

VIII.D | ESI CONFERENCE

The following is a list of topics counsel should discuss prior to or at the beginning of the case and no later than the Rule 26(f) case management meeting. They are strongly encouraged to include their clients' information technology employees and vendors in these discussions.

1. The locations and sources where relevant ESI is likely to be found. This includes the identity of people likely to have relevant ESI.
2. Reasonable steps to preserve ESI.
3. The relevant time period.
4. The manner and forms of preservation and production including the production of live database-based materials. Possible forms for the production of ESI include native, TIFF and PDF. Absent agreement or a Court order, Rule 34(b) provides that ESI should be produced in either the form in which it is "ordinarily maintained" or in a "reasonably useable" form. When deciding what format(s) to use counsel, with the assistance of their information technology experts, are encouraged to discuss:
 - a. The form or forms of ESI that will be most likely to provide the information needed to establish the relevant facts in the case.
 - b. The need for metadata.
 - c. Accessibility of ESI in the form requested.
 - d. The requesting party's ability to manage and use ESI in the form requested.
 - e. Risks associated with the inadvertent production of privileged or confidential information associated with the different forms of production.
 - f. The difficulty of redacting ESI in the form requested.
 - g. The extent to which alternative forms of production will satisfy a party's needs.
5. The types of metadata that will be preserved and produced.

6. Sources of ESI that are not reasonably accessible.
7. The relative costs and other burdens associated with production, review and processing ESI.
8. Allocation of the costs of production.
9. The use of search terms, sampling, de-duplication, "quick-peeks," technology assisted review methods including, for example, predictive coding and other strategies to reduce the volume of ESI that must be preserved and produced.
10. How to deal with issues of confidentiality and privilege including the use of "claw-back agreements" or the appointment of a special master to resolve disagreements.
11. Tiered discovery in which ESI is produced sequentially in tranches.
12. Disposal of ESI at the appropriate time.