

eDiscovery & I/T

Review of the Proposed Amendments to the Federal Rules Of Civil Procedure that address electronic documents & eDiscovery and a discussion about the potential impact on I/T operations

or

New legal stuff that I/T folks need to know about

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• Format/Agenda

- **Brief Overview** (→ why should I care?)
 - FRCP, Discovery, eDiscovery
 - Cases, current “case law”, and I/T’s involvement
- **The Rulemaking process**
- **The proposed amendments**
- **Feedback to-date**
- **Impact on I/T Operations**

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• Brief Overview

• What are the Federal Rules of Civil Procedure?

- Set of “Do”s and “Don’t”s that govern the conduct and procedure of all civil actions in Federal district courts
- Designed to ensure standardization and to secure the just, speedy, and inexpensive determination of every action
- While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions

• **Brief Overview**

Criminal Cases	Civil Lawsuits
Prosecutor vs. Defendant	Plaintiff vs. Defendant
Gather evidence	Request discoverable documents
Incident response	Litigation Hold Notice, General Counsel request
Search Warrant	Request/Demand
Beyond a reasonable doubt	Preponderance of the evidence

- Brief Overview

Civil Lawsuits

Plaintiff vs. Defendant

Request discoverable documents

Litigation Hold Notice, General Counsel
request

Request/Demand

Preponderance of the evidence

• Brief Overview

• What is legal discovery?

- Process of inquiry in a civil lawsuit
- The way to find out things
 - Depositions
 - Interrogatories
 - Request for documents

⇒ There is no “5th amendment” right for organizations

• Brief Overview

• What is eDiscovery?

- The legal discovery of electronic documents and data
 - eMail, web pages, word processing files, spreadsheets, meta data, databases, backup tapes, cache memory, hard drives, thumb drives, PDAs, firewall/IDS logs, phone call logs, IM transmissions, etc.
- ⇒ Anything outside of the traditional discovery of writings or business records on paper is “eDiscovery”

• Brief Overview

• Why should I/T or InfoSec care?

- In 2002, 31 billion eMails sent daily (est: 60 billion) ¹
- > 70% business records stored in electronic form ²
- > 90% information first generated in digital format ³
- Only 30% are ever printed to paper ⁴
- Direct and indirect costs of eDiscovery keep rising

¹ IDG News Service

² e-Commerce Times, May 16, 2000

³ Withers, 7 Federal Discovery News 3, Feb2001

⁴ Lange, Nat'l Law Jnl, Jan 2003

• Brief Overview

• Why should I/T or InfoSec care?

- The job falls to I/T Ops & Information Security
- To help General Counsel find the electronic evidence
 - Defend the organization, prosecute violators
 - Prove a case, find that “smoking gun”, etc.
- Determine I/T impact of statutes, case law, etc.
- Record retention policies, responsible use policies, etc.

• Brief Overview

• Why should I/T or InfoSec care?

- ✓ **Electronic evidence is discoverable**
 - *Anti-Monopoly, Inc. v. Hasbro, Inc.* 1995 WL 649934
- ✓ **Deleted data can be discoverable**
 - *Dodge, Warren & Peters Ins. Servs. v. Riley*, 130 Cal.Rptr.2d 385
- ✓ **Duty to preserve *e*Evidence**
 - *Kleiner v. Burns*, 2000 WL 1909470
- ✓ **Spoliation of evidence → Sanctions**
 - *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178

- Brief Overview

- eMail “Smoking Gun”

“... can I look forward to my ... signing ...
checks for fat p ... who ... silly
problem?”



\$16.6 Billion !

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• Federal Rulemaking Process

- Weren't keeping up with the times
- Federal Cases & Judges → “case law”
- Potential for inconsistent law
- **eDiscovery**

• Federal Rulemaking Process

- **US Judicial Conference**
 - 1922, group of federal judges → administrative policy
- **Advisory Committee on Civil Rules**
- **Discovery Subcommittee**
 - Proposed some changes affecting *eDiscovery*
 - Recommended publishing for comment



• Federal Rulemaking Process

• Proposed Rules

- Published for public comment on 9 Aug 2004
- www.uscourts.gov/rules/comment2005
- 3 public hearings
 - ✓ 12 Jan 2005 in San Francisco
 - ✓ 28 Jan 2005 in Dallas
 - ✓ 11 Feb 2005 in Washington, D.C.



• Federal Rulemaking Process

- 6 month public comment period
- Advisory Committee reviews comments & makes recommendation
- If substantial changes are warranted, there can be another public comment period
- Else, approved proposed rule changes are submitted to Judicial Conference



• Federal Rulemaking Process

- Judicial Conference normally considers rule amendments at September session
- If approved, amendments are sent to the US Supreme Court
- The “Supremes” can then approve and send to Congress by May 1 of year to be enacted



• Federal Rulemaking Process

- Congress then has 7 months
- If Congress does not reject, modify or defer the rules, they take effect on December 1



• Federal Rulemaking Process

- **Dates to keep on eye on:**
 - **September 2005** (US Judicial Conference → Supremes)
 - **May 2006** or earlier (Supremes to Congress)
 - **December 2006** (becomes law unless Congress acts)



• Federal Rulemaking Process

- Dates to keep on eye on:
 - September 2005 (US Judicial Conference → Supremes)
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Christmas 2006 is likely the earliest that these proposed changes will take effect

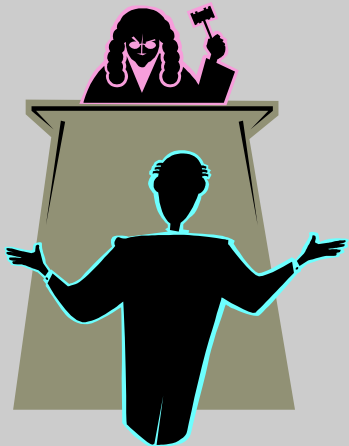
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• The Proposed Amendments¹

- Rule 33 – Response to Interrogatories
- Rule 26(b)(2) – Reasonably Accessible Info
- Rule 37(f) – Safe Harbor Provision

¹ There are a few others but these impact I/T the most

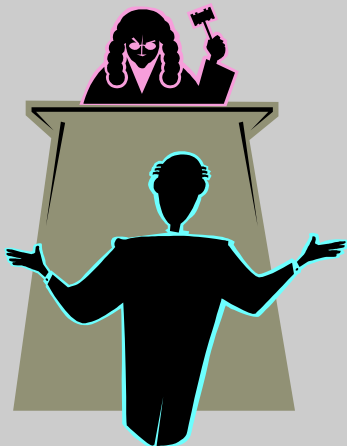


• The Proposed Amendments

• Rule 33 – Response to Interrogatories

- Allows a response to an interrogatory (i.e. a series of written questions) to be electronic data or electronic documents

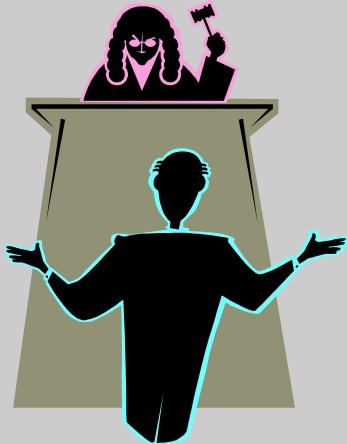
⇒ Currently, interrogatories like “what did you base your decision on?” are either answered in writing or by submitting a report or written document.



• The Proposed Amendments

• Rule 33 – Response to Interrogatories

- Problem → Rule lacks details & guidance
- Responding party could “answer” with 10 dozen tape cartridges created with ARCserv Release 1.0 containing VisiCalc spreadsheets, Wordstar documents and FORTRAN programs



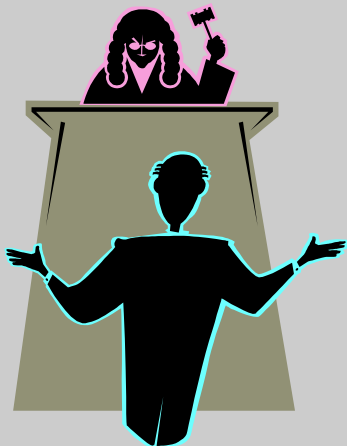
• The Proposed Amendments

• Rule 26(b)(2) – Reasonably Accessible Info

- Requires production of electronic data which is “reasonably accessible”

⇒ Responding party gets to decide what is “reasonably accessible”

⇒ However, if data is not accessed in the “ordinary course of business”, it is discoverable only upon a showing of good cause.



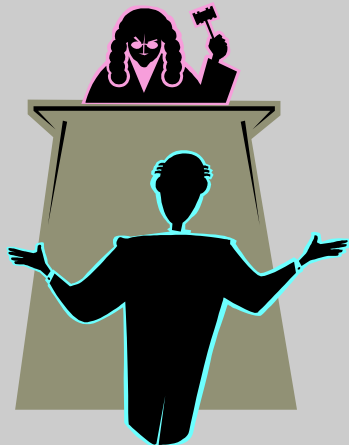
• The Proposed Amendments

• Rule 26(b)(2) – Reasonably Accessible Info

- This means that:

⇒ “Reasonably accessible” data is subject to discovery

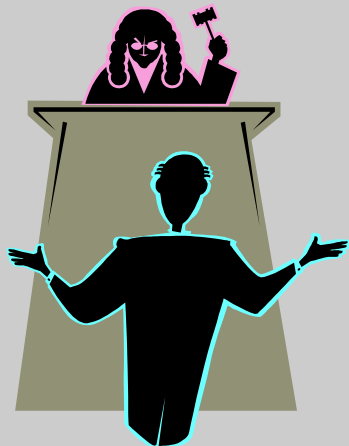
⇒ “Inaccessible” data is not



• The Proposed Amendments

• Rule 26(b)(2) – Reasonably Accessible Info

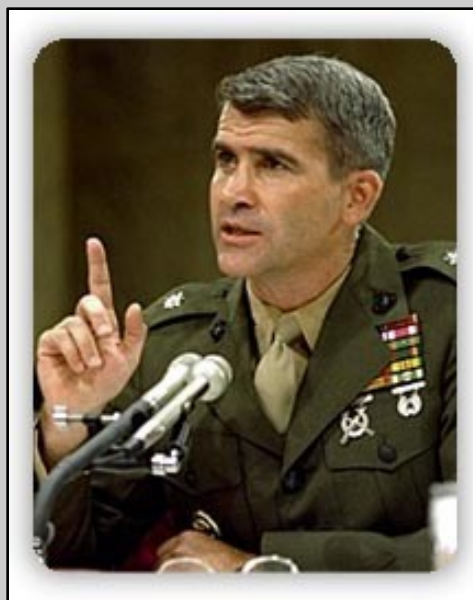
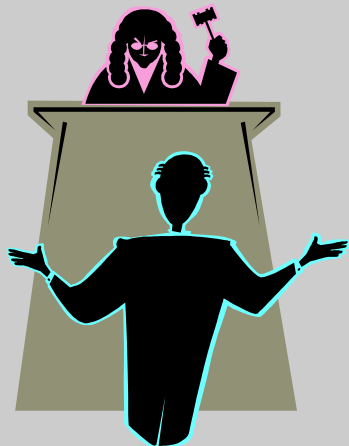
- Problem → Rule lacks details & guidance
- Originally designed to reduce costs, data deemed not “reasonably accessible” could be a PDA, or a faculty member’s home PC, or old backup – disaster/recovery tapes, or ... ???



- The Proposed Amendments

- Rule 26(b)(2) – Reasonably Accessible Info

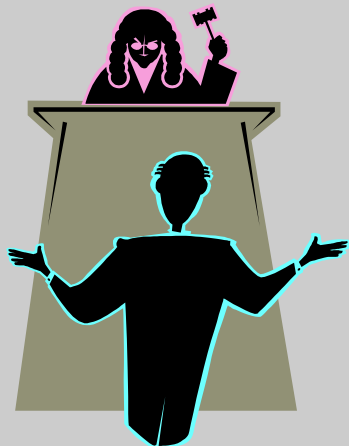
- Deleted data would be considered to be not “reasonably accessible”



• The Proposed Amendments

• Rule 37(f) – Safe Harbor Provision

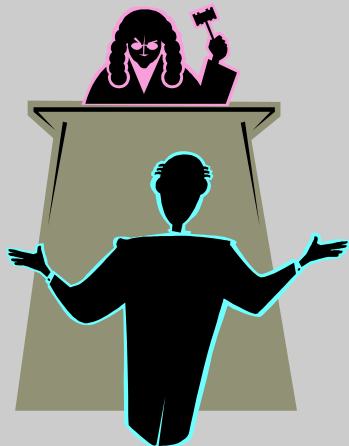
- Protects automatic loss of discoverable e-data
- Limits sanctions if discoverable electronic data is lost due to routine operations
- ⇒ No punishment if backup tapes get automatically reused or if eMail archives get automatically deleted
- ⇒ Can be sanctioned if Court-issued Preservation Order is ignored



• The Proposed Amendments

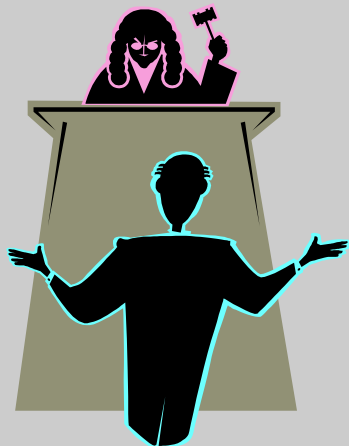
• Rule 37(f) – Safe Harbor Provision

- Problem → Rule lacks details & guidance
- May require I/T to suspend automated document destruction policies
- May enable defendants to *not stop* “shredding” eMail if it is a “routine operation”



- The Proposed Amendments
 - Rule 37(f) – Safe Harbor Provision

Heineken “Enron”
commercial
removed



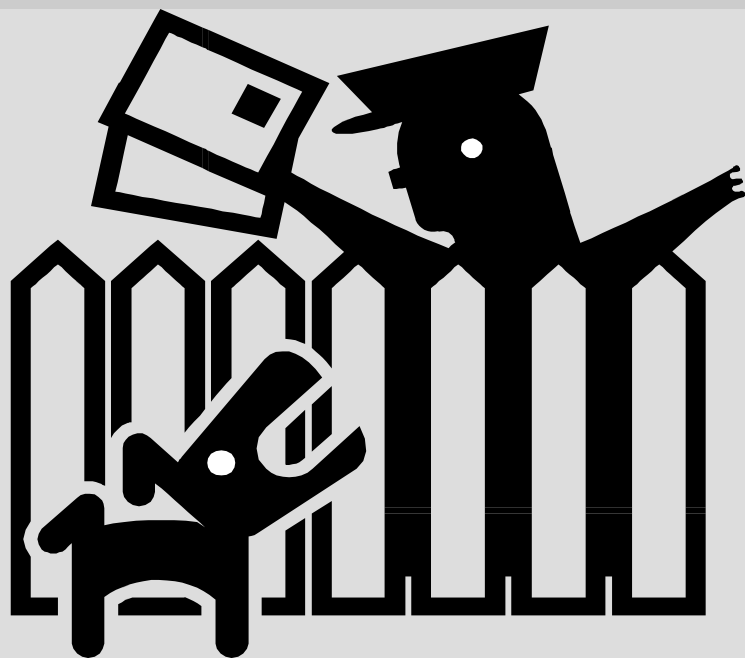
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- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

- Requires production of electronic data which is “reasonably accessible”



What side of
the fence are
you on?

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

Plaintiff	Defendant

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

Plaintiff	Defendant
Everything!	

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

Plaintiff	Defendant
Everything!	Hardly Anything!

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

Plaintiff	Defendant
Everything!	Hardly Anything!
Zeros & Ones: It's Easy!	

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

Plaintiff	Defendant
Everything!	Hardly Anything!
Zeros & Ones: It's Easy!	\$\$\$, obsolete bkup s/w, etc.

- Feedback to-date

- Rule 26(b)(2) – Reasonably Accessible Info

- Trial Lawyers for Public Justice

✂ → Plaintiff Attorneys

- Changes will create incentives for corporations to store eData on media deemed NOT reasonably accessible...

- Feedback to-date

- **Rule 26(b)(2) – Reasonably Accessible Info**

- **General Motors**

✂ → Defendants (most of the time)

- Supports the changes

- Wants eDiscovery requests to be even more specific...

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• Impact on I/T

- **Rule 26(b)(2) – Reasonably Accessible Info**
 - **Encrypt backup tapes ? ? ?**
 - **Retention Policies tied to Hierarchical storage system ? ? ?** (online, near-line, off-line, off-sight...)
 - **Creation of “system maps” ? ? ?**
 - o Graphical representation of systems
 - o Lists databases & describes contents
 - o Used to identify which systems are “reasonably accessible”

- **Impact on I/T**

- **Rule 33 – Response to Interrogatories**

- **May result in more requests from the lawyers**
 - o Copies of backup tapes
 - o Database dumps
 - o Ad-hoc reports cut to CD-ROM
 - o-? ? ?

- **Impact on I/T**

- **Rule 37(f) – Safe Harbor Provision**

- **May result in reuse of monthly backup tapes ??**
- **Stricter adherence to destruction and retention policies**
- **May result in more automation**
 - Auto-Emptying of PC “Recycle Bins”, etc.
 - Auto-Disk Cleanups, Defrags
 - StdOpProcedure stating what is “routine Ops”

- **Bottom Line / Conclusion**

- eDiscovery is here to stay
- Changes are coming
- Given the financial impacts of eDiscovery, defendant attorneys will lobby hard(er)
- Your relationship with GenCounsel will get even more cozy

⇒ **Have “the discussion” sooner than later**

- **Discussion?**

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