

Federal Court Electronic Discovery Rules Expand

The United States Supreme Court has approved new Federal Rules of Evidence in federal courts. These new rules provide sanctions for litigants who fail to have adequate document retention policies for all *Electronically Stored Information* (ESI). The changes have been made to Federal Rules 16, 26, 33, 34, 37, 45, and Form 35. These rules go into effect December 1, 2006.

The new rules generally require litigants to implement control of ESI in the pre-litigation phase, to have retained business records in anticipation of litigation, and to preserve ESI consistent with existing common law, which generally applies a “reasonably foreseeable standard”.

To ensure compliance, take the following steps:

- ✓ Review the written policies in place that describe what, when, and how ESI backups are made, labeled, stored and destroyed.
- ✓ Ensure that ESI identification labels are sufficiently detailed to allow for retrieval of ESI in the event of litigation.
- ✓ Those labels should include employee or user names, job titles or contractual relationship to the county, functional department identification, departmental unit identification, an inventory number or other specific computer identification method (such as specific location or who is assigned the equipment), and all date ranges for types of ESI.
- ✓ Label any ESI for compliance and ease

of retrieval within privacy rules. Also, some departments may list all client privacy identification on the label to assist in producing ESI without violating privacy rules.

- ✓ Include on the label the technical information locating particular sets of ESI on that storage. Talk with your IT specialist to help formulate this information. This will help prevent costly and time consuming searches for “a needle in a haystack”.
- ✓ Periodic managerial review of stored ESI inventory labels and destruction of ESI records should occur. For issues which were the subject of legal consultation, use a timely preservation flagging system or legal review of document destruction plans.
- ✓ Be prepared to produce a “privilege log” telling the court and the opponent what information was omitted from discovery requests, where it is on the tapes, and a brief justification of the particular privilege claimed. This will avoid expensive hours of in-court review of actual records.

What This Means For Counties

As a result of these new rules, it is strongly recommended that counties review their document retention policies and practices with the help of legal advisors.

For more information, contact CTSI at 303-861-0507.