E-Discovery Federal Rules of Civil Procedure and Federal Rules of Evidence

By Linda Volonino and Ian Redpath

Part of the E-Discovery For Dummies Cheat Sheet

http://www.dummies.com/how-to/content/ediscovery-for-dummies-cheat-sheet.html

During the e-discovery process, keep the e-discovery amendments to the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE) close by. These federal rules apply to the process for preparing and producing ESI, as well as for resolving related disputes.

Here are some of the implications of these federal rules.

- FRCP 16: Courts expect you to be ready for litigation, including being fluent in the IT and network architecture, so that the pretrial conference leads to agreements on what ESI is discoverable. FRCP 26(f) sanctions for not obeying a scheduling or pretrial order are a good thing to avoid.
- FRCP 26: Provides protection from excessive or expensive e-discovery requests, except when you don't deserve that protection.

FRCP 26(a)(1)(C): Requires that you make initial disclosures no later than 14 days after the Rule 26(f) meet and confer, unless an objection or another time is set by stipulation or court order. If you have an objection, now is the time to voice it.

Rule 26(b)(2)(B): Introduced the concept of not reasonably accessible ESI. The concept of not reasonably accessible paper had not existed. This rule provides procedures for shifting the cost of accessing not reasonably accessible ESI to the requesting party.

FRCP 26(b)(5)(B): Gives courts a clear procedure for settling claims when you hand over ESI to the requesting party that you shouldn't have.

Aule 26(f): This is the meet and confer rule. This rule requires all parties to meet within 99 days of the lawsuit's filing and at least 21 days before a scheduled conference.

Rule 26(g): Requires an attorney to sign every e-discovery request, response, or objection.

- FRCP 33: Defines business records that are created or kept in electronic format as discoverable giving the requesting party access to them.
- FRCP 34: Establishes a structured way to resolve disputes over document production.

FRCP 34(b): Establishes protocols for how documents are produced to requesting parties. As the requesting party, you choose the form of production. Most often, the requested form is native file because those files tend to reveal the most. You might not have the equipment or expertise to read the produced ESI easily if it's not in native form or a form you pick. This is usually a matter of regotiation between the parties.

FRCP 37: Judges have the power, courtesy of Rule 37(f), to impose sanctions against a party "who fails to obey
an order to provide or permit discovery."

Rule 37(e): Creates a safe harbor from sanctions if you did not preserve, and therefore no longer have, ESI that's requested provided that certain conditions and circumstances are met. Judges also have powers that are considered inherent in the court that expand the ability to impose sanctions beyond Rule 37.

 FRCP 45: If you're a nonparty to e-discovery, you're protected from some of the costs or burdens that parties typically have to pay or endure.

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A. Spencer

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Table of Contents Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev

- 1. Understanding the eBook Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - o The Rise of Digital Reading Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Advantages of eBooks Over Traditional Books
- 2. Identifying Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
- 3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - User-Friendly Interface
- 4. Exploring eBook Recommendations from Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Personalized Recommendations
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev User Reviews and Ratings
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev and Bestseller Lists

- 5. Accessing Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev Free and Paid eBooks
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev Public Domain eBooks
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev eBook Subscription Services
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev Budget-Friendly Options
- 6. Navigating Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev eBook Formats
 - o ePub, PDF, MOBI, and More
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev Compatibility with Devices
 - Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev Enhanced eBook Features
- 7. Enhancing Your Reading Experience
 - o Adjustable Fonts and Text Sizes of Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Highlighting and Note-Taking Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - o Interactive Elements Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
- 8. Staying Engaged with Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
- 9. Balancing eBooks and Physical Books Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Benefits of a Digital Library
 - \circ Creating a Diverse Reading Collection Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
- 10. Overcoming Reading Challenges
 - $\circ\,$ Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Setting Reading Goals Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - o Fact-Checking eBook Content of Federal Rules Of Civil Procedure Abrgd Educ Ed 04 05 Rev
 - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks
- 14. Embracing eBook Trends
 - Integration of Multimedia Elements
 - Interactive and Gamified eBooks

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