Test: *was the operation leading to the loss “designed, programmed or implemented” as part of the ordinary “technical and business” needs?*

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## RIM Contribution to Safe Harbor

- Be the protector and enforcer of retention policies and procedures.
- Establish “routine good faith operation” of records and information (i.e. follow the course).

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## Overall RIM Opportunities

- Address “unstructured data” (e.g., IM, e-mail)
  - Establish procedures for preserving business value and for litigation management.
- Accept that RIM is a “core value”
  - RIM identifies and implements policies.
  - RIM helps train, audit and promote culture of compliance.
  - RIM knows advantages of technological tools.
  - RIM presents a rational approach to records retention.

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**QUESTIONS?**



**Thank You**

**Howett Isaza Law Group, LLP  
John J. Isaza, Esq.**

**Jisaza@HiLawGroup.com**

**(949) 632-3860**

**21163 Newport Coast, Ste. 214  
Newport Coast, CA. 92657**

www.HiLawGroup.com  
(949) 632-3860

