

# The E-Discovery Amendments To The Federal Rules Of Civil Procedure

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## Purpose of the Amendments

- ▶ “[A]imed at discovery of **electronically stored information [ESI]**.”
- ▶ “[M]echanisms for providing full disclosure. . .”

*September 2005 Report of the Judicial  
Conference Committee on Rules of Practice and Procedure*

## Placing “ESI” Under the Microscope

- ▶ “Rule 34. Production of Documents, **Electronically Stored Information**, and Things..”

“... any designated **documents or electronically stored information** — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other **data or data compilations stored in any medium from which information can be obtained** — translated, if necessary, by the respondent into reasonably usable form.”

## Purpose and Effect of the Amendments

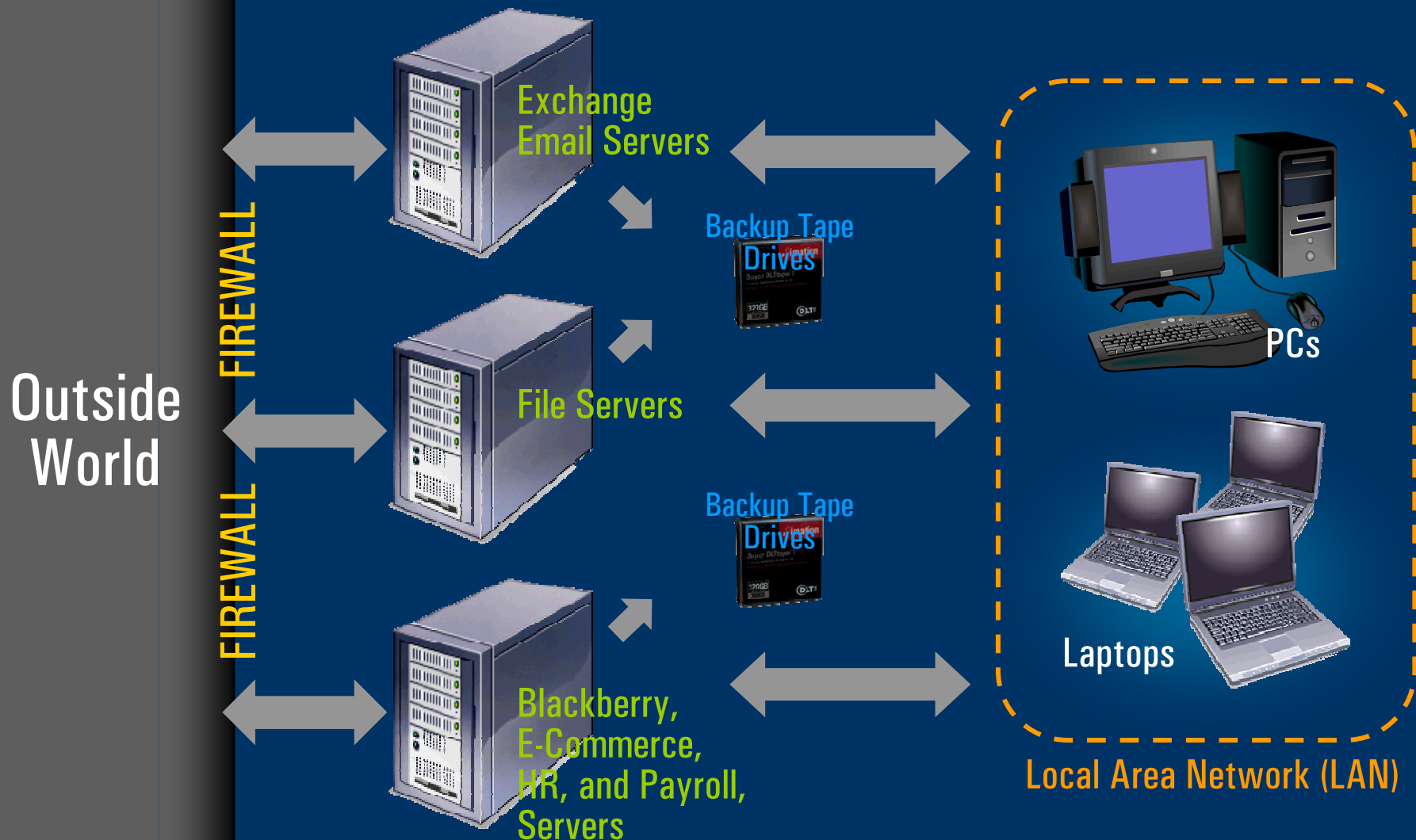
- ▶ **Procedural** mechanisms that force all parties and their lawyers to address their substantive ESI obligations **at the beginning of a case (at the latest)**
- ▶ Do not change the substantive obligations to preserve and produce ESI
- ▶ Companies: incentive to better manage ESI
- ▶ Require better communication between counsel and their clients



## Possible Sources of ESI include:

- ▶ PCs, laptops
- ▶ servers (e.g., email, file, print, fax and blackberry servers)
- ▶ PDAs
- ▶ voicemail database systems
- ▶ backup tapes

## Very Simplified Client Server Architecture



## Brief Summary of the Amendments

1. Meet and confer about “any issues relating to the disclosure or discovery” of ESI [Rule 26(f)]; Scheduling Order may provide for ESI discovery [Rule 16(b)(5)]
2. Early disclosure of the location of clients’ ESI [Rule 26(a)(1)]
3. Reasonably accessible ESI must be produced [Rule 34(b)]
4. ESI that is “not reasonably accessible” because of “undue burden or cost” may not have to be produced [Rule 26(b)(2)(B)]



## Brief Summary of the Amendments

5. Return of privileged materials inadvertently produced [Rule 26(b)(5)(B)]
6. Scheduling order may include agreements regarding privilege [Rule 16(b)(6)]
7. Document Requests: parties can specify the form of production [Rule 34(b)]
8. Safe Harbor from sanctions for failure to produce ESI that is “lost” under certain circumstances [Rule 37]

## Early Attention to ESI: Identify & Preserve

1. Understand your client's information management systems
2. Preservation: Help client define scope and means
3. Communicate with client's key IT personnel
4. Identify the client's in-house IT employee who could give 30(b)(6) testimony
5. Talk with "key" employees

## Preservation or “Litigation Hold”

- ▶ “Once a party **reasonably anticipates litigation**, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”).
- ▶ No duty to “preserve every shred of paper, every e-mail or electronic document” and the like. *Zubulake*, 220 F.R.D. at 217.

# Duty to Preserve

## Zubulake v. UBS

April 2001  
"Relevant  
people"  
anticipated  
litigation

August 16, 2001 – EEOC claim

August 2001 – D instructed employees to preserve (did not include backup tapes)

August 2001 – Outside counsel met with several key players; instructed employees to produce copies of their active computer files

October 9, 2001 – P fired with 2 weeks notice

February 15, 2002 – Lawsuit filed

February 22 – Repeated preservation instructions from outside counsel

August 2002 – P RFP calling for backup tapes

September 2002 – Repeated preservation instructions (including backup tapes)

2001

2002

2003

**DUTY TO PRESERVE TRIGGERED**



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## Zubulake V: What We Have Here, is a Failure to Communicate

- ▶ Counsel failed to communicate the litigation hold order to all key players.
- ▶ They also failed to ascertain each of the key players' document management habits.
- ▶ Employees ignored the litigation hold instructions.



## Zubulake: Preservation Requirements

1. When the duty to preserve attaches, counsel must put in place a **litigation hold**;
2. Counsel must also **identify sources** of discoverable information;
3. Counsel should **communicate** directly with the “**key players**” (i.e. “those employees likely to have relevant information”). “This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel”;



## Zubulake: Preservation Requirements

4. “[L]itigation hold instructions must be reiterated regularly and compliance must be monitored”;
5. “[C]ounsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.”

## Rule 26(b)(2)(B): Two-Tiered Approach to Discovery of ESI

1. Produce reasonably accessible ESI (it can be obtained and reviewed for relevance without extraordinary cost or technical difficulty)
2. ESI that is “not reasonably accessible”: may not have to be produced. Rule 26(b)(2)(B).
  - A. Burden: the responding party must show that ESI is not reasonably accessible because of undue burden or cost.
  - B. Court may order production even if it determines the ESI is not reasonably accessible if the requesting party shows “good cause.”

► **Practice Note: Must still preserve the evidence.**



## “not reasonably accessible” - ?

“‘[L]egacy’ data that can be used only by superseded systems” (Advisory Committee Note to Amendment of FRCP 34(a))

“[I]nformation [that] may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes” (Report of the Civil Rules Advisory Committee, May 17, 2004, at p. 47).

## RULE 34: Document Requests

### Rule 34(b):

1. Requesting Party: May specify the form in which ESI is to be produced
  2. Responding Party: Must object to the specified form:
    - A. the reasons for the objection; and
    - B. the form or forms it intends to use
  3. If a request does not specify the form or forms for producing ESI, then the producing party must produce the information in a form or forms
    - A. in which it is ordinarily maintained or
    - B. that is reasonably usable
- ▶ **Practice Point: Attempt to agree on the form of production at or before the Rule 26(f) conference.**

## Rule 26 (b)(5)(B): “Clawback” of Inadvertently Produced Information

- ▶ **Notification:** If privileged or work product information is disclosed, “the party making the claim may notify any party that received the information of the claim and the basis for it.”
- ▶ **Conditional prohibition on use:** “must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information **until the claim is resolved.**”
- ▶ The rule does not provide immunity to an inadvertent production. The receiving party retains the right to challenge the claim of privilege.
- ▶ **Practice Point:** Enter into a written agreement concerning inadvertently produced information and make the terms part of a court order.

## Early Attention to ESI: Rule 26(f) Conference

1. Consider inviting a computer consultant to assist
2. Attempt to agree:
  - A. “Key employees” and “key systems”
  - B. List of document “key words”
  - C. Format in which the parties will produce documents (TIFF v. Native v. PDF)
  - D. Will metadata be produced?
  - E. ESI that is “not reasonably accessible”
  - F. Privilege waiver issues (and have the agreement incorporated into a court order)

## Rule 37: “Safe Harbor” Provision

- ▶ Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

\* \* \* \* \*

(f) Electronically Stored Information. 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 the routine, good-faith operation of an electronic information system.**

## Preservation: the “Safe Harbor” (and why it may not be “safe”)

- ▶ **Rule 37(f):** information lost due to “routine, good faith” operation of electronic information systems
- ▶ **“Routine”:** necessary to have policies and procedures for information management that are implemented in practice
- ▶ **Good Faith:** show why information is destroyed pursuant to established routine
- ▶ Show that routines resulting in destruction of information arise from “the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.”
- ▶ Good faith may require suspension of routine in face of preservation duty

## Rule 45 Subpoenas

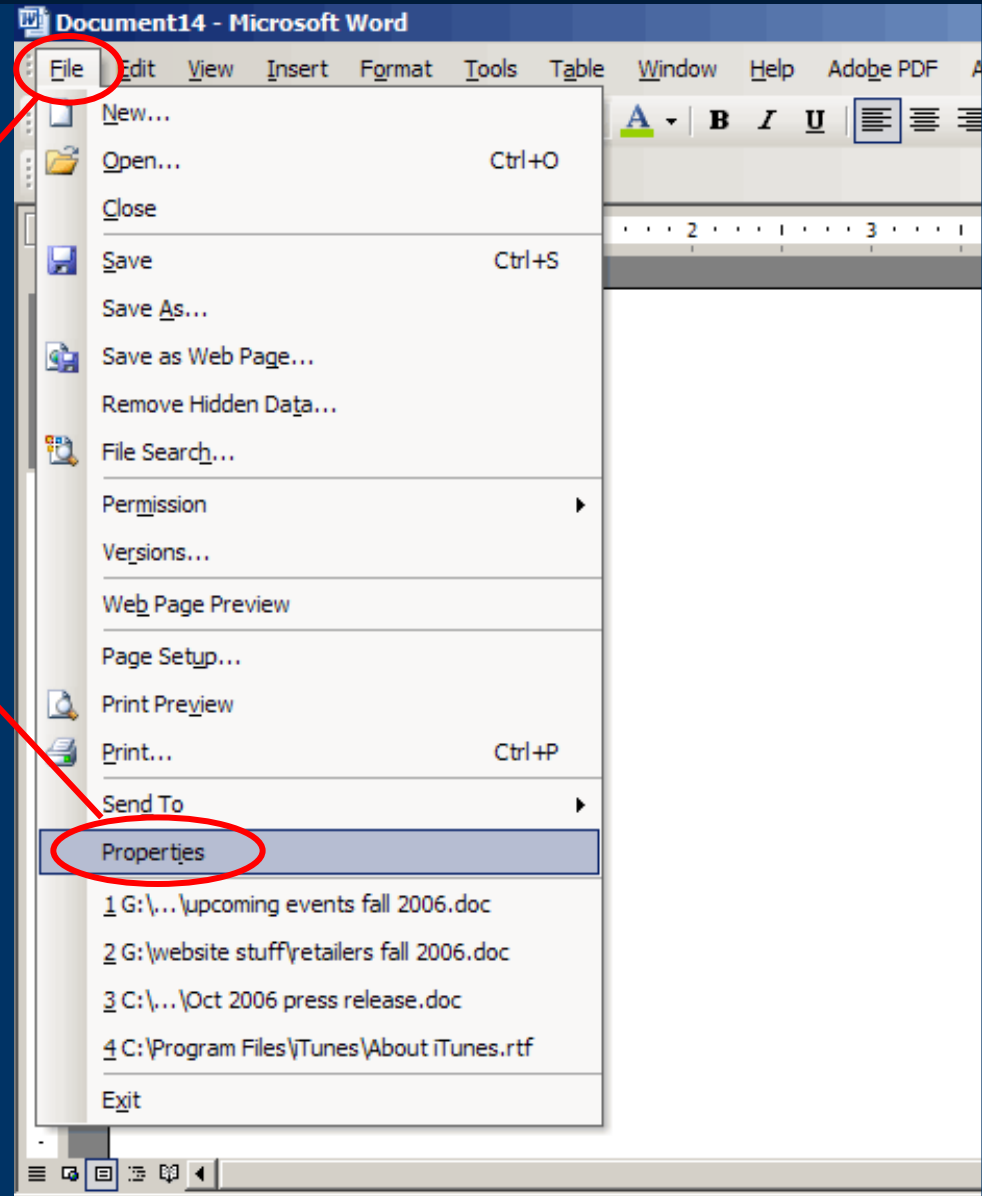
- ▶ New procedural rules apply to third parties
- ▶ Courts will likely be faced with numerous disputes about third-party subpoenas

## Where Do I Find Metadata?

In any Word, Excel, PowerPoint, or email, click on **File**

Then click on **Properties**

\* Does not include all of the Metadata, but it is the most readily available Metadata



# Examples of Metadata

WHERE

WHEN

WHO

WHAT

HOW MUCH

CSA Template - Law Firm Pricing Exhibit A.doc Properties

General Summary **Statistics** Contents Custom

Created: Friday, August 11, 2006 1:18:00 PM  
Modified: Wednesday, November 15, 2006 12:20:23 AM  
Accessed: Thursday, November 16, 2006 10:40:59 AM  
Printed: Tuesday, November 01, 2005 3:22:00 PM

Last saved by: azotalis  
Revision number: 4  
Total editing time: 3 Minutes

Statistics:

Statistic name	Value
Pages:	2
Paragraphs:	86
Lines:	92
Words:	505
Characters:	3415
Characters (with spaces):	3927

OK Cancel

# Examples of Metadata

CSA Template - Law Firm Pricing Exhibit A.doc Properties

General **Summary** Statistics Contents Custom

**Title:** Customer Service Agreement

**Subject:**

**Author:** John Smith

**Manager:**

**Company:** ABC Company Inc.

**Category:**

**Keywords:**

**Comments:**

Hyperlink base:


Template: Normal.dot

☐ Save preview picture

OK Cancel

FW: REMINDER: Monday Noon Lunch Video CLE Properti...

**General** Message ID

 FW: REMINDER: Monday Noon Lunch Video CL

Type: Message (Plain Text)

**Location:** Inbox

**Size:** 127 KB (Contains 2 included file(s))

**Sent:** 11/15/2006 10:51 AM

**Received:** 11/15/2006 10:51 AM

**Modified:** 11/15/2006 11:42 AM

Options for this item

**Importance:** Normal

**Sensitivity:** Normal

☐ Do not AutoArchive this item

**Read receipt requested:** No

**Delivery receipt requested:** No

OK Cancel Apply