

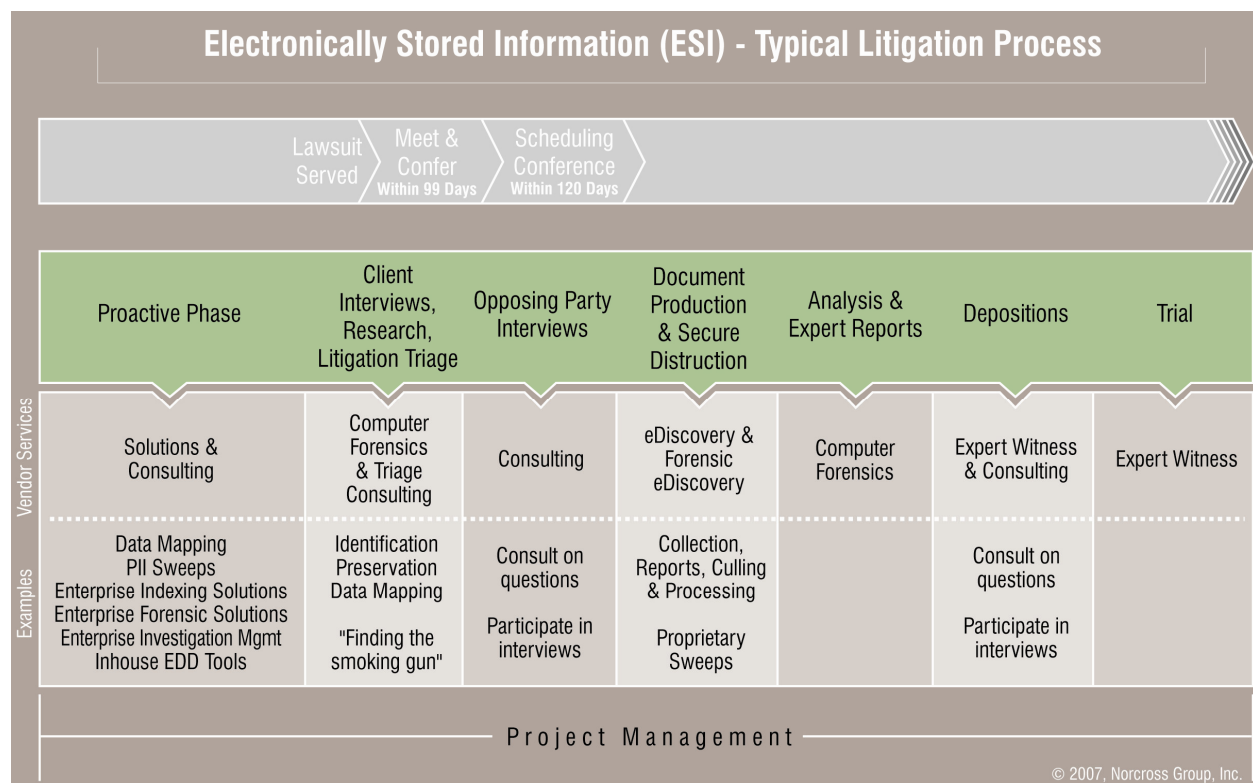
Litigation: The 99 Day Window

Are you ready for the ESI Amendments to the Federal Rules of Civil Procedure?

Executive Summary

The Electronically Stored Information (ESI) amendment to the Federal Rules of Civil Procedure has, quite literally, changed the rules. In addition to increased ESI related activities, the December 2006 Federal Rules of Civil Procedure (2006 FRCP) amendments have dramatically accelerated the overall litigation schedule.

With more to do and less time in which to accomplish it, all parties to litigation must take a substantially more proactive stance when it comes to discovery planning and litigation triage. As shown below, the keys to effective preparation for 2006 FRCP include having detailed data maps and real-time ESI indexing tools in place at the start of the 99-day window. This foundation greatly simplifies the effort and cost of complex litigation.



ESI requires a proactive, comprehensive approach across a broad range activities – all within a very shortened window of time.

This paper details the challenges of ESI compliance, and how to better plan for the critical first 99 days of any civil action. It also outlines what law firms, courts and corporations should seek in a single-resource ESI compliance solution.

Introduction – ESI and Litigation Triage

The ESI amendments to the Federal Rules of Civil Procedure, and particularly the December 2006 amendments, set the standard for what must be included as part of the discovery process, and how that information must be handled to maintain a secure chain of custody. All parties to federal civil litigation – law firms, courts and corporations – are bound by these new rules.

2006 FRCP requires that litigants treat electronic information as fully equal to paper information during the discovery process. The result is that the first 99 days of litigation are now a critical period for litigants and law firms, in which they must be prepared to disclose and discuss many details related to their potential ESI evidence. Even more dramatically, strategic decisions must be made during the first 99 days that will impact the entire course of the litigation – often with millions of dollars on the line. Litigants must be able to map the location of and index both paper and electronic data to meet these requirements and rapidly accomplish a triage effort to fully understand the technical merits of a lawsuit.

And yet, law firms, courts and corporations rarely understand the implications of these requirements, or how to satisfy them in a timely, cost-effective manner. For example, major corporations must balance the advantages of outside counsel against the time necessary to bring these resources up to speed. At the same time, internal legal resources are rarely up to the technical and volume challenges that ESI represents.

Even worse, policies and procedures for the proper handling of electronic evidence – including proof of a secure chain of custody – involve complex data collection techniques that are difficult to master. Very few businesses or law firms can afford to invest in a comprehensive, in-house solution.

The goal of 2006 FRCP is to create a faster, fairer, more comprehensive process for completing civil litigation, with a firm time deadline for all parties to complete discovery and be fully prepared to settle, mediate or go to trial. The catch is that the amendments bring electronic information resources into play that litigants often overlook, such as:

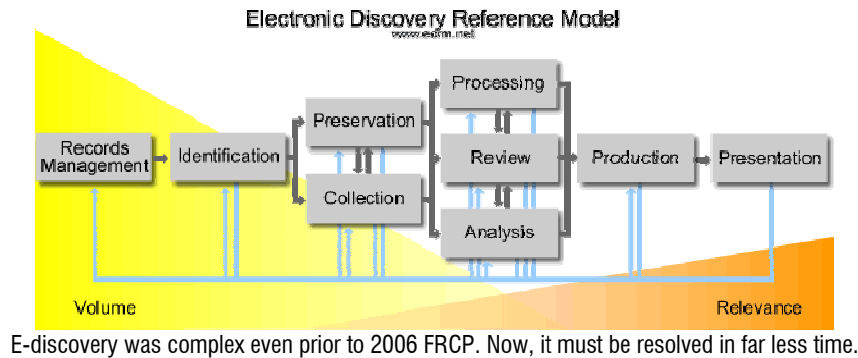
- Secondary e-mail repositories, text messages and instant messaging logs
- PCs, personal data assistants (PDAs), smart phones (e.g., Treo, Blackberry, iPhone, Motorola Q)
- Removable storage (USB-based thumb drives, MP3 players, CDs and DVDs)
- Network-based storage, including off-site backups and redundant systems
- Damaged, deleted or retired data storage systems

2006 FRCP also covers metadata, or information about electronic information. For example, every document file created in Microsoft Word may contain additional information outside text and formatting that can affect a legal proceeding, including:

- When the file was created
- Who created the file
- Who has modified the file
- When the file was last accessed
- Changes made to the text

Network security logs, Web surfing logs, network storage and retrieval logs and many other resources can also produce ESI useful for a civil procedure.

Clearly, these amendments to the FRCP greatly expand what must be covered during discovery, yet also reduce the time in which to complete the process. The answer is to integrate a methodology that maps where data is located and automatically indexes relevant content, including both active systems and backup archives. This structure makes it much easier to identify and classify potentially actionable information. Litigation triage, the normal process in which parties to a civil action must decide what they can and cannot find as part of the discovery process, then becomes a planned and orderly function rather than a rushed effort with unpredictable results.



The Data Map Trap

Section 26(f) of the 2006 FRCP amendments describes the Meet and Confer process under which counsel is presumed to be ready to proceed. At this conference, legal teams and the court must agree upon what information must be produced, the most advantageous/cost-effective means for collecting and organizing that information and the format in which it must be presented.

The key to 26(f) is to include the entire IT infrastructure, including all data repositories and data retention policies, inside a comprehensive data map. Without this map, it is extremely difficult for litigants or their representatives to deliver what the court expects, when the court expects it.

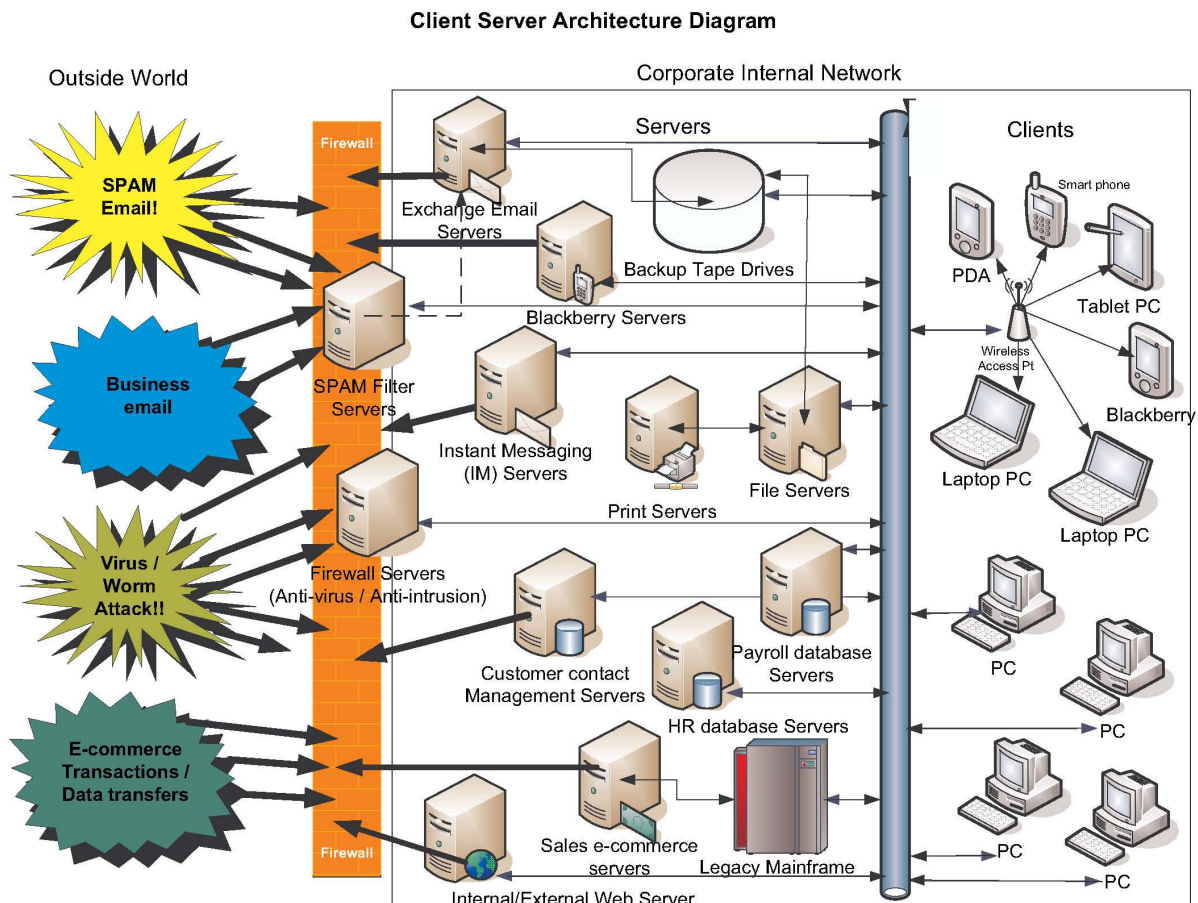
Most corporations already have some degree of data mapping in place, since larger businesses must document compliance with a wide range of regulatory and industry initiatives such as HIPAA, Sarbanes-Oxley, Gramm-Leach-Bliley, PCI or CA State Bill 1386. However, these maps are built to support normal daily operations. They are not equipped to service the unexpected directions that any legal action can compel. Businesses typically do not have the resources to pull staff off of daily tasks to meet the needs of a legal action, nor do IT people have a sufficient understanding of legal issues to perform the work properly.

It takes detailed internal knowledge of client IT structures and policies to build an accurate data map. Likewise, experience is critical in e-discovery and digital forensics. Lawyers and their support staff may understand how IT structure – the way in which information is named, organized and located – can affect litigation strategy, or how production formats for discovered data will affect timing or case strategy. But they are unlikely to be able to match that knowledge to a client's internal business processes within the limited time that 2006 FRCP demands.

Likewise, the courts themselves can dictate what must be discovered, but the details of that discovery process fall to the litigants and their representatives. There is no intervention while discovery is in process to ensure that

all evidence has been properly located and reviewed. So, the court itself is at the mercy of the data mapping produced (or not) by the litigants.

In short, any given party in a civil action may have *some* of the skills necessary to meet the requirements of the 2006 FRCP amendments. However, it is extremely unlikely that any group has most, let alone all, of the skills or breadth of experience necessary to produce what the amendments require within the 99 day requirement. Indeed, ESI and data mapping present specific challenges to each of these groups.



Complex networks require significant experience for timely data mapping and accurate information indexing.

The Technical Issues Raised by ESI

Any organization entering civil litigation must be prepared to address the following issues. In other words, even a relatively straight-forward data map must encompass:

Applications & Systems

- Which e-mail servers, file servers and Web servers are in operation
- Which enterprise and departmental applications are in operation on these systems
- Which individual PCs, PDAs or smartphones contain sensitive information
- Which systems have been retired but still retain data
- Plans for retiring systems in the future

Systems Architectures

- Tiers, repositories, etc., for transporting data
- Tiers, repositories, etc., for preserving data

Backup Systems and Policies

- Purpose of each backup (e.g., mission-critical business records vs. occasional discrete restores vs. disaster recovery only)
- Retention policy for both current and historical media
- Data catalog retention

Types of Data

- Data sources, including systems of record and ancillary copies (duplicates, laptops, drafts, temp files, spool files, access logs, etc.)
- Retention activities within operational systems
- Preservation and collection techniques, including documentation of results

Organizational Policy

- Who is responsible for building and maintaining the data map
- Who archives the data map at specific points in time
- How are data types segregated
- How document use and handling policies are documented and applied
- How document retention policies are documented and applied

Technical Responses

- Regular, reliable backup of actionable information and content indices
- Maintaining the availability of legacy or retired systems that contain relevant content
- Active enterprise-wide content management systems

Clearly, data maps are a very complex operation at the enterprise level. As a result, most participants in litigation find it difficult to master all of the skills necessary to meet the demands of ESI and 2006 FRCP.

Law Firms and ESI

Since most law firms lack the deep understanding of IT, business processes, how the two interact, and how to use digital forensics to locate lost or damaged data, the natural tendency is to stick to easily-found paper trails and primary ESI repositories. Unfortunately, that leaves valuable, legally actionable elements untapped, such as:

- Digital information not in obvious places
- Digital metadata
- Deleted or damaged information

Paper discovery, too, is more complex than ever before. Today's businesses produce tremendous amounts of paperwork. At the same time, the traditional practice of law does not address how to reduce these huge quantities of printed material to collated, indexed and digitally searchable material. For complex cases, scanning is a monumental task, requiring very consistent procedures over time to produce useful, meaningful results.

Even law firms that truly understand the value of data mapping and its relationship to litigation triage find that outside resources can greatly reduce the time required to prepare for a case. This expertise is absolutely critical for a planned, orderly and cost-effective discovery process.

The Court System and ESI

One of the ironies of 2006 FRCP is that it is court-mandated – which therefore requires that court officials be able to verify compliance and enforce adherence to its mandates. In other words, court officials must become sufficiently knowledgeable in IT and business process so that they can:

- Monitor and supervise agreement for both paper and electronic discovery
- Ensure that digital forensics efforts use proper procedures and protect the chain of custody
- Assess penalties or insist on third-party resources when mandates have not been met

Court officials also need a trusted independent party who can provide digital investigation services for disputed situations in which litigants cannot agree, or when the court suspects that full discovery has not taken place. Both neutral third parties and Special Masters must be able to work under the authority of the court, and be regarded as impartial by all sides.

The skill, budget and experience to meet these needs are as much a challenge for courts as they are for law firms. And yet, they are critically important if ESI is to function as intended.

Corporations and ESI

Any corporation that applies data mapping to document regulatory compliance already has some of the structure in place to satisfy 2006 FRCP. However, for true litigation support, the data map must be expanded to cover data retention policy as well as *how* data flows through an organization. Very few businesses are sufficiently proactive to have taken these steps until forced to by a lawsuit.

This more comprehensive data map measures:

- Where information enters the IT infrastructure, and where it goes once inside
- Who accessed what information, when, and for what reasons
- Where information is stored, including disaster recovery
- How, why and when information is destroyed or deleted
- What information is paper in origin, electronic in origin, and in what format it is stored

Data can appear in a variety of unexpected places, such as audio or video clips. In short, anything that can be digitized and stored on PC, server or across a network must become part of the data map.

2006 FRCP mandates that corporations produce what the lawyers and courts require quickly and efficiently. Therefore, it is essential that businesses learn to expand their data mapping to protect themselves from civil or criminal liability. Lost or damaged information is often interpreted as evidence of improper or criminal activity. Failure to meet this standard forces the corporation to race the clock to decide what is essential, determine what can be found, and then hope that it proves sufficient.

Corporations must also understand how proactive data maps and data retention policies apply to internal investigations, such as building a case for employee removal or other disciplinary action. Rapid production of critical information produces better cases, which can be resolved faster and less expensively. In addition, litigation support information that meets the standard for proper chain of custody saves time and money, since it does not need to be re-searched and separated for future litigation. It also helps document that private information such as social security or credit card numbers have not been accidentally disclosed during the legal process.

Even the most proactive corporations rarely have the budget or resources to meet this very broad mandate. And yet, corporations must build the processes and technologies necessary to meet ESI if they are to protect themselves from legal liability and successfully prosecute actions against individuals and other firms.

Technology solutions do exist. For example, one solution “reads” data as it crosses from a PC or server to a backup tape. The essence of the content is all that is important, not the format or the punctuation, so content is indexed without slowing the backup system’s performance. This plain text can become a first line of defense during the discovery process.

Technology, however, can only take a corporation part of the way towards satisfying 2006 FRCP. The broader question is how to develop or retain the expertise necessary to be ready in advance of civil litigation.

The Importance of a Single-Source ESI Solution

Everyone affected by ESI must now engage in complex data collection operations on an ongoing basis. This intersection of IT, business process and legal issues requires skills that very few organizations can produce – or afford to produce – internally. Since the requirements are not part of these organizations’ core business operations, it is very hard to find, train and retain talented, experienced, relevant personnel.

That challenge is why many organizations have tried to outsource paper discovery, electronic discovery, digital forensics and digital investigations. Unfortunately, these efforts tend to be piecemeal in structure, with predictable results. Complex links between different types of data – one of the prime reasons for ESI – are often overlooked. Critical data is not found. Improved business processes are not identified or implemented. Inconsistent results make it difficult to measure the value of the expenditures, or if progress has been made over time.

Law firms, courts and corporations need a single resource that can bring all of these skills together as part of a single, comprehensive, integrated set of offerings including:

- Paper discovery
- Electronic discovery
- Digital forensics and investigations
- Proactive data mapping and consulting

This organization also needs to be stable, with a court-proven track record of superior results. Staff must have technical, law enforcement and investigatory experience. The company must be expert in corporate IT and business processes, with deep roots in regulatory compliance.

Norcross Group: The ESI Data Map Experts

Law firms, court organizations and businesses alike turn to Norcross Group to help them address the challenges of ESI and 2006 FRCP. Norcross Group is the most trusted, most secure, most cost-efficient means to locate essential information that supports litigation, subpoena compliance and internal investigations. The firm is the vendor of choice for locating what is needed, whether in paper or digital format, including misplaced, erased or damaged data.

Norcross Group has a long and distinguished record, having earned the trust of law firms, courts and corporations alike with its unique combination of business, IT and discovery offerings. In fact, Norcross Group is often used as an expert witness, neutral third party, or as a court-appointed Special Master for independent

investigation. The key to this trust is Norcross Group's ability to sequester and protect the confidentiality of information, even when equipment must be removed from a client's premises or the site of the investigation.

Equally importantly, Norcross Group knows how to transfer this knowledge to its clients. These consulting services include:

- ESI compliance
- Data mapping and data collection
- Data management and data retention
- Digital forensics and secure chain of custody
- ***Concordance™***, ***Summation*** and ***Index Engines*** solutions

Norcross Group has the experience and expertise necessary to streamline all data collection and analysis associated with the critical first 99 days of a civil action. Advanced data mapping locates critical information. Trusted, secure paper and electronic discovery coupled with superior digital forensics collects, indexes and distributes this data. Add in unmatched impartial, independent investigation skills and proactive consulting to simplify similar situations in the future, and Norcross Group becomes the obvious choice for businesses, law firms and court officials seeking a faster, more cost-effective way to meet the demands of ESI.

For more information, visit the Norcross Group Web site at www.norcrossgroup.com, or call Norcross Group at 770-242-6687.

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