



# **BEYOND THE HYPE:** Understanding the Real Implications of the Amended Federal Rules of Civil Procedure

A Clearwell Systems White Paper

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## Introduction

The Federal Rules of Civil Procedure was recently amended to provide definition, structure, and predictability to electronic discovery (eDiscovery) during the litigation process. Effective December 1, 2006, the new Rules require a fundamental shift in the way companies prepare for and manage the discovery of electronically stored information (ESI) for Federal cases. Changes to the State Rules are not far behind. Several states, such as California, Maryland, and New Hampshire, are in various stages of implementing rule changes. Changes are already in effect in Idaho and New Jersey. As a result, companies involved in any type of litigation can not afford to ignore the new Rules. If companies do not take proactive steps to prepare for this fundamental shift, they face higher costs in the form of ad-hoc eDiscovery processes and increased risk of court sanctions.

While the objectives of the new Rules are clear, the steps which companies must take to comply with them are not. This paper examines the major rule changes and their implications. It provides a roadmap for how companies can become compliant, control business risks, and use the new Rules to their legal advantage.

## Give Early Attention to Electronic Data Discovery

Rules 16 and 26 are amended to provide the court early notice of eDiscovery issues. Specifically, Rule 16(b) now states that the scheduling order must include “provisions for disclosure or discovery of electronically stored information” and “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.” Rule 26(f) requires that parties “discuss any issues relating to preserving discoverable information and to develop a proposed discovery plan”. Before the new Rules, this plan was often communicated well into the litigation process, after years in some cases. But since these new requirements are part of the initial “meet and confer”, the timeframe has been significantly reduced. Under Rule 16(b), parties must “meet and confer” at least 21 days before the scheduling conference (which must occur within 120 days after filing the lawsuit). The bottom line is that parties must define and share their eDiscovery plans within the first 99 days of a case!

The real implication for companies is that the number of cases subject to rapid case assessment, litigation holds, evidence preservation, and collection will increase significantly. In a recent survey, it was found that large U.S. companies are already concurrently managing 556 cases on average, with an average of 50 new disputes emerging each year for close to half of them<sup>(1)</sup>. Moreover, due to the increased number of requests and the large amounts of data now categorized as discoverable, these rules will significantly impact corporate resources and eDiscovery processes. Email discovery is particularly important, since email has become the most voluminous business record repository. In fact, employee email has been subpoenaed from almost one out of every four companies in the U.S.<sup>(2)</sup> In order to cost effectively scale their eDiscovery practices, companies will need to utilize technology to 1) accurately analyze terabytes of data, enabling rapid early case assessment and ensuring litigation readiness, and 2) audit their current eDiscovery process to ensure it is cost efficient, predictable, and defensible.

A defined, defensible eDiscovery process will also be necessary for protection under Rule 37(f), the so-called “Safe Harbor Rule”. The Rule states that “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”. Rule 37(f) may offer companies protection if ESI is lost, but only if a “routine, good faith” discovery process is well defined, documented, and followed.

## Know Where the Relevant ESI Lives

Now, with the new Rules, the first step in any litigation with eDiscovery is to identify all relevant data sources and formats. Rule 26(a) states that initial disclosures during the meet and confer include a “copy of, or a description by category and location” of relevant ESI. A critical requirement to comply with this Rule is the ability to rapidly identify all relevant data sources within the company. If additional sources of ESI are added after the fact, a judge can impose costly sanctions. The real implications of Rule 26(a) are that companies must inventory ESI, classify data, and communicate time and cost estimates for its discovery. Legal and IT departments will need to work together to understand what different forms of ESI exist, where it resides, and how accessible it is.

An inventory of ESI will also serve to help companies that seek protection from eDiscovery cost under Rule 26(b)(2), “protection due to undue burden or cost”. In fact, it would be impossible to seek protection under Rule 26(b)(2) without it. Rule 26(b)(2) was designed to handle the difficulties in discovering information and states 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.” This might sound like available protection for the ill-prepared company, but beware, it is not a panacea for all eDiscovery issues. It is widely accepted that business email and documents—comprising the vast majority of corporate ESI—are readily accessible and won’t be normally protected by this Rule. The key for companies will be to make their eDiscovery process as scalable and cost efficient as possible, with appropriate resources and available technology. Companies should determine the best ways to:

- Efficiently access corporate data sources where ESI is created, stored, and archived (e.g., email systems, networked storage, archives, etc.)
- Rapidly find, hold, analyze, and produce only the relevant ESI for each case (more on this below)
- Lower costs of eDiscovery by centralizing ESI repositories over time

## Send Only the Relevant ESI to Requesting Parties

The combination of inefficient eDiscovery processes and large amounts of ESI makes the inadvertent transfer of privileged or otherwise protected ESI a real possibility. Some companies perceive Rule 26(b)(5), which provides a mechanism to “claw-back” inadvertent transmission of privileged and protected ESI, offers suitable protection, but that simply isn’t the case. The real implication is that if inadvertent transmission does occur, it’s almost impossible to completely recover all trade secrets, intellectual property, privileged information, etc., resulting in potentially significant legal, business, and financial risks.

This Rule should serve as an alarm to the real risk of privileged information disclosure. Because of potential damages, companies should take heed and only produce relevant and non-privileged ESI. Companies need to utilize readily available technology to help analyze and “cull-down” ESI from an initially large set to a much smaller, relevant, non-privileged set for production. By performing more analysis up front in their eDiscovery process, companies not only protect themselves against transferring privileged information but significantly lower the cost of production.

## Support Native Formats for ESI Production

Rule 34(b) was amended to determine how ESI is produced. The Rule states that it is the requesting party, not the responding party, which requests “the form or forms in which electronically stored information is to be produced”. Rule 34(b)(ii) goes on to state that if the request does not detail the form(s) of production, the responding party must produce it “in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”

The real implication for companies is that they are likely to see an increase in requests to produce ESI in native formats because of the importance of searching and reviewing metadata. The knowledge gained from close inspection of ESI’s metadata, which is unavailable when ESI is produced as hardcopy, can be extremely useful. For example, the date when a certain document was created or when an email was forwarded can make or break your case. Companies need to immediately investigate technology or services that both analyze and produce ESI in native formats.

<sup>1</sup> 2006 Fulbright and Jaworski Survey available at <http://www.fulbright.com/>

<sup>2</sup> 2006 Workplace Email, Instant Messaging & Blog Survey, American Management Association & The ePolicy Institute

## Conclusion

The amended Federal Rules of Civil Procedure will dramatically change the way courts govern the use and discovery of ESI during litigation. As a result, companies now need to audit (and most likely modify) their eDiscovery processes and technical solutions to ensure compliance—or face serious consequences. Companies can ill-afford to ignore the rising costs of eDiscovery or view eDiscovery as an ad-hoc, fire-drill. To leverage the new Rules to your legal advantage and turn the tide of eDiscovery costs, eDiscovery must evolve into to an efficient, accurate, and predictable process.

### FOR MORE INFORMATION

For more information about Clearwell Systems Inc., or the Clearwell Intelligence Platform, please contact us at:

**877.727.9909**

### Clearwell Systems

2901 Tasman Drive, Suite 100  
Santa Clara, CA 95054  
408.727.9900 tel  
408.727.9910 fax  
[www.clearwellsystems.com](http://www.clearwellsystems.com)  
[info@clearwellsystems.com](mailto:info@clearwellsystems.com)

## About Clearwell Systems

Clearwell Systems is transforming the way enterprises discover, organize and analyze the information captured in emails and documents. By automating the analysis and cull-down process, Clearwell enables business and IT executives to reduce the cost, time, and risk of email and document analysis for legal requests, regulatory inquiries and corporate investigations. Global enterprises, governmental agencies, and legal service providers have all realized immediate and significant value within days of their production deployments.

