
FLORIDA, MIDDLE DISTRICT DISCOVERY HANDBOOK (2015)
SECTION VIII: E-DISCOVERY
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E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

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FLORIDA, MIDDLE DISTRICT DISCOVERY HANDBOOK | FEDERAL

SECTION VIII E-DISCOVERY

RULES: A-H

VIII.A | GENERAL

The Court's e-discovery goal is to facilitate fair, open, proportional discovery of the facts underlying a dispute so that it is resolved on the merits and not by gamesmanship. This requires cooperation among counsel. The discovery of electronically stored information ("ESI") stands on equal footing with the discovery of paper documents. The Federal Rules of Civil Procedure and Evidence provide a framework within to conduct cost effective e-discovery but they cannot be effective unless attorneys become familiar with their applicability and use them where appropriate. The early discussion and resolution of discovery issues is an important factor in reducing overall case length and the cost of litigation. Attorneys must take the time to educate themselves about ESI and because attorneys often lack the technical knowledge to fully understand ESI they should consult their clients' information technology departments and vendors regarding ESI issues. The Sedona Principles and the Sedona Cooperation Proclamation published by the Sedona Conference are an excellent source of information on the duties of clients and counsel and best practices for addressing the discovery of ESI. Additionally, The United States District Court for the District of Maryland has made available on its website, Judge Paul Grimm's Suggested Protocol for Discovery of Electronically Stored Information which provides an excellent template for counsel.

VIII.B | PRESERVATION

A party has a duty to retain ESI that may be relevant to pending or reasonably anticipated litigation. The scope of a party's preservation obligation is determined on a case-by-case basis. Rule 26(f) requires the parties to confer as soon as practicable and plan for discovery. The discussion of preservation issues, to include each party's records management policies and procedures ideally should occur before suit is filed but certainly no later than the Rule 26 conference. The parties should exercise reason and good faith when they discuss issues concerning ESI. On the topic of preservation, counsel should be informed and otherwise prepared to articulate both good cause for the preservation of ESI and the costs and burdens of maintaining ESI.

VIII.C | PROPORTIONALITY

The discovery of ESI should be proportional to the amount in controversy, the nature of the case and the resources of the parties. Rule 26(b)(2)(c) imposes a duty on the parties to balance the need for the discovery with the burdens of production. Rule 26(b)(2)(B) expressly provides that a party does not have to provide discovery of ESI that is not reasonably accessible because of undue burden or cost except on motion and order of the Court. The Sedona Conference has published six principles to guide the Court and counsel in applying the concept of proportionality to civil litigation:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.¹

¹ *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 *Sedona Conf. J.* 289 (2010).

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.

VIII.E | PROCEDURE

Counsel should have sufficient technical knowledge to propound educated and reasonable requests for ESI. Opposing counsel should have sufficient technical knowledge to provide educated and reasonable responses to requests for ESI. Blanket, overbroad, burdensome requests for production invite blanket objections and lead to motions to compel and for protective orders. To avoid this process and reduce the volume and expense of discovering ESI, requests for production should, to the extent possible, clearly specify what is being sought including by topic and reference to persons involved. Responses to requests for ESI should state clearly and specifically what is being objected to and why. They should also clearly state the extent to which discovery of ESI will be permitted, the sources from which ESI has been obtained and potential sources of ESI that were not searched.

Rule 34(a) establishes that unless requested in another form, the producing party must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. The Rule permits testing and sampling as well as the inspection and copying of ESI.

Inspection of an opponent's computer system is the exception, not the rule and the creation of forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost. A request to image an opponent's computer should include a proposal for the protection of privacy rights, protection of privileged information, and the need to separate out and ignore non-relevant information.

As an alternative to Bates numbers, consider using Hash tags or Hash values to identify ESI.

Ordinarily, information should only be produced once, i.e., electronically or by paper copies, not both.

VIII.F | RESOLVING DISCOVERY DISPUTES

The parties should resolve discovery disputes through the meet and confer process of if such negotiations are unsuccessful, resort to motion practice. Counsel should consult Rule 26(b)(2)(B) on proportionality and this Handbook for relevant factors to discuss when they confer.

VIII.G | DISCOVERY FROM NON-PARTIES

Rule 45 does not require a party issuing a subpoena for ESI to a non-party to confer with the non-party in advance. Nevertheless, in most cases, the party issuing the subpoena and the non-party responding to the subpoena should discuss, in advance, the same issues a party would discuss with an opposing party before commencing discovery of ESI.

VIII.H | METADATA

Counsel are encouraged to discuss:

1. The types of metadata that are ordinarily maintained.
2. The potential relevance of the metadata.
3. The importance of reasonably accessible metadata to facilitate the parties' review, production and use of ESI.
4. The locations of metadata that will be sought in discovery.

Except as otherwise ordered by the Court, once produced, metadata is reviewable without notice to the producing party.

APPENDIX

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CONTACT INFORMATION

E: TextBookDiscrimination@gmail.com

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