



CHANGE TO THE FEDERAL RULES OF CIVIL PROCEDURE – UNDERSTANDING THE IMPACT ON YOUR ORGANIZATION

THE DISCOVERY OF ELECTRONIC EVIDENCE ALTERS THE WAY ORGANIZATIONS MANAGE THEIR ELECTRONIC RECORDS

On December 1, 2006 new rules for the discovery and handling of electronic records in Federal courts went into effect.

According to change committee members, the changes were made to formally align legal process with current business reality, including:

- ▶ The majority of business records are now created and stored electronically, hence the introduction of a new category of records described as Electronically Stored Information (ESI)
- ▶ The volume of ESI is growing at an exponentially greater rate than the volume of paper records
- ▶ Electronic information is dynamic
- ▶ ESI is difficult, although not impossible to delete
- ▶ ESI may need to be retrieved, restored or translated before it can even be reviewed

In order for the handling of ESI to be most effective, clear rules and processes must directly address the unique characteristics of information that is both created and stored electronically.

UNDERSTANDING THE CHANGES

An important difference embodied throughout the changes is the recognition of “electronically stored information” as a category of evidence equal to paper documents.

The changes directly address issues relating to numerous aspects of dealing with electronically stored information.

Key points include:

- ▶ Rule 16(b) now makes provisions to meet in advance of the trial to discuss discovery issues related to electronically stored information.
- ▶ Rule 26(a)(1) states that a party must provide the names of holders of its relevant information and a copy or description of the data it will use to the other parties in the litigation, without awaiting a discovery request.
- ▶ Rule 26(b)(2)(B) deals with the issues of the discovery of information that is not reasonably accessible because of undue burden or cost.
- ▶ Rule 26(f) touches on a wide range of issues including discussing any issues relating to preserving discoverable information at the pre-trial meetings.
- ▶ Rule 33 is amended to make it clear that the option to produce business records includes electronically stored information.
- ▶ Rule 34 adds “electronically stored information” as a category subject to production. Rule 34(b) permits a requesting party to specify the form or forms in which electronically stored information is produced.
- ▶ Rule 37 is amended to address the problem of the destruction of records as a result of the routine, good-faith operation of an electronic information system. The rule is not intended “to provide a shield for the destruction of information related to a litigation.”
- ▶ Rule 45 is amended to provide for subpoenas regarding electronically stored information as well as paper documents.



IMPACT OF THE CHANGES ON RECORDS MANAGEMENT PRACTICES

While these changes deal specifically with the legal processes for discovery of electronically stored information in federal civil litigation, numerous states are already enacting similar rules. The rules have significant repercussions on organizations' electronic records management policies. The impact of the changes, therefore, must be considered from an IT as well as legal perspective.

The approach that IT takes in managing information that is generated or stored electronically will significantly affect an organization's ability to competently manage its litigation. Policies and practices that affect the retention, disposition and availability of electronic records management are now more critical than ever, as a result of this regulatory change.

For most organizations, the management of electronically stored information is the responsibility of IT, so IT must therefore update and implement appropriate practices and technologies to support the changes in legal processes. In order to ensure proper preparation for litigation, legal departments must work in conjunction with IT to review and recommend appropriate changes to the organization's electronic records management infrastructure.

AXS-ONE RECOMMENDATIONS

The changes to the Federal Rules of Civil Procedure set out specific, detailed processes that organizations must follow, in the event of federal civil litigation. Organizations should therefore review and test their current policies, procedures and practices to ensure they support the changes, rather than wait until notice of litigation has been served.

- ▶ Companies must know where and how electronic records are stored and managed at all times. Personal folders, such as .pst files, present a serious risk in the discovery process and steps should be taken to eliminate them.
- ▶ In organizations where the records management function as well as the actual storage of electronic records is distributed (versus managed centrally), IT and legal must know who has what data as well as where and how it is retained.
- ▶ Companies must have complete control of all of their data: employees should not be expected to decide what records should be kept and for how long, what should be deleted, as well as where and how records should be stored.
- ▶ Corporate counsel must be very familiar with IT's electronic information handling practices and ensure that those practices support the requirements for the revised Federal Rules of Civil Procedure.
- ▶ IT should review its ability to manage electronically stored information that is related to court cases.
- ▶ Organizations should review and test:
 - ▶ Their ability to access, search and retrieve electronic records in the event of litigation. Special consideration should be given to the speed, accuracy and completeness of searches.
 - ▶ Litigation hold processes and where necessary, consider implementing technology to electronically enforce litigation hold, while not impacting the scheduled destruction of records not affected by a hold order.
 - ▶ Written policies and procedures for handling electronic records, and ensure that implemented technology can prove they consistently enforces them.

ABOUT AXS-ONE

AXS-One is a leading provider of Records Compliance Management solutions. The AXS-One Compliance Platform™ enables organizations to implement secure, scalable and enforceable policies that address records management for corporate governance, legal discovery and industry regulations such as SEC17a-4, NASD 3010, Sarbanes-Oxley, HIPAA, The Patriot Act and Gramm-Leach Bliley. AXS-One's technology has been critically acclaimed as best of class and delivers digital archiving, business process management, electronic document delivery and integrated records disposition and discovery for e-mail, instant messaging, images, SAP and other corporate records.