

21.3 DISCOVERY OF ELECTRONICALLY STORED INFORMATION

(A) Definitions and Introduction

- (1) “Electronically Stored Information” (“ESI”) has the same meaning as does that term as used in Civ.R. 26 and 34.
- (2) The intent and purpose of this Rule is to encourage parties to meet and confer on a regular basis, as needed, concerning issues involving ESI; to encourage parties to reach agreement on issues involving ESI wherever possible; to set out basic principles which should guide the parties in reaching those agreements and which should guide the Court in resolving any disputes concerning ESI; and to establish general procedures and guidelines for the resolution of any disputes concerning ESI. This Rule is to be read in conjunction with, and is subject to, Civ.R. 26(A) and (B)(4) and Civ.R. 34.

(B) General Principles Governing ESI

- (1) Consistent with Civ.R. 26(B)(4), the scope of the production of ESI is generally limited to that which does not impose undue burden.
- (2) The Court will honor agreements voluntarily entered into by the parties, including but not limited to, those with respect to the scope of preservation and production of ESI; the form and format of ESI; the preservation of privilege; and the confidentiality of any ESI, including agreements contemplated by section (E) of this Rule. Notwithstanding the preceding sentence, the Court will consider changed circumstances in evaluating any request to relieve a party from any agreement regarding ESI.

(C) Meet and Confer

- (1) This section (C)(1) applies to the following civil cases: employment discrimination cases, non-competition cases, trade secret cases, cases assigned to the commercial docket, cases in which a party alleges the existence of a class certifiable under Civ.R. 23, and all other civil cases in which the parties or the Court believes ESI may be an issue. At least fourteen (14) days before the initial Case Management Conference required by Local Rule 21, or as otherwise agreed by the parties, counsel and unrepresented parties shall meet and confer to discuss the preservation and production of ESI. Counsel and unrepresented parties must be prepared to discuss, and shall discuss, whether discovery of ESI is reasonably expected to be required in the case. If so, then the parties shall also discuss, to the extent practical:
 - (a) The general nature of any ESI reasonably believed to be potentially relevant, the location where it is stored, the devices on which it is stored, and whether any party believes it should be preserved or should be subject to a litigation hold.
 - (b) The scope and nature of the efforts each party will take to identify and preserve potentially relevant ESI, including but not limited to whether the ESI will be preserved by forensic cloning or some other method.
 - (c) The scope of email discovery and any protocol for searching emails for production.
 - (d) The scope of production of metadata and embedded data.

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- (e) The scope of any search of, and production of ESI contained on, back-up or archival systems.
 - (f) Whether any ESI in a party's possession is not reasonably accessible or subject to production without undue burden.
 - (g) Who will bear the costs of preservation, collection, and production of ESI.
 - (h) The reasonably usable form and format in which ESI shall be produced.
 - (i) Whether the parties will enter into any confidentiality agreement, protective order, "quick peek" agreement or "clawback" agreement, as provided for in sections (B)(2) and (E) of this Rule.
- (2) At least seven (7) days in advance of the initial Case Management Conference, the parties will submit a report to the Court, jointly if possible, outlining any agreement reached at the meet and confer and identifying any areas currently expected to require resolution by the Court. The report shall be in the form attached as Schedule A or in a substantially similar form.
- (3) Counsel and unrepresented parties shall be prepared for the meet and confer. Counsel shall, in advance of the meet and confer, be reasonably informed regarding the issues likely to be in dispute in the case, their clients' information management systems, and their client's practices with respect to retention, destruction, purging, archiving and backing-up ESI reasonably expected to be potentially relevant.
- (4) The Court, in its discretion, may direct counsel and unrepresented parties to meet and confer on any schedule the Court directs to address additional issues with respect to ESI.

(D) Preservation of ESI

- (1) Whenever litigation is reasonably anticipated, threatened, or pending, parties must take reasonable steps to preserve ESI.
- (2) Factors that may be considered in determining the scope of ESI that should be preserved include: (a) the nature of the issues raised in the matter; (b) the accessibility of the information; (c) the likelihood that the ESI contains information that is relevant and/or reasonably calculated to lead to the discovery of admissible evidence; that is reasonably likely to be requested during discovery; or that is the subject of a pending discovery request; and (d) the relative burdens and costs of preserving the information.
- (3) If there is a dispute concerning the scope of a party's preservation obligations, the parties or their counsel must meet and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate. If the parties are unable to resolve a dispute over the preservation of ESI through personal consultation, then the dispute should be promptly raised with the Court in accordance with Local Rule 11(F).
- (4) In resolving any dispute over any party's obligation to preserve ESI, the Court shall consider the factors listed in section (D)(2) above. The Court may, in its discretion, conduct an evidentiary hearing to assist it in resolving these matters. In resolving any dispute over the preservation of ESI, the Court may apportion some or all of the costs of preservation to the requesting party or to the producing party, or both.

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- (5) The Court may, in its discretion and with the consent of all parties, appoint a special master to aid it in the resolution of any dispute concerning the preservation of ESI.

(E) Preservation of Privilege

Civil Rule 26(B)(6)(b) applies to the production of ESI. To facilitate efficient, cost-effective, and timely production of ESI, the parties may agree to provide information for a “quick peek” without any waiver of privilege; to enter into a “clawback” agreement requiring the receiving party to return any information the producing party claims is privileged, regardless of whether the production was inadvertent; or to other forms of voluntary agreements relating to the attorney-client privilege and/or the work-product doctrine. The Court shall enforce such agreements, provided they are memorialized in writing.

(F) Production of ESI

- (1) Local Rule 11(F) governs all motions concerning disputes regarding the production of ESI.
- (2) If a party seeks production of ESI, and if the responding party opposes such production, then:
- (a) The party opposing the production of ESI must demonstrate, in opposition to any motion to compel or in support of any motion for protective order, that the ESI is not reasonably accessible because of undue burden or expense.
 - (b) If the producing party meets its burden, as set forth in section (F)(2)(a), then the requesting party must demonstrate, either in its motion to compel or in its opposition to a motion for protective order, that good cause exists for the discovery of the ESI.
 - (c) The Court shall consider the following factors when determining if good cause exists:
 - (i) Whether the information sought is reasonably accessible;
 - (ii) Whether the information sought can be obtained from some other source that is less burdensome;
 - (iii) Whether the costs of producing the ESI are proportionate to the case, taking into account the relative importance in the case of the issues on which the information is sought, including any legal issues and public policy concerns implicated in the case; the amount in controversy; the parties’ resources; and the importance of the information in resolving the issues; and
 - (iv) All other factors (set forth or identified) in Civil Rule 26(B)(4).
 - (d) In resolving any dispute relating to the production of ESI, the Court may order that the discovery not be had, it may apportion some or all of the costs of the discovery to the requesting party, or it may compel the production at the producing party’s cost. The Court may, in its discretion, conduct an evidentiary hearing to assist it in resolving these matters.
 - (e) The Court may, in its discretion and with the consent of all parties, appoint a special master to aid it in the resolution of any dispute concerning production of ESI.
- (3) Consistent with Civ.R. 34(B)(3), ESI shall be produced in a reasonably usable form. If a party seeks re-production of ESI that has previously been produced in a different form than the form in which the party seeks production, the Court will consider:

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- (a) whether the previously-produced ESI was in a reasonably usable form;
- (b) whether the previously-produced ESI was produced in a form to which the receiving party previously agreed;
- (c) the receiving party's showing of any particularized need for re-production in a different form;
- (d) whether inadequate preservation caused the request for re-production; and
- (e) the feasibility, burdens and costs of re-production in a different form. If the Court orders re-production, it may apportion some or all of the costs of the re-production to the requesting party.