

The New Federal Rules: A Survivor's Guide to E-Discovery and E-Privilege

By Tyler G. Storms and Hal Odom, Jr.

They presented him the words: "And this, too, shall pass away."

— Abraham Lincoln

Recent modifications to the Federal Rules of Civil Procedure (FRCP) present "the most important rule changes to come along in some time."¹ Our goal in this article is to help our Bar adjust to the mandatory changes required in the courts of the United States. Whether or not you have a federal practice, you need to be able to understand the cause for these changes. In fact, even if you practice exclusively in state court, it will benefit you greatly to understand these changes, as the FRCP informed recent amendments to Louisiana's Code of Civil Procedure.² In addition, the new federal rules can serve as a guide for the types of information you should be seeking from your opponents in discovery.

From Stone/Clay to Paper, and Now on to PDF

As recently as the 1990s, some of us can recall having no option but to research (and Shepardize) using only books. Many of us began our careers with "pocket party duty." Then came computers, modems and CD-ROMs. Then, an "Information Superhighway" allowed easy exchange of data, at warp-like speeds.

The Internet now allows your computer to exchange digital or "digitized" information (collectively, "data") with another computer, much like the telephone allows the exchange of phonic data rapidly.³ Since



the best way to exchange data is now via the Internet, information is being stored electronically instead of physically. There is no need to panic, however.

The abbreviation "PDF" stands for *portable document format*. It is a fixed-layout format used to represent a two-dimensional document, including any typed, printed or handwritten page. The PDF file stores a complete description of the document, including text, fonts and images that appear on the page.

All federal district courts in Louisiana now accept or require filings in PDF; therefore, think of a "PDF file" or a "PDF document" as you would an authenticated copy of an original document or a faxed letter. The outstanding advantage of PDF is that it helps prevent changes from being made to the virtual document after it leaves the author's computer.

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[E]lectronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation, by the responding party into a reasonably usable form[.]

Copies of e-mail saved on an office server computer's hard drive are the consummate example of ESI, and without regard to how letters are written, transmitted or preserved. The information contained by the document itself (its "image") is, under the FRCP, no different from the paper letters of our youth.⁴

Of course, ESI existed before the Internet became popular. A computer that has never been connected to the Internet may be storing ESI.⁵

Today, your client may be a hospital that employs programmers to write code for some specialized purpose. If some of that specialized computer information must be disclosed under federal law, the requisite ESI will require special attention. You will likely need to speak to those programmers and understand how they are storing the data before you are actually required to disclose ESI.

The ESI you need to produce is only that information which is in "reasonably usable form."⁶ If information becomes too difficult to access under an objectively reasonable analysis, then that hard-to-get information need not be disclosed.¹¹

Keeping this in mind will help you avoid much confusion.

ESI can be anywhere computer storage may be found, and in whatever form that information has ever been stored, whether available on the Internet, burned on a disk or recorded magnetically on a tape drive in a secure vault.¹²

This does not mean that all ESI is discoverable. Your law firm probably has a treasure trove of ESI in terms of forms or files. These ".doc" files, in Microsoft Word format, or ".wpd" files, in Corel WordPerfect format, probably contain privileged information and would never be freely exchanged or placed on the Internet for public view.¹³

On the other hand, photos saved as JPEG files — the image format used by most digital cameras — on a compact disk clearly constitute ESI. Photos showing the extent of damage to a vehicle after an auto accident must be treated exactly as you would treat a hard copy of a photo. The FRCP requires you to deliver a copy of that photographic image in a manner that can be used, if you intend to utilize it in support of your client's claims or defenses. Specifically, the image must be shared, whether created on a cell phone, computer, digital camera, developed in a lab, or otherwise.¹⁴ Whatever the means by which an image is preserved, one can probably make or somehow produce a paper version of it.

We would, therefore, suggest that, when it comes to mandatory disclosure of "images," whether photographic or documentary, the production of a legible copy (a "printout" on paper, in color if applicable) seen on the computer screen should be satisfactory under the initial disclosure requirement of Rule 26. The production of a paper image of an e-mail or a photo could foreclose the need to exchange any electronic copy of the image in its digital format.¹⁵

Conversely, sending the JPEG file via e-mail also should be sufficient to convey a photographic image. Sending a document in

Electronically storing data reflects, in our view, progress in human behavior.⁴ Most 18-year-olds intuitively know that it is at least 42 cents cheaper to type a letter, convert it to a PDF file, and simply e-mail that "virtual letter" electronically, bypassing the U.S. Postal Service altogether. The legal world can now go digital because a new form of software creates "virtual documents." What made this possible is not the Internet, *per se*.⁵

The only difference between a paper document and a PDF document is that you cannot hold the PDF's "image" in your hand; you must view it on a computer monitor, or you can print (or otherwise convert) it on paper. Some documents will automatically be preserved paperlessly. One of us has participated in bankruptcy hearings in which the electronic documents qualified as best evidence, and the proof and contents thereof were displayed on a monitor.⁶

The amendments to the FRCP have sought to incorporate these new modes of document preservation and transmission.

The Law Reacts to Societal Changes with Deliberate Speed

The new legal jargon for data or computerized data compilations is nothing more than an attempt to create "initials of art" such as USA, WMD, LBJ or CIA. Regardless, "electronically stored information" may now be referred to simply as "ESI."⁷

ESI sounds like a much more complicated and sophisticated concept than it actually is, but let's first take a look at how Rule 34(a)(1)(a) defines ESI through usage:

PDF, instead of making a paper copy of the document, should likewise satisfy Rule 26.

The reason for specifying JPEG and PDF files as an example of ways to avoid printing hard copies is that most computers recognize those formats and can use those files. Sending a universally usable file can save you money, both in terms of paper and toner, UPS or USPS. Electronic distribution of the information should provide you with an exact record of what you sent, and this can be preserved in your paperless file effortlessly, without the need of a human being for filing.¹⁶

ESI Basics

Before addressing the specific changes to the FRCP, we offer a few practical tips to survive the ESI requirements.¹⁷

- Never presume that all you need the client to show you is the "papers." You need to ask your client for the "files." The "paper" and the "data." Otherwise, your opponent might discover it at the same time you do, and possibly get you an unwelcome sanction on top of the humiliation of being unprepared.

- Ask your client for the "reasonably accessible" data.¹⁸

- Find someone in "IT" (the information technology department) who can testify as to what information is "reasonably accessible."

- Deal with e-privilege in the scheduling order.

- Use requests for production to gain your opponent's ESI. See if you can get a computer expert to help you request the data in the best format available.

- Inform your existing clients of the consequences of storing, preserving or losing ESI as a matter of legal risk.¹⁹

Must you understand how your client's ESI is stored? Must you understand how computers work? No, you had better ask your client to identify someone who does understand electronic storage, or determine that there is no ESI.²⁰ As one court explained:

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The underlying assumption [with paper documents] is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention. That party may therefore be expected to locate specific data, whether for its own needs or in response to a discovery request. With electronic media, however, the syllogism breaks down because the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it.²¹

Ask your client's IT person whether he or she can also electronically search certain types of data from your opponent's computers. This will help you request and search the opponent's ESI.

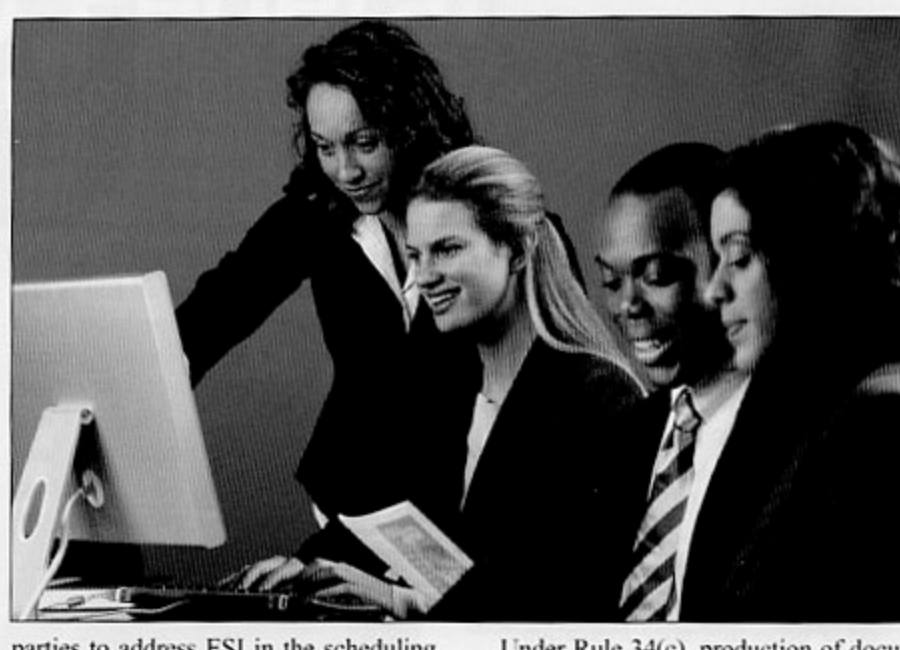
Practical Hints on a Rule-by-Rule Basis²²

Under Rule 26, you now *must disclose* the ESI that you may use in support of your case, except that ESI which may be used for impeachment evidence.²³ The general limitation on what ESI must be produced is, of course, anything that is not "reasonably accessible."²⁴

If you cannot produce information because it is not reasonably accessible,²⁵ you should consider getting someone who can testify that the information truly is not reasonably accessible.²⁶ At the very least, you need to disclose the existence of the relevant ESI and specifically object to its production.²⁷

Rule 26 also addresses cost-sharing issues in the production of ESI.²⁸ The court is to balance the same old discovery issues (relevance, need, cost), but with an eye to just how difficult it will be to get the information into usable form.

Rule 16(b)(5) simply encourages the



parties to address ESI in the scheduling order. The scheduling order may also include "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production."²⁹

Have a strategy for dealing with "safe harbor" issues. At some point, you may accidentally disclose privileged information; this can be as easy as hitting "Reply to All" instead of "Reply to Sender." At the very least, Rule 26 requires that the recipient 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."³⁰ Further, the receiving party "may promptly present the information to the court under seal for a determination of the claim."³¹ Parties may also enter a "clawback agreement" for voluntary return of such documents without waiver of the privilege.³² Also bear in mind that safe harbor is not limited to ESI.

Rule 33 specifically authorizes ESI to be provided in response to interrogatories to produce business records.³³ Bear in mind that the party responding with ESI production must assure that the information can be located and identified by the requesting party "as readily" as the supplying party.³⁴

Under Rule 34(c), production of documents, and Rule 45, subpoenas, a non-party may be compelled to produce documents and tangible things or to permit an inspection. Against a subpoena, however, the person serving the subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,"³⁵ and the order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance.³⁶

The Rules treat the responses differently, depending on whether it is a request for required Rule 26 disclosures, or a request for production or a subpoena. Under Rule 26, you must provide ESI in a usable form; thus, a paper copy may minimally suffice if this can convey the ESI to be disclosed. By contrast, a proper request for information under Rules 34 or 45 can require disclosure of the information *as it is kept on the hard drive*.³⁷ An adverse party may even be justified to justify access to your client's computer.³⁸

Conclusion

Society has changed; so must we. The new rules show our power to adapt.

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FOOTNOTES

1. Tom Mighell, "Technology: The New Federal Rules—Are You Ready?," 69 Tex. B. J. 1042 (December 2006). The 2006 amendments took effect Dec. 1, 2006.

2. A useful summary of Louisiana's ESI rules can be found in William R. Forrester Jr., "New Technology and the 2007 Amendments to the Code of Civil Procedure," 55 La. B. J. 236 (December 2007-08).

3. These regimes overlapped when computers had to "dial up" AOL or CompuServe.

4. The revisions reflect "the growth in electronically stored information and in the [dramatic] variety of systems for creating and storing such information[.]" U.S. Judicial Advisory Committee Notes on Civil Rules, 2006 proposed amendments to FRCP 34(a). These comments are referred to herein as "2006 Advisory Committee Notes."

5. Disk delivery may be rather slow, but is a functional means of exchanging electronically stored information. Some jurisdictions currently allow filing by CD-ROM, through the mail:

(2) The digital version of the brief may be furnished on 3½-inch computer diskette or on a CD-ROM. Nothing else should be on the diskette or CD-ROM. The label of the diskette or CD-ROM must include the case name, docket number, and the name of the party on whose behalf the brief is filed. If a diskette is provided, the filing party must certify that the diskette has been scanned for viruses and that it is virus-free. If a CD-ROM is provided, the filing party must certify that the file copied to the CD-ROM has been scanned for viruses and that it is virus-free.

Rule 28(A) ("Briefs"), Rules of Court for the United States Court of Appeals for the Eighth Circuit (March 1, 2008).

6. Such documents are available for view online via PACER, an electronic public access service of U.S. court documents, managed by the Administrative Office of the U.S. Courts. See, www.pacer.psc.uscourts.gov.

7. FRCP 34 categorizes ESI, and FRCP 26 describes discoverable information as, *inter alia*, ESI.

8. ESI is "no less subject to disclosure than paper records." Rowe Entertainment Inc. v. William Morris Agency Inc., 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

9. The authors had small computers that saved ESI on cassette tapes when Reagan was president. These were simply smaller versions of those huge dual magnetic tape reels used when computers occupied entire floors of large buildings. NASA probably still has some of those tape reels containing ESI from the Apollo Program, but such a compilation is probably a good example of ESI that would not qualify as "reasonably accessible."

10. FRCP 26(b)(2); see also, FRCP 45(c)(1).

11. FRCP 26(b)(2); see also, FRCP 45(c)(1).



12. ESI is on an "equal footing" such that we should include ESI in an "expansive approach." 2006 Advisory Committee Notes to FRCP 45.

13. In addition to their contents, these files also contain metadata, showing whose computer was used to create a file and when it was created.

14. A party "may not have a preference" as to the form in which ESI is produced. 2006 Advisory Committee Notes to FRCP 34(b).

15. "A party need not produce the same electronically stored information in more than one form." FRCP 34(b)(2)(e)(iii).

16. FRCP 34 contemplates translation of ESI into a "reasonably usable form." It is difficult to suggest that paper is not a usable form of preserving and distributing information.

17. The authors wish to thank Meloney Cargil Perry, who presented "The Times are a Changin' (or are they?): Amended Federal Rules and E-Discovery and the Impact Upon Practitioners." State Bar of Texas 4th Annual Advanced Insurance Law Course, March 29-30, 2007.

18. An expansive treatment of the concept of "relatively accessible" can be found in Andrew R. Lee, "Keep or Toss? Document Retention Policies in the Digital Era," 55 La. B. J. 240 (December 2007-January 2008).

19. This occurred in a joint venture between advertisers in a limited time product. The large firm did not want to pay a college friend of the author's for his freelance work. The preserved metadata off the freelancer's PC helped him to establish that the creative work originated, or was at least typed out, on his computer well before it had been openly discussed at a mutual meeting where the concept had been first used.

20. Some of us have clients without computers.

21. Rowe Entertainment Inc. v. William Morris Agency Inc., *supra*.

22. The authors again wish to thank Meloney Cargil Perry for ideas from her presentation in March 2007.

24. FRCP 26(b)(2)(B).

25. FRCP 45(d)(1)(D).

26. "The party resisting discovery by asserting any privilege bears the burden of proof sufficient to substantiate its privilege claim and cannot rely merely on a blanket assertion of privilege.... The mere assertion of a lawyer in oral argument that materials were prepared in anticipation of litigation is not evidence sufficient to bear the burden." Auto Club Family Ins. Co. v. Ahner, C.A. No. 05-5723 (E.D. La.), 2007 U.S. Dist. LEXIS 63809, citing Cornell Research Found. Inv. v. Hewlett Packard Co., 223 F.R.D. 55, 73 (N.D. N.Y. 2003); 8A Wright, Miller & Marcus, Federal Practice & Procedure § 2218.

27. "First, Rinkus failed to provide a privilege log as required by Rule 26(b)(5)." *Id.* (emphasis added).

28. FRCP 26(b)(2)(B).

29. FRCP 16(b)(6).

30. FRCP 26(b)(5)(B).

31. *Id.*

32. FRCP 26(f), and especially, 2006 Advisory Committee Notes to FRCP 26(f).

33. FRCP 33(d).

34. 2006 Advisory Committee Notes to FRCP 33.

35. FRCP 45(c)(1).

36. FRCP 45(c)(2)(B).

37. Auto Club Family Ins. Co. v. Ahner, *supra*. Magistrate Judge Wilkinson reminded the party wishing to produce only hard copies, "The mere fact that [ESI] has been produced in functional equivalent, such as through hard copy, does not in and of itself excuse a party from producing the requested information in electronic form."

38. 2006 Advisory Committee Notes to FRCP 34(a), 45.

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