

# Federal Rules One Year Later: RIM's Role at Counsel Table

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## Learning Objectives

Upon completion of this session, participants will be able to:

- 1. Provide a quick overview of the Federal Rules
- 2. Discuss regulatory and case law updates since the December 1, 2006, effective date of the revised Federal Rules
- 3. Identify opportunities for RIM to actively participate in compliance with the Federal Rules
- 4. Take away helpful checklists of considerations for RIM to contribute to the discovery process

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## Course Agenda

- Part I: Provide overview in 5 key areas of revised Rules & address practical effects on e-records retention
- Part II: Review recent case developments showing trends since 12/1/06
- Part III: Discuss RIM change management strategies in the 5 key areas to adapt to new rules

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## What this Course is NOT

- “How to” guide for creating retention schedules
- Survey of thousands of retention regulations
- Industry- or function-specific strategies for RIM such as insurance industry or HR functions

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## Part I: Federal Rules Overview

- Part I: Meet & Confer - Rules 26(f) & 16(b)
- Part II: Document - Rules 33(d), 34(a) & 45
- Part III: Production - Rules 34(b) & 45
- Part IV: Dual Discovery - Rules 26 & 45(d)
- Part V: Safe Harbor – Rule 37(f)

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## But First: Understand Universe of ESI (the “Digital Haystack”)

Documents, Books, E-mail, Word, Reports, Presentations, Backup Tapes, Intranet, Instant Messenger, Web Sites, Mail, Faxes, Cell Phones, Blackberrys, Newspapers, Court Decisions, Palm Pilots, Databases, Pagers, Voice Mail, Blogs, Discussion Boards, Paper, Extranets, Directories, Wikis, Adobe PDFs, CD-ROMs, Conferences, Temporary Internet Files, Magazines, Floppy Disks, Schedulers, Laptops, Networks Storage, Lexis, Westlaw, Web, Seminars, Hard Drives, Third Party Hosted Applications, Information stored at ISPs...

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## Meet & Confer: Rule 26(f)

Conference of Parties; Planning for Discovery.

[...] the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), [...] confer to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

▶ (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

▶ (4) any issues relating to claims of privilege or protection as trial-preparation material, including –if the parties agree on a procedure to assert such claims after production –whether to ask the court to include their agreement in an order

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## Pre-Trial Orders - Rule 16(b)

**Rule 16. Pretrial Conference; Scheduling; Management**

[The court's scheduling order may include:]

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production;

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## Redefining Business Records: Rule 33(d)

Definition of "business records" now includes "electronically stored information."

Therefore, the practical effect is:

- ▶ Requesting party may examine and copy electronic business records
- ▶ Responding party may have to provide technical support or direct access to its electronic information systems
- ▶ Responding party may choose to craft the answer if there are confidentiality concerns

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## ESI - Rule 34(a)

Adds “electronically stored information” as a category subject to production

- ▶ Includes information stored in any medium
- ▶ Parties no longer have to wordsmith “document” to include electronic information

Therefore, the practical effect is:

- ▶ Allows parties to test and sample electronic information – Can be intrusive, burdensome and raise issues of confidentiality and privacy.

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## Form of Production - Rule 34(b)

- Requesting party can specify the form or forms in which it wants electronic information produced
- Responding party can object to the specified form, but ...
  - ▶ If object to the form, must state the form in which information will be produced
  - ▶ Otherwise, if no form specified, provides default forms for production as either:
    - Form ordinarily maintained in business
    - Reasonably usable form

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## Dual Discovery – Rule 26(a)

Under Rule 26(a), parties are to disclose, without a discovery request per se, and via copy or via a description by category “all documents, [including] electronically stored information” that the disclosing party may use to support its claims or defenses

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## Inaccessible Info – Rule 26(b)

(b) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify terms and conditions for the discovery.

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## Dual Approach of Rule 26(b)(2) – In other words:

- If the information is accessible, information must be produced.
- If the information is not reasonably accessible due to undue burden or cost
  - Information from the inaccessible source does not need to be produced, but
  - The source that is inaccessible must be identified.

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## What is “inaccessible?”

- “Undue burden or cost”
- Examples include:
  - Non-indexed back-up tapes
  - Legacy information from obsolete systems
  - Deleted data in fragmented form

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## Safe Harbor – Rule 37(f)

- **Rule 37 (f) would limit sanctions as follows:**
  - *Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine good faith operation of the party’s electronic information systems.*

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## What is “Routine”

- **Alteration or overwriting in databases**
  - **“dynamic databases”**
    - Deletion to promote better storage, load management or disaster recovery
    - **Recycling of magnetic disaster recovery tapes**
    - **Automatic deletion of stale email not subject to litigation holds**
    - **Manual and automatic systems to limit mailbox size**
    - Test: *was the operation leading to the loss “designed, programmed or implemented” as part of the ordinary “technical and business” needs?*

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## Part II

### RECENT STATUTORY & CASE DEVELOPMENTS INTERPRETING THE REVISED FEDERAL RULES

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## States Following Suit

- Idaho [Rules 33(C) and 34(a)]
- Illinois [Sup. Ct. Rules 201(b)(1) & 214]
- Mississippi [Rule of Civ. Pro. 26(b)(5)]
- New York (Sup. Ct. Rule 8(b), Sec.202.70]
- Texas [Rule of Civ. Pro. 196.4]
- New Hampshire [Rule 62(A)]
- Local court guidelines issued in
  - Dist. Kansas
  - Maryland

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## Notable Cases Citing the Revised Federal Rules

- Courts providing some guidance re: scope
- Tendency to be more forgiving early after the Rules became effective
- Courts warn that the next time they may not be as forgiving
- Specific case examples to follow re: scope under the new Rules

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## Columbia Pictures v. Bunnell (2007) Lexis 46364

- Preservation duty creates obligation to modify or suspend features or routine operation of electronic systems
- Copyright infringement case filed 2/06
- Notified to preserve server log data 5/06
  - IP addresses of users of def's website
  - Request for dot-torrent files
  - Dates and times of requests

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### Columbia Pictures: Server Log Data Case (cont'd.)

- If website logging function enabled, then server copies requests of dot-torrent files into a log file
- Decision not to enable logging function justified as making site more attractive to users wanting privacy
- Even so, data stored temporarily in RAM for 6 hours

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### Columbia Pictures' court findings

- RAM qualifies as ESI under Rule 34(a)
- SLD within custody or control of defendants whether in their servers or partner's
- This finding does not mean all that is temporarily stored in RAM must be preserved

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### Columbia court's reprieve: no sanctions

- There was no prior precedent for RAM discovery
- There was no specific request or discovery to preserve the data at issue
- There was no violation of a preservation order
- Decision recently upheld on appeal

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**Oxford House v. City of Topeka (D. Kansas 2007) Lexis 31731**

- Inaccessible back-up tapes case
- Duty to preserve does not extend to backup tapes maintained solely for disaster recovery
- Plaintiffs contended Defendant failed to preserve certain emails sent to City Council members concerning permit considerations

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**Oxford House (cont'd.)**

- Tapes backed up the emails, but rotated every six weeks & thus overwritten by subsequent backups
- Alleged destruction on 6/05
- There was no evidence that tapes contained the deleted emails when notice to preserve received 8/05

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**Oxford House (cont'd.)**

- Plaintiffs alleged duty to preserve arose before 8/05, based on anticipated litigation
- Court said backup tapes are considered inaccessible and no need to preserve
- “[A] party need not preserve all backup tapes even when it reasonably anticipates litigation.”
- Court did not address if backup tapes were the only source of the records

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## Part III

### RIM Strategies for New Rules

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### High Level Practical Effects

- 1) Not all cases are Federal cases.
- 2) Not all cases involve electronic discovery.
- 3) Addressing electronic discovery at the outset will minimize risks of sanctions and procedural complexities.
- 4) RIM is an essential participant in the process.
- 5) The duty of preservation does not change.
- 6) Retain the assistance of an IT specialist.

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

- Understand your own electronic information systems
- Identify the types and location of relevant information
- Take immediate steps to preserve said relevant information
- Identify all persons who might have relevant electronic information
- 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
  - Steps taken and to be taken to preserve information
  - Any burden (cost) shifting arrangements
  - Records management policies
  - Form in which information is to be produced
  - Information that will be sought
  - Preservation of privilege

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## RIM Change Management for Meet & Confer Process

- Collect all current policies and procedures, including the electronic communications policy, records management policy, records management procedures, records retention schedule, and legal holds policy with procedures.
- Be prepared to thoroughly explain the history of each of the above noted policies and procedures, including implementation history and a candid discussion of implementation weaknesses, if any.
- Discuss likelihood of electronic information being critical in the discovery process of the case at hand, as not all cases will hinge on electronic discovery.

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## RIM Change Management (cont'd.)

- If determined likely need to produce electronic records, discuss an inventory of all the possible sources where responsive electronic information could be found (e.g., the digital haystack).
- Discuss and educate counsel and IT on what has been considered a Record for retention schedule purposes, versus all other information stored in the electronic systems.

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### RIM Change Management (cont'd.)

- Per Rule 26(b), address access to potentially responsive information, including cost estimates and tools needed. Both IT and RIM may bring different perspectives on this latter issue. For instance, do not expect IT to be familiar with the latest records management applications and discovery solutions.
- Help counsel identify the persons or departments that are likely to have responsive information.
  - Be thoroughly familiar with the company's organization chart and have the latest employee contact information readily available.

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### RIM Change Management (cont'd.)

- Help counsel identify the likely sources of records, including electronic information, to obtain from the opposing side.
- Help counsel see where the skeletons of the opposing side could be buried, in addition to pointing out potential flaws in the opposing side's records and information management system.

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### RIM Change Management under Re-defined "Document" – Rules 33 & 34

- Have records managers manage and produce electronic business records
  - "IT owns the tools; RIM owns the rules."
- Help counsel identify & produce confidential and privileged records
  - Keep a list of the company's most critical confidential and privileged records
- Create list of all mediums where records could be found
  - Once that list is compiled, identify which sources will house the official records. This exercise will allow you to assign shorter retention to all the information contained in secondary media.

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**RIM Change Management re: Form of Production – Rules 34 & 45**

- Be conversant and comfortable with discussions regarding formats for production (e.g., native, TIFF, PDF, etc.)
- Know all vendors who offer copying and/or responsive technologies
- Know and understand the company's formats used for everyday business.
- No need to be IT expert – just conversant!

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**RIM Change Management re: Accessibility**

- Create a thorough list of inaccessible information, including:
  - Type of media (e.g., non-indexed back-up tapes, legacy information from obsolete systems, deleted data in fragmented form)
  - Location
  - Reasons for inaccessibility
  - Estimated costs to recover

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**Thank You**

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