

MEMORANDUM

TO: United States District Court for the Western District of Missouri

FROM: ESI Committee

DATE: August 9, 2016

RE: Proposed Principles and Checklist for Electronic Discovery in Civil Cases

The ESI Committee recommends that the Court consider adopting the attached proposed Principles for the Discovery of Electronically Stored Information and Checklist for Rule 26(f) Meet and Confer for Electronically Stored Information.

Both of the attached proposals were vetted through the Federal Practice Committee. The Federal Practice Committee positively received the ESI Committee's initial proposals and suggested a few changes that were incorporated into the proposals following a joint meeting between the ESI Committee and the Federal Practice Committee. Another comment from a member of the Federal Practice Committee is noted here for the Court's consideration.

This memorandum summarizes some common problems and concerns in e-discovery, the information the Committee considered, the Committee's approach in formulating the attached proposals, and how the proposals differ from the model the Committee used as the starting point for drafting.

Common Problems and Concerns in E-Discovery

E-discovery has been a growing area of concern for civil litigants. Some of the 2015 FRCP Amendments are designed to address e-discovery issues. Some common issues can include:

- Unproductive Rule 26(f) conferences. Lawyers often do not understand their clients' ESI systems; have not started factual inquiry into what persons, sources, or volume will be necessary to complete discovery; and do not understand issues associated with production format. In addition, many lawyers are hesitant to share things that they view as factual (custodians, issues, dates, important documents, etc.) at the Rule 26(f) stage or even later in the litigation process.
- Lack of fact-based inquiry into burdensomeness or reasonableness of discovery requests. Lack of inquiry frequently leads uninformed counsel to fight unnecessary fights and make decisions based on conjecture.
- Wide-net e-discovery (too broad) or "gotcha" e-discovery (focus on potential missing emails or documents). Both can lead to unnecessary expense when there is

insufficient connection to the merits or consideration of how such discovery promotes a just, speedy, and inexpensive determination of the action.

- E-discovery criteria that needlessly increase expense, such as a requirement to preserve “created data,” which requires forensic collection and use of an outside e-discovery vendor in cases where such information has no bearing on the merits.
- Difficulties in identifying ESI for preservation at early stages of the litigation. Initial discovery often reveals additional topics or items that are material to the case, and it is difficult to foresee with any certainty what those categories may be early in the case.
- Difficulties in rebutting claims of burdensome expense and/or scope without (1) having access to the ESI that is the subject of the claim, and (2) incurring incredible expense to rebut the claim by retaining an independent expert.

The Committee’s Approach to Formulating the Proposals

The Committee began its work by reviewing e-discovery guidelines, protocols, and principles adopted by other federal courts, speaking with federal judges responsible for and knowledgeable about the implementation of various guidelines in their districts, consulting other experts and authorities in the field, and drawing on the experience of the Committee’s members.

These inquiries led the Committee to approach drafting with the following in mind:

- The recommended proposal should help focus the discussion of parties and serve as a center of gravity that assists parties to work through discovery issues fairly and efficiently as contemplated by FRCP.
- The recommended proposal should be scrupulously fair, even-handed, and easy to understand.
- The recommended proposal should not create an extra layer of rules or new source of potential sanctions.
- The recommended proposal should be able to “size up” or “size down” to the relative complexity of the case and sophistication of the parties and their counsel.

Based on the above considerations, the Committee elected to use the Northern District of California’s ESI Guidelines and Rule 26(f) Checklist as the baseline documents for drafting. Most Committee members ranked the N.D. Cal. Guidelines as one of the top models to use as a drafting starting point. The N.D. Cal. Guidelines are plainly and concisely written and not overly technical. They were also the only set of guidelines that had been updated to align with the December 1, 2015 FRCP amendments at the time the Committee was conducting its work.

The Proposed Principles and Recommendations

For ease of reference, the Committee is providing the Court with “clean” versions of the proposals and redlines showing how the proposals differ from the N.D. Cal. models used as the starting points for drafting. Explanations for substantive changes are provided below.

A. Proposed Principles for the Discovery of ESI

Use of the term “Principles” instead of “Guidelines”

The Committee’s review of e-discovery materials from other courts found that districts used differing terminology. Some adopted e-discovery “principles.” Others adopted “guidelines,” “standing orders,” or “protocols.” The Committee felt the term “principles” most accurately captured the approach it sought to take in drafting while also emphasizing to litigants the expectation that the principles will need to be applied to the circumstances of their individual cases.

Changes to the “Purpose” Principle

The Committee recommended a few changes to the language in the “Purpose” principle to place fair adjudication of the merits before cost-saving, which better tracks the “just, speedy, and inexpensive” language in Rule 1. Additional language was added to emphasize that the Principles are designed to help parties work through issues fairly and efficiently.

Changes to the “Proportionality” Principle

The Committee recommended modifications to the “Proportionality” principle to match more closely the language of Rule 26 and to refer litigants to the Advisory Committee Notes, which provide additional interpretive guidance on proportionality. Another change was suggested to encourage reasonableness on the part of responding to discovery requests, as the original version focused only on reasonableness in framing requests.

Movement of E-Discovery Liaison to “General Principles” Section

The Committee recommended moving the E-Discovery Liaison Principle to the “General Principles” section. This is intended to encourage more cooperative and productive Rule 26(f) conferences and earlier resolution of disputes by emphasizing that each party should have someone with appropriate functional knowledge of a party’s electronic systems available to participate in discussions.

Pared Down “Meet and Confer” Principle

Early drafts of Principle 2.02 (Rule 26(f) Meet and Confer) detailed ESI topics the parties should discuss at the initial meet-and-confer conference. This approach was revised and substantially pared down in order not to be duplicative of the Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information to which the parties are referred in the final

draft. The final draft also now encourages the parties to participate in on-going meet-and-confer discussions rather than just the initial conference. The goal of this section is to encourage discussion so that the parties may identify issues early, have adequate opportunity to resolve issues without court intervention, and/or seek timely the Court's assistance if and when necessary.

Changes to "Preservation" Principle

In response to comments from the Federal Practice Committee, the final proposal modified subsection (e) of the "Preservation" principle to better match the requirements of Rule 26 with regard to identification of sources of ESI that are not reasonably accessible and to facilitate discussion among the parties of any preservation expectations regarding those sources.

Also with regard to preservation, one member of the Federal Practice Committee noted that it was often good practice to send a preservation letter when there was potential for spoliation and hoped that the Principle's statement that a preservation letter was unnecessary would not discourage lawyers from sending such letters to the detriment of their clients. The Committee researched the statements in the draft proposal concerning preservation obligations arising in the absence of a preservation letter and concluded that they were consistent with prevailing authority. Based on further input from the Federal Practice Committee, the Committee felt that the concern was one to be brought to the Court's attention rather than text change suggested and that lawyers seeking to prevent spoliation would likely send a preservation letter with the text as it currently stood.

Changes to "Disputes" Principle

This section was revised to be consistent with and reference L.R. 37.1.

Changes to "Education" Principle

The Committee recommended replacing the N.D. Cal. reference to the federal rules advisory committee report on the 2015 amendments (a 375-page document) with reference to the Federal Rules Advisory Committee Notes.

Additionally, the Committee suggested including non-mandatory resources that may assist parties in discussing e-discovery issues with their clients, opposing counsel, and the Court. The suggested references are the Sedona Conference "Jump Start Outline" and Glossary and the EDRM Glossary. The Sedona Conference is a leading think-tank on e-discovery, often cited in judicial opinions, with member attorneys representing both the plaintiff and the defense bar. The EDRM glossary, which stands for the Electronic Discovery Reference Model, is a widely known and well respected organization comprised of attorneys from both the plaintiffs' and defense bar, governmental and in-house attorneys and multiple e-discovery vendors. All referenced documents are publicly available on-line.

B. Proposed Checklist for Rule 26(f) Meet and Confer Regarding ESI

Changes to Prefatory Section

The Committee recommended changes that encourage standard use of the Checklist to facilitate discussion. The Checklist topics are general and likely beneficial in any case with ESI. If some topics are inapplicable, the Committee expects parties can skip them without a prefatory sentence that could invite non-use of the Checklist by recalcitrant litigants.

Changes to Proportionality and Potential Cost-Saving Measures Section

The title was changed to be more descriptive of potential cost-saving measures encouraged to be explored. Some bullet points relating to preservation were eliminated as duplicative of an earlier checklist section addressing preservation.

In response to comments from the Federal Practice Committee, the second bullet point encouraging the parties to discuss the nature and scope of burdens associated with the proposed preservation and production of ESI now includes additional language encouraging parties to identify anticipated costs, practical burdens (if any), and expectations concerning the recurrence of ESI production during the pendency of litigation (if any).

Also in response to comments from the Federal Practice Committee, the final bullet point under this section encourages the parties to cover potential cost-shifting agreements.

Change from “Phasing” to “Prioritization”

In the Checklist, the Committee expressed a preference for the term “prioritization” over “phasing.” The Committee believes that using the term “phasing” would suggest normalizing the delaying certain discovery until after the requesting party has made threshold showings in the early phases of discovery. Additionally, the term “phasing” could suggest that it is appropriate to bifurcate or segment discovery in a way not contemplated by the Rules of Civil Procedure. The term “prioritization,” on the other hand, simply encourages the parties to consider focusing on the most important discovery first, which could reduce costs and create efficiencies in many cases.

Change from “Search” to “Identification of Discoverable ESI”

This section expands upon the “search” bullets in the model used as a starting point. The model checklist suggested that search terms are the only acceptable method for identifying and collecting ESI. The expanded concepts are included to ensure that any method may be used as long as that method is reasonable under the circumstances of the specific case at issue. The expanded bullets also include topics relating to the identification and production of ESI that were not included in the initial draft, which may help to refine the methods and process used. These modifications are consistent with the Rules and the prevailing authority.¹

¹ A party responding to discovery must do so after conducting a reasonable inquiry to find, collect, and identify responsive information. Fed. R. Civ. P. 26(g). The “reasonable

Cross-Reference to Model 502(d) Order

The Committee recommends adding a cross reference to the Model 502(d) order suggested for inclusion on the Court's website.

inquiry” requirement is fact specific and it is met when the investigation undertaken is “reasonable under the circumstances.” Fed. R. Civ. P. 26(g) Advisory Comm. Notes, (1983 Amendment) (“Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances[,]” and “[t]his standard is heavily dependent on the circumstances of each case.”).

United States District Court
Western District of Missouri

PRINCIPLES FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION

GENERAL PRINCIPLES

Principle 1.01 (Purpose)

Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay.

These Principles should guide the parties as they engage in electronic discovery. They are intended to ensure that ESI is appropriately preserved and produced to allow for fair adjudication of the merits, while limiting the cost, burden, and time spent by all parties. At all times, the discovery of ESI should be handled by the parties consistently with Fed. R. Civ. P. 1 to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

These Principles also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention by helping the parties focus their discussion and work through e-discovery issues fairly and efficiently.

Principle 1.02 (Cooperation)

The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney’s zealous representation of a client is not compromised by conducting or responding to e-discovery in a cooperative manner. Cooperation in reasonably framing ESI discovery requests, on the one hand, and in reasonably responding to ESI discovery requests, on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties’ Fed. R. Civ. P. 26(f) conference.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) should be applied to the discovery plan and its elements, including the preservation, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider the parties’ claims and defenses and the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, 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. The Committee Note to Fed. R. Civ. P. 26(b)(1) provides additional information about this standard. In general, discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable, and the burden or expense of proposed discovery should be determined in a realistic way.

Principle 1.04 (E-Discovery Liaisons)

In many cases, discovery and the meet-and-confer process may be aided by participation of “e-discovery liaisons.” If a dispute arises involving the technical aspects of e-discovery, each party shall designate an e-discovery liaison to promote early resolution of the dispute. An e-discovery liaison should be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), an employee of the party, or a third party consultant, the e-discovery liaison should, to the extent necessary to address proportionality factors in the specific case:

- a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;
- b) Be knowledgeable about the party’s e-discovery efforts;
- c) Be familiar with the party’s electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

ESI DISCOVERY PRINCIPLES

Principle 2.01 (Preservation)

- a) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.
- b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Principle 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable in the context of the claims and defenses involved.
- c) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.
- d) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court consistent with Local Rule 37.1.
- e) The parties should identify sources of ESI that are not reasonably accessible and any preservation expectations regarding those sources consistent with Rule 26. The parties should also consider identifying sources that (1) the parties believe could contain relevant information but (2) determine, under the proportionality factors, need not be preserved.

Principle 2.02 (Rule 26(f) Meet and Confer)

When a case involves e-discovery, the Court encourages the parties to engage in on-going meet-and-confer discussions and to use the Court’s *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information* to facilitate ESI discussions. Such discussions should be framed in the context of the specific claims and defenses involved.

Principle 2.03 (Cooperation and Informal Discovery Regarding ESI)

The Court strongly encourages an informal discussion about the discovery of ESI (rather than deposition) at the earliest reasonable stage of the discovery process. Counsel, or others knowledgeable about the parties’ electronic systems, including how potentially relevant data is stored and retrieved, should be involved or made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.

Principle 2.04 (Disputes Regarding ESI Issues)

Disputes regarding ESI that counsel for the parties are unable to resolve after good-faith efforts shall be presented to the Court at the earliest opportunity consistent with Local Rule 37.1.

EDUCATION PRINCIPLES

Principle 3.01 (Judicial Expectations of Counsel)

The Court expects that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

- a) The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;
- b) The Federal Rule Advisory Committee Notes; and
- c) These Principles and this Court’s *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information*.

The Court does not require familiarity with the following items but notes that they may be helpful depending on the needs of a particular case.

- a) The Sedona Conference ® “Jump Start” Outline, available at <https://thesedonaconference.org/publications>
- b) The Sedona Conference ® Glossary: E-Discovery and Digital Information Management, available at <https://thesedonaconference.org/publications>
- c) EDRM Glossary, available at <http://www.edrm.net/resources/glossaries>

United States District Court
~~Northern~~Western District of ~~California~~Missouri

GUIDELINESPRINCIPLES FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION

GENERAL GUIDELINESPRINCIPLES

Guideline

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Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay.

These GuidelinesPrinciples should guide the parties as they engage in electronic discovery. ~~The purpose of these Guidelines is They are intended to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring~~ensure that information ~~subject to discovery is~~ESI is appropriately preserved and produced to allow for fair adjudication of the merits, while limiting the cost, burden, and time spent by all parties. At all times, the discovery of ESI should be handled by the parties consistently with Fed. R. Civ. P. 1 to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

These GuidelinesPrinciples also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention by helping the parties focus their discussion and work through e-discovery issues fairly and efficiently.

Guideline

Principle 1.02 (Cooperation)

The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney’s zealous representation of a client is not compromised by conducting or responding to e-discovery in a cooperative manner. Cooperation in reasonably ~~limiting~~framing ESI discovery requests, on the one hand, and in reasonably responding to ESI discovery requests, on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties’ Fed. R. Civ. P. 26(f) conference.

Guideline

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) should be applied to the discovery plan and its elements, including the preservation-, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider ~~factors that include~~the parties’ claims and defenses and the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, 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. ~~To further the application of the proportionality standard~~ The Committee Note to Fed. R. Civ. P. 26(b)(1) provides additional information about this standard. In general, discovery requests for production of ESI and related responses should be reasonably

targeted, clear, and as specific as practicable, and the burden or expense of proposed discovery should be determined in a realistic way.

Principle 1.04 (E-Discovery Liaisons)

In many cases, discovery and the meet-and-confer process may be aided by participation of “e-discovery liaisons.” If a dispute arises involving the technical aspects of e-discovery, each party shall designate an e-discovery liaison to promote early resolution of the dispute. An e-discovery liaison should be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), an employee of the party, or a third party consultant, the e-discovery liaison should, to the extent necessary to address proportionality factors in the specific case:

- a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;
- b) Be knowledgeable about the party’s e-discovery efforts;
- c) Be familiar with the party’s electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

ESI DISCOVERY GUIDELINES/PRINCIPLES

Guideline

Principle 2.01 (Preservation)

- a) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.
- b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline/Principle 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome in the context of the claims and defenses involved.
- c) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.
- d) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court consistent with Local Rule 37.1.
- e) The parties should discuss what ESI to identify sources of ESI that are not reasonably accessible will be preserved, but not searched, reviewed, or produced. As

well as discussing ESI and any preservation expectations regarding those sources that are not reasonably accessible, the consistent with Rule 26. The parties should also consider identifying data from sources that (1) the parties believe could contain relevant information but (2) determine, under the proportionality factors, should need not be preserved.

Guideline

Principle 2.02 (Rule 26(f) Meet and Confer)

At the required Rule 26(f) meet and confer conference, when a case involves electronic discovery, the topics the parties should consider discussing include: 1) preservation; 2) systems that contain discoverable ESI; 3) search and production; 4) phasing of discovery; 5) protective orders; and 6) opportunities to reduce costs and increase efficiency. In order to be meaningful, the meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case. Some or all of the following details may be useful to discuss, especially in cases where the discovery of ESI is likely to be a significant cost or burden:

- a) The sources, scope and type of ESI that has been and will be preserved—considering the needs of the case and other proportionality factors—including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation;
- b) Any difficulties related to preservation;
- c) Search and production of ESI, such as any planned methods to identify discoverable ESI and filter out ESI that is not subject to discovery, or whether ESI stored in a database can be produced by querying the database and producing discoverable information in a report or an exportable electronic file;
- d) The phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information and is postponed or avoided from sources less likely to contain relevant and discoverable information;
- e) The potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) Order;

Opportunities to reduce costs and increase efficiency and speed, such as by conferring about the methods and technology used for searching ESI to help identify the relevant information and sampling methods to validate the search for relevant information, using agreements for truncated or limited privilege logs, or by sharing expenses like those related to litigation document repositories. When a case involves e-discovery, the Court encourages the parties to engage in on-going meet-and-confer discussions and to use the Court's *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information* to facilitate ESI discussions. Such discussions should be framed in the context of the specific claims and defenses involved.

~~§) Principle~~

~~The Court encourages the parties to address any agreements or disagreements related to the above matters in the joint case management statement required by Civil Local Rule 16.9.~~

Guideline 2.03 (Cooperation and Informal Discovery Regarding ESI)

The Court strongly encourages an informal discussion about the discovery of ESI (rather than deposition) at the earliest reasonable stage of the discovery process. Counsel, or others

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knowledgeable about the parties' electronic systems, including how potentially relevant data is stored and retrieved, should be involved or made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.

Guideline

Principle 2.04 (Disputes Regarding ESI Issues)

Disputes regarding ESI that counsel for the parties are unable to resolve after good-faith efforts shall be presented to the Court at the earliest ~~possible~~ opportunity, ~~such as at the initial Case Management Conference. If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process, the Court may require additional meet and confer discussions, if appropriate consistent with Local Rule 37.1.~~

Guideline 2.05 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of e-discovery liaisons as defined in this Guideline. If a dispute arises that involves the technical aspects of e-discovery, each party shall designate an e-discovery liaison who will be knowledgeable about and responsible for discussing their respective ESI. An e-discovery liaison will be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in house or outside counsel), an employee of the party, or a third-party consultant, the e-discovery liaison should:

- ~~a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;~~
- ~~b) Be knowledgeable about the party's e-discovery efforts;~~
- ~~c) Be familiar with, or gain knowledge about, the party's electronic systems and capabilities in order to explain those systems and answer related questions; and~~
- ~~d) Be familiar with, or gain knowledge about, the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.~~

EDUCATION GUIDELINES PRINCIPLES

Guideline

Principle 3.01 (Judicial Expectations of Counsel)

~~It is expected~~The Court expects that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

- a) The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;
- ~~b) The Advisory Committee Report on the 2015 Amendments to the Federal Rules of Civil Procedure, available at www.uscourts.gov/rules_policies/archives/committee-reports/advisory_committee_rules_civil_procedure_may_2014; and~~
- ~~b) The Federal Rule Advisory Committee Notes; and~~
- c) These Guidelines Principles and this Court's Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information.

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The Court *ESI and Stipulated* does not require familiarity with the following items but notes that they may be helpful depending on the needs of a particular case.

- a) The Sedona Conference ® “Jump Start” Outline, available at <https://thesedonaconference.org/publications>
- e)b) The Sedona Conference ® Glossary; E-Discovery *Order for Standard Litigation* and Digital Information Management, available at <https://thesedonaconference.org/publications>
- c) EDRM Glossary, available at <http://www.edrm.net/resources/glossaries>

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United States District Court
Western District of Missouri

CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION

In cases involving the discovery of electronically stored information (ESI), the Court encourages the parties to engage in on-going meet and confer discussions and to use the following Checklist to facilitate ESI discussions. These discussions should be framed in the context of the specific claims and defenses involved.

I. Preservation

- The date ranges for any ESI to be preserved.
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of data from sources that (a) the party believes could contain relevant information but (b) had determined, under the proportionality factors, is not discoverable and need not be preserved.
- Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.).
- The number of custodians for whom ESI will be preserved.
- The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Any disputes related to scope or manner of preservation.

II. Liaison

- The identity of each party’s e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- Description of systems in which potentially discoverable information is stored.
- Location of systems in which potentially discoverable information is stored.
- How potentially discoverable information is stored.
- How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Potential Cost-Saving Measures

- The amount and nature of the claims being made by either party.
- The nature and scope of burdens associated with the proposed preservation and production of ESI, including but not limited to anticipated costs, practical burdens (if

any), and expectations concerning the recurrence of ESI production during the pendency of the litigation (if any).

- The likely benefit of the proposed discovery.
- Costs that the parties may agree to share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measure.
- Other potential cost-saving measures or cost-shifting agreements (if any).

V. Prioritization

- Sources of ESI most likely to contain discoverable information.
- Other sources of ESI likely to contain discoverable information.
- Custodians (by name or role) most likely to have discoverable information.
- Other custodians (by name or role) likely to have discoverable information.
- Date ranges most likely to include discoverable information.
- Whether it is appropriate to prioritize certain ESI discovery over others.

VI. Identification of Discoverable ESI

- Whether the parties can agree on limits to the number of sources of ESI that will be collected.
- Whether the parties can agree on how to handle the de-duplication of data.
- Whether the parties can agree on the methodology(ies) to use for the identification of discoverable ESI.
- Whether the parties can agree on procedures to narrow the ESI at issue, such as filtering data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters.

VII. Production

- The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

VIII. Privilege

- How any production of privileged or work-product protected information will be handled.
- Whether the parties can agree on alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production. (A Model 502(d) Order is available on the Court's website.)

United States District Court
~~Northern~~Western District of ~~California~~Missouri

CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION

In cases ~~where~~involving the discovery of electronically stored information (~~“(ESI”) is likely to be a significant cost or burden.”~~), the Court encourages the parties to engage in on-going meet and confer discussions and ~~to~~ use the following Checklist to ~~guide those~~facilitate ESI discussions. These discussions should be framed in the context of the specific claims and defenses involved. ~~The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.~~

I. Preservation

- The ~~date~~ ranges ~~of creation or receipt dates~~ for any ESI to be preserved.
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of data from sources that (a) the party believes could contain relevant information but (b) had determined, under the proportionality factors, is not discoverable and ~~should~~need not be preserved.
- Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- The names and/or general job titles or descriptions of ~~eustodian~~custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.).
- The number of custodians for whom ESI will be preserved.
- The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Any disputes related to scope or manner of preservation.

II. Liaison

- The identity of each party’s e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- Description of systems in which potentially discoverable information is stored.
- Location of systems in which potentially discoverable information is stored.
- How potentially discoverable information is stored.
- How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and ~~Costs~~Potential Cost-Saving Measures

- The amount and nature of the claims being made by either party.

- The nature and scope of burdens associated with the proposed preservation and discovery of ESI-production of ESI, including but not limited to anticipated costs, practical burdens (if any), and expectations concerning the recurrence of ESI production during the pendency of the litigation (if any).
- The likely benefit of the proposed discovery.
- Costs that the parties will/may agree to share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measure.
- Limits on the scope of preservation or other-Other potential cost-saving measures: or cost-shifting agreements (if any).
- ~~Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.~~

V. Search/Prioritization

- ~~The search method(s), including specific words or phrases or other methodology that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.~~
- The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

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VI. Phasing

- ~~Whether it is appropriate to conduct discovery of ESI in phases:~~
- Sources of ESI most likely to contain discoverable information ~~and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.~~
- Sources/Other sources of ESI ~~less~~-likely to contain discoverable information ~~from which discovery will be postponed or avoided.~~
- Custodians (by name or role) most likely to have discoverable information ~~and whose ESI will be included in the first phases of document discovery.~~
- Custodians/Other custodians (by name or role) ~~less~~-likely to have discoverable information ~~and from whom discovery of ESI will be postponed or avoided.~~
- ~~The time period during which~~Date ranges most likely to include discoverable information.
- Whether it is appropriate to prioritize certain ESI discovery over others.

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VI. Identification of Discoverable ESI

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- Whether the parties can agree on the methodology(ies) to use for the identification of discoverable ESI.
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VII. Production

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