

# Discussion of Electronic Discovery at Rule 26(f) Conferences: A Guide for Practitioners

## INTRODUCTION

Virtually all modern discovery involves electronically stored information (ESI). The production and review of such information can be complex and expensive. Competent litigators must be familiar with the fundamentals of electronic discovery; they cannot delegate that duty to clients or non-lawyers. Moreover, lawyers' early identification, discussion, and joint resolution of potential e-discovery issues will help minimize future disputes. It will also assure that discovery proceeds efficiently, consistent with the goals of Fed. R. Civ. P. 1 and 26. Conversely, lawyers who lack this competence, and who fail to cooperate in discovery, are likely to increase the cost of litigation and may face the risk of sanctions. In August 2012, the ABA amended Model Rule 1.1 to require, as part of a lawyer's duty to provide "competent representation," that such competency include "keep[ing] abreast of *changes* in the law and its practice, including the benefits and risks associated with *relevant technology*." ABA Model Rule 1.1, cmt. 8 (emphasis added). An argument could be made that this includes lawyers' duty to keep abreast of changes in the technology of e-discovery.

This Guide was prepared by this U.S. District Court, District of Minnesota's Federal Practice Committee for the purpose of helping counsel anticipate, discuss, and resolve common e-discovery issues. Because each case is different, however, this Guide is neither a court rule nor a one-size-fits-all checklist. It identifies a variety of issues relating to e-discovery that *may* arise in civil litigation before this Court, but by no means intends to suggest that all such issues will be relevant or that they must be addressed in any given case.<sup>1</sup> Rather, its goal is to assist counsel at the Rule 26(f) conference to engage in a meaningful discussion about the scope and process of ESI search, review, and production that is reasonable, proportionate, and efficient in view of the circumstances of their case.

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<sup>1</sup> On the other hand, the Guide is also not intended to be encyclopedic. Counsel who wish to learn more will find representative resources listed at the end of this Guide.

## A. Preservation and Litigation Hold<sup>2</sup>

- Issuance.** Has each party issued a litigation hold/preservation notice?
  - If so, when?
  - If so, to whom?
- Updates.** Does the hold or notice need to be updated?
- Burden.** Does the hold or notice unfairly burden any party?
  - If so, can the parties agree upon ways to relieve that burden?
  - For example:
    - Limiting its scope?
    - Limiting the number or types of custodians covered?
- Exclusions.** Can the parties agree that certain ESI sources need not be preserved because the burden of preservation outweighs the likelihood that the sources will contain probative information not otherwise available in more accessible forms? Such potential ESI sources could include:
  - backup tapes
  - printer files
  - mobile devices
  - voicemail
  - legacy systems
  - deleted files
  - archival systems
  - certain cloud storage repositories
  - others
- Retention and destruction practices.** What are each party's regular record retention/disposal practices (to understand and set expectations about

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<sup>2</sup> The law is unsettled on whether litigation holds are privileged or otherwise immune from discovery. Counsel should consider this before disclosing information regarding the issuance and contents of a litigation hold.

what otherwise relevant ESI (or other documents) may no longer be available or reasonably accessible)?

- Non-parties.** Are any non-parties likely to have significant relevant information? If so:
  - **Preservation.** Should a preservation letter be sent?
  - **Cost.** Should one or both parties reimburse some or all of the expenses that may be incurred by the non-party as a result of the anticipated discovery?

## **B. Relevant ESI Types and Reasonable Accessibility**

- Priority.** Should certain types and/or sources of ESI (or other documents) be prioritized for early review and production?
- Early 30(b)(6).** Would an early Rule 30(b)(6) deposition help the parties to better focus their ESI requests?
- E-mail.** Should the parties defer serving requests for e-mail until after they exchange other discovery (electronic or otherwise)? Some considerations include:
  - How likely is it that information that is relevant to the issues in the case and not cumulative of information available from other sources will be found in the party's e-mail?
  - Does either party ordinarily maintain potentially relevant business records (*e.g.*, contracts, financial reports, strategic plans) *only* as e-mail attachments, rather than maintaining them separately?
  - Should requests for e-mail be:
    - Distinguished from other discovery requests?
    - Focused on particular issues?
- Databases.** How will the parties produce relevant information from databases?
  - Produce the entire database?
  - Grant database access to the opposing party's counsel or expert?
  - Produce report(s) of relevant information out of the database?
- Legacy software or media.** Is any potentially relevant ESI likely to reside in obsolete, proprietary, or unsupported software or media that may no longer be available or readable? If so, is it likely to be cumulative of information available from other, more accessible sources?

- Cloud storage.** Is any potentially relevant ESI likely to reside in cloud storage (e.g., Dropbox, Google Drive, OneDrive)?
- Social media.** Is any potentially relevant ESI likely to reside in social media (e.g., Facebook, Twitter, LinkedIn, Google Plus)?
- Personal e-mail, storage, and social media.** Is any potentially relevant ESI likely to reside in personal e-mail accounts, personal cloud storage (e.g., Dropbox, Google Drive, OneDrive), or on personal social media sites (e.g., Facebook, LinkedIn, Twitter)?
- Former employees.** Does each party have a process to identify and preserve potentially relevant ESI of custodians who leave the company?
- Passwords/Encryption.** How will the parties handle encrypted or password-protected ESI?
- Mobile devices.** Under what circumstances, if any, will the parties search for ESI on mobile devices, such as cellular phones, tablets, PDAs, or wearable devices?
- Voicemail.**
  - Is potentially relevant information likely to reside in voicemail?
  - Does a party's voicemail system convert messages into audio and/or text files, sending them automatically to the custodian's e-mail account?
  - In light of the above, or other circumstances, will the parties search or collect voicemail? If so,
    - For what sources?
    - In what format will it be produced?
- Non-accessible ESI.** Is any other source of potentially relevant ESI not reasonably accessible for other reasons?
- Burden outweighing benefit.** Can the parties agree that certain sources or types of ESI (e.g., backup tapes, printer files, mobile devices, voicemail, legacy systems, deleted files, archival systems, etc.) need not be searched or collected because the information is not reasonably accessible or searchable, such that the burden outweighs the likely probative value of the information, and/or it is likely that any probative information is available in other, more accessible forms?

## C. Collection/Search/Review Protocol and Limitations

- **Limiting scope of search and collection**
  - **Number of sources.** Should parties agree on limits to the number of sources searched?
    - For potentially relevant ESI generally?
    - For e-mail specifically?
  - **Type of sources.** Should parties agree that certain types of ESI sources, even though accessible, need not be searched, e.g., because of the burdensomeness of the search in comparison to the likelihood that relevant information that is not cumulative of other sources will be retrieved.
  - **Deadline for limiting scope.** If the parties lack information needed to agree to such limits, should they set a deadline for exchanging sufficient information to reach such an agreement?
  - **Factors.** How will those sources be selected?
    - Criteria?
    - Number?
    - Who will make the selection (i.e., the producing party or the requesting party)?
    - Can sources later be added to or taken off the list, and if so, under what circumstances?
    - How will the parties resolve disputes regarding the number or identity of sources?
  - **Other limitations.** Can the parties agree on other limitations on scope of search or collection?
    - Date range?
    - Metadata (e.g., particular fields or file types)
- **Uncommon ESI.** Does some potentially relevant ESI require special handling or production methods?
  - Pictures or drawings?
  - GPS coordinates?
  - Car black box data?
  - Source code?
  - Others?

- **International collection.** Does any party store potentially relevant ESI internationally?
  - **Privacy laws.** If so, does the host country have privacy laws that could impede, prevent, or constrain collection? Constrain review?
  - **Foreign languages.** Is any party likely to have foreign-language documents that would require translation to determine their relevance? If so:
    - **Protocol.**
      - Can the parties agree on a translation protocol?
      - Can the parties agree upon a joint translator?
      - Will translation be the responsibility of the producing party, or will the documents be produced untranslated, with each party translating the documents for itself?
    - **Costs.** How will the parties allocate translation costs?
- **Technological efficiencies and accuracy.** What methods could assist the parties in efficiently and accurately culling, reviewing, and producing the ESI?<sup>3</sup>
  - **De-duplication?**
    - If so, how?
      - Across the entire production?
      - Only within each source?
    - How will near duplicates be handled?
    - How will e-mail threads (e.g., e-mails with the same text but different attachments) be handled?
  - **Keyword searching?**<sup>4</sup> If so, what information about the process will the parties exchange or agree to?
    - Limit on number of keywords
    - Degree of specificity of keywords

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<sup>3</sup> Parties might not necessarily agree to use the same methodologies, as a number of factors – including disparate sizes of document populations, the nature of the responsive ESI, and how the parties maintain and organize their ESI – may make one methodology appropriate for one party but not for another.

<sup>4</sup> Keyword search is the search of ESI content and/or file metadata that identifies documents and files containing one or more of the key terms, key term combinations, or key phrases from a pre-determined list.

- Process for proposing, reviewing, and revising keyword list
  - Testing/sampling/auditing of proposed keywords
  - Process for resolving disputes regarding keywords
  - Process/justification for subsequent addition of keywords, including whether costs of additional searches would be shifted to requesting party
  - Others?
- **Technology-assisted review (TAR),**<sup>5</sup> such as predictive or iterative coding? If so, what information about the process will the parties exchange or agree to?
    - Particular technology platform?
    - Vendor?
    - Reviewing party?
    - Size of document populations?
    - Quality controls?
    - Additional disclosures requested by the receiving party?
      - sampling rates?
      - precision rates?
      - recall rates?
      - responsiveness rates?
  - **Methodology validation.** Will parties share information about their ESI culling and review methodology to verify or validate the process?
  - **Methodology application.** To what populations of documents will the parties apply the methodology selected?
    - All ESI?
    - E-mail only?
  - **Exceptions to application of methodologies?** Conversely, will there be any exceptions to the application of the methodology

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<sup>5</sup> Technology-assisted review (TAR) is document review that is facilitated by the use of advanced analytics to help categorize the review population – either by conceptual analysis of the document content performed entirely by the software, or “predictive” analysis and ranking performed by the software, based on initial human input.

selected, i.e., certain types of sources of ESI that will be reviewed without first applying the methodology?

#### D. Metadata<sup>6</sup>

- What, if any, metadata fields *will* be preserved?
- What, if any, metadata fields *will not* (or cannot) be preserved?
- Will any metadata be produced? If so,
  - What metadata?
  - For what ESI?
    - All ESI?
    - E-mail only?
    - Others?
- Metadata issues.** Do the parties know of any metadata issues?
  - Incomplete metadata
    - Because of storage method?
    - Because of transmission method?
    - Because of how the ESI is identified and captured for review?
  - Other metadata issues?
- Attorney-client information and tracked changes.** Are there potential privilege issues associated with metadata, such as counsel's revisions or notations on drafts?

#### E. Form of Production

- What will be the default ESI production method?
  - native?
  - image only?
  - image and text?
  - image, text, and metadata?

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<sup>6</sup> Metadata captures data elements or attributes (name, size, date, type, etc.), data about records or data structures (length, fields, columns, etc.) and data about data (where it is located, how it is associated, ownership, etc.).



- PDF?
  - image only?
  - image and text?
- paper (i.e., printed out and produced in hard copy)?
- **Scanning.** Will the parties scan paper documents, producing them electronically?
  - If so, will the parties implement Optical Character Recognition (OCR) to make the images' text searchable?
- **Load files.** Will load/unitization files<sup>7</sup> be produced?
  - If so, what format?
    - Summation DII?
    - \*.csv?
    - Others?
- **Color.** Must images be produced in color? Or will black and white suffice?
- **Document beginning/end; attachments.**
  - How will a document's beginning and end be indicated?
  - How will the production indicate the association of attachments with parent documents?
- **Exceptions to format.** Will there be any exceptions to the general production format?
  - Natively produce Excel spreadsheets and PowerPoint presentations?
  - Natively produce only upon a party's request for specific documents? (e.g., spreadsheets or presentations)
  - If ESI stored in personal email, on websites, or on social media sites is to be produced, how will that be accomplished?
    - screen shots?
    - HTML and associated files?
    - PDFs?
    - direct access?

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<sup>7</sup> A load/unitization file is a structured file – containing converted document data and associated file/image links – which is imported into a litigation-support or document-review system. It is usually accompanied by the associated image or native document files.

- authorizations for release of information?
  - subpoenas to service providers?
- Bates and identification.** How will the parties identify the documents (e.g., Bates number scheme, prefix identifying the producing party)?
- Identification of native files.** If files are produced natively, how will they be identified and authenticated for use in depositions, motions, or trial?
- Sources and custodians.** Will the parties identify each document's source or custodian?
  - If so, how?
  - If a document is found in multiple locations, will each source and custodian be identified?
- Redactions.** How will redactions be handled?
  - Will the specific reason for redaction be endorsed on the document? In load/unitization files?
  - Will redactions for reasons other than privilege or immunity from discovery (e.g., irrelevance or trade secret) be allowed?
  - Will redactions be included on a log?
  - Will ESI that has been redacted be produced in searchable form, or only as an image?
- Encryption and passwords.** How will the parties handle ESI that is encrypted or password-protected?
- Non-convertible, corrupt, and non-document ESI.** How will parties handle non-convertible, corrupt, or "non-document" (e.g., Audio, Video, etc.) files?
- Production media.** On what type of media will productions be made (e.g., CD, DVD, hard drive, cloud storage like Dropbox, etc.)? If by cloud storage or similar transfer means, how will security for confidential information be assured?

## F. Timing of Production

- Phases?** Would the litigation proceed more efficiently with a phased approach to discovery, focusing on certain issues or early decisions?
- Rolling?** Should parties produce on a rolling basis?

- Prioritized production?** Can the parties agree to prioritize certain custodians, document types, or ESI sources?
- Deadlines for substantial completion?** Can the parties agree on deadlines for when productions, or at least certain portions, will be substantially complete?

#### G. ESI in Custody or Control of Non-Parties

- Non-party custodians.** Does either party have potentially relevant information kept by non-parties (e.g., service providers, outside contractors, or other agents) with whom the party has a right of access?
- Non-party collection and production.** If so, how will the party handle collection and production?

#### H. Privileged Material

- Privilege logs.** Will the parties produce privilege logs?
- Timing.** When will privilege logs be produced?
  - With or shortly after each production?
  - After production is substantially complete?
  - Other timing?
- Detail.** In how much detail will privileged documents be described?
- E-mail logging.** Will e-mail strings be logged as a single document or multiple documents?
- Date limitations.** Can the parties agree to date limitations on log entries?
  - E.g., exclude privileged documents or ESI dated on or after the complaint?
- Consolidated entries.** Can parties log certain categories of privileged documents or ESI as a single entry, rather than individually?
  - E.g., communications with outside litigation counsel?
- “Quick peek” reviews.** Will the parties allow “quick peek” reviews?
  - To permit the opposing party to review documents or ESI that have not yet been reviewed for privilege?
  - To allow the producing party to reserve the right to demand the return of privileged documents or ESI without risk of waiver?

- Inadvertent productions.** Will the parties agree that inadvertent production of privileged documents or ESI will not waive the privilege, even without a producing party's showing that it took reasonable steps to avoid disclosure?
- Clawback.** How will the parties handle return of privileged documents or ESI?
  - Return production media upon request and remove privileged data from receiving party's system?
  - Produce replacement media?
  - Produce privilege log for documents returned?
  - Potential motions to compel production?
    - Procedure for such motions?
- Stipulated protective order.** Will the parties stipulate to a protective order provision under Fed. R. Evid. 502, providing for circumstances under which disclosure of privileged information will not constitute waiver?

## I. Confidentiality and Protective Orders

- Presence and types of confidential information.** Is either party's production likely to include potential confidential information?
  - If so, what types of potentially confidential information?
- In-house counsel access.** Will in-house counsel be permitted access to the other side's confidential information?
  - If so, under what conditions?
- Confidentiality designations.** How will the parties indicate confidentiality designations on produced ESI, documents, files, media, and other discovery (e.g., deposition testimony)?
- Protection of confidentiality.** How will each party or counsel assure the continued confidentiality of information received from the other side?
- Export controls.** Is either party's production likely to contain information that is export-controlled? If so:
  - What information types?
  - What must the receiving party do to ensure its protection?
- Inadvertent failure to designate.** How will the parties handle a producing party's inadvertent failure to designate information as confidential?

- Non-party confidential information.** How will the parties protect the confidentiality of non-party information?
- Readiness for protective order.** Are the parties ready to negotiate an appropriate protective order?
  - NOTE: Consider preparing a draft in anticipation of the conference. Suggested forms may be found on the Court's website.

## J. Costs and Cost Allocation

- Estimated costs.** Can the parties reasonably estimate the likely costs of collecting, searching, and producing ESI?
  - If not, should the parties set a date to make by which they will make such an estimate?
- Cost sharing.** Under what circumstances would the parties agreed to shift or share the costs of discovery?
  - Additional sources?
  - Additional searches?
  - Searches of ESI that is not reasonably accessible?
  - Other circumstances?
- Cost saving.** Can the parties agree to additional cost-saving measures?
  - Common e-discovery vendor with protocols to ensure no unauthorized access to opposing parties' information?
  - Shared document repository?
  - Others?

## K. Forensic Preservation and Searching<sup>8</sup>

Forensic preservation and searching is not commonly required. But if the need arises, counsel should discuss possible forensic preservation and searching methods, including:

- Identify a vendor to undertake forensic efforts
- Vendor's role (e.g., jointly retained, court expert, or retained by one party)
- Collection protocols and limitations

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<sup>8</sup> A process used for the collection and preservation of ESI, such as drive imaging, that ensures the ESI is handled in such a fashion that the file content and associated metadata are not altered.

- Search protocols and limitations
- Review of producing party's search results (and timing of that review)
- Production of search results; format of that production
- Retention of searched information
- Costs and cost-sharing

**L. Continuing Communications**

Should the parties schedule periodic discovery conferences to discuss discovery status and issues?

## SUGGESTED RESOURCES

1. "The Sedona Conference Working Group Series" contains a number of educational resources and publications proposing best practices in the area of electronic discovery. <https://thesedonaconference.org/>
2. EDRM (Electronic Discovery Reference Model) offers a number of practical resources relating to electronic discovery and information governance. <http://www.edrm.net/>
3. American Bar Association - "Your At-a-Glance Tool for Information on E-Discovery"  
<http://www.americanbar.org/groups/litigation/resources/e-discovery.html>
4. Ediscovery Team blog - A blog by Ralph Losey on the team approach to electronic discovery. <http://e-discoveryteam.com/> See also the companion site "Electronic Discovery Best Practices" > <http://www.edbp.com/>
5. Association of Certified E-Discovery Specialists (ACEDS) - ACEDS is an organization of professionals in the private and public sectors who work in the field of electronic discovery. <http://www.aceds.org>
6. The Electronic Discovery Institute (EDI). EDI conducts studies of litigation processes that incorporate modern technologies. <http://www.ediscoveryinstitute.org>
7. "The Implications of Rule 26(g) on the Use of Technology-Assisted Review," 7 FEDERAL COURTS LAW REVIEW 239 (2013).