

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

(January 2021)

All discovery involves electronically stored information (ESI). The production and review of such information can be complex and expensive. Litigators must be familiar with the fundamentals of electronic discovery; they cannot delegate that duty to clients or non-lawyers. 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 a lawyer's duty to keep abreast of changes in the technology of e-discovery. Moreover, lawyers' early identification, discussion, and joint resolution of potential e-discovery issues will help minimize future disputes. It will also help assure that discovery proceeds efficiently, consistent with the goals of Fed. R. Civ. P. 1 and 26. Conversely, lawyers who lack competence in e-discovery or who fail to cooperate in discovery are likely to increase the cost of litigation and may face the risk of sanctions.

This Guide was prepared by the Federal Practice Committee of the U.S. District Court, District of Minnesota 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 every issue must be addressed in any given case.<sup>1</sup> Rather, its goal is to assist counsel – whether they represent individuals, small businesses, or multinational corporations – in preparing for and participating in the Rule 26(f) conference so that there will be 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 not intended to be encyclopedic. Counsel who wish to learn more will find [representative resources](#) listed at the end of this Guide.

## TABLE OF CONTENTS

I)	Counsel and Client: Preparing for the Rule 26(f) Conference.....	2
A)	Preservation of Client ESI.....	2
B)	Collecting Client ESI.....	4
C)	The Search/Review Process for Client ESI .....	5
D)	Form of Production.....	5
E)	Early Rule 34 Requests for Production .....	6
II)	Counsel and Opposing Counsel: The Rule 26(f) Conference.....	7
A)	Preservation .....	7
B)	Identification of Potentially Relevant ESI Data Sources.....	7
C)	Collection .....	8
D)	The Search/Review Process .....	8
E)	Forms of Each Party’s Production.....	10
F)	Timing of Production .....	12
G)	Validation Process.....	12
H)	Privilege Log.....	12
I)	Rule 502 Order and Other Privilege Issues .....	13
J)	The Need for Follow-up Discussions.....	13
III)	All Counsel And The Court: The Rule 16(F) Conference.....	14
	Suggested Resources on Electronic Discovery .....	15

## **D) COUNSEL AND CLIENT: PREPARING FOR THE RULE 26(F) CONFERENCE.**

This section identifies and discusses issues that counsel and client should consider discussing at or before the initiation of litigation and before the Rule 26(f) conference.

The relevancy and proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) is the guide for all efforts, including efforts related to preservation, collection, review, and production. To assure proportionality in discovery, parties should consider the allegations and defenses, and such factors as 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 would outweigh its likely benefit.

Methodical preparation is the key to an effective Rule 26(f) conference. There are several steps that counsel and client should consider taking before meeting with their adversaries to set the metes and bounds of discovery. These include the issuance of litigation hold notices, the identification of potentially relevant and accessible ESI (including ESI in the possession of others that is nevertheless within the client's custody or control), the pre-Rule 26(f)-conference delivery of initial requests for production, and the determination of burdensomeness with respect to preservation and production. Counsel and client should consider involving witnesses, subject-matter experts, and IT personnel, vendors, or experts (as necessary) in these efforts.

### **A) Preservation of Client ESI**

A party's preservation obligation is triggered by its reasonable anticipation of litigation. Typically, this means that a plaintiff is expected to initiate the litigation hold process once it anticipates bringing suit or otherwise raising its allegations, while a defendant is expected to begin that process once it is on notice that litigation is likely.

Preservation should be reasonably tailored to cover information relevant to any claim or defense in the matter. Counsel and client (whether a large corporation, a small business, or an individual) should identify potentially relevant information within the client's possession, custody, or control.<sup>2</sup> To do so, counsel and client should:

- Analyze each claim and defense to determine what information is potentially relevant, considering the relevant time period. Include helpful and harmful content.
- Identify the custodians of the potentially relevant information. Custodians may include employees, consultants, family members, vendors, and other agents and non-party custodians.

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<sup>2</sup> Counsel should consult the case law as to what constitutes possession, custody, or control of various categories of information.

- Consider where custodians’ potentially relevant ESI may be located, such as computers, tablets, cell phones, online e-mail accounts, cloud-based repositories, messaging applications, or social media platforms.
- Identify potentially relevant ESI that is not in the possession, custody, or control of a particular individual but is in the possession, custody, or control of the client as a whole. Databases are one example of such “non-custodial” ESI.
- For corporate clients, determine their information storage framework and interview key custodians for a detailed view of what potentially relevant information exists and where and how it is stored.
- Determine clients’ data-retention and disposal practices for potentially relevant ESI, including e-mail purging cycles, text-message retention settings, cell-phone backup practices or lack thereof, and other automated processes (such as auto-deletion features) that may need to be turned off, suspended, or otherwise accounted for.

In short, going into the Rule 26(f) conference, counsel should understand her client’s sources of ESI, whether that client is an individual or a large organization.

Once the location of potentially relevant ESI is determined, counsel and client should then determine the burden and benefit of preserving that potentially relevant ESI, which may involve consideration of the following:

- The most efficient method of preservation: collection (and the various methods available), preservation-in-place, or otherwise.
- The estimated burden, in terms of expense *and* effort, to preserve (and later review) each source or category of information.
- Any alternative sources of the same information that are more convenient, less burdensome, or less expensive to preserve.
- The estimated benefit, to *either* party, of each type of potentially relevant content that is burdensome to preserve.
- Data sources that may not be “not reasonably accessible” pursuant to R. 26(b), such as back-ups/disaster-recovery systems, system logs, deleted files, file fragments and ephemera, legacy databases, and so forth.
- Document the burden for discussion during the Rule 26(f) conference.

To assist with preservation, one tool that parties often use is the litigation hold notice. Counsel and client should discuss the content, recipients, and process for issuing a litigation hold notice. The hold notice should document the categories and sources of information to be preserved as well as the individuals responsible for the preservation, with sufficient factual detail to guide recipients’ decision-making and actions. Counsel should consider following up with hold recipients regularly to ensure compliance.

For example, it may be appropriate for counsel and client who are considering issuing a litigation hold notice as part of their preservation effort to discuss the following:

- Which fact witnesses and records custodians, such as IT or human resources personnel, should receive a litigation hold notice.
- How much detail is needed to permit recipients to determine relevance.
- When and how often to update or reissue the hold notice—for example, how often or frequently after new claims, defenses or relevant facts arise.
- How to ensure that departing employees' potentially relevant content is preserved.
- How to ensure that potentially relevant content is preserved before a device such as a cellphone or computer is replaced or wiped.

Especially when representing individual clients, the notices should be tailored to ensure the client understands which sources are subject to the hold and how to appropriately comply. Under some circumstances, collection or routine backups may be the best method for preserving an individual's data to avoid the risk of inadvertent destruction. This may be appropriate, for example, for potentially relevant information stored only on client's current cell phone.

Relevant information in the possession, custody, or control of the client may also include content in the physical possession or custody of third parties (e.g., consultants, vendors, carriers, family members, agents, or customers). Counsel and client should discuss how to preserve such data and whether to issue a Third-Party Preservation Request.

In preparation for the Rule 26(f) conference, counsel and the client should also discuss any information the client may have about what potentially relevant information exists in the opposing party's possession, custody, and control, and where and how the opponent stores it, so as to be prepared to discuss that ESI in the Rule 26(f) conference. Counsel may also consider sending the opposing party a notice in advance of the conference (or delivering an early Rule 34 Request for Production, see Section I.E below), identifying the types and sources of relevant information and data believed to be in the possession, custody, or control of the opposing party, better ensuring that that information will be timely preserved by that party. This is particularly helpful for data sources counsel suspects may be routinely deleted or destroyed in the ordinary course of business, such as internal instant messages, security logs, or surveillance footage.

## **B) Collecting Client ESI**

Having identified and located potentially relevant ESI, counsel and client should discuss in preparation for the Rule 26(f) conference the various methods for collecting that ESI for review, culling, and production, considering in part the costs and format provided by each potential collection method. This discussion will help inform counsel before the Rule

26(f) conference, so that the parties can explore cost-saving techniques to cull the scope of collection.

For example, counsel and client should consider whether it is appropriate to deploy:

- date ranges,
- de-duplication at the collection phase, or
- domain exclusion or isolation (for e-mail sources).

Counsel and client should also look into any potential obstacles to collection, review, or production. For example, they should look into whether the client has discoverable information that may be subject to a third-party right of confidentiality that requires notification to that third party before the information can be disclosed in discovery. They should also determine whether any potentially relevant ESI (stored in the U.S. or elsewhere) is subject to state, federal, or international privacy laws that could restrict or constrain collection, review, or production. Counsel should also discuss whether the potentially relevant ESI will include foreign-language documents.

#### **C) The Search/Review Process for Client ESI**

To be prepared to fully participate in the Rule 26(f) conference with opposing counsel, counsel and client should discuss the method or methods they may wish to employ for searching and reviewing potentially relevant ESI. Common search-and-review processes include: manual review, keyword searching<sup>3</sup> and Technology Assisted Review (“TAR”), also referred to as “Predictive Coding.”<sup>4</sup> Counsel and client should consider whether different methods should be deployed for different categories of ESI, different requests for ESI, different custodians or time periods, or otherwise.<sup>5</sup> These methods are discussed in more detail in Section II.D.

#### **D) Form of Production**

Rule 34 permits a requesting party to “specify the form or forms in which electronically stored information is to be produced.” If no form of production is specified, or if the responding party objects to the requested form, the responding party must specify the form it intends to use, and in any event it must produce ESI “in a form or forms in which

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<sup>3</sup> Keyword search is the search of ESI content and file metadata that identifies documents and files containing one or more key terms, key term combinations, or key phrases from a pre-determined list, which documents are then further reviewed for relevance and responsiveness.

<sup>4</sup> See II.D, *infra*.

<sup>5</sup> Relevant to these topics, in August 2019, the ABA adopted Resolution 112, which resolved that “the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.”

it is ordinarily maintained or in a reasonably usable form or forms.” Fed. R. Civ. P. 34(b)(1)(C), (b)(2)(E)(ii).

To assist counsel in making or responding to proposals at the Rule 26(f) conference, counsel and client should discuss the forms in which the client stores potentially relevant ESI, the forms in which it can be collected, and their preferred form or forms of production. This will allow counsel to discuss production format issues at the Rule 26(f) conference, and perhaps to agree or stipulate to a form of production as part of a broader ESI Protocol.

Thus, in preparation for the Rule 26(f) conference, it may be appropriate for counsel and client to discuss the following topics and develop relevant positions:

- default production format,
- provision of load files<sup>6</sup> and metadata,
- handling of track changes and hidden data,
- production of color content,
- use of Bates numbering,
- manner of redactions,
- use of de-duplication and e-mail threading, and
- delivery factors, including encryption, passwords, and delivery method.

Further detail on each of these topics is provided in Section II.E. Last, counsel and client should discuss the form in which they wish to receive productions from the opposing party, considering, among other things, the document review platform they intend to employ.

#### **E) Early Rule 34 Requests for Production**

The 2015 Amendments to the Federal Rules of Civil Procedure provide a new tool to enhance the Rule 26(f) meet-and-confer process: the early “delivery” of Rule 34 requests for production. This allows parties to send out production requests as early as 21 days after the summons and complaint have been served. While this “delivery” does not constitute formal service for purposes of Rule 34(b)(2)(A) (Time to Respond), it allows parties to analyze their adversary’s discovery targets and expectations ahead of the Rule 26(f) conference, thereby facilitating a more substantive and meaningful conference. Counsel and client should consider using this option to focus the Rule 26(f) conference.

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<sup>6</sup> A load file is a structured file – containing metadata and other production-related data – which may be used to load productions into a document-review system or to inspect the metadata of a specific file.

## **II) COUNSEL AND OPPOSING COUNSEL: THE RULE 26(F) CONFERENCE.**

The Rule 26(f) conference is intended, in part, to help the parties “develop a proposed discovery plan.” Fed. R. Civ. P. 26(f)(2). As part of that process, the parties should engage in a transparent and cooperative dialogue in hopes of reducing later discovery disputes.

Rule 26 was amended in 2015 to provide: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to 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.” Rule 26(b)(1). Counsel must keep this in mind when crafting their discovery plan pursuant to Rule 26(f).

The parties may choose to discuss and prepare an ESI Protocol outlining an agreed-upon process for some or all of the issues discussed in this section. If the parties decide to prepare an ESI Protocol to document their agreed-upon processes, they should consider whether they want the Court to enter that ESI Protocol as a stipulated order.

### **A) Preservation**

Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, parties are to “discuss any issues about preserving discoverable information” at the conference. The parameters and usefulness of that discussion will depend largely on the information counsel obtain from their clients beforehand as explored in Section I.A above.

Potential topics at the Rule 26(f) conference may include preservation issues identified to date, the scope of preservation, preservation options, the cost of preservation, and so forth. Parties should approach this discussion with the goal of finding agreement on where preservation efforts can be narrowed or expanded, as appropriate.

Delivery of early Rule 34 Requests for Production, as discussed in Section I.E above, can provide a helpful framework for discussions regarding preservation.

### **B) Identification of Potentially Relevant ESI Data Sources**

The Rule 26(f) conference provides an opportunity for the parties to exchange basic information about the ESI sources believed to potentially contain relevant information, e.g., e-mails, instant messages, or social media platforms. Exchange of such information may assist the parties in crafting more accurate and tailored discovery requests. Again, delivery of early Rule 34 Requests for Production, as discussed in Section I.E above, provide a helpful framework for discussions about relevant and responsive ESI sources.



For each source, the parties may identify and discuss<sup>7</sup>:

- data custodians,
- non-custodial data sources, and
- non-party custodians (e.g., service providers, agents, contractors)

For non-party custodians, the parties may further discuss limitations to each party's right of access to such data, and the proposed method for collection and production.

### C) **Collection**

The parties may discuss their proposed search and collection processes, the tools they intend to utilize, and the metadata they intend to capture, thereby allowing the parties to explore cost-saving techniques to reduce scope, including limits according to:

- date ranges,
- sources from which to collect,<sup>8</sup>
- de-duplication, at the collection phase, and
- domain exclusion (for e-mail sources).

The parties should also discuss whether any party stores potentially relevant ESI in a jurisdiction that may be subject to privacy laws, blocking statutes, or other laws or regulations that could restrict or constrain collection, review, or production of this content.

### D) **The Search/Review Process**

The parties may choose to disclose their anticipated search and review process for each ESI source. While disclosure, discussion, and agreement on each of the issues below is not a requirement, the search methodology may benefit from input from one's opponent, and agreements on some or all of these issues can enhance efficiency and minimize disputes. However, the producing party has ultimate responsibility for complying with that party's discovery obligations to identify and locate relevant and responsive ESI.

Two common search and review processes include:

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<sup>7</sup> A party should consider whether an early Rule 30(b)(6) deposition regarding her opponent's IT architecture and information systems could further guide discovery efforts and focus subsequent discovery requests. If so, the party should consider discussing such a deposition during the Rule 26(f) conference and requesting the same from the Court during the Rule 16 conference.

<sup>8</sup> The parties may agree that certain types of ESI sources, even if accessible, need not be searched, e.g., if the burden of the search is greater than the likelihood that relevant, non-cumulative information may be retrieved. If inadequate information is available at the time of the Rule 26(f) conference, the parties may wish to agree on a process for investigating and determining whether certain sources should be searched.

- **Keyword searching.** Keyword searching is the search of ESI content and file metadata that identifies ESI containing one or more key terms, key term combinations, or key phrases from a pre-determined list. Keyword searching, in and of itself, does not determine relevance or responsiveness, but is just one way to cull the universe of ESI to make the review for relevance and responsiveness more cost-effective.
- **Technology Assistant Review (“TAR”), also referred to as “Predictive Coding.”** Technology-assisted review (TAR) as defined by the EDRM is “a process of having computer software electronically classify ESI based on input from expert reviewers, in an effort to expedite the organization and prioritization of the document collection.”<sup>9</sup>

Parties should keep in mind that the most effective and efficient search-and-review approach may involve the use of multiple methodologies, and that the correct methodology or methodologies for one party, type of ESI, source of ESI, or date range of ESI may not be correct for all parties, ESI types/sources, or date ranges.

For ESI that counsel determine should be reviewed using keywords, counsel may wish to discuss the following:

- What data sources will be subjected to the keyword search?
- Should different keywords be used for different custodians, for different time periods, or different RFPs/categories of information?
- What will be the process for proposing, reviewing, and revising the list of custodians whose data will be subject to the search?
- What will be the process for proposing, reviewing, and revising the keywords that will be used?
- What are the systems’ search capabilities (i.e. search syntax)?
- What will be the process for testing, sampling, and auditing of proposed keywords, such as the exchange of hit count reports?
- What will be the process for resolving disputes over the process?
- What validation process will be used to test the sufficiency of the search terms?
- Under what circumstances will additional keywords be run later in discovery?

For ESI that counsel believe should be reviewed using technology-assisted review (TAR), counsel may wish to discuss the following:

- What data sources will be subjected to TAR?
- What information about the process will the parties exchange or agree to?

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<sup>9</sup> <https://www.edrm.net/resources/frameworks-and-standards/technology-assisted-review>. The EDRM diagram outlines the eDiscovery process in the form of nine interrelated phases.

- Which particular software platform will be used and by which vendor?
- How will the software be trained?
- How big are the document populations?
- What quality control measures will be implemented?
- Will the reviewing party disclose sample rates, precision rates, recall rates, and responsiveness rates?
- What will be the process for resolving disputes over the process?
- What validation process will be used to test the sufficiency of the review?

The parties may also address how they will handle foreign-language documents if such documents may be present. The parties may consider developing a translation protocol and potentially to stipulate on a joint translator. They may also discuss which party (or parties) should bear the cost for such translations.

#### E) **Forms of Each Party's Production**

Rule 34 permits a requesting party to “specify the form or forms in which electronically stored information is to be produced.” If no form of production is specified, or if the responding party objects to the requested form, the responding party must specify the form it intends to use, and in any event it must produce ESI “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” Fed. R. Civ. P. 34(b)(1)(C), (b)(2)(E)(ii).

To preclude disputes, the parties may stipulate at the Rule 26(f) conference or in an ESI protocol to the form of production for anticipated ESI sources.

**Format.** The parties may select a default format for ESI production, such as native, static-image (e.g., TIFF or PDF), or hybrid (e.g., static-image productions with native-format exceptions) and may agree on the production of metadata. Parties should discuss how native-format files will be identified and authenticated for use in depositions, motions, or trial. Parties should discuss whether text files and load files will accompany the production.

The parties may agree to carve out certain types of ESI from the default production type. For example, parties may agree to produce only Microsoft Excel and PowerPoint files as natives. The parties should discuss the appropriate format of production for ESI that might not be useful when imaged, such as audio/video recordings or structured data.

The parties may also discuss how to produce paper documents. Will the documents be scanned and produced electronically? If so, will the parties implement Optical Character Recognition (OCR) to make the images text searchable?

**Load Files<sup>10</sup> and Metadata.** As stated, the parties may discuss whether the productions will be accompanied by a load file and which metadata will be included in the file. Common load file formats are delimited by commas or other characters.

Load files tell parties where a document begins and ends. The load file may also identify custodians, which attachments relate to which e-mails, and which e-mails are related by a thread. If the parties do not intend to exchange load files, they may still agree upon other methods for exchanging this information.

Load files also provide metadata for the content being produced, subject to the parties' agreement and the availability of the metadata. For instance, the parties may agree on the precise metadata fields to be produced, depending on the ESI format and the data source. For example, "to", "from", "cc" metadata may be limited to e-mail productions. If the parties are aware that productions will contain incomplete metadata, for example because of the storage or transmission method, an early discussion about that between the parties could identify a resolution and avoid later disputes.

Alternatively, parties may agree to simply preserve metadata, and produce it only if later requested.

**Track Changes & Hidden Data.** When agreeing to non-native productions, the parties may specify whether track changes in a Microsoft Word document or hidden columns/rows in an Excel spreadsheet will be visible when that content is imaged.

**Color.** The parties may specify whether productions will be in color or black-and-white.

**Bates Numbering.** The parties may agree to a numbering scheme or prefix to uniquely identify each page (or native file) produced. The Bates number for each page (or native file) may be found on the corresponding image (or native file name) and the load file.

**Redactions.** The parties may agree on the types of permissible redactions and whether they will identify the reason/s for each redaction on the produced image itself or in a separate load file or log. The parties can also discuss format of production for redacted ESI.

**De-duplication.** The parties may agree to a process for de-duplicating ESI prior to production. De-duplication may be done globally, i.e., by retaining only one copy of a particular file even when it is possessed by multiple custodians, or it may be done locally, i.e., by eliminating duplicate copies within a single custodian's collection only (and retaining one duplicate copy for each other custodian who has that same file in their collection).

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<sup>10</sup> A load file is a structured file – containing metadata and other file information – which is imported into a document-review system. It is accompanied by associated images or native files.

**E-mail Threading.**<sup>11</sup> The parties may agree to the use of e-mail threading, so that (for instance) only one complete thread (e.g., the last e-mail in a chain) is produced for each unique e-mail chain.

**Encryption, Passwords, and Delivery.** The parties may discuss the security of discovery productions, including specifying encryptions to be used, whether passwords will be required, and whether the productions will be exchanged physically (e.g., by CD or hard drive) or whether they will be transmitted through a secure file transfer site.

**F) Timing of Production**

At the Rule 26(f) conference, it is appropriate for the parties to discuss timing. Will discovery be conducted in phases, focusing on certain issues? Will the parties produce content on a rolling basis, and if so, what does that mean? Does it make sense to prioritize certain productions over others? The parties may also set deadlines for substantial completion of the productions.

**G) Validation Process**

The parties may also decide to share information about, and potentially agree upon, their process for verifying and validating their ESI culling and review methodology.<sup>12</sup> This could include sharing which populations of ESI will be part of the validation process (e.g., all ESI or just e-mail) and which ESI will be excluded from the process.

**H) Privilege Log**

The parties may discuss whether they will produce privilege logs in connection with their productions or only upon request. If the former, the following details may be discussed:

- **Timing.** When will privilege logs be produced, with or shortly after each production or after the production is substantially complete?
- **Detail.** What information will be contained on the log and how much detail will describe the privilege asserted and content withheld/redacted?
- **Exclusions/Date Limitations.** Will certain categories or date ranges of communications be excluded, e.g., communications with outside litigation counsel, or privileged documents or ESI dated on or after the date of the complaint?
- **Format.** Will the log be provided as a spreadsheet containing agreed-upon metadata from the load file along with the privilege rationale?

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<sup>11</sup> An e-mail “thread” includes the original message, responses, forwards, and accompanying attachments. E-mail threading groups related messages together.

<sup>12</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.

- **E-mail Logging.** Will e-mail threads be logged as a single entry or multiple entries on the privilege log?
- **Consolidated Entries/Categorical Logging.** Can the parties log certain categories of privileged documents or ESI as a single entry, rather than individually, e.g., communications with outside litigation counsel?

#### I) **Rule 502 Order and Other Privilege Issues**

The parties may also discuss the handling of privileged material that is produced to the opponent, including:

**Rule 502(d) Order.** The parties may request that the Court enter a stipulated order under Rule 502(d) of the Federal Rules of Evidence, finding that privilege “is not waived by disclosure connected with the litigation pending before the court.”

**“Quick Peek” Reviews.** The parties may decide to allow “quick peek” reviews of content not yet reviewed for privilege while also allowing the producing party to reserve the right to demand the return of privileged documents and ESI without risking waiver.

**Claw-back Procedure.** The parties may discuss the timing and procedures for demanding and returning privileged documents or ESI, including how quickly a demand must be made after learning of the disclosure, whether the materials must be returned or destroyed (and what “destroyed” means), how replacement media will be produced, whether a privilege log will be exchanged for returned content, and the procedure for motions to compel production of the clawed-back content.

#### J) **The Need for Follow-up Discussions**

Finally, the parties should consider whether in view of the discovery demands in their case, it would be beneficial for the Court to schedule periodic discovery-status conferences.

Regardless of Court involvement, the parties should meet-and-confer throughout the discovery process to discuss the above issues. The parties should consider setting deadlines for accomplishing the relevant discussions above.

The following are additional conversations that are more likely to take place in subsequent discovery discussions rather than at the Rule 26(f) conference:

**Discovery Costs.** Once the parties are able, they may wish to discuss the likely costs for collecting, searching, and producing ESI and explore whether cost-sharing is appropriate and under what circumstances. Through these discussions the parties may explore whether additional cost-saving measures may be appropriate, such as use of a common vendor or a shared document repository. Taxation of eDiscovery costs may be another point of discussion. Certain eDiscovery costs may be taxed to the prevailing party under

Fed. R. Civ. P. 54 and 28 U.S.C. § 1920. Parties may consider stipulating about how potentially taxable eDiscovery costs will be allocated at the conclusion of the case.

**Forensic Preservation or Extraction.** The parties may discover that forensic analysis may be appropriate in given circumstances and may meet and confer to discuss:

- the choice of vendor to undertake forensic efforts;
- the vendor's role (e.g., jointly retained neutral, court expert, or retained by one party);
- collection protocols and limitations;
- search protocols and limitations;
- review of the producing party's search results (and timing of that review);
- production of search results;
- format of that production;
- retention of searched information; and
- costs and cost-sharing for all of the above.

### **III) ALL COUNSEL AND THE COURT: THE RULE 16(F) CONFERENCE**

An Order for Rule 16(f) Conference is issued by the District Judge or Magistrate Judge who will hold the conference. These Orders may include guidance and preferred forms. Counsel should review these Orders carefully, along with the judge's preferences as posted on the Court's website. The parties should consider memorializing their ESI agreement within their joint 26(f) report or a separate stipulation for ESI protocol and plan.

## SUGGESTED RESOURCES ON ELECTRONIC DISCOVERY

- 1. The Sedona Conference** – The Sedona Conference “Working Group Series,” particularly Working Groups 1 and 6, offers several educational resources and publications that provide background, propose best practices, and comment on developments in the law concerning electronic discovery. Representative examples include:
  - [https://thesedonaconference.org/publication/The\\_Sedona\\_Conference\\_Glossary](https://thesedonaconference.org/publication/The_Sedona_Conference_Glossary)
  - [https://thesedonaconference.org/publication/The\\_Sedona\\_Principles](https://thesedonaconference.org/publication/The_Sedona_Principles)
  - [https://thesedonaconference.org/publication/Selection\\_of\\_Electronic\\_Discovery\\_Vendors](https://thesedonaconference.org/publication/Selection_of_Electronic_Discovery_Vendors)
  - [https://thesedonaconference.org/publication/Commentary\\_on\\_Legal\\_Holds](https://thesedonaconference.org/publication/Commentary_on_Legal_Holds)
  - [https://thesedonaconference.org/publication/The\\_Sedona\\_Conference\\_Cooperation\\_Proclamation](https://thesedonaconference.org/publication/The_Sedona_Conference_Cooperation_Proclamation)
- 2. EDRM (Electronic Discovery Reference Model)** – EDRM offers several practical resources relating to electronic discovery and information governance, including a White Paper Series.
  - [www.edrm.net](http://www.edrm.net)
  - <https://edrm.net/resources/white-paper-series/>
- 3. 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>
- 4. The Electronic Discovery Institute (EDI)** – EDI conducts studies of litigation processes that incorporate modern technologies. [www.ediscoveryinstitute.org](http://www.ediscoveryinstitute.org)
- 5. Published Articles** – Examples of relevant published articles on various aspects of e-discovery include:
  - Robert Keeling, Rishi Chhatwal, Peter Gronvall, and Nathaniel Huber-Fliflet, Humans Against the Machines: Reaffirming the Superiority of Human Attorneys in Legal Document Review and Examining the Limitations of Algorithmic Approaches to Discovery, 26 RICH. J.L. & TECH., Vol. XXVI, Issue 3, 2020. <https://jolt.richmond.edu/files/2020/10/Keeling-FE.pdf>
  - Thomas Y. Allman, Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures, 26 RICH. J.L. & TECH., Vol. XXVI, Issue 2, (2020) <https://jolt.richmond.edu/files/2020/04/Allman-FE.pdf>



- Hon. William Matthewman, TOWARDS A NEW PARADIGM FOR E-DISCOVERY IN CIVIL LITIGATION: A JUDICIAL PERSPECTIVE, 71 Fla. L. Rev. 1261 (2019) <http://www.floridalawreview.com/wp-content/uploads/Matthewman.pdf>
  - Robert Keeling, Nathaniel Huber-Fliflet, Dr. Jianping Zhang, Rishi P. Chhatwal, Separating the Privileged Wheat from the Chaff – Using Text Analytics and Machine Learning to Protect Attorney-Client Privilege, 26 RICH. J.L. & TECH., Vol. XXVI, Issue 3, 2019. <https://jolt.richmond.edu/separating-the-privileged-wheat-from-the-chaff-using-text-analytics-and-machine-learning-to-protect-attorney-client-privilege/>
  - Hon. Elizabeth D. Laporte (ret.) and Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure, Vol. 9, Issue 2, THE FEDERAL COURTS LAW REVIEW [https://www.fclr.org/fclr/articles/pdf/Laporte-Redgrave\\_Final\\_Publication\\_Vol9Issue2.pdf](https://www.fclr.org/fclr/articles/pdf/Laporte-Redgrave_Final_Publication_Vol9Issue2.pdf)
  - THE GROSSMAN-CORMACK GLOSSARY OF TECHNOLOGY-ASSISTED REVIEW, Vol. 9, Issue 2, THE FEDERAL COURTS LAW REVIEW <https://www.fclr.org/fclr/articles/html/2010/grossman.pdf>
  - Hon. John M. Facciola (ret.) and Jonathan M. Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, Vol. 4, Issue 1, THE FEDERAL COURTS LAW REVIEW <https://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf>
  - A.J. Tadler, et al., *The Sedona Conference “Jumpstart Outline”: Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (March 2016 Version), [https://thesedonaconference.org/sites/default/files/publications/The%2520Sedona%2520Conference%2520Jumpstart%2520Outline%2520March%25202016\\_Tadler%2520et%2520al.pdf](https://thesedonaconference.org/sites/default/files/publications/The%2520Sedona%2520Conference%2520Jumpstart%2520Outline%2520March%25202016_Tadler%2520et%2520al.pdf)
6. **Blogs** – There are several blogs on various aspects of e-discovery for those who would like to keep up with developments. *See, e.g.,*
- E-Discovery Team: A blog by Ralph Losey on the team approach to electronic discovery. [www.e-discoveryteam.com](http://www.e-discoveryteam.com)
    - *See also* the companion sites “Electronic Discovery Best Practices” [www.edbp.com](http://www.edbp.com) and “E-discovery Team Training” [www.e-discoveryteamtraining.com](http://www.e-discoveryteamtraining.com)

- Bowtie Law: A blog by Joshua Gilliland on developments in the law of electronic discovery. [www.bowtielaw.com](http://www.bowtielaw.com)
- Ball in Your Court: A blog by Craig Ball on e-Discovery and computer forensics. [www.craigball.net](http://www.craigball.net)
- eDiscovery Journal: Blog posts, news commentary, research, tools, surveys and private peer discussion groups moderated and curated by Greg Buckles. [www.ediscoveryjournal.com](http://www.ediscoveryjournal.com)
- E-Discovery Daily Blog: A blog by Doug Austin with (as the title suggests) daily posts on the latest news and case law in this area. [www.cloudnine.com/education/daily-blog/](http://www.cloudnine.com/education/daily-blog/)

7. **Federal Court Guidance** – Some federal districts have established standing orders or local rules governing discovery of ESI. The following is a representative (but non-exhaustive) list:

- [http://www.nhd.uscourts.gov/pdf/ESI\\_Checklist.pdf](http://www.nhd.uscourts.gov/pdf/ESI_Checklist.pdf)
- <https://www.njd.uscourts.gov/sites/njd/files/2016SEPTEMBEROrderAmd26.pdf>
- <https://www.ded.uscourts.gov/default-standard-discovery>
- <https://www.mdd.uscourts.gov/sites/mdd/files/ESI-Principles.pdf>
- [http://www.txed.uscourts.gov/sites/default/files/forms/E-Discovery\\_Patent\\_Order.pdf](http://www.txed.uscourts.gov/sites/default/files/forms/E-Discovery_Patent_Order.pdf)
- <https://www.mied.uscourts.gov/PDFFiles/ModelESIDiscoveryOrderAndRule26fChecklist.pdf>
- <https://www.pawd.uscourts.gov/ed-information>
- <http://ksd.uscourts.gov/wp-content/uploads/2015/10/Guidelines-for-cases-involving-ESI-July-18-2013.pdf>
- <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20174-1%20entered%209-12-18.pdf>
- <https://www.ediscoverycouncil.com/sites/default/files/7thCircuitESIPilotProgramPrinciplesSecondEdition2018.pdf>
- <https://www.cand.uscourts.gov/forms/e-discovery-esi-guidelines/>

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## **E-Discovery in the Criminal Justice System**

Practitioners on both sides in the criminal arena have also been discussing and developing recommendations and best practices. The following resources may be of interest:

- “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System).

[www.justice.gov/archives/dag/page/file/913236/download](http://www.justice.gov/archives/dag/page/file/913236/download)

- ABA Standards for Criminal Justice Discovery (4<sup>th</sup> Edition, 2020), Part III: Special Discovery Procedures, published by the Criminal Justice Section of the American Bar Association.

[www.americanbar.org/groups/criminal\\_justice/standards/discovery-fourth-edition/](http://www.americanbar.org/groups/criminal_justice/standards/discovery-fourth-edition/)