



Getting Ready to Comply With New Federal E-Discovery Rules

Rebecca Levy-Sachs, Esq.

Robinson & Cole, LLP

Hartford, Boston, New York, Sarasota, Manchester, New
London, Stamford, Greenwich, White Plains



Rules

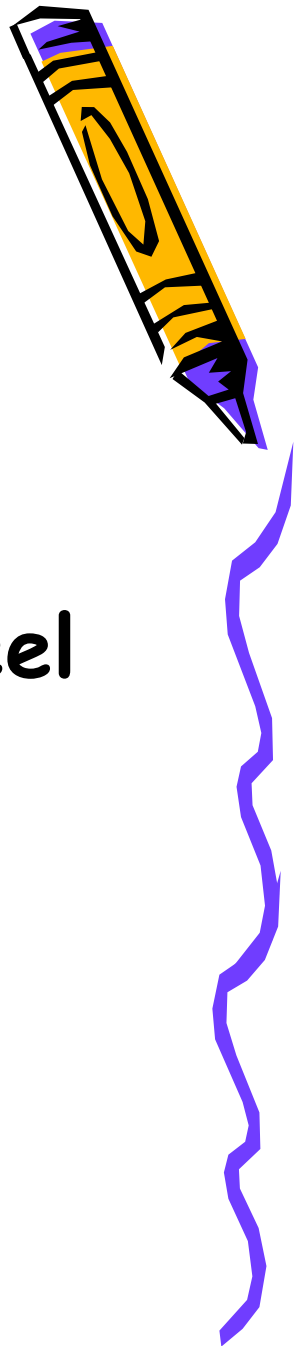
Rule 16, 26(a) & (b) pre-trial disclosures

- Give early attention, discuss preservation, privilege & work product protection
- Discuss inadvertent disclosure
- Discuss form of production
- Court has discretion to approve parties agreement



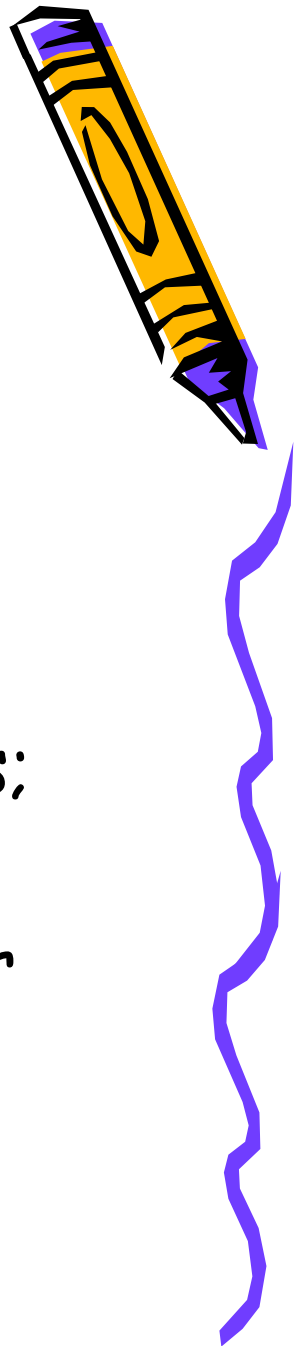
What the Company Should Do

- Ideally You have Addressed the Above Issues Company Wide and will not need to reinvent the wheel on a case by case basis.

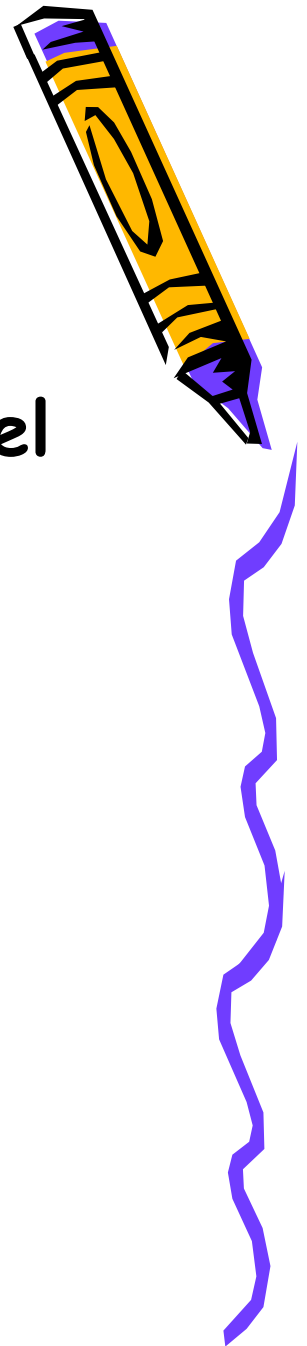


What do I mean?

- Have you reviewed your Document Retention Policies?
 - Are they written, updated, enforced
 - Are they communicated to employees; audited
 - Is there a document hold process for litigation?



What Do you and Your Counsel Need to Do?



- As soon as case comes in, your counsel will want to meet with an in house IT person to identify
 - potential sources of material
 - Storage protocols,
 - Back-up procedures
 - Operating systems;
 - Unique software
 - Retention policies and practices



Counsel will then:

- Develop inadvertent destruction policies;
- Litigation holds;
- Imaging requests,
- Discuss agreements with adverse counsel to limit production of and obligation to preserve non working data- back-up tapes;
- Identify the individual at your company to provide 30 b 6 testimony or Affidavits re: document issues and burdensomeness claims



Rules, contd.

Rule 26(b)(2)

- Court order needed for ESI that is not reasonably accessible because of undue burden or cost.
- Recognizes proportionality issues and allows Judge to limit or forbid discovery where costs and burdens outweigh benefits
- Court can order production for "good cause" and specify conditions including who pays.



Your Involvement

- In order to make burdensomeness arguments and proportionality arguments for fee shifting, counsel will need affidavits from an IS person in your company with detail.



Rules, contd.

Rule 26(b)(5)

- Provides procedure for asserting privilege “after” production
- Based, in part, on volume and form or storage
- Inadvertent production becomes substantial risk
- Must notify opposition within reasonable time
- Requesting party must retrieve, preserve until court decides privilege exists or waiver has occurred.



How You Can Help

- Offer IT assistance to counsel which will allow searches which will pick up Privileged Documents;
- Consider e-mail fields which allow identification of privileged matters, or will flag when privileged matter is being sent to someone who might vitiate privilege;
- Understand this is a time sensitive issue



Rules, contd.

Rules 33 & 34

- Can respond to interrogatory request by offering access to ESI
- Party should specify form of production, absent this, responding party can use form ordinarily maintained



What You Need to Know



- Courts do entertain arguments re: form of production and accept challenges to CD's or only hard copy production;
- Courts have required parties with proprietary systems to convert data into another system, or offer the software;
- Mechanism needs to be developed to capture relevant hidden data-
 - (e.g. underwriting screens)



Rules, contd.”

Rule 37(f)

- No sanction for “good faith” storage—
routine, good faith operation of an
electronic information system





To Establish "Good Faith"

- There Must be Procedures in Place Before the Litigation which are followed;
- Should Be Inventory of ESI, software, hardware, operating systems, users, chains of authority, retention policies, back-up procedures and purpose of back-up & evidence these procedures are followed.

