# The eDJ Bottom Line Report

## eDiscovery Cost Calculator: 2014 FRCP Proposed Amendments

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## Overview

**Proposed amendments to the Federal Rules of Civil Procedure (FRCP) will:**

- Require litigators to tackle complex Discovery cost calculations
- Necessitate Early Case Assessment (ECA) participation
- Understand data volumes, cull rates and workflow options
- Proactively engage with eDiscovery service providers to have competitive offerings in place

The proposed amendments mean litigators will need to sharpen their pencils and become "eDiscovery Calculator" savvy in order to realistically estimate the potential Discovery costs in order to comply with the changes' more specific language about proportionality and burden. These issues are not new to the Rules but they get a new level of emphasis with the proposed language. This report provides a summary of three of the affected rules and recommendations as to how to stay on top of evolving regulations.

# Proposed Rule Changes And The Bottom Lines

Note: Verbatim rules are reflected without line numbers. Unchanged text is displayed in black, strike-through text designates proposed deletions, and proposed additions are in red. All Rules text and committee notes are from http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf

**Rule 34(b)(2)(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~~ the grounds for objecting to the request with specificity, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

**Rule 34(b)(2)(c)**

> *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

**Committee Notes:**

> "First, Rule 34(b)(2)(b) would require that the grounds for objecting to a request be stated with specificity."
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> "Rule 34(b)(2)(B) is amended to make it clear that objections to Rule 34 requests must be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34."
>
> "More specific concerns underlie Rule 34 proposals addressing objections and actual production. Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. This language is borrowed from Rule 33(b)(4), where it has served well. Second, Rule 34(b)(2)(C) would require that an objection 'state whether any responsive materials are being withheld on the basis of that objection.'"

## Bottom Line

Those who want to object on the basis of costly eDiscovery must be prepared with reliable pricing estimates. Responding parties will also need to have identified custodians, sources or types of information that will not be produced because of specified burden and the applicable additional cost to produce the referenced responsive materials. In addition, there is the new requirement to produce by requested deadline (or a counter-proposed 'reasonable' deadline). That means every responding party must be able to estimate time of compliance and substantiate any deadline proposal.

**Rule 26(b)(1)**

**(b) Discovery Scope and Limits.**

**(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know 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)(C).~~

**Committee Notes:**

"Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: In 1983, the Committee thought to have solved the problems of disproportionate discovery by adding the provision that has come to be lodged in present Rule 26(b)(2)(C)(iii). This rule directs that 'on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that * * * (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.' The final sentence of present Rule 26(b)(1) also provides explicitly that 'All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).' "

"The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order."

## Bottom Line

A Cost Benefit Proportionality argument will require a deep analysis of Discovery costs. Early Case Assessment (ECA) efforts will help litigants understand cost ratios as well as what is truly at stake in the matter to be able to contrast costs with potential outcomes. Fundamentally, litigants MUST put a system in place to track discovery metrics to support scope arguments. And, it is important to note that, while this may limit the scope of discovery, it does not necessarily limit the scope of preservation.

**Rule 26(c)(1)**

> **(c) Protective Orders.**
>
> > **(1) In General.** * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment,
> >
> > > **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

**Committee Notes:**

> "Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is implicit in present Rule 26(c), and is being exercised with increasing frequency. The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text. The Committee soon will begin to focus on proposals advanced by some groups that greater changes should be made in the general presumption that the responding party should bear the costs imposed by discovery requests. It will be some time, however, before the Committee determines whether any broader recommendations might be made."
>
> "Proportionality: Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is implicit in present Rule 26(c), and is being exercised with increasing frequency. The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text. The Committee soon will begin to focus on proposals advanced by some groups that greater changes should be made in the general presumption that the responding party should bear the costs imposed by discovery requests. It will be some time, however, before the Committee determines whether any broader recommendations might be made."

### Bottom Line

Scope-impacted data volume (SIDV) refers to the volume of collected information resulting from scoping decisions made by counsel or negotiated by parties during 26(f) conferences following each party's identification of potentially responsive data. Responding parties will want to have cost estimates ready as they relate to these scoping decisions to support cost sharing arguments or discovery requests perceived to be overly broad.

## eDJ Recommendations

Litigators need to tighten up their Discovery cost management skills now more than ever. Here is what the 2014 tool kit should look like:

- ECA methods that include rapid gathering of information – identification of key and lower-tiered custodians, data maps, inaccessible data, structured data stores and an initial strategy as to Rule 26(b) scope negotiations and proportionality ratios. Specifically, corporate counsel needs to approach discovery as a litigation business cycle and implement tools and workflow to track, analyze and project discovery metrics to support these arguments.
- Preferred eDiscovery Service Provider Selection Program(s) or at the very least, several trusted vendor relationships that will offer up-to-date pricing, as well as information about current culling and analytics

methods.

- Selection vehicles such as a detailed Request for Proposal (RFP) that can be used to compare pricing and also model Discovery costs when used as an eDiscovery Calculator.
- Ability to engender cooperation between the client and retained counsel to codify who is responsible for eDiscovery processes and tasks and to act as a team to perform ECA tasks and come to an overall agreement on scope and outcomes strategy.

**ECA:**

Early Case Assessment methods have gotten a lot of press since the 2006 Rule changes related to preparing for the 26(f) conference, aka, "meet and confer". But like the weather, everyone talks about ECA but no one seems to do anything about it. The current proposed changes create an even greater need for litigators to understand their own data landscapes as well as that of opposing parties. This means not only gathering one's own information but also being able to discuss both sides' data burdens during 26(f) conferences.

A litigator arguing that a scope of Discovery is unduly burdensome will need to know the projected costs of each tier of custodian or collection group in order to show hard information and offer more cost-effective scenarios to the court. Litigators will also have to be able to describe data that has been identified as potentially responsive but is not being produced, under the scope argument. This will entail a much deeper understanding of Discovery scope and data content. Participants with experience analyzing samples of data and leveraging analytical tools will be able to make more compelling arguments for both broadening or narrowing collections and productions.

**Preferred Vendors:**

eDiscovery service provider selection should not be undertaken lightly. It is an important first step in vendor management and the courts have come down hard on litigants who do not take responsibility of this area of Discovery.

> **Peerless Indus., Inc. v. Crimson AV, LLC, No. 1:11-cv-1768, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013)**
>
> "Defendants cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process."

Having pre-existing vendor relationships makes the process of managing vendors much easier. Running a preferred vendor selection project in an organization assures a disciplined and business-like approach to a vendor selection process that is all too often reactive and under-informed.

Litigants with vendor partnerships are able to leverage cost, project approach and timeline information when faced with the requirement to object with "specificity" (keep in mind that this only applies to the elements the provider covers within the process). Showing estimated Discovery costs from two to three vendors adds to the strength and transparency of the argument. Additionally, familiarity with vendors and their methods can enhance a litigator's ability to discuss culling and/or technology assisted review options. For example, knowing a vendor's approach to Predictive Coding will allow for a more educated meet-and-confer session discussion around whether or not to use Predictive Coding.

**eDiscovery Calculator:**

Service provider selection almost always includes a Request for Proposal (RFP) document. A good RFP pricing component should have formulae that use information such as data volume and pricing models to assist in a comparison of the potential costs various service providers will charge. Drafting a thorough RFP is a great opportunity to provide an organization with an eDiscovery Calculator. Litigators can plug case volumes into an RFP spreadsheet to show the impact of collection scope. A really great feature of such a calculator is to show more than one range of data volume in order to show the "delta" i.e. the change in cost between collection scenarios A and B. Also, showing more than one vendor's costs modeled in the calculator and even multiple culling scenarios is an effective way to show transparency in the calculation method which might go a long way to creating a successful objection or proportionality argument. A good eDiscovery calculator will also include long term tracking of case metrics, ability to project timelines for setting production deadlines or to set case budgets.

**Cooperation:**

Cooperation isn't just for opposing counsel, it's for the entire litigation team. Litigants and outside counsel must be clear as to who is primarily responsible for vendor selection and management and must agree to a communication protocol or method that ensures clear instructions to any outside service providers. Additionally, clients must participate fully in ECA tasks, especially custodian and data store identification, as early as possible to empower the decision-making process, strategy crafting and cost calculations. Finally, retained counsel must be informed and ready to discuss estimated Discovery costs with the client in a proactive and honest manner in order that they understand the potential expense of the matter but also that they understand their own responsibilities related to all of the phases of Discovery.

## About The eDJ Group

eDJ Group is a new kind of research firm – our analysts are "working analysts" that cycle between consulting engagements and research projects in order to keep a real-world perspective. eDJ's analysts all have 10-25 years of experience in detailed eDiscovery and information governance projects. Our analysts research, analyze, and write based on a combined one hundred (100) years in the legal technology community.

We operate with the utmost integrity and commitment to our clients on these guiding principles:

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