



White Paper



Email ARCHIVING Solutions:

The Law & Electronic Data

Federal Rules of Civil Procedure 16, 26, 33, 34, 45



INTRADYN™
Archiving and eDiscovery Innovation

About Intradyn™

Founded in 2001, Intradyn is a recognized leader in the eDiscovery and archiving markets, producing leading edge products for small and mid-sized businesses, organizations, and governments.

Intradyn is headquartered in Mendota Heights, Minnesota, with partners throughout North America, Europe and Asia.

This paper will provide a knowledge base of legal aspects involved with company email.

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Discovery:

Discovery is the pre-trial exchange of information by parties in a case. Studies have estimated that the cost of discovery represents approximately 50 percent of the litigation costs in all cases, and as much as 90 percent of the litigation costs in the cases where discovery is actively employed. Case law has been developing on the discovery of electronically stored information and has helped provide guidance, but it has been inconsistent and incomplete. Disparate local rules filled the gap between the existing discovery rules and practice, resulting in differing treatments of litigants depending on the jurisdiction. The Federal rules became necessary to provide uniformity and prevent the flourishing of a patchwork of local rules and requirements.

On December 1, 2006, amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 45 and revisions to Form 35 took effect. These amendments and revisions are all aimed at one particular area of discovery—electronically stored information, and e-mail is a large piece of that area.

The new amended rules require every corporate litigant to recognize, declare, and produce e-mail and electronic files in civil litigation. These new rules impose standards on discovery issues that are unique to electronic records, seriously complicating the life of the IT director or CIO.

5 main areas were addressed in the amendments:

- 1) Requiring parties to give early attention to the issues of electronic discovery
- 2) Relieving parties from searching inaccessible electronic information
- 3) Requiring parties to agree on the form of production
- 4) Retaining privilege protection
- 5) Limiting sanctions for loss of electronic information as a result of routine operation

Specifics on the amendments:

Rule 16:

– (a) In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes...

– 16.b.(5) provisions for disclosure or discovery of electronically stored information

Basically this says that the court can order that a pretrial conference(s) be scheduled and that the parties must be prepared to discuss the details pertaining to electronically stored information. In the world of email, it means that the CIO or IT Director must be prepared to discuss how and where emails are stored. If you have an Intradyn Email Archiving Solution such as RazorSafe or Orca to archive emails, then you are already prepared: complete copies of all emails are stored in a simple to search archive. If you don't have an Intradyn Email Archiving Solution, be prepared to discuss how you will share emails stored on the email server, email server backups, local pst files, email that may have been stored by an end user on their local desktop, tablet, cell phone, or other device.

Rule 26:

– (b)(1) Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2) (i), (ii), and (iii).

– (b)(5)(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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 26 says that even before a discovery request is stipulated or ordered you must provide to the court contact information for anyone that may be likely to have discoverable information (including the location of the information). It also states that you must be prepared to provide a copy – or a description by category and location – of all electronically stored information, documents and other





“The very fact that the emails are missing leaves us in the realm of speculation as to what they contained and in what manner they might have assisted the plaintiff in litigating claims.”

-Federal Magistrate Judge Dolinger (S.D.N.Y.)

tangible things. Once again, as this relates to email, if you have an Intradyn Email Archiving Solution you are covered: complete copies of all your email are stored in one central repository. If you don't have an Intradyn Email Archiving Solution, be prepared to provide to the court contact information of anyone who may know where email is stored (including past employees) plus complete catalogs of your servers, desktops, and potential hiding places for email within your organization. Rule 26, also, states that you may claim that the information is not accessible because of “undue burden or cost,” but be warned the courts have set this bar pretty high. In the case of *Zubulake v. UBS Warburg*, the court did not think that \$19,000 to restore and search five backup tapes was unduly burdensome.

Rule 33:

(d) Option to Produce Business Records.

If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Rule 33 says you have an option to either provide the interrogating party with exactly the emails they are looking for OR give them access to all of your emails and let them find the ones they want to use. If you have an Intradyn Email Archiving Solution, you can confidently select option 1, because you will be able to easily search all of your organization's emails and specify exactly the emails that are being requested.

Rule 34:

(a) In General.

A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(b) Procedure.

(1) Contents of the Request.

The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

Rule 34 explains the procedure of how to request and how to respond.

- Section a.1.A reiterates that email (electronically stored information) can be requested.
- Section b.1 says that the request should be specific and most importantly gives the requestor the opportunity to request how email should be produced.
- Section b.2 sets the response time, generally 30 days, but this can be changed by the court. This section also gives particular attention to how email should be produced.



- Directing that email must be shared as they are normally stored, if would imply that you may have to grant access to your email server; or that it be produced and labeled in an orderly fashion, that corresponds to the request. Intradyn's Email Archiving Solutions allow you to define multiple tags that you can easily associate with the specific searches that you perform to respond to a request. The search criteria that are used can also be saved so that you can easily comply with the specifics contained within Rule 34. This section also states that email should be shared in a reasonably usable form. The Intradyn Email Archiving Solution gives you options as to how email can be copied from the archive. These options include forwarding to an email address, printing, exporting, and sharing messages. All of these options can be performed upon individual messages or groups of messages. When email is exported from the Email Archiving Solution it is provided in a .eml format that follows RFC 822; this means that the exported emails can be easily imported by most email clients and/or viewed using a simple text editor.

Rule 45

Rule 45 covers the use of the Subpoena as it relates to the discovery process. It basically summarizes all the previous rules, but adds provisions for Privilege. Rule 45 also states clearly that any person that fails to comply with a discovery request without adequate excuse may be held in contempt. Intradyn's RazorSafe and Orca Email Archiving Solutions Search Exclusion features provide functionality to easily exclude emails that are covered by privilege. While no guarantees can be made related to prevention of Contempt, having a properly configured Intradyn Email Archiving Solution installed will definitely minimize the amount of work —and risk— related to answering eDiscovery requests related to email.

