

PUBLICATION

The New E-Discovery Battle of the Forms

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There are few easy answers in this new era of e-discovery under the *Federal Rules of Civil Procedure*. When you are "talking tech" and approaching e-discovery, universal rules have a strange way of being the wrong approach for the immediate problem. The strength of the new e-discovery rules lies in their flexibility. The rules allow lawyers to approach the issues of electronically stored information ("ESI") and decide, based on the needs of the case, how their clients will best be served. In other words, the new rules allow lawyers to be lawyers.

The flexibility of the new e-discovery rules is evident in the procedure of Rule 34(b), which allows the parties to choose the "form or forms" in which ESI will be produced. Fed. R. Civ P. 34(b). This question of the "right" form for each case is a mixed bag that includes both issues that are within the province of Information Technology ("IT"), and issues that are questions of law. This article addresses Rule 34's permissiveness and provides some guidance on how to "lawyer" your way through this intersection of IT and law. The topics covered include: (1) an overview of the structure of Rule 34's battle of the forms; (2) a brief overview of the types of ESI production form; and (3) the considerations that should govern an analysis of which ESI production form best fits the needs of the case.