

## **Amendments to the Federal Rules of Civil Procedure (FRCP)**

The Federal Rules of Civil Procedure (FRCP) govern civil procedure in the United States district courts. New amendments to the Federal Rules of Civil Procedure address the discovery of electronically stored information. On April 12, 2006, the Supreme Court of the United States approved and forwarded these amendments to Congress, and take effect on December 1, 2006. Certain revisions to the Federal Rules of Civil Procedure address the preservation and discovery of data in electronic media, also known as e-Discovery.

*Authored by Janelle Julien, Assistant Editor, AIIM*



## Amendments to the Federal Rules of Civil Procedure

---

The Federal Rules of Civil Procedure (FRCP) govern civil procedure in the United States district courts. New amendments to the Federal Rules of Civil Procedure address the discovery of electronically stored information. On April 12, 2006, the Supreme Court of the United States approved and forwarded these amendments to Congress, and take effect on December 1, 2006. Certain revisions to the Federal Rules of Civil Procedure address the preservation and discovery of data in electronic media, also known as e-Discovery.

The amendments will revamp existing discovery rules in order to better accommodate discovery directed at information generated by computers, and will affect Rules 16(b), 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34(a), 34(b), 37(f) and 45, as well as Form 35.

When it comes to FRCP preparation, ask these questions:

- What is an e-discovery request?
- What are the true costs to produce electronically stored information?
- How can your organization prepare for discussions on electronic discovery prior to a pre-trial conference?
- How do you identify all potentially relevant sources of information?
- What are the different issues concerning discovery of electronically stored information from the conventional discovery of paper records?

This **AIIM Compliance Solution Center Primer on the Federal Rules of Civil Procedure** will help you and your organization prepare to respond to e-Discovery requests for information.

## What is it?

---

The Federal Rules of Civil Procedure (FRCP) govern court procedures for civil suits in the United States district courts. Circulated by the United States Supreme Court according to the Rules Enabling Act, the FRCP is then approved by the United States Congress. Supreme Court modifications to the rules are based on recommendations from the Judicial Conference of the United States, the federal judiciary's internal policy-making body.

The Judicial Conference of the United States authorizes its Committee on Rules of Practice and Procedure to appoint an Advisory Committee on the Rules of Civil Procedure, which monitors the effectiveness of the Rules of Civil Procedure and makes recommendations for proposed amendments.

The US district judge has the ultimate authority in courtroom legal procedure, and has a role in advancing common law practice and establishing new positions. When making decisions, the district court judge applies the substantive laws of the state. Federal courts must apply the substantive law of the states as rules of decision in cases where state law is in question. However, the federal courts usually use the FRCP as their rules of procedure. States make their own rules that apply in their own courts, but most states have adopted rules based on the FRCP.

Established in 1938, the rules replaced the earlier Field Code and common law pleadings. Significant revisions were made in 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, and 2000. The 2006 revisions provide practical changes in discovery rules that will make it easier for courts and litigating parties to manage electronic records.

The Field Code and common law pleading was more formal, traditional, and particular in its phrases and requirements. An intermediate step between common law and modern rules, New York attorney David Dudley Field created the Field Code. Adopted in 1848–50, Field's code merged law and equity proceedings. By contrast, the FRCP is based on a notice pleading, which is less formal, created and modified by legal experts, and not as technical in requirements. For example, in a notice pleading, the same plaintiff-bringing suit would not face dismissal for lack of the exact legal term, providing the claim itself was legally actionable. This change gives "notice" of your grievances, and reserves the details for when the case progresses. Actual law and not the exact construction of pleas is the primary focus.

Another system used by a minority of states (e.g. California) is Code Pleading, which is older than notice pleading and based on legislative statute. Code Pleading bridges the gap between obsolete common law pleading and modern notice pleading by placing additional burdens on a party to plea the "ultimate facts" of their case. On the contrary, notice pleading only requires a "short and plain statement" showing that the pleader is entitled to relief. The only exception is when a plaintiff alleges fraud; the plaintiff must plead the facts of the alleged fraud with particularity. (FRCP 8(a)(2)).

## Categories and Rules

Comprised of 11 different categories and 86 different rule sets, the following table outlines the Federal Rules of Civil Procedure:

Category	Category Description	Rules in Category	General Content in Category
I	Scope	1 and 2	Category I describes the purpose of the rules and their role in governing civil action in federal district courts.
II	Commencement of civil suits	3 to 6	Category II contains the rules that provide for the commencement of a civil suit, including the filing, summons, and service of process (legal notice).
III	Pleadings and motions	7 to 16	Category III provides for civil suit pleadings, motions, and defenses and counterclaims. The "complaint" is the plaintiff's pleading. The "answer" is the defendant's pleading.
IV	Parties	17 to 25	Category IV describes the capacities in which a party or parties can be sued. It maintains the provisions describing the mechanisms for the filing of countersuits, joinder claims, class action lawsuits, and other actions.
V	Discovery	26 to 37	Category V contains the rules governing discovery (e-discovery included). In general, the discovery rules help ensure that neither party is subjected to surprises at trial. In many states discovery can occur only through formal request. In contrast, the FRCP requires parties to divulge certain information without a formal discovery request.
VI	Trial	38 to 53	Category VI provides for the plaintiff's right to a trial by jury or by the court. Additionally, this category contains the rules that describe how cases are assigned for trial, how actions are dismissed, and how subpoenas are handled. On December 1, 2006, FRCP 45 (subpoenas) will be amended to conform with the e-discovery rules.
VII	Judgment	54 to 63	Category VII maintains the provisions governing legal judgment and costs. "Judgment" is the decree and any other

			order from which an appeal lies. Category VII judgment rules maintain provisions for establishing new trials, amending judgments, and the enforcement of judgments.
VIII	Provisional and final remedies and special proceedings	64 to 71	Category VIII contains the series of rules that provide for the final provision or remedy of a case. The rules covered in this category include seizure of property, injunctions, offers of judgment, and execution of judgments.
IX	Special proceedings	72 to 76	Category IX contains the rules governing special civil action proceedings, such as condemnation of real and personal property, magistrate judges, and pretrial orders.
X	District courts and clerks	77 to 80	Category X provides direction concerning the business and operations of the district courts. The rules covered in this category include hours of operation, filing of pleadings and orders, trials and hearings, orders in chambers, procedures for books and records maintained by the clerk, the role of stenographers, and transcripts as evidence.
XI	General provisions	81 to 86	Category XI explains to which proceedings the rules apply (United States district courts vs. state courts) and provides direction on their general applicability, jurisdiction and venue, local rules applications, and judges directives.

After years of applying traditional paper discovery rules to electronic discovery, on April 12, 2006, the Supreme Court of the United States approved several proposed amendments to the Federal Rules of Civil Procedure to accommodate the modern practice of discovery of electronically stored information. The goal of the amendments is to recognize the importance of electronically stored information and to respond to the increasingly prohibitive costs of document review and protection of privileged documents. These amendments reinforce the importance of litigants thinking about electronic discovery.

## Amendments

---

*Amendments to the Federal Rules of Civil Procedure include, according to the Advisory Committee Notes:*

- **Rule 16 — Pretrial Conferences; Scheduling; Management:** New subsections 16(b)(5) and 16(b)(6) provide that the scheduling order may address “disclosure or discovery of electronically stored information” and any agreements “for asserting claims of privilege or of protection as trial-preparation material after production.”
- **Rule 26 — General Provisions Governing Discovery; Duty of Disclosure:** Subsection 26(a)(1)(B) is amended to substitute “electronically stored information” for “data compilations” as a category of the required initial disclosures. Subsection 26(b)(2)(B) is added to excuse a party from providing discovery of electronically stored information that is “not reasonably accessible because of undue burden or cost,” but the burden remains on the producing party to make the required showing. Subsection 26(b)(5)(B) is added, providing a procedure for a party to maintain “a claim of privilege or of protection as trial-preparation material” concerning any discovery, even after it is produced. As the Advisory Committee Notes clarify, “Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production,” but rather it “provides a procedure for addressing these issues.” Finally, similar to new Rules 16(b)(5) and 16(b)(6), new subsections 26(f)(3) and 26(f)(4) are added to make sure the Rule 26(f) conference includes a discussion of any issues relating to “disclosure or discovery of electronically stored information,” and “claims of privilege or of protection as trial-preparation material.” Form 35 (Report of Parties’ Planning Meeting) is revised to reflect the changes to Rule 26(f).
- **Rule 33 — Interrogatories to Parties:** Rule 33(d) is amended to specify that electronically stored information may qualify as appropriate business records from which an answer to an interrogatory may be derived or ascertained.
- **Rule 34 — Production of Documents, Electronically Stored Information, and Things:** Rule 34(a) is amended to reference electronically stored information, and Rule 34(b) is amended to supply a procedure for specifying and objecting to the form in which electronic information is to be produced. Under new subsections 34(b)(ii) and 34(b)(iii), the default form for producing electronically stored information is that “in which it is ordinarily maintained [or] reasonably usable,” and “a party need not produce the same electronically stored information in more than one form”.
- **Rule 37 — Failure to Make Disclosure or Cooperate in Discovery; Sanctions:** New subsection 37(f) is added which states, “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 routine, good-faith operation of an electronic information system.” The Advisory Committee Notes explain that the premise for this amendment is that ordinary computer use necessarily involves routine alteration and deletion of information for reasons unrelated to litigation.

- **Rule 45 — Subpoena:** Rule 45 is amended to incorporate the changes to Rule 26(b) and Rule 34 as applied to the production of documents by third parties pursuant to a subpoena.
- **Proposed Rule of Evidence 502 — Attorney-Client Privilege and Work Product: Waiver By Disclosure:** The Advisory Committee on Evidence Rules has proposed a new Rule 502 that would formalize a "subject matter" waiver of the attorney-client or work product privileges through voluntary disclosure, with an important exception for "inadvertent" disclosure. Specifically, upon a voluntary disclosure of privileged or work product information, Rule 502(a) would further require production of "undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information." Rule 502(b), however, would provide an exception where "the disclosure is inadvertent . . . and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B)." The Committee Notes explain that the new Rule 502 would resolve disputes over the effect of inadvertent disclosure and selective waiver of privileged or work product information, and responds to the prohibitive litigation cost of reviewing and protecting privileged or work product material, particularly in cases involving electronic discovery.
- **Local E-Discovery Rules:** Several local jurisdictions have already amended their court rules to reflect the importance of discovery of electronic data. A summary of the applicable local rules can be provided upon request.
- **Citation of Unpublished Opinions:** The Supreme Court also approved new Federal Rule of Appellate Procedure 32.1, which will allow litigants to cite any "federal judicial opinion, order, judgment, or other written disposition" issued on or after January 1, 2007, even if it has been given an "unpublished" or similar designation. The effect of the new rule, as stated in the Committee Note, is that "a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason."

## E-Discovery

---

Rules 26 and 34 of the Federal Rules of Civil Procedure specifically cover discovery and disclosure of information that is relevant to civil suits.

Discovery is the part of the litigation process in which opposing parties exchange relevant information and testimony. This process helps both sides understand the facts and evidence before the commencement of a trial.

Electronic discovery (e-Discovery or ediscovery) refers to “any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case”. This includes but is not limited to computer forensics, email archiving, online review, and proactive management. The emergent e-Discovery field augments legal, constitutional, political, security, and personal privacy issues.

*FRCP 26(b)(5)* deals with General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; and Claims of Privilege or Protection of Trial Preparation Materials. *FRCP 34(b)* focuses on the Production of Documents, Electronically Stored Information, and Things. These amendments to the FRCP address a common corporate problem: the volume of electronically stored information and its maintenance. During an electronic discovery process, all types of data serve as evidence such as text, images, calendar files, databases, spreadsheets, audio files, animation, Web sites, and computer programs. Because of lax corporate management, e-mail is often the most valuable source of evidence in civil or criminal litigation.

A common, specialized form of e-Discovery is computer forensics (cyberforensics), which is “the application of computer investigation and analysis techniques to gather evidence suitable for presentation in a court of law”. Computer forensics executes a structured investigation while maintaining a documented chain of evidence to discover the contents of the hard drive of a specific computer. After physically isolating the computer, investigators make a digital copy of the hard drive and store the original computer in a secure facility. The cyberforensics team performs all investigation on the digital copy.

Under these amendments, corporations must proactively manage the electronic discovery process to avoid sanctions, unfavorable rulings, and a loss of public trust. Corporations must be prepared for early discussions on electronic discovery with all departments. Topics should include the form of production of electronically stored information and the preservation of information. Records management and IT departments must have made available all relevant electronically stored information for attorney review.

## **The Sedona Guidelines: Best Practice Guidelines for Managing Information**

The Sedona Conference is a 501(c)(3) research and educational institute consisting of academics, industry experts, lawyers, and judges dedicated to the advancement of law and policy in the areas of antitrust law, intellectual property rights, and litigation.

The following guidelines are recommended best practices from the Sedona Conference:

1. An organization should have reasonable policies and procedures for managing its information and records.
2. An organization's information and records management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.
3. An organization need not retain all electronic information ever generated or received.
4. An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.
5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit.

## Guidelines for the Federal Rules of Civil Procedure preparation

---

1. **Map out all places where electronic information is stored.** Locate any data source including deleted data, data on systems no longer in use, data in remote or third-party locations, copies of production data used in demos, test systems, etc.
2. **Update your records retention policy to include all electronic information.** Corporate retention policies should be applied to email and other electronic records.
3. **Ensure your litigation hold policy fully covers all electronic information including backup tapes.** Make sure your litigation hold policy document includes rules for all relevant electronic records, such as email, electronic documents, scanned documents, and backup tapes.
4. **Establish systems that simplify identification, retrieval and production of potentially relevant data.** Purchase software that provides Online Risk Management and Web Application Security.
5. **Establish a Plan of Action.** Evaluate how you can organize your data storage to proactively prepare for electronic discovery requests.

## Sources

- 1) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
[http://www.foley.com/files/tbl\\_s31Publications/FileUpload137/3345/IP%20Lit%20Alert%20amendments%20to%20ediscovery.pdf](http://www.foley.com/files/tbl_s31Publications/FileUpload137/3345/IP%20Lit%20Alert%20amendments%20to%20ediscovery.pdf)
- 2) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
[http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1\\_032032.hcsp?dDocName=bok1\\_032032](http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_032032.hcsp?dDocName=bok1_032032)
- 3) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
<http://www.s-ox.com/News/detail.cfm?articleID=1917>
- 4) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
[http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf)
- 5) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
<http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=110>
- 6) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
<http://www.h2law.com/CM/BreakingLegalNews/BreakingLegalNews297.asp>
- 7) "New Federal Rules to Civil Procedure (FRCP) Rules 26 and 34":  
<http://www.legalpub.com/publications/The%20New%20E-Discovery%20Rules.htm>
- 8) "e-Discovery":  
[http://searchsecurity.techtarget.com/sDefinition/0,,sid14\\_gci1150017,00.htm](http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci1150017,00.htm)
- 9) "e-Discovery": <http://en.wikipedia.org/wiki/E-discovery>
- 10) "Computer Forensics":  
[http://searchsecurity.techtarget.com/sDefinition/0,,sid14\\_gci1007675,00.htm](http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci1007675,00.htm)
- 11) "New E-Discovery Rules & The Attorney-Client Privilege: A Middle Ground for Waiver?" by Julie Anne Halter, Preston Gates & Ellis LLP  
<http://www.prestongates.com/westlaw/HalterCLN.pdf>
- 12) "Amendments to the Federal Rules of Civil Procedure":  
[http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf)
- 13) "Federal Rules of Civil Procedure" by Judi Hasson:  
[http://en.wikipedia.org/wiki/Federal\\_Rules\\_of\\_Civil\\_Procedure](http://en.wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure)
- 14) "Interview of Judge Shira A. Scheindlin." The Sedona Conference, 2004.  
<http://www.thesedonaconference.org/dltForm?did=ScheindlinInterview.pdf>
- 15) Baldwin-Stried, Kim. "E-Discovery and HIM: How Amendments to the Federal Rules of Civil Procedure Will Affect HIM Professionals." *Journal of AHIMA* 77, no.9 (October 2006): 58-60ff.
- 16) AHIMA e-Discovery e-HIM Workgroup. "The New Electronic Discovery Civil Rule." *Journal of AHIMA* 77, no. 8 (2006): 68A-H.
- 17) US Courts. "Summary of the Report of the Judicial Conference Committee in Rules of Practice and Procedure." September 2005, [www.uscourts.gov/rules](http://www.uscourts.gov/rules).
- 18) Federal Rules of Civil Procedure, 2005.  
<http://judiciary.house.gov/media/pdfs/printers/109th/civil2005.pdf>
- 19) "The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age," September 2005, [www.thesedonaconference.org](http://www.thesedonaconference.org)
- 20) Ronan, Timothy G. "A Primer on the Pitfalls of Failing to Preserve Electronic Evidence." *Connecticut Lawyer*, May 2004.  
[www.pullcom.com/docs/ElectronicEvidence\\_TGR\\_May04.pdf](http://www.pullcom.com/docs/ElectronicEvidence_TGR_May04.pdf)