

**Issue:** What amendments to the Rules of Civil Procedure should be made to accommodate emerging discovery of electronically stored information?

**Background:**

An increasingly large percentage of information is available in electronic form and much will never exist in paper form.

Electronic data is hard to erase and hard to keep; found everywhere and easy to conceal or overlook.

Technical issues with electronic data as well as its sheer volume lead to discovery cost disputes, causing concern that the traditional allocation of the cost burden of production to the producing party is unfair.

The mass of electronic material produced makes it hard for the producing party to do privilege screening. Privileged material is often inadvertently produced, leading to waiver issues.

**Current federal rules proposals:**  
(committee action in July?)

**Non controversial:**

Amend Rules 16(b)(3)(B) and 26(f) and Form 35 to suggest dealing with electronic discovery issues at early conferences.

- Encourages early planning and avoids preservation and spoliation issues.

Amend Rule 34(a)(1)(A) and 33(d) description of records to include “electronically stored information.”

- Updates the definition to meet current data storage expectations.

Amend Rule 34(a)(1) to permit testing or sampling in addition to inspection and copying.

- Validates the practice of experimenting with small data sets.

Amend Rule 34(b) to (1) permit requesting party to designate form of electronic data production and (2) allow the producing party to object to any requested form and, in the absence of specification in the request, require production in the form ordinarily maintained *or* in an electronically searchable form.

- Provides a “default” standard for form of production.

Amend Rule 45 to conform to all the above changes to Rules 33 and 34.

**Controversial:**

Enact a new Rule 37(f) to limit sanctions for spoliation of electronic evidence.

- Gives some guidelines beyond the evolving case law. Problem – where to draw the line?

Amend Rule 26(b)(2) or 34(a) to provide a presumption that cost of production of “off-line” records shifts to requesting party.

- Gives some guidelines beyond the evolving case law. Problem: Is it a valid concept?

Enact a new Rule 26(b)(5)(B) to provide that inadvertent production of privileged matter does not waive privilege.

- A tidy solution to a touchy problem. Problem: Is it a valid subject for procedure rules? Is it a valid treatment of waiver issues?