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# The New E-Discovery Rules

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# What does the increase in Electronic Discovery mean for lawyers and clients?

- Costs will increase.
- Risks will increase.
- Lawyers must be more proactive.

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## The rules use the new term “Electronically Stored Information.”

- “Rule 34(a)(1) is expansive and includes any type of information that is stored electronically.”
- This approach applies to all rules that use the term.
- All references to “documents” mean “electronically stored information.”

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The new rules do **not** expand the types of media subject to discovery.

- The changes to the rules simply confirm what courts had already recognized.

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The new rules do **not** expand a party's obligation to preserve evidence.

- This obligation is created by case law (e.g. Zubulake).

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# Duty to Preserve: Trigger Date

The duty to preserve evidence arises [1] “when the party has notice that the evidence is relevant to litigation or [2] when a party should have known that the evidence may be relevant to future litigation.”

*Zubulake v. UBS Warburg (“Zubulake IV”), 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003).*

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# Zubulake V, 229 FRD 422

Steps you must take:

- Issue and Reissue a “Litigation Hold.”
- Locate All Sources of Relevant Information.
- Ensure Continual Preservation and Production.

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The new rules do **not** create any new rights regarding privileged information produced in discovery.

- Rule 26(b)(5)(B) creates a procedure for presenting and addressing privilege claims.
- The rule does **not** address whether the privilege is waived by the production.
- Proposed FRE 502 addresses waiver.

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## Rule 26(b)(5)(B) procedure:

- A party notified that it has received privileged information must **return, sequester or destroy** the information.
- The Party must **preserve** and **may not use** the information until the claim is resolved.

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## Rule 26(b)(2)(B) allows a party to resist discovery of ESI based upon cost.

- Party resisting discovery must identify sources that are not “reasonably accessible because of undue burden or cost.”
- Party resisting discovery has burden of showing source is not reasonably accessible.
- Requesting party then has burden of showing that the need outweighs the cost.

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Parties may use “focused discovery” to determine what burdens and costs are involved in accessing information.

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A party may resist discovery under Rule 26(b)(2)(C) if it is unreasonably cumulative or the burden or expense outweighs the likely benefit.

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The new rules require the parties to identify and discuss electronically stored information early in the case.

- ESI must be described in the Initial Disclosures.
- Parties must address ESI issues in the early pleading conference under Rule 26(f).
- Joint Preliminary Report and Discovery Plan may address ESI.

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# Rule 34(b) Procedure:

- The request may specify the form or forms in which ESI is to be produced.
- Responding party may object to the requested form(s).
- If objection is made to form or no form was specified, responding party must state the form(s) it intends to use.
- If no form is specified in request, ESI must be produced in form in which it is maintained, or in a reasonably usable form (same functionality).
- Responding party may have to provide technical support.
- ESI ordinarily need not be produced in more than one form.

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Rule 37(f): No sanctions for inability to produce ESI lost “as a result of routine, good-faith operation of an electronic information system.”

- Good faith operation may require intervention to prevent loss of information.

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# Rule 45 Subpoena

- Parallels provisions of Rules 26 and 34.

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## Resources:

- Conference of Chief Justices “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information.”
- “Sedona Principles,” available at <http://www.thesedonaconference.org>

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