

# **The Top Ten List (and one) of Changes to the Federal Rules**



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# The List

(1) The rules now refer to “electronically stored information,” which is “on equal footing” with paper. **Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 33(d), 34(a)(1) 34(b), 37(f)**

(2) Initial disclosures now include “a copy of, or a description by category and location of . . . electronically stored information . . . that the disclosing party may use to support its claims or defenses”. **Rule 26(a)(1)(B)**

(3) Rule 26(f) conference: address preservation, create a plan for discovery and disclosure, including the form or forms of production, and discuss “claw back” or “quick peek” agreements. **Rule 26(f)(4) and Advisory Committee Note**

(4) Rule 16: order may include “provisions for disclosure or discovery of electronically stored information” and “any agreements the parties reach for claims of privilege or” trial-prep material. **Rule 16(b)(6)**

**Practical Tip: Review the appendix to Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, for a list of topics that you may want the judge to consider. This article can be found at [www.kenwithers.com](http://www.kenwithers.com)**

(5) Requests for Production (**Rule 34(b)**)

## Part One:

- a. Requesting party may specify the form, but the responding party must object to the form and must state the form it intends to use
- b. If requesting party objects to form stated by responding party, then the parties must meet and confer under Rule 37(a)(2)(B) before filing a motion to compel
- c. Court is not limited to the forms that the parties specified.

## Part Two:

The responding party has to produce documents:

- “(i) . . . as they are kept in the ordinary course of business or shall organize and label them to correspond with the categories in the request; and
- (ii) if the request does not specify the form or forms for producing electronically stored information, a responding party must produce the



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information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

**Practical Tips :**

- a. **Specifically request documents and electronically stored information.**
- b. **Consult your client’s computer system administrator or an expert to help craft requests for electronic information.**
- c. **The requests should be tailored to the claims and defenses in the case and show an understanding of how electronic data is created, stored, and destroyed.**
- d. **Consider whether you need electronic versions only or also hard copies. The latter may have marginalia or fax header information or the like that does not appear on the electronic version. An electronic version will have metadata showing who the authors are, what the edits were, when the document was last modified, when it was last accessed and by whom that does not appear on the hard copy.**

(6) A party cannot convert ESI into a form that makes it more difficult to use, it must remain electronically searchable, and the responding party may need to provide technical support. **Advisory Committee Note to Rule 34(b)**

(7) Interrogatories (**Rule 33(d) and Advisory Committee Note**): A party can reference ESI rather than give a narrative response, but the interrogating party has to be able to locate the ESI “as readily as can the party served” and give the interrogating party “reasonable opportunity to examine, audit or inspect” the information. The party served may need to provide technical support.

(8) Subpoenas (**Rule 45**):

- a. Form is handled as under Rule 34(b)
- b. The responding party does not have to provide information from sources that the party identifies as not “reasonably accessible” unless the court orders discovery for “good cause.” – Rule 26(b)(2)(C)
- c. Party can claim privilege or trial prep material after it is inadvertently produced.



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(9) Undue burden and cost and the proportionality test:

a. A party can object to producing ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” **Rule 26(b)(2)(B)**

(1) The responding party has to “identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing” with “enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”

**Advisory Committee Note**

(2) May still have to preserve ESI that is not reasonably accessible.

b. The responding party “must show [the court] that the information is not reasonably accessible because of undue burden or cost.”

c. The court may still order discovery and specify conditions for the discovery if the requesting party “shows good cause, considering the limitations of Rule 26(b)(2)(C),” meaning the benefits outweigh the burden and cost.

(1) The requesting party may need to conduct discovery to test the responding party’s claim, e.g. sample the sources, conduct an on-site inspection, or take a deposition.

(2) Appropriate considerations are (**Advisory Committee Note**):

a. Specificity of the discovery request;

b. Quantity of information available from other and more easily accessed sources;

c. Failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;

d. Likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

e. Predictions as to the importance and usefulness of the further information;

f. Importance of the issues at stake in the litigation; and

g. Parties’ resources.



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(10) Privilege:

a. The party withholding privileged or trial prep ESI has to identify it in a manner that will allow the requesting party to decide whether to contest the claim. **Rule 26(b)(5)(A)**

b. A party may assert a claim of privilege or trial prep material after the ESI has been produced. **Rule 26(b)(5)(B)**

**Practical Tip: Avoid any dispute about waiver by agreeing to a “quick peek” or “claw back” agreement that you include in the Rule 16 order.**

(11) Sanctions: A party will not be sanctioned for losing data due to “routine, good-faith operation of an electronic information system”. **Rule 37(f)** Focus is on “culpable conduct.” Failure to issue and abide by a “litigation hold” when litigation is “pending or reasonably anticipated” is culpable conduct. **Advisory Committee Note.**



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