

**Be Prepared: How The  
New Changes To The FRCP  
Affect Information Governance**

Presented by  
**John Isaza, Esq., FAI** – CEO, Information Governance  
Solutions, LLC

Wednesday, April 15, 2015  
1:00 p.m. (PDT)




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**Your Presenters**



**John Isaza, Esq., FAI**  
John is a leading author and speaker on Information Governance and Records Management issues. He is a distinguished ARMA fellow and recipient of the Britt literary award. In addition to being CEO of Information Governance Solutions, John chairs the Records & Information Governance practice at Rimon PC, a global law firm.



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**Agenda**

- Procedural History
- Overview of Proposed Changes
- Effect on eDiscovery, IG and RIM practices
- Mock Trial – *State of California vs. McCallister Construction and Scarpone Concrete*



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## Part I

### Procedural History



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## Recent History



**DEC 2006**  
Rules Amendments

**OCT 2012**  
Mini-Conference on Preservation

**APR 10-11, 2014**  
Approval by Advisory Committee

**MAY 29-30, 2014**  
Standing Committee unanimously approved amendments

**JUN 3, 2014**  
Judiciary's Committee on Rules of Practice and Procedure (known as the "Standing Committee") approved for publication proposals to limit the scope of discovery under the Federal Rules of Civil Procedure

**SEP 16, 2014**  
Final review at Judicial Conference: approved then sent to Supreme Court for approval; if so, sent to Congress

**NOV 2013 – FEB 2014**  
Public Hearings

**MAY 2010**  
Duke Conference eDiscovery Panel

**DEC 1, 2015**  
Earliest implementation



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## Part II

### Overview of Proposed Changes



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### Key Proposed Changes

- Amendments intended to advance early case management
- Amendments intended to promote proportionality in discovery
- Changes to Rule 37(e) related to ESI preservation and sanctions for spoliation



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### Rule 1 – Just & Speedy Justice

#### RULE 1

Scope and Purpose . . . [these rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.



*This means . . .  
Judges are not the only ones  
tasked with speedy justice.  
Lawyers and parties also tasked.*



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### Amendments Intended To Advance Early Case Management

#### Rule 4(m): Time Limit for Service

- Reduce from 120 days to 90 days

#### Rule 16: Scheduling order to be issued

- 90 days after service (down from 120), or 60 days after defendant has appeared (down from 90)
- Order may provide for the preservation of ESI, and agreements reached under FRE 502
- Before moving for an order related to discovery, the movant must request a conference with the court

#### Rule 26(f)(3) amended in parallel to Rule 16(b)

- A discovery plan must include discussion about "preservation" of ESI and whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502

**Proposed Rule 26(d)(1) would allow for service of Rule 34 requests, relating to electronically stored information and tangible things, prior to the parties' Rule 26(f) conference**

- The time to respond to such early requests would not begin to run until after the Rule 26(f) conference



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### Early Case Management

*This means . . .  
Tighter time frames, so you best have all your eDiscovery ducks in order early in the process.*



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### Rule 34 — Amendment To Promote Proportionality in Discovery

- Changes to Rule 34 document requests
  - ✓ Requires that an objection to a request to produce must be stated "with specificity"
  - ✓ Permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and may state a reasonable time for the response



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### Rule 26(b) – Amendment To Promote Proportionality in Discovery

- Rule 26(b)(1) Scope in General
  - ✓ Unless otherwise limited by court order, the scope of discovery is as follows:
    - Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional** to the **needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit [emphasis added].**
    - Information within this scope of discovery need not be admissible in evidence to be discoverable.



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### Proposed Rule 26(b)(1)

*This means . . .  
Discovery is limited on the basis of both relevance (to the claims and defenses) and proportionality.*

The rule currently states that “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”



This provision is now gone!



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### Rule 37(e) – Curative Measures and Sanctions

- Proposed Rule 37(e) seeks to address litigants’ growing concern over the burdens and uncertainty of their preservation obligations.
  - ✓ Original Rule 37(e) was intended to provide a “safe harbor”
  - ✓ Courts often finding “exceptional circumstances”
  - ✓ Awarding sanctions based on other authority, and/or finding that loss of evidence was not from “**routine, good-faith operation[s]**”



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### Existing Rule 37(e) “Safe Harbor”



Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions (e) **FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.**

- 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 of an electronic information system.



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### Proposed Rule 37(e)

- (e) Failure to Preserve ESI
  - ✓ If [ESI] that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:
    - (1) upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or
    - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
      - (a) presume that the lost information was unfavorable to the party;
      - (b) instruct the jury that it may or must presume the information was unfavorable to the party; or
      - (c) dismiss the action or enter a default judgment.



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### Summary of Key Revisions

- Limiting Rule 37(e) application to failure to preserve ESI
- Removed factors for courts to consider when assessing whether a party's failure to preserve was willful or in bad faith
- Reject sanctions based on a finding of mere negligence or even gross negligence
- Emphasis on judicial discretion to apply curative or remedial measures
- Maintain adoption of a standard where there are no severe measures to be awarded without a showing of specific intent of bad faith



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### Part III



Effect on eDiscovery, RIM and IG Practices: Practice Tips



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## Bottom Line

Amendments intended to bring focus of litigation back to where it should be:

*"on the merits of the claims and defenses, rather than on discovery sideshows or unfair leverage due to the sheer costs and burdens of unrestricted discovery."*

— Marc Goldich, David Cohen and Emily Dimond.  
Law 360, "FRCP Amendments Could Change Discovery as We Know It" (June 4, 2013)



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## High Level Practical Effects

- 1 Set national uniform standard for spoliation
- 2 Attempt to curb fishing expeditions
- 3 Lawyer participates in just and speedy justice
- 4 Four keys:
  - Reasonable steps are key . . . to defense of spoliation
  - Early preparation is key . . . for eDiscovery
  - Records Retention Schedule is key . . . in defense of spoliation
  - Intent is key . . . to finding of spoliation and harsh sanctions



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## Key #1 – Reasonable Steps

This combines IG/RIM practices with Legal Holds	Were 7 Steps for Legal Holds followed?
Judge Scheindlin's prediction . . . <i>there will be litigation over what "reasonable steps" to preserve data will entail</i>	Never defined <i>Recommended "good practice" – Define and document in your policies/procedures what those "reasonable steps" to preserve information are for your organization</i>



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### Recommended Information Governance Related Actions

- Perform an internal self-assessment on how your existing IG, RIM & Lit Support Programs, Policies and Procedures measure up to the changes.
- Identify and prioritize the gaps that need filling in your IG, RIM & Lit Support Programs.
- Identify your Executive Champion, garner support and build your business case for the required/necessary program enhancements.



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### Specifics To Include in Your Self-Assessment

- Must be specific in your production of ESI, both in request and response to produce.
- Requests to produce ESI "MUST BE" relevant and reasonable.
- "Safe Harbor" continues, however, sanctions will be awarded for and upon those NOT "operating in good faith."
- Failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system WILL NOT result in penalties.
- Bottom line: get your act together and cross your T's and dot your I's.



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### Key #2 – Early Preparation

Early preparation is key.

- Ensure your policies, procedures and processes are updated to address these changes.
- Test these same policies, procedures and process modifications.
- Be proactive: take out your eTrash with Defensible Deletion before your next litigation.



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### What Is Defensible Deletion?

*Not all data is created equally!*

Identify business critical data vs. non-critical data

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### Evaluate Legacy Info in-place

- Crawl, index, analyze, search, report information repositories in-place
- Take action upon the discovered information assets
- Examples: Decommission non-required information in-place, capture & classify records

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### Preparing for the Rule 26(f) Meeting

- Understand your own electronic information systems.
  - ✓ Develop a Data Map of "all information systems repositories"
- Identify the types and location of relevant information for each litigation.
  - ✓ This will be included in the Data Map
- Take immediate steps to preserve said relevant information.
  - ✓ The result of taking out the eTrash (it's the wheat once the chaff has been eliminated)
- Identify all persons who might have relevant electronic information (both behind & beyond your fire wall).
- 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 including: type and format of data contained within each system, including employee laptops, desktops, file shares, SharePoint servers, etc.	Steps taken and to be taken to preserve information, including what is reasonable and unreasonable	Any burden (cost) shifting arrangements and what are those thresholds	Records management policies including exception processing
Form in which information is to be produced: data, media and index	Information that will be sought, including potential roles of actors	Preservation of privilege	Safe harbor/ claw-back examples



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### Key #3 – The RRS

The Records Retention Schedule takes on greater significance to prevent findings of intent to destroy	Litigation holds can be crafted appropriately without fear of repercussions for mere negligence or where a loss of ESI does not prejudice the requesting party	A national uniform standard for spoliation will provide greater predictability when addressing the loss of ESI
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### Key #4 – Focus on Intent

Judge Scheindlin states . . .

*“The new rule, however, only allows the adverse inference when the party acts with the intent to deprive another party of the information’s use in the litigation.”*

— ABA Journal, September 2014, page 53.



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### Impact

How will the changes to Rule 37(e) impact possible sanctions against a party who fails to preserve ESI?

Court-imposed actions

Preclusion case-ending

Cost shifting monetary fines

The court may: (1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice

Special jury instructions



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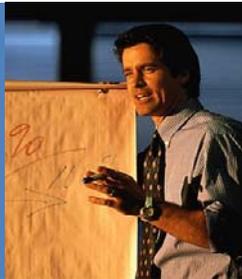
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### Impact (cont'd.)

- More limited scope of discovery
- Stronger framework in which litigants navigate preservation obligations
  - ✓ *Should make IG support easier*
- Aggressively rein in a discovery process
  - ✓ *Many believe out of control in too many cases*



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