



Introduction to the New FRCP Amendments for ESI

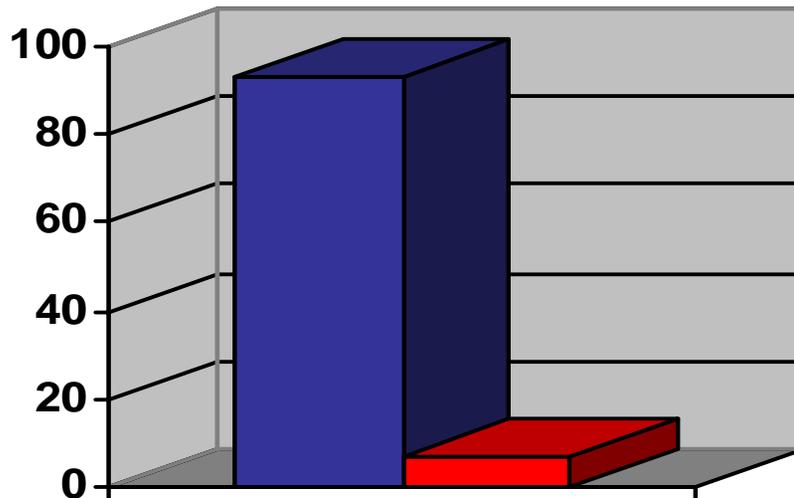
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Electronic Evidence: How is Information Created?

- ◆ Over 92% of information is created electronically.



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■ Digital

■ Non-Digital

Electronic Evidence: How is Information Stored?



- ◆ 70% of electronic information is never printed.

FRCP Amendments and E-Evidence

- ◆ Amendments to the Federal Rules of Civil Procedure address “electronically stored information” (ESI)
- ◆ Effective December 1, 2006.
- ◆ Critical to federal practitioners and provide important guidance to state courts.

FRCP Amendments: 4 Conceptual Initiatives

- ◆ Early Consideration
- ◆ Two-Tier Approach
- ◆ Practical Adjustments
- ◆ Shallow Safe Harbor

FRCP: Early Consideration

- ◆ **Amendments to Rules 16(b), 26(a), 26(f) and Form 35.**
- ◆ **ESI part of Rule 26 disclosure; must confer about e-issues.**
- ◆ **Must present issues to judge early, including issues of preservation, protection of privilege and form of production.**
- ◆ **Form 35 includes model introductory language.**

Rule 16 Conferences

- ◆ Courts required to consider “disclosure or discovery of electronically stored information.” FRCP 16(b)(5).
- ◆ Also any agreements “for asserting claims of privilege or of protection as trial-preparation material after production.” FRCP 16(b)(6).
...but note FRE 502.
- ◆ Conference occurs early so must act early.

Rule 26: Two-Tier Approach re: Cost Shifting

- ◆ **2-tiers of data: accessible, e.g. active files, and “not reasonably accessible”, e.g. archival tape.**
- ◆ **Accessible ESI must be produced; not easily accessible not typically produced.**
- ◆ **But “court may nonetheless order discovery if the requesting party shows good cause”.**
- ◆ **Committee Note says fact not easily accessible does not mean need not preserve; trap for the unwary.**

FRCP: Two-Tier Approach Rule 26(b)(2)(C)

- ◆ Benefit v. Burden: likely benefit taking into account needs of case; amount in controversy; parties' resources; importance of issues; importance of proposed discovery to resolving the case.
- ◆ Committee Note says sampling may be required to provide data for decision.
 - Model is *Zubulake v. UBS Warburg*

Practical Adjustments: Forms of Production

- ◆ **FRCP 34(b) authorizes demanding party to “specify the form or forms in which [ESI] is to be produced”; subject to challenge.**
- ◆ **If not specified, produce as “ordinarily maintained” or in a form that is “reasonably useful”.**
- ◆ **Can be a “form or forms” so can have different kinds of production for different kinds of e-documents.**

Practical Adjustments: Inadvertent Disclosure

- ◆ **Volume of e-evidence makes privileging difficult.**
- ◆ **Rule 26(b)(5)(B) provides for procedure to return inadvertently produced information after production.**
- ◆ **Committee Note states that rule “does not address whether privilege is waived” by production. This potential trap drives proposal for FRE 502. But note that even this proposal only deals w/federal practice.**

Practical Adjustments: Interrogatories and Subpoenas

- ◆ Rule 33 is amended to allow parties to respond to interrogatories w/ESI.
- ◆ Rule 45 amended to take account of changes in federal subpoenas.

FRCP: Shallow Safe Harbor

- ◆ **Rule 37(f) states “absent exceptional circumstances”, no sanctions for “routine, good-faith operation of an electronic information system.”**
- ◆ **“good-faith” a loaded term. Committee Note indicates need for litigation hold whenever have duty to preserve.**
- ◆ **Per Note duty includes common law knew or should have known standard plus duties arising from statute or order.**