

E-Discovery for Paralegals: Definition, Application and FRCP Changes

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IPE Seminar



MANNING LILENFELD LLP

Initial Disclosures

- ESI – Electronically Stored Information
- FRCP 26(a)(1)(B) – all ESI must be disclosed initially
- FRCP 26(a)(2)(B) – exception: ESI which is “not reasonably accessible because of undue burden or undue cost”

Let's Chat – Rule 26 Conference

- At Rule 26(f) ask opposing counsel about:
 - the preservation of discoverable information
 - form in which ESI will be produced
 - issues regarding claims of privilege or protection as trial preparation material

Interrogatories – FRCP 33(d)

- Amended Rule 33(d) permits interrogatory responses to be ESI if “the burden of deriving the answer will be substantially the same for both parties.”
- Make sure opposing party provides "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained."



Metadata

- Metadata is data about data
- Document metadata includes:
 - name of file creator
 - name of last editor
 - number of times printed
 - number of revisions
 - some deleted text
 - document comments

Requests for Inspection – Don't Hit Delete! – FRCP 34

- ESI includes metadata.
- Clients should be archiving reports generated automatically to preserve metadata and also make it searchable.
- As long as the client's rules are consistent and not event based on any specific event, the rule will put clients at lesser risk to meet the new FRCP laws on e-discovery.
- Benefit - this allows for easy inspection by the opposing party upon a Rule 34 request.

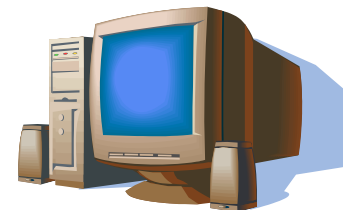
Request For Production of Documents

- "Document" or "Documents" shall be defined as follows: Every printing, record, graphic, photographic or sound reproduction of every type and description that is or has been in your possession, custody, or control or of which you have knowledge, including but not limited to correspondence, contracts, memoranda of agreements, assignments, licenses, minutes, memoranda, stenographic or handwritten notes, diaries, notebooks, books of account, ordered invoices, statements, bills, checks (or check stubs or records), vouchers, purchase orders, reports, studies, surveys, charts, analysis, publications, books, pamphlets, periodicals, catalogs, brochures, schedules, circulars, bulletins, notices, instructions, manuals, journals, data sheets, work sheets, statistical compilations, data processing cards, computer records, computer memory, computer e-mail, tapes and printouts, photographs, drawings, films, pictures, voice and tape recordings and transcriptions of telephone conversations; every copy of such writing or record where the original is not in your possession, custody or control; and every copy of every such writing or record where such copy contains any commentary or notation whatsoever that does not appear on the original blah blah blah blah blah blah blah blah blah blah blah blah blah blah blah blah



What is ESI?

- Rule 34 - ESI include writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained.
- ESI includes information stored not only on computers, but on external hard drives, back-up tapes, CDs, DVDs, jump drives, PDAs, cell phones, online databases as well as hundreds of other information storage devices.



200:1

- Discovery is still limited
- Nevertheless, the resulting amount of ESI which a party must produce in a lawsuit could still be two hundred or more for every one hard copy produced under the previous rules

Rule 34(a) - Sneak-A-Peak

- Under Amended Rule 34(a), where massive amounts of data may be in issue, you can now "sneak a peek" by sampling the ESI
- If relevant information is found, opposing party is required to produce it
 - If it is not found, however, it may be difficult to convince the court that you need more discovery

Go Native!



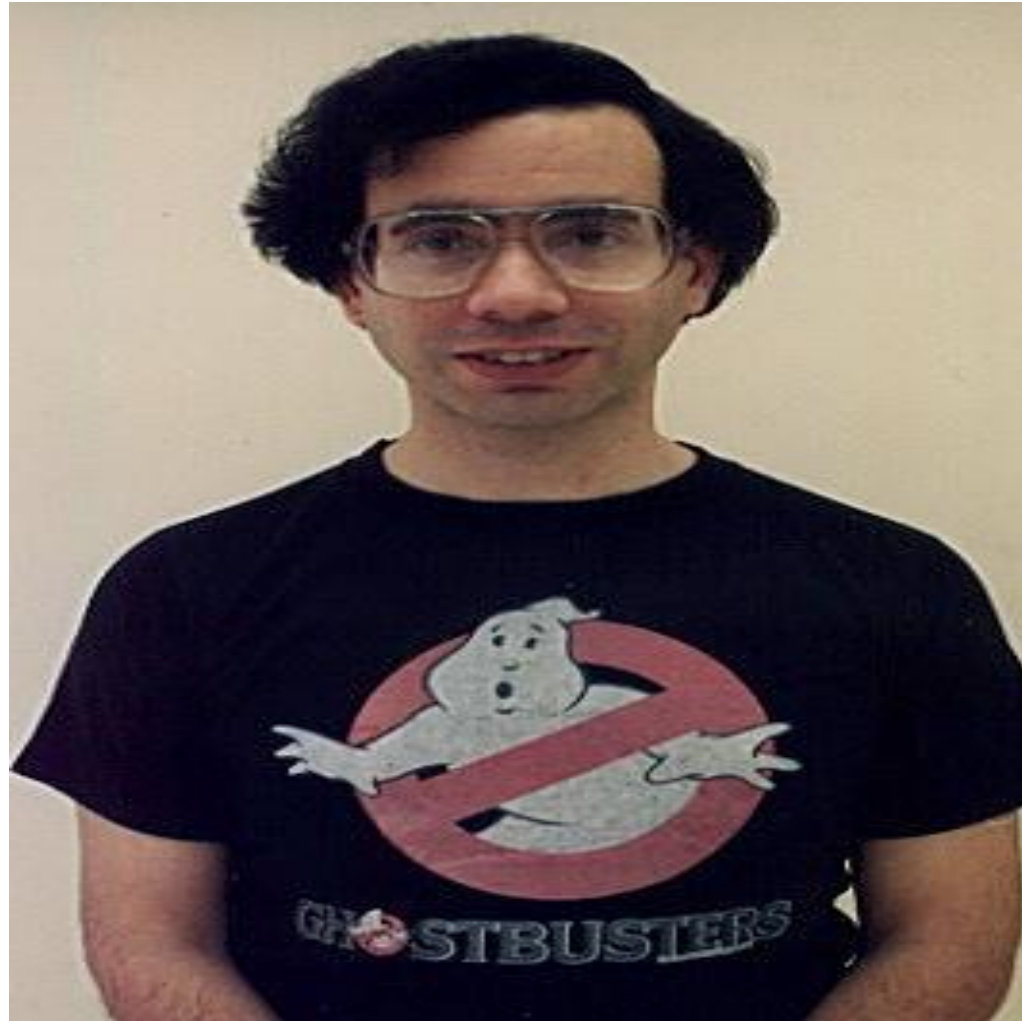
Rule 34(b) - Native Format

- Rule 34(b) permits a requesting party to specify the format in which it would prefer to have ESI produced.
- Make a request!
- “native format” will have the most metadata.
- You may elect to request this first and, if what you need is not readily available through the native format, you can make a follow-up request.



Questions Regarding FRCPP?

Computer Experts



Depositions

- Rule 30(b)(6) deposition of an IT expert – do this early and focus on:
 - substantive IT information.
 - opposing party's IT systems.
 - document management protocols.
 - email systems.
 - methods of acquisition, location and disposition of computers.

Deposing the Opposition's IT Experts

- Prior to this deposition you should confer with your IT expert to find out what information he/she needs.

Sample questions are listed in the written materials.



Effective Search Plan



Search Plan

- In developing a search plan, make sure you answer these questions:
 - what are your client's budget constraints?
 - how long is the discovery period and are there other time constraints?
 - what is the volume of data to be reviewed?
 - what work will be done by the law firm, by the client and by outside vendors?

Search Plan (con't)

- Questions for developing search plan con't:
 - who are the data/document custodians?
 - who has electronic evidence?
 - where are e-documents stored?
 - what programs do the key personnel use (email, word processing, presentation software, spreadsheets, cad files)?
 - when was the responsive data created?
 - when did the duty to preserve data attach?
 - where are e-data servers, desktops, laptops, pdas back-up drives and tapes, removable media?



Production of Forensic Evidence and Findings

- work product (not discoverable by the opposing party).
- Instruct your IT experts to limit those communications to only what is necessary.

OTHER CONSIDERATIONS IN E-DISCOVERY



Ethical Responsibilities and Conflicts of Interest

- Failing to comply with e-discovery required practices is costly for the party and its attorneys.
- Court imposed sanctions will vary but fines will be assessed against clients.
- However, judges have indicated that may change if the lawyers appear culpable.

Spoliation

- Judges will certainly ensure that missing or spoiled evidence is construed against the culpable party.
- Uptight lawyers – may be asking themselves what will it cost my client or my firm if we do not meet the e-discovery requirements.

Non-expert Tools

- ESI which was posted on the Internet but has since been removed.
- You will seek that data through discovery, but there is searching you can do on your own.



AllWhois.com

- Allwhois.com - a free service which locates the appropriate "whois" database server for a particular domain name and returns all available data



Wikipedia - free content encyclopedia project written collaboratively by volunteers



Google cache

- Google takes a snapshot of each page it examines and caches that version.
- Practically every search result includes a cached link.
- Sometimes you can access the cached version from a site that otherwise require registration or a subscription.

The Google logo is displayed in its characteristic multi-colored font (blue, red, yellow, blue, green, red) with a trademark symbol (TM) to the upper right.

WayBackMachine.com

- Browse through 85 billion web pages archived from 1996 to a few months ago

The screenshot shows the homepage of the Atlanta Journal-Constitution website as it appeared in 2007. The layout includes a top navigation bar with categories like JOBS, HOMES, CARS, and CLASSIFIEDS. A main content area features a large article titled "Officers' pleas won't end probe" with a photo of a dining room. To the right, there is a "news buzz" section with a list of headlines and a "quick links" section. The bottom of the page contains several promotional banners, including one for an AJC subscription and another for Veri-on wireless service.

ajc.com Thurs, Apr. 26, 2007 Personalize with myajc.com


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→ JOBS → HOMES → CARS → CLASSIFIEDS → SHOPPING → FIND A SERVICE Search Yellow Pages Archives

Home Nation/World Metro Sports Entertainment Living Travel Business Obituaries Opinion

ON AN ELEGANT NOTE



Kimberly Smith / AJC
Walking through the Atlanta Symphony's Decorators' Show House is like listening to a soothing concerto. [Story](#) | [Photos](#)
• [More modern home pics: 1 | 2](#)

Officers' pleas won't end probe
Feds suspect more wrongdoing in Atlanta elderly woman's killing. [Video](#) | [Photos](#) | [Timeline](#)

Tornado watch: Cobb, Cherokee
In effect until 11 p.m. | [Map](#)

Cops search Vick house in Va.
Probe may target kin . | [Photos](#)
• [Vick faces trespass charge](#)

2 Georgians killed in Iraq
Suicide blasts claim more lives.

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Basic Expert Tools

- Which tools and processes should be employed will almost entirely be left to the discretion of your IT expert, but it helps for you to be familiar with the basics.
- Popular vendors of search tools are listed in your materials.
- These all tackle different types of systems. From workstations, servers and networks, to e-mail stores and wireless technologies, each system will be explored.

Third Party Experts

- Interview your client's IT expert.
- Pros:
 - cheaper
 - less distracting
 - core competency
 - faster
 - scalable
- Cons:
 - less control
 - expense and client billing issues
- The earlier the better – put him/her to work.

IT Discovery Process Step #1 of 3

- Acquire data in a forensically sound manner

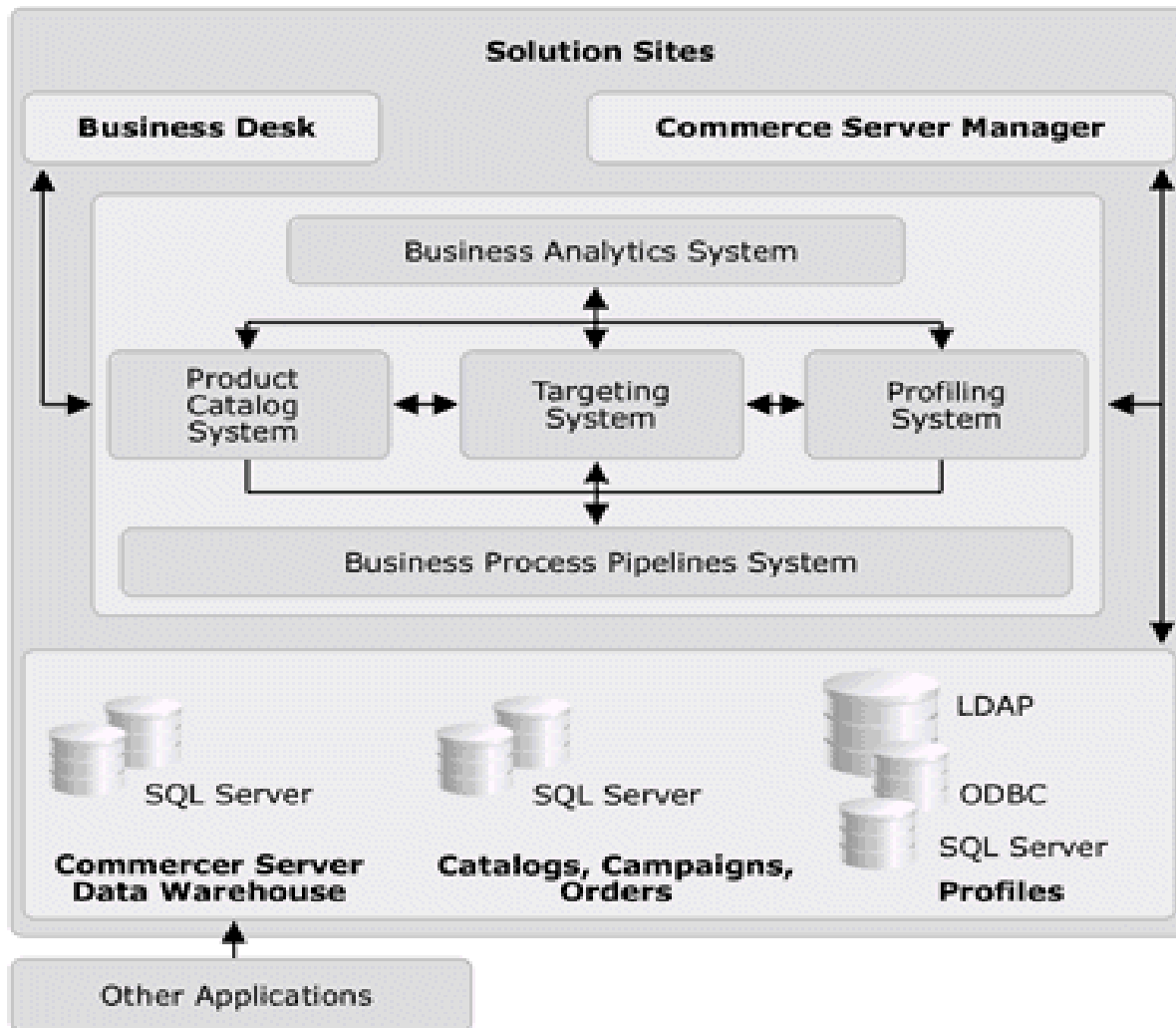
IT Discovery Process Step #2 of 3

- Analyze information

IT Discovery Process Step #3 of 3

- Reporting

Compatibility



Are We Compatible?

- Software compatibility. This question will inevitably be asked (and the earlier it is asked the better):
 - Can the data be transported into an expert's online repository or a third party's litigation support software with ease and limited expenses?
- TIFF is the most universally accepted file format for most electronic document views. If data is extracted into a .pdf document, the document will probably need to be transferred to a .tiff again.



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