

Rules 26 & 34: Records Management Implications for Organizations Facing Litigation

This document is intended as a discussion of records management issues, not a comprehensive list of records management compliance requirements. The following information should not be relied upon as legal advice. Please consult legal and records management experts before developing and implementing a records management program for your organization.

CITATION

Federal Rules of Civil Procedure; V. Depositions and Discovery:

- Rule 26: General Provisions Governing Discovery; Duty of Disclosure
- Rule 34: Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

BACKGROUND

The Federal Rules of Civil Procedure govern the conduct of civil actions brought in Federal district courts. Rules 26 and 34 govern discovery and disclosure of information relevant to the civil actions. In 1993, Rule 26 was amended substantially to accelerate the exchange of information.

WHO IS AFFECTED

Entities affected by these Rules are:

- Organizations facing litigation
- Organizations that are aware that a discovery request may be made

In addition, since any entity may face litigation concerning activities long after the activities were carried out, each organization should consider its ability to comply with Rules 26 and 34 as it conducts its business in the ordinary course, so that it is able to comply with the Rules' requirements if a litigation event occurs. In many instances it may be too late to respond efficiently when faced with litigation if the groundwork for compliance was not in place when relevant records were created.

WHAT IT MEANS

Rule 26

Prior to the 1993 amendment of Rule 26, the burden was on requestors to request information, identify relevant records, request the records and, in some cases, subpoena records. The amended Rule 26 stipulates that each party involved in litigation must proactively provide a description of all records relevant to the disputed facts without waiting for discovery requests.

Specific requirements of the Rule include:

- Contact information of each individual likely to have discoverable information
- A copy or description (including category and location) of all relevant information
- Delivery of the above information within specified time frames (within approximately 85 days from the time the defendant files an answer and 90 days before trial)

The objective of Rule 26 was to accelerate the exchange of information during the pre-trial process by eliminating information-request paperwork and thereby combat the long and difficult discovery process that had, in some cases, prolonged federal cases for years. The result is that organizations with poor records management programs will find it difficult to comply and may face sanctions or loss of rights.

Rule 34

Rule 34 provides that any party may request access to information covered by Rule 26 for inspection and to make copies. The request must specify a reasonable time, place, and manner of making the inspection and performing related acts. The party receiving the request must respond in writing within 30 days, unless otherwise directed by the court. The response must, for each item or category in the request, either grant permission to inspect or object, with reasons for the objection specified. In cases where the permission is granted, the information must be produced for inspection as it is kept in the usual course of business, or organized and labeled to correspond with the request.

RECORDS MANAGEMENT IMPLICATIONS**Rule 26**

In order to comply with Rule 26 requests, organizations must be able to quickly identify documents relevant to a potential discovery request—across the organization and in any format. This requires a single, comprehensive records management program that is enterprise-wide, not divisional or departmental, and that manages all information, including e-mail and other electronic records. The records management program should also include a facility capable of implementing a formal discovery process to ensure that disclosure is efficient and complete, but does not interrupt non-related business operations.

Rule 34

In order to support Rule 34, organizations must be able to provide requested documents for inspection (and related acts) at the specified place, in the specified manner, and within the specified time frame.