

If I had wanted to join the wrestling federation...!@*

WHAT (OR WHEN) IS A LITIGATION HOLD?

ELECTRONIC DISCOVERY UNDER THE NEW FEDERAL RULES

Civil Procedure Rules amended:

Rule 16. Pretrial conferences; scheduling; management

Rule 26. General provisions governing discovery; duty of disclosure

Rule 33. Interrogatories to parties

Rule 34. Production of documents and things and entry upon land for inspection and other purposes

Rule 37. Failure to make disclosure or cooperate in discovery; sanctions

Rule 45. Subpoenas

Proposed Rule of Evidence:

Rule 502 Attorney-client Privilege and Work Product; Limitations on Waiver

Research sources:

Rules <http://www.law.cornell.edu/rules/frcp/>

Advisory Committee notes

<http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>

Sedona Conference Proceedings

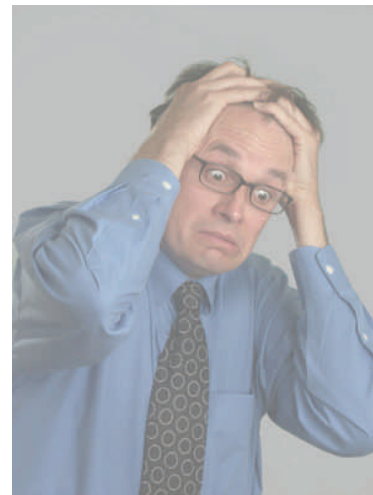
http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf

Publications:

ABA Section on Litigation, *e-Discovery: A Special Publication on e-Discovery* (2007) available at

<http://www.abanet.org>

Scheidlin, S. *Moore's Federal Practice, E-Discovery: The Newly Amended Federal Rules of Civil Procedure* (2006)



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LITIGATION TIMELINE



Anticipate Litigation--Preserve relevant documents
Zubulake v UBS Warburg, LLC, 220 FRD 212 (SDNY, 2003)

Inter-party conference Rule 26(f), agree on form of production, Rule 26(f)(3); 34(b), accessibility, Rule 26(b)(2)(B), privilege, Rule 26(f)(4), 26(b)(5)

Discovery Order, Rule 16(b)(5), privilege 16(b)(6), proposed Rule of Evidence 502(b) & (d)

Discovery about discovery, Rule 26(b)(2)(B)

Safe harbor, Rule 37(f)

Sanctions & Spoliation, Zubulake v. UBS Warburg, LLC, 229 FRD 422 (SDNY 2004)

The Sedona Principles for Electronic Document Production

RULE 26(B)(2)(B)—A PARTY NEED NOT PROVIDE DISCOVERY OF ELECTRONICALLY STORED INFORMATION FROM SOURCES THAT THE PARTY IDENTIFIES AS NOT REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR COST.

1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents.
2. Parties must preserve electronic data and documents that can reasonably be anticipated to be relevant to the litigation.
3. Parties should confer early in discovery to discuss preservation and production responsibilities.
4. Discovery requests should make as clear as possible the scope of responses and objections to discovery.
5. The obligation to preserve electronic information that may be relevant to the litigation requires a party to take every conceivable step to preserve such information.
6. Responding parties are best situated to identify, preserve and produce their own electronic data and documents.
7. The requesting party has the burden to identify and produce relevant electronic data and documents.
8. The primary source of electronic data and documents is the party's own systems. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

Backup tapes: Advisory Committee notes at 30-31; Sedona Principles #8; *Zubulake v. USB Warburg LLC*, 217 FRD 309 (SDNY 2003)

Erased, fragmented or damaged data: Advisory Committee notes at 30; Sedona Principles #9; *Zubulake, supra*

Data on legacy systems: Advisory Committee notes at 31

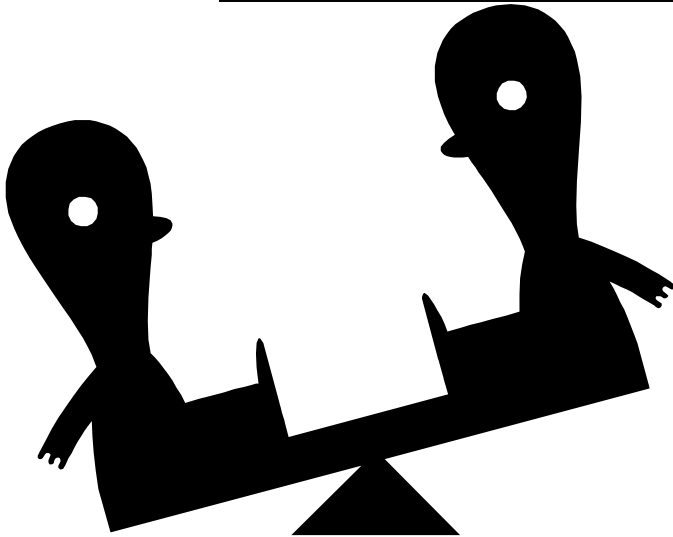
RULE 34(B)—THE REQUEST MAY SPECIFY THE FORM OR FORMS IN WHICH ELECTRONICALLY STORED INFORMATION IS TO BE PRODUCED....
(II) IF A REQUEST DOES NOT SPECIFY THE FORM OR FORMS FOR PRODUCING ELECTRONICALLY STORED INFORMATION, A RESPONDING PARTY MUST PRODUCE THE INFORMATION IN A FORM OR FORMS IN WHICH IT IS ORDINARILY MAINTAINED OR IN A FORM OR FORMS THAT ARE REASONABLY USEABLE; AND
(III) A PARTY NEED NOT PRODUCE THE SAME ELECTRONICALLY STORED INFORMATION IN MORE THAN ONE FORM

Litigation Hold

Inaccessible does not lift, but see safe harbor

Spoliation & Sanctions

Privilege Claims



Timely Production

Cases

Zubulake v. USB Warburg, LLC, 217 FRD 309 (SDNY 2003), test for cost shifting

Zubulake v. USB Warburg, LLC, 216 FRD 280 (SDNY 2003), costs of relevance and privilege screening on producer

Zubulake v. USB Warburg, LLC, 220 FRD 212 (SDNY 2003), timing of litigation hold

Zubulake v. USB Warburg, LLC, 229 FRD 422 (SDNY 2004) monitor litigation hold

Arthur Anderson LLP v. US, 544 US 696 (2005), execution of ordinary document destruction not obstruction of justice