

# Beat the eDiscovery Shot Clock

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Discovery Management | Information Governance

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## About the Author



Mr. Reissner co-founded Planet Data in 2001 and is involved in every aspect of the organization, including strategic planning, development and implementation of its patented technology, but most importantly is his focus on client relations.

A former practicing lawyer, he has extensive experience in providing technology and eDiscovery services and solutions to the legal industry.

He is a well-known figure in the international legal industry, speaking at high profile conferences and events on data management, security and eDiscovery issues.

Utilizing his experience, Mr. Reissner has built Planet Data into a global data management services provider, retained by a number of Fortune 500 companies and many leading law firms.

Mr. Reissner has a B.A. in Government, from Cornell University, a J.D. from George Washington University and an M.B.A. from Columbia University.

He is an active member of the New York Bar and currently sits on the Board of Directors of the George Washington University Law Alumni Association as Chair of Specialized Curriculum.

## **Starting with more data shouldn't end with more data**

**Yes**, we are now starting with much greater quantities of raw data that is subject to discovery.

**No**, that does not mean that more documents need to be reviewed by attorneys.

What has been the common thread in eDiscovery over the past year? In a nutshell; the practical and economic necessity to substantially reduce the quantity of data requiring direct attorney review. The game changing requirement accompanying this mandate is the need to achieve this result in a faster, more accurate and cost effective manner. This is not a simple endeavor in an innovative global technology environment. Especially since massive quantities of data are created on a daily basis in ever-expanding data platforms and formats.

The latest Amendments to the FRCP (effective December 2015), had their origins in the realization that the increasing amounts of data being created and stored was often skewing the legal process. The costs of the discovery process were becoming a central issue as to whether litigants would be denied the right to have their cases decided on the merits.

### **Intent of the Amendments to the FRCP**

The primary intent of the Amendments is to enable the discovery process to be faster, more focused, reduced in scope, and thereby less expensive - ultimately allowing cases to be decided on the merits (Rule 1).

### **FRCP 37(e): data preservation requirements after amendments**

Consistent with this theme is the effort to clarify document preservation requirements. Rule 37(e) allows the routine deletion of data stored without the fear of sanctions at some point in the future if reasonable steps were taken to preserve such information.

Several years ago, it was generally accepted that organizations needed to implement information governance processes that disposed of data on a routine basis. The general concept that this is good corporate policy has not changed. Information that is not legally required to be retained should be discarded, thereby reducing the costs of locating, processing, searching and producing the information when subjected to a discovery request.

Until quite recently, one of the main economic reasons supporting the concept of data deletion was the high cost of storage (i.e. hardware, software, security, expert personnel). While the need to appropriately eliminate data to avoid unnecessary costs at the outset of future litigation has not changed, the acceptance of inexpensive cloud base storage has - encouraging the current rationale of "let's just keep it all because it's a cheaper solution than figuring out what to discard and what to retain".

## **Acceleration of FRCP timeline to respond**

We believe that one of the practical implications of the Amendments, the accelerated number of days to comply with scheduling requirements, is having an impact on the eDiscovery industry that was not fully anticipated.

In essence, the reduced timeframes required for obtaining knowledge of a litigant's document systems and data within their control has had an effect similar to the adoption of the 24 second shot clock in the NBA 60 years ago. There is a lot less time now to pass the ball around. The "scope" of the potential discovery for a case now needs to be addressed at the very outset of that case (if not before, when possible).

All information necessary to support claims or defenses needs to be identified and understood pursuant to Rule 26(a)(1) Initial Disclosure. Pursuant to this Rule, an attorney must be familiar with all of the client's documents and electronically stored information in its possession, custody or control to support its claims or defenses. Rule 26(g) requires the attorney to sign each disclosure certifying that to the best of the person's knowledge, information and belief formed after a reasonable inquiry that it is complete and correct at the time it is made. To reinforce the seriousness of this Rule, Section (3) requires that court **MUST** (emphasis added) impose an appropriate sanction on the signer absent substantial justification for the violation.

Rule 26(b)(1) directs that discovery requests be focused on non-privileged evidence that is relevant to a claim or defense **AND** (emphasis added) is proportional to the needs of the case. To summarize, the FRCP now requires attorneys to have substantial knowledge of the full scope of their client's data more quickly, completely and accurately than prior to the Amendments.

The practical result is that discussions regarding the scope of discovery are taking place much earlier in a case. Outside counsel now need to be knowledgeable of the legal issues and relevant data under the control of their client to enable competent responses at 26(f) conferences and to early requests for discovery on every case. How much faster is the clock moving now? A 26(f) conference must be scheduled at least 21 days prior to a Rule 16 Scheduling Order, which must be issued within 90 days (in most circumstances) after receipt of the Complaint by the defendant. The effect is that an attorney must be competently prepared to attend a 26(f) conference within 69 days of receipt of the Complaint. Pursuant to 16(f), the court **MUST** (again, emphasis added) require the payment of expenses by the attorney or party if they are substantially unprepared to participate.

## **M & A growth**

To further complicate matters, the low interest rate environment in the global economy the past few years has facilitated a substantial amount of corporate merger activity. Low financing costs have made it less expensive than ever to buy, rather than internally develop business growth.

This activity has created new corporate structures encompassing disparate legacy data management systems. From an information governance perspective, data increasingly resides in multiple locations, often with no common connectivity or searching capabilities.

## **The game moves much faster in this new era**

What are some of the unintended consequences of the well intentioned changes to the Rules that have compressed the time periods for data identification, analysis review and production? I am willing to offer that they have blind-sided technology providers, litigants and attorneys who had been relying on tools and workflow developed during a more leisurely, less complex, less cost sensitive era.

While the Rules were being amended over a period of several years, fundamental changes in technology was rapidly expanding the volumes of data created, the complexity and variety of information, and the decreasing costs of storage (e.g. cloud back-up). In essence, technology developments are far outpacing the ability of the law to keep up. The law is always fighting the battle with the last war's weapons.

Remember, until recently there was no social media, mobile devices, chat or apps. The challenges to legal data management technology providers have multiplied both in the massive increase of new data creation and the diversity of platforms upon which it is being created and transmitted. Most legal data management systems that were designed a decade or more ago did not have the foresight to architect its infrastructure and workflow to address these issues. The inability to fully and accurately process and search all of these data types across a unified platform is becoming a serious disadvantage those unable to fulfill today's client requirements.

To summarize the corpus of information potentially responsive to discovery requests has skyrocketed, and time frames to respond have become compressed. Nonetheless, corporations are insisting vigorously to their outside counsel that the number of documents requiring attorney review must NOT increase. This has accelerated the emphasis on the utilization of technology earlier in cases to identify a more discrete universe of potentially responsive data.

## **Scalable technology, efficient workflow and great client support**

So what is the most efficient, cost effective way of limiting the quantity of data that must be reviewed by attorneys?

At least a few times a week I see an article describing new methodologies of TAR, which I consider a catchall phrase for various technology and workflow paradigms that attempt to identify, cull and categorize information throughout the discovery process. Properly implemented TAR workflows during pre-review can eliminate a large percentage of the non-relevant data, thereby allowing a more targeted, relevant subset of the data that ultimately is reviewed.

I am confident that in the right types of cases (and data sets), TAR methodologies such as conceptual search, categorization, clustering, “predictive coding”, and “continuous active learning”, have proven effective in substantially reducing the original corpus of information that requires human review. Additionally, in the latest emerging technology frontier, much progress has been made in utilizing Artificial Intelligence to identify relationships and threads in data sets that may not be apparent when viewed in a traditional linear manner.

But strip away all of the above TAR methodologies to their bare essentials, they are not effective if not designed and utilized in a manner that provides complete, accurate results in a consistent, defensible platform. As important, the technology and work-flow should be user-friendly and understandable to attorneys and their support staff.

For the majority of litigation cases, advanced TAR is not being utilized. That is because many attorneys do not wish to become technologists; an eDiscovery platform that can accurately process all of the data, provide detailed reports, enable an easy-to-navigate workflow, and supported by knowledgeable people is the often unmet “gold standard”.

## **Implications for attorneys, litigation support, and service providers**

The practical realities of today’s economic environment are that corporations demand streamlined, efficient discovery, with as few documents requiring attorney review as possible, at the lowest cost. The challenge for service providers is to achieve this result without compromising on work quality (and completeness), and of course, client service. Industry service providers who did not anticipate the current environment and failed to adapt their work-flows, technology and personnel resources to meet these challenges are failing to meet these heightened levels of client expectations.

## **Conclusion**

To conclude, the current challenge for eDiscovery service providers is to offer highly efficient, easy to navigate technology solutions supported by expert personnel. The size and complexities of the raw data universe will only increase. Attorneys, most who are not technophiles, are being challenged to adapt to this new era, whether by choice or practical demands.

Easy to navigate, intuitive technology, combined with expert support will (for the vast majority of cases) be the most efficient way to confidently reduce the quantity of documents requiring attorney review. This is good news for the market participants that have invested their resources in creating flexible, scalable technology while noting the increased importance of responsive, client support.



We are the creators of the Exego technology, and the home of stress-free eDiscovery. Exego is the pillar of our eDiscovery solutions and has processed countless amounts of data since 2004. Our platform provides clients with a sophisticated, yet easy-to-use set of tools, and come with a support staff of certified experts ready to assist. Planet Data proudly offers domestic and international eDiscovery solutions from managed services, consulting, data collection and mobile forensics - to ESI processing, ECA, advanced pre-review analytics, document review and hosting. We also proudly partner with industry leaders in cybersecurity and managed document review services, giving our additional support where they need it most.

The Exego Platform was developed by Planet Data's project management experts and dedicated development team. Exego patented technology processes and manages unstructured data for the legal, financial, insurance, M&A and corporate markets.

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We built our business on making the process of turning terabytes of information into accurate and understandable results for our clients. Completely processed data - including the most difficult file types like Bloomberg<sup>®</sup>, Lotus Notes<sup>®</sup>, mobile data and embedded text - is normalized, and appears in Exego Select ready to be fully searched and indexed along with the rest of your typical eDiscovery data. Families and attachments are properly reconstructed to maintain the email relationship to its attachments. Without this custom development, during document review, the reviewer would not be able to view or understand the relationship to the attachments. Best of all, you will have access to many TAR tools in Exego Select that are not typically available in ECA (such as email threading, bulk tagging and robust reporting) at no additional cost.

## **EXEGO<sup>®</sup> Select**

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For more information on Planet Data, Exego and our services please visit [www.PlanetData.com](http://www.PlanetData.com).