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# Preparation for Minnesota Federal and State Discovery Conferences: A Practical Approach

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# PREPARATION FOR MINNESOTA FEDERAL AND STATE DISCOVERY CONFERENCES: A PRACTICAL APPROACH

Minnesota E-Discovery Working Group 4†



† The Minnesota E-Discovery Working Group is a grassroots organization that was founded in 2011 with the goal of writing five separate papers that address various aspects of e-discovery best practices from a Minnesota perspective and could be used as a resource by both judges and lawyers in Minnesota. The Minnesota E-Discovery Working Group consists of members of the Minnesota judiciary, in-house attorneys, attorneys practicing with law firms across Minnesota, and e-discovery experts. The Working Group and the *William Mitchell Law Review* thank Briggs & Morgan, P.A. and Fredrikson & Byron, P.A. for their financial contribution to this joint project.

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†† The views expressed in this article do not necessarily reflect the views of the firms and companies listed, or the United States Department of Justice. Working Group 4 wishes to acknowledge committee member Hildy Bowbeer, attorney at 3M Company, for her contributions to the Working Group.

## I. INTRODUCTION

Benjamin Franklin easily could have been talking about discovery conferences when he said, "By failing to prepare, you are preparing to fail." In the age of e-discovery, discovery conferences can become a trap for the unprepared. Ill-prepared litigants can later discover that they made strategic errors, committed their clients to promises they cannot keep, and even set the stage for future sanctions motions. Well-prepared litigants, by contrast, can gain strategic advantages for their clients, significantly reduce the costs and burdens of discovery, and eliminate many potential avenues for sanctions and wasteful discovery motion practice.

The Federal and Minnesota Rules of Civil Procedure do not provide a clear roadmap for how to handle the myriad of e-discovery issues litigants may face. While there are some rules that explicitly address electronically stored information (ESI), many significant e-discovery issues are embedded within the general rules governing discovery. Moreover, due to the fast-paced nature of developments in e-discovery, the rules of procedure are simply incapable of keeping pace with developments in technology that often drive changes in legal standards. As a result, case law, local rules, and persuasive secondary sources (e.g., the Sedona Conference materials) have increasingly stepped in to fill in the gaps left by the rules of procedure.

With these rules and case law as a backdrop, Working Group 4 prepared the following Litigation-Hold, Pretrial-Discovery-Conference, and Court-Conference Checklists to assist practitioners with addressing the preservation and discovery of ESI with their clients, opposing counsel, and the court at the initial discovery or pretrial conference. These checklists are merely guidelines, and some of the topics may not apply to a particular case. Counsel should tailor the particular checklist to each case for maximum benefit. These checklists also are not intended to guide the typical scope of production a party should agree to. Each party's counsel must analyze the claims asserted, his or her client's ESI, and the potential costs and burdens of production in order to determine the appropriate discovery, consistent with the overarching goal of proportionality. Except in some limited circumstances, these checklists do not specifically address unique issues related to the preservation and collection of hard-copy information.

## II. PRESERVATION AND LITIGATION HOLDS

With the advent of electronic information, preservation disputes are frequently at the heart of many spoliation motions and issues: Was the litigation hold put in place at the right time? Were all the custodians identified? Were reasonable efforts taken to preserve the data? Yet, the terms "preservation" (in the context of discovery) and "litigation hold" do not appear in the rules of procedure themselves, and have traditionally been considered outside the scope of the rules. As a result, the common law has defined the scope and timing of the duty to preserve.[1]

The unsettled nature of preservation and litigation-hold case law makes these subjects prime targets for inquiry at discovery conferences. The inability to set forth a clear and coherent preservation story at the discovery conference can create the impression that relevant data may have been lost, which encourages opposing counsel to make preservation a focus of the litigation. The following sections (and the checklist that follows) are designed to assist practitioners in understanding the evolving preservation standards and educating clients on the elements of a successful preservation strategy. A practitioner who comes into the discovery conference able to tell a good preservation story about the topics listed below should also be able to avoid many of the preservation pitfalls that have plagued other litigants.

### *A. Rules of Procedure*

The only rule that directly touches upon discovery preservation is the "safe harbor" provision in Rule 37 of the Federal Rules of Civil Procedure, and its counterpart in the Minnesota Rules of Civil Procedure, Rule 37.05. Both provide limited protections to litigants who spoliate evidence resulting from the good-faith operation of an auto-delete system: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[2] Additionally, in its notes regarding the 2006

1. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (applying "federal [common] law of spoliation").

2. FED. R. CIV. P. 37(e); MINN. R. CIV. P. 37.05.

amendment to Rule 37, the advisory committee references the term "litigation hold," as well as the standard for triggering one.[3]

The proposed 2013 amendments to the Federal Rules of Civil Procedure would compel parties to address preservation issues. Preservation has moved from being a sometimes-suggested topic at the Rule 26(f) conference to a required part of the parties' discovery plan,[4] and preservation is now specifically included in a list of topics for Rule 16(b) scheduling orders.[5] Additionally, the proposed 2013 amendments replace the "safe harbor" provision with a list of five factors to be considered when determining sanctions for failure to preserve.[6] Should the proposed amend-

3. FED. R. CIV. P. 37(f) advisory committee's note (2006 amendment) ("When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'") (later renumbered to 37(e)); *see also* MINN. R. CIV. P. 37.05 advisory committee's comment (2007 amendment) ("The good-faith part of this test is important and is not met if a party fails to take appropriate steps to preserve data once a duty to preserve arises.").

4. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 295 (Aug. 2013), *available at* http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf ("A discovery plan must state the parties' views and proposals on: . . . (C) any issues about disclosure, discovery, *or preservation* of electronically stored information . . . ." (first alteration in original) (emphasis added)).

5. *See id.* at 285 ("The scheduling order may . . . (iii) provide for disclosure, discovery, *or preservation* of electronically stored information . . . ." (emphasis added)).

6. *See id.* at 316–17. The language of the proposed draft is as follows:

> The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved *in the anticipation or conduct of litigation, and* whether the failure was willful or in bad faith. The factors include:
>
> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
>
> (B) the reasonableness of the party's efforts to preserve the information;
>
> (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
>
> (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

ments become law, they will incentivize parties to make preservation a priority in the initial stages of a lawsuit. Nonetheless, even though these new amendments are a step in the right direction, they do little to define clear standards of preservation for litigation-hold triggers, reasonableness of preservation efforts, and proportionality in preservation. Given this lack of clear standards, preservation will continue to remain a potentially perilous topic at discovery conferences.

### *B. Common Law and Local Rules*

Regardless of whether the proposed 2013 amendments become part of the Federal Rules of Civil Procedure (and whether they are later adopted by the Minnesota courts), preservation obligations will still be defined primarily by common law as well as local rules that have filled in the interstices left by the current rules of procedure. Parties' preservation obligations can generally be bifurcated into two categories: (1) identification of the "trigger" for the duty to preserve and (2) implementation of a litigation-hold process to effectuate the parties' preservation duties.

#### *1. The Duty to Preserve*

There is no bright-line rule about when the duty to preserve attaches. Most courts use some version of the preservation standard articulated by the court in *Zubulake v. UBS Warburg L.L.C.* ("*Zubulake IV*"),[7] holding that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold.'"[8] In some cases, the trigger for the duty to preserve is unambiguous, such as when a party receives a summons, complaint or subpoena, or formal notice that it is a target of a governmental investigation. In

> (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

*Id.* (emphasis added).

7. Zubulake v. UBS Warburg L.L.C. (*Zubulake IV*) 220 F.R.D. 212 (S.D.N.Y. 2003).

8. *Id.* at 218; *see also* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.").

many cases, however, the trigger is ambiguous. For example, one federal court held that a demand letter referencing potential "exposure" was insufficient to trigger a party's preservation obligations because the letter needed to be "more explicit and less equivocal."[9] In contrast, another court held that mere awareness of the dispute by others in the industry was sufficient to trigger the duty to preserve years before a lawsuit was filed.[10] On the plaintiffs' side (which will commonly be triggered sooner than defendants' side), the test for determining when the duty to preserve arises is based on when the plaintiffs "determined legal action was appropriate."[11] But again, this standard is far from unambiguous because there could be multiple triggers for the duty to preserve, such as seeking of advice from counsel, sending a cease-and-desist letter, or taking concrete steps to commence litigation.

The Sedona Conference[12] has identified a non-exhaustive list of factors to be considered in determining whether litigation is or should be reasonably anticipated:

- The nature and specificity of the complaint or threat
- The party making the claim
- The business relationship between the accused and accusing parties
- Whether the threat is direct, implied, or inferred
- Whether the party making the claim is known to be aggressive or litigious
- Whether a party who could assert a claim is aware of it the claim
- The strength, scope, or value of a known or reasonably anticipated claim
- Whether the company has learned of similar claims
- The experience of the industry, and

9. *See* Cache La Poudre Feeds, L.L.C. v. Land O'Lakes, Inc., 244 F.R.D. 614, 623 (D. Colo. 2007).

10. *See* Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1191, 1195 (D. Utah 2009).

11. Millenkamp v. Davisco Foods Int'l, Inc., 562 F.3d 971, 981 (9th Cir. 2009).

12. The Sedona Conference is a nonprofit research and educational institute focused on the advanced study of law and policy in the areas of antitrust, complex litigation, and intellectual property. *About the Sedona Conference*, SEDONA CONF., https://thesedonaconference.org (last visited Nov. 18, 2013).

- Reputable press and/or industry coverage of the issue either directly pertaining to the client or of complaints brought against someone similarly situated in the industry.[13]

Given this lack of bright-line standards, parties should generally err on the side of caution when analyzing whether the duty to preserve has been triggered.

*2. Implementing a Litigation-Hold Process*

Once it has been determined that the duty to preserve has been triggered, a party needs to implement a litigation-hold process to preserve potentially relevant ESI. While a *written* litigation hold is not automatically required, it is generally considered a best practice to issue one because courts look for a litigation hold when considering the reasonableness of a party's preservation efforts.[14]

The drafting of a litigation hold accomplishes nothing, however, unless there is a process in place to identify to whom the hold should be issued, and the steps that need to be taken to identify and secure relevant ESI, monitor compliance, and ultimately release the hold when the matter is resolved. A combination of case law and local rules has helped to define the requirements of this litigation-hold process.

*a. Key Custodians*

Any credible litigation-hold process must begin by focusing on key custodians because they are the individuals most likely to possess relevant information and be witnesses in the litigation. The

13. The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 276 (2010).

14. *See* Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012) (agreeing that failure to institute written litigation hold is not gross negligence per se, but one factor for consideration in determining whether discovery conduct is sanctionable); *see also* Kinnally v. Rogers Corp., No. CV-06-2704-PHX-JAT, 2008 WL 4850116, at *6–7 (D. Ariz. Nov. 7, 2008) (holding that sanctions are not warranted merely because of the "absence of a *written* litigation hold" when a party has taken "the appropriate actions to preserve evidence"); The Sedona Conference, *supra* note 13, at 280 (finding that failure to issue a litigation hold is not a violation of the duty to preserve "if the organization otherwise preserved the information").

emphasis on key custodians began in *Zubulake IV*[15] when the court singled out "key players" for special consideration. The emphasis on key players has also been enshrined in the local rules of some federal courts that have developed discovery protocols that expect parties to identify "key persons" as part of the litigation-hold process.[16]

*b. Identification of Relevant Data Systems*

The identification of key custodians and the issuance of the litigation hold do not complete the preservation process. Care must be taken to identify all the potential sources of ESI and determine if any are at risk of spoliation. Depending on the size of the organization, it may make sense to create teams to identify the sources of ESI, define what needs to be preserved, and then determine the individuals responsible for preserving ESI for the length of the litigation hold.[17]

A principal challenge facing preservation today is the growing number of sources of ESI. Many cases reach far beyond e-mail accounts and Word documents.[18] Today, key custodians may have

15. *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); *see also* Day v. LSI Corp., No. CIV 11-186-TVC-CKJ, 2012 WL 6674434, at *11–12, 15–16 (D. Ariz. Dec. 20, 2012) (granting adverse inference instruction where defendant failed to identify a highly relevant key custodian for six months and ESI was destroyed as a result of the delayed identification); United States *ex rel.* Baker v. Cmty. Health Sys., Inc., No. 05-279 WJ/ACT, 2012 WL 5387069, at *4, 9 (D.N.M. Oct. 3, 2012) (sanctioning government where attorney in charge of litigation holds failed to take steps to identify and preserve key custodian information); Zubulake v. UBS Warburg L.L.C. (*Zubulake V*), 229 F.R.D. 422, 433–34 (S.D.N.Y. 2004) (discussing counsel's obligations toward "key players").

16. *See Order Governing Electronic Discovery*, E.D. PA. ¶ 2a, http://www.paed.uscourts.gov/documents/procedures/respola.pdf (last visited Dec. 22, 2013); *Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, D. MD. ¶ 7(A)(1)(c), at 7, http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf (last visited Dec. 22, 2013).

17. *See Zubulake V*, 229 F.R.D. at 432; The Sedona Conference, *supra* note 13, at 277; *Guidelines for Discovery of Electronically Stored Information ("ESI")*, N.D. OKLA. ¶ 1, http://www.oknd.uscourts.gov/docs/34dc340b-bff2-4318-9dee-cb0a76bcf054/Guidelines_for_Discovery_of_Electonically_Stored_Information.pdf (last visited Oct. 18, 2013); *Order Governing Electronic Discovery*, *supra* note 16, ¶ 2b; *Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, ¶¶ 7(A)(2), 7(D).

18. *See, e.g.*, Potts v. Dollar Tree Stores, Inc., No. 3:11-cv-01180, 2013

unique data stored on noncustodial business platforms, such as SharePoint sites and shared drives, devices that are primarily for personal use (e.g., home computers, personal e-mail accounts, smartphones), and/or social media sites (e.g., Facebook, Twitter, blogs). Additionally, with respect to structured databases, the identification process must also determine which databases are at issue, the retention schedules on these databases, and the "owners" or data stewards responsible for suspending the retention schedules to prevent losses due to routine business operations.[19]

Additional consideration must also be given to sources of information that are under the control of third parties, but deemed to be within the control of an organization because of a contractual or other relationship. Because courts will view such third-party data as within the "possession, custody and control" of the organization, the organization should consider providing appropriate notice to these third parties and directing them to preserve potentially relevant information.[20]

*c. Monitoring Litigation-Hold Compliance*

Organizations should develop ways to monitor a litigation hold to ensure compliance.[21] Monitoring can take a number of forms:

WL 1176504, at *1 (M.D. Tenn. Mar. 20, 2013) (motion to compel discovery of plaintiff's "Facebook and/or social media data"); Christou v. Beatport, L.L.C., No. 10-cv-02913-RBJ-KMT, 2013 WL 248058 (D. Colo. Jan. 23, 2013) (awarding sanctions where defendants failed to preserve key custodian's text messages (the iPhone was lost)); Keller v. Nat'l Farmers Union Prop. & Cas. Co., No. CV 12-72-M -DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013) (motion to compel production of plaintiff's social networking site); EEOC v. Original Honeybaked Ham Co. of Ga., Inc., No. 11-cv-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012) (motion seeking Facebook data of class members).

19. *Zubulake V*, 229 F.R.D. at 432; *Zubulake IV*, 220 F.R.D. at 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy . . . ."); The Sedona Conference, *supra* note 13, at 277; *see also* Pillay v. Millard Refrigerated Servs., Inc., No. 09 C 5725, 2013 WL 2251727 (N.D. Ill. May 22, 2013) (awarding sanctions where defendant had failed to suspend its auto-delete policy resulting in the loss of key performance data); *Baker*, 2012 WL 5387069, at *3 (sanctioning government where data retention policies were not adequately suspended).

20. *See* The Sedona Conference, *supra* note 13, at 279 (citing Federal Rule of Civil Procedure 34 and its state equivalents).

21. *Zubulake V*, 229 F.R.D. at 432 ("Counsel must oversee compliance with the litigation hold . . . ."); *see also Baker*, 2012 WL 5387069, at *4 (criticizing

periodically issuing reminder notices or reissuing the litigation hold, requiring ongoing certifications from custodians and data stewards, or employing audit and sampling procedures to ensure compliance.[22] The specific processes a company uses to monitor compliance with the litigation hold will vary considerably given the technological tools available.[23]

*d. Release of Litigation Hold*

The final step in the litigation-hold process is the release of the hold. A critical piece in releasing the litigation hold is to remind all custodians and data stewards that they need to confirm before the records retention policy can be applied to the information that the information is not subject to a litigation hold in another matter.

*C. Litigation-Hold Checklists*

With the above backdrop, the goal of the following Litigation-Hold Checklists is to provide a roadmap for a practitioner's discussion of preservation-related topics with his or her own client in the beginning stages of litigation. A thorough vetting of these topics with one's client is critical to a successful discovery conference because the successful implementation of these topics is the key to creating a good preservation story that will deflect needless skirmishes over a client's preservation efforts. Here, perhaps more than with respect to the other checklists, the precise nature of such a conversation will depend on the type of case, the nature of the client, and the client's resources (individual, small or large corporation, government). As a result, we have prepared two checklists. The first is a shorter checklist, designed to address the essential topics that should be discussed in most cases. The second is a longer, perhaps more aspirational checklist. While this longer checklist covers a host of activities, many of which are probably not necessary or proportional for most routine litigation matters, it does provide a more inclusive step-by-step list of activities that a company may need to address.

government for "suggest[ing] a 'lackadaisical attitude'" with regards to monitoring the litigation holds); The Sedona Conference, *supra* note 13, at 286.

22. *See* The Sedona Conference, *supra* note 13, at 286.

23. *See id.*

| SHORTER LITIGATION HOLD CHECKLIST: THE ESSENTIALS | | |
|---|---|---|
| *Issue* | *Description of Activity* | *Responsible Team(s)* |
| *Identification & Preservation* | Determine that the duty to preserve has been triggered. | • In-House Legal<br>• Outside Counsel |
| | Identify the key players and custodians (both current and former employees). | • In-House Legal<br>• Business Unit |
| | Draft the litigation hold. | • In-House Legal<br>• Outside Counsel |
| | Distribute the litigation hold. | • In-House Legal<br>• Outside Counsel |
| | Determine the location of all relevant ESI (e.g., e-mail systems, backup tapes, databases). | • IT Teams<br>• In-House Legal<br>• Business Unit<br>• Custodians<br>• Records Manager<br>• Outside Counsel |
| | Prevent the destruction of relevant ESI by immediately collecting and/or preserving it to prevent the deletion or automatic purging of the ESI. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| *Monitor Litigation-Hold Compliance* | Periodically reissue litigation-hold reminders, but take extra precautions with key custodians (e.g., periodic direct communications regarding litigation-hold compliance). | • In-House Legal<br>• Outside Counsel |
| | Periodically check with the IT-litigation contact to verify that systems continue to comply with the litigation hold. | • IT Teams<br>• In-House Legal |
| *Lifting of Completed Expired Litigation Holds* | Verify that the need for the litigation hold has ended. | • In-House Legal<br>• Outside Counsel |
| | Send litigation-hold release communications to all recipients of the litigation hold. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Communicate with IT and records departments to resume normal tidy or purge options for systems and information impacted by the litigation hold. Be sure to communicate that other litigation holds that may be in place are not impacted and may require the continuation of suspended tidy/janitorial operations. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |

| LONGER LITIGATION HOLD CHECKLIST: MORE ASPIRATIONAL | | |
|---|---|---|
| *Issue* | *Description of Activity* | *Responsible Team(s)* |
| *Identification & Preservation* | Determine that the duty to preserve has been triggered. | • In-House Legal<br>• Outside Counsel |
| | Schedule meetings with the required teams or persons. | • In-House Legal |
| | Identify the key players and custodians (both current and former employees). | • In-House Legal<br>• Business Unit |
| | Gather known information about all of the custodians (both current and former employees). | • In-House Legal<br>• Business Unit |
| | Draft the litigation hold. | • In-House Legal<br>• Outside Counsel |
| | Distribute the litigation hold. | • In-House Legal<br>• Outside Counsel |
| | Collect confirmations from the custodians indicating that they received the litigation-hold notice. | • In-House Legal<br>• Outside Counsel |
| | Determine the relevant ESI applications and systems: e-mail, electronic documents, business line applications and databases, enterprise-wide systems (ERP), Customer Relationship Management (CRM) software, voicemail, instant messaging, outsourced applications or services, legacy systems, and former employees' data. | • IT Teams<br>• In-House Legal<br>• Business Unit<br>• Custodians<br>• Records Managers<br>• Outside Counsel |
| | Determine the locations for relevant active ESI: network shares, network "home drives," local storage on computers (PCs/laptops), removable media (CD/DVD, thumb drives, USB hard drives). | • IT Teams<br>• In-House Legal<br>• Business Unit<br>• Custodians<br>• Outside Counsel |
| | Determine the backup retention of the identified systems or locations. | • IT Teams |
| | Determine if any ESI or documents have been retained for other litigation holds that may overlap by custodian or subject matter with this litigation hold and need to be included. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Determine if any identified system containing ESI has an automatic purge or tidy policies that may delete potentially relevant ESI (e-mail inbox/sent/deleted folders, and document management systems). | • IT Teams<br>• In-House Legal<br>• Outside Counsel |

| LONGER LITIGATION HOLD CHECKLIST: MORE ASPIRATIONAL | | |
|---|---|---|
| *Issue* | *Description of Activity* | *Responsible Team(s)* |
| *Identification & Preservation (continued)* | Prevent the destruction of relevant ESI by automated purge or tidy policies by either changing the policy or early collection of ESI from system (note: early collection requires ability to identify all likely custodians and repositories). | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Determine if ESI on backup media is subject to overwriting or destruction; if so, document schedules. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Determine if backup media may contain unique information (i.e., ESI no longer present on identified systems due to user deletion or automated purging, but may still exist on backup media). | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Decide if backup media, which is identified as subject to overwriting or destruction and identified as potentially containing unique ESI, needs to be preserved to prevent the overwriting of unique ESI. | • In-House Legal<br>• Outside Counsel |
| | Notify IT to preserve any backup media that is determined to require preservation. | • IT Teams<br>• In-House Legal |
| | Determine if smart phones or other devices may contain unique information. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | For any smart phone or other device that contains unique information, determine how it can be preserved. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Identify any planned changes or upgrades to identified systems. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Create a plan to preserve relevant ESI for any applications and systems that are planned for upgrades, changes, or decommissioning. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Create a plan to preserve relevant ESI for custodians who leave the organization (network "home drives," e-mails, locally stored files, files stored on external media). | • IT Teams<br>• In-House Legal<br>• Outside Counsel |

| LONGER LITIGATION HOLD CHECKLIST: MORE ASPIRATIONAL | | |
|---|---|---|
| *Issue* | *Description of Activity* | *Responsible Team(s)* |
| *Identification & Preservation (continued)* | Determine if the records manager is in possession of, or has control over, relevant documents or ESI. | • In-House Legal<br>• Records Manager<br>• Outside Counsel |
| | Identify all "record" ESI or documents that may be stored offsite. | • In-House Legal<br>• Records Manager<br>• Outside Counsel |
| | Ensure that any relevant "record" information stored either on-site or offsite is preserved and not subject to destruction schedules or policies. | • In-House Legal<br>• Custodians<br>• Records Manager<br>• Outside Counsel |
| | Determine if the matter requires "forensic preservation" or "forensic analysis" (e.g., data theft, employment embezzlement). | • In-House Legal<br>• Outside Counsel |
| | For forensic matters, determine the vendor to perform preservation and/or analysis (should be done very fast, as log files and information may be lost quickly). | • In-House Legal<br>• Outside Counsel<br>• Forensic Vendor |
| *Monitor Litigation-Hold Compliance* | Remind all custodians and periodically reissue litigation hold reminders. | • In-House Legal<br>• Outside Counsel |
| | Take additional precautions as appropriate with key custodians (e.g., periodic direct communications) regarding their particular litigation-hold compliance. | • In-House Legal<br>• Outside Counsel |
| | Periodically check with the IT-litigation contact to verify that systems continue to comply with litigation hold. | • IT Teams<br>• In-House Legal |
| *Lifting of Completed or Expired Litigation Holds* | Verify that the need for the litigation hold has ended. | • In-House Legal<br>• Outside Counsel |
| | Draft and send the litigation-hold release communications to all recipients of the litigation hold. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Communicate with IT and records departments to resume normal tidy or purge options for systems and information impacted by the litigation hold. Be sure to communicate that other litigation holds that may be in place are not impacted and may require the continuation of suspended tidy/janitorial operations. | • IT Teams<br>• In-House Legal<br>• Outside Counsel |
| | Determine the need to retain information preserved or collected for this litigation hold. | • In-House Legal<br>• Outside Counsel |

| LONGER LITIGATION HOLD CHECKLIST: MORE ASPIRATIONAL | | |
|---|---|---|
| *Issue* | *Description of Activity* | *Responsible Team(s)* |
| *Lifting of Completed or Expired Litigation Holds (continued)* | Determine the location for any retained information for this litigation hold and update any database or tracking log so the retained information is readily identifiable for future litigations holds. | • IT Teams<br>• In-House Legal<br>• Records Manager |

## III. PRETRIAL DISCOVERY CONFERENCES

Whereas preservation obligations fall outside the scope of the rules of civil procedure, the specific requirements and topics for pretrial discovery conferences are set forth in various rules of civil procedure,[24] as well as in many local rules[25] that have further delineated the subject areas that should be addressed at pretrial conferences.

With respect to e-discovery, both the Federal and Minnesota Rules of Civil Procedure require the parties to produce, from the pretrial discovery conference, a "discovery plan" that states the parties' views and proposals on "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[26] Although the advisory committee notes to the Federal Rules of Civil Procedure provide some direction on the topics to be addressed in the parties' discovery plans,[27] many courts have adopted local rules that specify in greater detail the e-discovery related topics that must be addressed.[28]

While many of the topics addressed below are not mandated for discussion at the pretrial discovery conference—except where local rules require discussion—it is to a party's advantage to come prepared to discuss a wide range of e-discovery topics. A well-

24. *See* FED. R. CIV. P. 16, 26, 33, 34, 37, 45; *see also* MINN. R. CIV. P. 16.03, 26.06, 33.01, 34.02.

25. *See infra* notes 30–99 and accompanying text.

26. FED. R. CIV. P. 26(f)(3)(C); MINN. R. CIV. P. 26.06(c)(3).

27. *See* FED. R. CIV. P. 26 advisory committee's note (2006 amendments) (discussing information to be searched, whether the information is reasonably accessible, forms of production, preservation, and protections for inadvertently disclosed privileged communications).

28. *See infra* notes 30–99 and accompanying text.

prepared party is more likely to secure favorable agreements, obtain strategic advantages, and obtain significant cost savings.

### *A. Preservation and Litigation Holds*

Assuming your preservation story is a good one, it will be advantageous to discuss in some detail at the discovery conference preservation-related topics, such as when the litigation hold was issued, key custodians, potential updates to the litigation hold, and records management practices (both to confirm they have been suspended and to set expectations about which documentation is no longer available).[29] Additionally, various federal jurisdictions have both general and specific requirements about what must be discussed and disclosed regarding the parties' preservation efforts during pretrial discovery conferences. The list below is just a sample of the local rules that federal courts have adopted with respect to preservation.

| *Local Rules Regarding Preservation* | |
|---|---|
| Seventh Circuit Principle 2.04 | (a) The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses . . . .<br>. . . .<br>(c) [T]he parties and counsel should be prepared to discuss reasonably foreseeable preservation issues [at the Rule 26(f) conference] . . . .[30] |

29. There is some debate about whether a litigation hold is protected by the attorney-client privilege and the work product doctrine, and under what circumstances. Counsel should consider this issue before deciding what information to reveal regarding the issuance and content of the hold. *See, e.g.*, Major Tours, Inc. v. Colorel, No. 05-3091 (JBS/JS), 2009 WL 2413631, at *5 (D.N.J. Aug. 4, 2009) (holding that litigation hold is generally protected as privileged or work- product unless there has been a "preliminary showing" of spoliation); *In re* eBay Seller Antitrust Litig., No. 07-CV-01882 (RS), 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007) (holding as a general matter that hold letters are not discoverable but noting that opposing parties have a right to some information, such as the categories of ESI preserved and the actions undertaken to preserve).

30. *Principles Relating to the Discovery of Electronically Stored Information*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM 3–4, http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf (last visited Oct. 18, 2013).

| *Local Rules Regarding Preservation* | |
|---|---|
| Northern District of California Guideline 2.02 | At the required Rule 26(f) meet and confer conference, . . . the topics that the parties should consider discussing include . . . :<br>a) The sources, scope and type of ESI that has been and will be preserved—considering the needs of the case and other proportionality factors—including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation; [and]<br>b) Any difficulties related to preservation[.][31] |
| Northern District of Ohio Default Standards ¶ 2 | Prior to the Rule 26(f) conference, the parties shall exchange the following information: a. A list of the most likely custodians of relevant [ESI] . . . .[32] |
| Northern District of Illinois Standing Order § 2.01(a) | Prior to the initial status conference . . . , counsel shall meet and discuss . . . . :<br>(1) the identification of relevant and discoverable ESI; [and]<br>(2) the scope of discoverable ESI to be preserved by the parties . . . .[33] |
| Middle District of Tennessee Default Standard ¶ 2.a | [At the Rule 26(f) conference, the parties should discuss] a list of the most likely custodians of relevant [ESI] . . . .[34] |
| Western District of Pennsylvania Local Rule 26.2.C.1 | [At the Rule 26(f) conference, the parties should discuss the] steps the parties have taken to preserve ESI[.][35] |

31. *Guidelines for the Discovery of Electronically Stored Information*, N.D. CAL. 2, http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf (last visited Oct. 18, 2013).

32. *Default Standard for Discovery of Electronically Stored Information ("E-Discovery")*, N. D. OHIO 1, http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixK.pdf (last visited Oct. 18, 2013).

33. *Standing Order Relating to the Discovery of Electronically Stored Information*, N.D. Ill. 2, http://www.ilnd.uscourts.gov/home/_assets/_documents/webdocs/brown/ESI%20discovery%20order.pdf (last visited Oct. 18, 2013).

34. Order No. 174, *In re*: Default Standard for Discovery of Electronically Stored Information ("E-Discovery") § 2.01, at 1 (M.D. Tenn. July 9, 2007), *available at* http://www.tnmd.uscourts.gov/files/AO_174_E-Discovery.pdf.

35. W.D. PA. LOCAL CT. R. 26.2.C.1, http://www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

### *B. Relevant Sources and Types of Documents*

If knowledge is power, counsel who come into the Rule 26(f) conference understanding their clients' data sources are at a significant strategic advantage. Counsel will be able to make accurate representations about what ESI sources are available and raise concerns about sources that may pose access or production problems (e.g., databases, specialized propriety software).

As set forth below, federal courts are also raising the bar on their expectations for counsel's knowledge about data sources. Thus, the days when counsel could attend a Rule 26(f) conference and simply say, "I'll get back to you on that," are coming to an end.

| *Local Rules Regarding Knowledge of Relevant Sources and Types of Documents* | |
|---|---|
| Northern District of Oklahoma Guideline 1 | Prior to the Fed. R. Civ. P. 26(f) conference, counsel should become knowledgeable about their clients' information management systems and their operation, including how information is stored and retrieved. In addition, counsel should make a reasonable attempt to determine where ESI is likely to be located, including backup, archival and legacy data . . . .[36] |
| Western District of Pennsylvania Local Rule 26.2.A | Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall:<br>1. Investigate the client's Electronically Stored Information ("ESI"), . . . in order to understand how such ESI is stored [and] how it has been or can be preserved, accessed, retrieved, and produced.[37] |
| District of Maryland Suggested Protocol ¶ 8 | The following topics, if applicable, should be discussed at the [Rule 26(f) Conference]:<br>. . . .<br>C. . . . preservation of Meta-Data, preservation of deleted ESI, back up or archival ESI, ESI contained in dynamic systems, ESI destroyed or overwritten by the routine operation of systems, and, offsite and offline ESI (including ESI stored on home or personal computers). . . .<br>. . . .<br>H. The nature of information systems . . . . Counsel [should] be prepared to list the types of information systems used by the client and the varying accessibility, if any, of each system. . . . Counsel [should] be able to identify the software (including the version) used . . . , and the file formats . . . .[38] |

36. *Guidelines for Discovery of Electronically Stored Information ("ESI"), supra* note 17, at 1.

37. W.D. PA. LOCAL CT. R. 26.2.A.1, http://www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

38. *Suggested Protocol for Discovery of Electronically Stored Information ("ESI"),*

| *Local Rules Regarding Knowledge of Relevant Sources and Types of Documents* | |
|---|---|
| Northern District of Ohio Default Standard ¶ 2 | Prior to the Rule 26(f) conference, parties shall exchange the following information:<br>. . . .<br>b. A list of each relevant electronic system . . . .<br>c. The name of the individual . . . most knowledgeable regarding that party's electronic document retention policies . . . , as well as a general description of the party's electronic document retention policies . . . .[39] |
| Middle District of Tennessee Default Standard ¶ 2 | At or before the Rule 26(f) conference . . . , the parties shall exchange and discuss the following information:<br>. . . .<br>b. A list of each relevant electronic system . . . ;<br>c. The name of the individual . . . most knowledgeable regarding that party's electronic document retention policies . . . and a general description of each system . . . .[40] |
| Eastern District of Pennsylvania Order ¶ 2 | Prior to the Rule 26(f) conference, the parties shall exchange the following information:<br>. . . .<br>b. a list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system.[41] |
| Middle District of Pennsylvania Local Rule 26.1(a) | Prior to the [pretrial] conference . . . , counsel for the parties shall inquire into the computerized information-management systems used by their clients . . . , including how information is stored and how it can be retrieved.[42] |
| District of Delaware Bankruptcy Court Local Rule 7026-3(b) | [P]rior to the Rule 26(f) conference, the parties shall exchange the following information:<br>. . . .<br>(ii) A list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system.[43] |

*supra* note 16, at 18, 21.

39. *Default Standard for Discovery of Electronically Stored Information ("E-Discovery"), supra* note 32, at 2.

40. Order No. 174, *supra* note 34, at 1.

41. *Order Governing Electronic Discovery*, *supra* note 16, ¶ 2(b).

42. M.D. PA. LOCAL CT. CIV. R. 26.1(a), http://www.pamd.uscourts.gov/sites/default/files/local_rules/LR120112.pdf.

43. BANKR. D. DEL. LOCAL CT. R. 7026-3(b)(ii), http://www.deb.uscourts.gov/sites/default/files/local_rules/Local_Rules_2013.pdf.

| *Local Rules Regarding Knowledge of Relevant Sources and Types of Documents* | |
|---|---|
| Western District of Pennsylvania Bankruptcy Court Local Rule 7026-1(c) | At least seven (7) days prior to the first pretrial conference, the parties shall exchange the following:<br>. . . .<br>(4) A list of each relevant electronic system . . . in place at all relevant times and a general description of each system, including: (a) the nature, (b) scope, (c) character, (d) organization, (e) formats employed in each system, and (f) whether the electronic documents are of limited accessibility . . . .[44] |

### *C. Collection and Search Protocol*

One of the biggest cost drivers[45] of modern discovery is the collection and search protocols the parties agree upon during the meet and confer. At the outset, agreements on the scope of the collection efforts (e.g., how many custodians will be collected from, will the collection include backup tapes) will determine the size of discoverable material. From that point, agreements on search protocols—keywords, date restrictions, de-duping,[46] filtering, sampling, concept clustering, and/or predictive coding—will determine how many documents will be reviewed and ultimately produced to the other side.

In recognition that the collection and search protocols can have a tremendous impact on whether discovery will exceed the value of the case, federal courts are increasingly pushing the parties

44. BANKR. W.D. PA. LOCAL CT. R. 7026-1(c), http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule7026-1.pdf.

45. *See* LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES app. 1, at 13–15 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (noting that a voluntary survey of Fortune 200 companies revealed that discovery costs averaged between $621,880 and $2,993,567 from 2006 to 2008 for cases where the litigation expenses exceeded $250,000 (excluding settlement or judgment)). *See generally* NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY (2012), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf (determining per gigabyte cost for processing, analysis, and review of ESI).

46. De-duping is the process whereby duplicate documents (especially e-mails) are removed from a document set in order to reduce the amount of information to be reviewed. *See De-duplication*, EDRM, www.edrm.net/resources/gloassaries/gloassary/d/de-duplication (last visited Dec. 22, 2013).

to work collaboratively to bring discovery down to size through reasonable collection and search efforts:

| *Local Rules Collection and Search Protocols* | |
|---|---|
| Seventh Circuit Principles 2.04–2.05 | *Principle 2.04 (Scope of Preservation)*<br>. . . .<br>(d) [lising categories of ESI generally not discoverable]<br>. . . .<br><br>*Principle 2.05 (Identification of [ESI])*<br>(a) At the Rule 26(f) conference . . . parties shall discuss potential methodologies for identifying ESI for production.<br>(b) Topics for discussion may include . . . :<br>(1) eliminat[ing] duplicative ESI . . . ;<br>(2) filter[ing] data based on . . . date ranges . . . [or] custodian . . . ; and<br>(3) us[ing] keyword searching . . . or other advanced culling technologies.[47] |
| Northern District of Illinois Standing Order §§ 2.04(d), 2.05(a)–(b) | [Same as Seventh Circuit Principles 2.04(d), 2.05(a)–(b)].[48] |
| District of Maryland Suggested Protocol ¶ 8 | The following topics, if applicable, should be discussed at the [Rule 26(f) Conference]:<br>. . . .<br>K. Search methodologies . . . such as . . . key word searches[;] . . . sampling . . . ; limitations on the time frame . . . ; limitations on the fields or document types to be searched; [and] limitations regarding whether back up, archival, legacy or deleted ESI is to be searched . . . .[49] |
| District of Kansas Guidelines 16–17 | [At the Rule 26(f) conference:]<br>16. Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol. . . .<br>17. Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.[50] |

47. *Principles Relating to the Discovery of Electronically Stored Information*, *supra* note 30, at 4–5.

48. *Standing Order Relating to the Discovery of Electronically Stored Information*, *supra* note 33, at 5–6.

49. *Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 22.

50. *Guidelines for Cases Involving Electronically Stored Information [ESI]*, D. KAN. 6–7, http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited Dec. 23, 2013).

| *Local Rules Collection and Search Protocols* | |
|---|---|
| Northern District of Oklahoma Guideline 4 | During the Fed. R. Civ. P. 26(f) conference . . . :<br>. . . .<br>(b) Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol.<br>(c) Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.[51] |
| Northern District of Ohio Default Standard ¶ 5 | [T]he parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the [ESI]. The parties shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched . . . .[52] |
| Eastern District of Pennsylvania Order ¶ 5 | [Same as Northern District of Ohio Default Standard ¶ 5].[53] |
| Middle District of Tennessee Default Standard ¶ 5 | [T]he parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete . . . search of the [ESI]. The parties shall use their best efforts to reach agreement as to the method of searching and the words, terms, and phrases to be searched . . . .[54] |
| Western District of Pennsylvania Bankruptcy Court Local Rule 7026-1(e) | [T]he party shall disclose any restrictions as to scope and method which might affect its ability to conduct a complete search [of the ESI]. The parties shall reach an agreement as to the method of searching, and the words, terms, and phrases to be searched . . . .[55] |
| District of Delaware Bankruptcy Court Local Rule 7026-3(e) | [T]he parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the [ESI]. The parties shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched . . . .[56] |

51. *Guidelines for Discovery of Electronically Stored Information ("ESI"), supra* note 17, at 1–2.

52. *Default Standard for Discovery of Electronically Stored Information ("E-Discovery"), supra* note 32, ¶ 5.

53. *Order Governing Electronic Discovery*, *supra* note 16, ¶ 5.

54. Order No. 174, *supra* note 34, at 2.

55. BANKR. W.D. PA. LOCAL CT. R. 7026-1(e), http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule7026-1.pdf.

56. BANKR. D. DEL. LOCAL CT. R. 7026-3(e), http://www.deb.uscourts.gov/sites/default/files/local_rules/Local_Rules_2013.pdf.

### *D. Metadata*

It is generally understood that metadata must be produced in discovery. However, that is about all that is agreed upon. Some commentators, such as Craig Ball, have argued for nothing short of native production—where all the metadata is necessarily intact.[57] That said, static image productions (TIFF or PDF) with load files containing selected fields of metadata remain the norm. If the parties opt for a static image production, they will need to determine which metadata fields will be included in the load file. Additionally, as noted below, courts generally require a party making a static image production to maintain a complete set of native files in case additional metadata is later needed.

| *Local Rules Regarding Metadata* | |
|---|---|
| Sedona Conference Principle 12 | [P]roduction should . . . tak[e] into account the need to produce reasonably accessible metadata . . . .[58] |
| District of Maryland Suggested Protocol ¶ 8.A.3 | [T]he parties should collect and produce [electronic] files in Native File formats in a matter that preserves the integrity of . . . the contents of the file [and] the Meta-Data . . . .[59] |
| District of Kansas Guideline 18 | [At the Rule 26(f) conferences] [c]ounsel should discuss whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege . . . .[60] |
| Northern District of Oklahoma Guideline 4(d) | The parties should discuss at the Fed. R. Civ. P. 26(f) conference whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding attorney-client privilege . . . .[61] |

57. Craig Ball, *Are They Trying to Screw Me?*, BALL IN YOUR COURT (Oct. 9, 2012), http://ballinyourcourt.wordpress.com/2012/10/09/are-they-trying-to-screw-me/.

58. THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 60 (Jonathan M. Redgrave et al. eds., 2d ed. 2007).

59. *See Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 17.

60. *Guidelines for Cases Involving Electronically Stored Information [ESI]*, *supra* note 50, at 7.

61. *Guidelines for Discovery of Electronically Stored Information ("ESI")*, *supra* note 17, at 2.

### *E. Production Protocol: Format*

Closely related to the issue of metadata is the form of production. A full native production[62] is relatively straightforward, but can present obstacles to Bates stamping, confidentiality endorsements, redaction, and privilege review.[63] Accordingly, most parties still opt for a half-native, half-static image production with Excel spreadsheets and PowerPoint presentations produced in native format, and the remainder of the documents produced in TIFF or PDF with accompanying load files for metadata. Local rules have generally endorsed this bifurcated production format so long as the parties maintain a full set of native files.

| *Local Rules Regarding Format for Document Protection* | |
|---|---|
| Seventh Circuit Principles 2.01, 2.06 | *Principle 2.01*<br>(a)(3) [Parties are to consider] the formats for preservation and production of ESI . . . .<br>*Principle 2.06*<br>(a) At the Rule 26(f) conference, . . . parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). . . .<br>(b) The parties should confer on whether ESI stored in a database . . . can be produced by querying the database for discoverable information, resulting in a report . . . .[64] |
| Northern District of Illinois Standing Order § 2.06 | (a) At the Rule 26(f) conference, . . . parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form).<br>(b) ESI stored in a database . . . often can be produced by querying the database for discoverable information, resulting in a report . . . .[65] |

62. A native production involves producing files in the format they were created and maintained (e.g., MS Word documents are produced as .doc or .docx files, MS Excel files are produced as .xls or .xlsx files, Adobe files are .pdf files).

63. Bates stamping, confidentiality endorsements, and redactions necessarily involve placing markings onto the pages of a document. If these markings were placed on a native document, the metadata would be altered. A static production (TIFF or PDF), by contrast, permits these markings. However, a static production will involve some loss of metadata since only those metadata fields selected for the load file will be produced. As for the privilege issues raised by native production, it is possible that metadata will contain privileged, secret, or sensitive information, which may compel the producing party to incur additional costs to review the metadata before production. *See* THE SEDONA CONFERENCE, *supra* note 58, at 62.

64. *Principles Relating to the Discovery of Electronically Stored Information*, *supra* note 30, at 2, 5.

| *Local Rules Regarding Format for Document Protection* | |
|---|---|
| District of Maryland Suggested Protocol ¶ 8.A.1 | [As a default], ESI should be produced to the Requesting Party as Static Images. . . . [T]he Producing Party should maintain a separate file as a Native File . . . .[66] |
| Northern District of Ohio Default Standard ¶ 6 | If . . . the parties cannot agree to the format . . . , [ESI] shall be produced . . . as image files (*e.g.*, PDF or TIFF). . . . [T]he producing party must preserve the integrity of the electronic document's contents . . . . [A] party must demonstrate a particularized need for production of [ESI] in [its] native format.[67] |
| Middle District of Tennessee Default Standard ¶ 6 | [Same as Northern District of Ohio Default Standard ¶ 6][68] |
| Eastern District of Pennsylvania Order ¶ 7 | [Same as Northern District of Ohio Default Standard ¶ 6][69] |
| District of Delaware Bankruptcy Court Local Rule 7026-3(f) | [Same as Northern District of Ohio Default Standard ¶ 6][70] |
| Western District of Pennsylvania Local Rule 26.2 Comment 7 | Regarding [Rule 26.2(C)(5)], the . . . format . . . for preserving ESI may differ from the . . . format . . . for producing ESI. For example, a party may preserve ESI in native format, and the parties may agree on production in a different format.[71] |
| Western District of Pennsylvania Bankruptcy Court Local Rule 7026-1(f) | Unless the parties otherwise agree, electronic documents shall be produced as image files, such as [PDF or TIFF]. The producing party shall preserve the integrity of the electronic document's contents . . . . For production of electronic documents in their native format, particularized need shall be shown.[72] |

65. *Standing Order Relating to the Discovery of Electronically Stored Information*, *supra* note 33, at 6.

66. *Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 17.

67. *Default Standard for Discovery of Electronically Stored Information ("E-Discovery")*, *supra* note 32, at 3.

68. Order No. 174, *supra* note 34, at 3.

69. *Order Governing Electronic Discovery*, *supra* note 16, ¶ 7.

70. BANKR. D. DEL. LOCAL CT. R. 7026-3(f), http://www.deb.uscourts.gov/sites/default/files/local_rules/Local_Rules_2013.pdf.

71. W.D. PA. LOCAL CT. R. 26.2.C.5 cmt. 7, http://www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

72. BANKR. W.D. PA. LOCAL CT. R. 7026-1(f), http://www.pawb.uscourts.gov

### *F. Production Protocol: Timing*

Given the volumes and different levels of accessibility, sequenced discovery (i.e., phased, tiered, bifurcated) is becoming more common. In certain types of cases, such as class actions, this phased approach results in class certification discovery followed by merits discovery.[73] However, federal courts are also pushing for phased discovery as a matter of course to drive down the costs and excessive waste in every case.[74] For example, some local rules now emphasize that parties should focus on where the most relevant information is located and only address secondary sources later.[75] Likewise, other courts draw a distinction between data that is accessible, which should be produced first, and not reasonably accessible data, which should only be produced—if at all—much later in the discovery process.[76]

/sites/default/files/lrules2013/LocalRule7026-1.pdf.

73. *See* Kreger v. Gen. Steel Corp., No. 07-575, 2008 WL 490582, at *1 n.2 (E.D. La. Feb. 19, 2008) (affirming bifurcation of class certification and merits discovery); Gates v. Rohm & Haas Co., No. 06-1743, 2007 WL 1366883, at *2 (E.D. Pa. May 3, 2007) (affirming bifurcated class and merits discovery); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 21.14, at 256 (4th ed. 2006) ("Courts often bifurcate discovery between certification issues and those related to the merits of the allegations.").

74. *See* Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) ("[T]he court . . . may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and lease [sic] expensive sources." (quoting The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 297 (2010)); Barrera v. Boughton, No. 3:07cv1436(RNC), 2010 WL 3926070, at *3 (D. Conn. Sept. 30, 2010) (ordering a phased approach to custodian searches by starting with the three most relevant custodians rather than the forty proposed by plaintiffs).

75. *See, e.g.*, *Guidelines for the Discovery of Electronically Stored Information*, *supra* note 31, at 2.

76. *See, e.g.*, *Order Governing Electronic Discovery*, *supra* note 16.

| *Local Rules Regarding Timing of Production* | |
|---|---|
| Northern District of California Guideline 2.02(d) | At the required Rule 26(f) meet and confer conference, . . . the topics that the parties should consider discussing include . . . :<br>. . . .<br>d) The phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information and is postponed or avoided from sources less likely to contain relevant and discoverable information[.][77] |
| District of Maryland Suggested Protocol ¶ 8.M | [Parties should consider discussing the] need for two-tier or staged discovery of ESI . . . . [S]earches of or for ESI identified as not reasonably accessible should not be conducted until [all accessible data has been searched and produced]; and . . . requests for . . . not reasonably accessible [data] should be narrowly focused.[78] |
| Eastern District of Pennsylvania Order ¶ 6 | Discovery of [ESI] shall proceed in the following sequenced fashion:<br>a. after receiving requests for document production, the parties shall search their documents, other than those identified as limited accessibility [ESI], and produce responsive [ESI] . . . ;<br>b. electronic searches of documents identified as of limited accessibility shall not be conducted until the initial [ESI] search has been completed; [and]<br>c. requests for information expected to be found in limited accessibility documents must be narrowly focused . . . .[79] |
| Northern District of Ohio Default Standard ¶ 4 | Discovery of relevant [ESI] shall proceed in a sequenced fashion.[80] |
| Middle District of Tennessee Default Standard ¶ 4 | Discovery of relevant [ESI] shall proceed in a sequenced fashion.[81] |

### *G. Privileged or Protected Material*

Issues regarding privilege remain one of the most vexing issues in discovery because of the costs involved. Review for privilege is

77. *Guidelines for the Discovery of Electronically Stored Information*, *supra* note 31, at 2.

78. *See Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 23.

79. *See Order Governing Electronic Discovery*, *supra* note 16, ¶ 6.

80. *Default Standard for Discovery of Electronically Stored Information ("E-Discovery")*, *supra* note 32, at 2.

81. Order No. 174, *supra* note 34, at 2.

disproportionately expensive[82] and often encourages collateral litigation over the adequacy of a party's privilege log. At the pretrial conference, parties should look to address the burdens and costs of privileged materials in two different ways. First, they should attempt to find ways to reduce the burdens associated with privilege logs through date-range limitations and agreements on formats. Second, they should discuss "clawback" or "quick peek" agreements that alleviate some of the burdens associated with reviewing privileged materials. Under the Federal Rules, parties may avail themselves of a Rule 502 protective order, which affords even greater protections against the inadvertent disclosure of privileged information.[83]

| *Local Rules Regarding Privilege and Protected Material* | |
|---|---|
| Seventh Circuit Principle 2.01(a) | [C]ounsel shall meet and discuss the application of the discovery process . . . . Among the issues to be discussed are:<br>. . . .<br>(5) . . . procedures . . . for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.[84] |
| District of Maryland Suggested Protocol ¶ 4.B | [Parties may provide a "quick peek" or establish a "clawback" agreement.][85] |
| District of Kansas Guideline 23 | [Parties may provide a "quick peek" or establish a "clawback" agreement.][86] |

82. One study has found that review for relevance, responsiveness, and privilege can account for as much as seventy-three percent of discovery budgets. *See* PACE & ZAKARAS, *supra* note 45, at xiv. Privilege review consumes a disproportionate amount of that percentage due to lower review rates for privileged documents and the additional costs associated with creating, editing, and finalizing privilege logs. *See* Mark A. Fuchs et al., *Hanging by a Thread: Save Your Litigation Budget and Privilege*, 27 ACC DOCKET 86, 88 (2009). With Federal Rule of Evidence 502, however, litigants in federal courts may now be able to take a less stringent (and less costly) approach to the review of privileged documents without fear of subject-matter waiver. *See* FED. R. EVID. 502.

83. FED. R. EVID. 502(b).

84. *Principles Relating to the Discovery of Electronically Stored Information*, *supra* note 30, at 2.

85. *See Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 4.

86. *See Guidelines for Cases Involving Electronically Stored Information [ESI]*, *supra* note 50, at 7–8.

| *Local Rules Regarding Privilege and Protected Material* | |
|---|---|
| Northern District of Oklahoma Guideline 4(h) | [Parties may provide a "quick peek" or establish a "clawback" agreement.][87] |
| Northern District of California Guideline 2.02(e) | [At the Rule 26(f) conference, the parties should discuss the] potential need for a protective order and any procedures . . . for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) Order.[88] |

### *H. Not Reasonably Accessible Data*

Federal Rule of Civil Procedure 26(b)(2)(B) sets forth a two-tiered discovery process whereby a party does not need to provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.[89] A party seeking to invoke the protections of Rule 26(b)(2)(B) bears the burden of persuasion and should be prepared to discuss in some detail the burdens and costs associated with making this data accessible for discovery.[90] Consistent with this burden, some federal

87. *Guidelines for Discovery of Electronically Stored Information ("ESI")*, *supra* note 17, at 2–3.

88. *Guidelines for the Discovery of Electronically Stored Information*, *supra* note 31, at 2.

89. *See* Young v. Pleasant Valley Sch. Dist., No. 3:07cv854, 2008 WL 2857912, at *3 (M.D. Pa. July 21, 2008) (rejecting plaintiffs' request for production of e-mails from backup tapes because "[t]he burden and expense of rebuilding the district's e-mail system in order to provide the discovery requested by the plaintiffs, along with the additional and less expensive means available for plaintiffs to get this material[,] makes the plaintiffs' discovery request impractical"); Best Buy Stores, L.P. v. Developers Diversified Realty Corp., 247 F.R.D. 567, 571 (D. Minn. 2007) (holding that database backup tapes did not need to be restored where defendants had not argued the data was uniquely available on the tapes or that it could not be obtained more easily elsewhere).

90. *See, e.g.*, Cartel Asset Mgmt. v. Ocwen Fin. Corp., No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010) (criticizing defendants for being non-specific about the burdens of producing allegedly inaccessible information from backup tapes); *In re* Zurn Pex Plumbing Prods. Liab. Litig., MDL No. 08-1958 ADM/RLE, 2009 WL 1606653, at *2 (D. Minn. June 5, 2009) (holding that the affidavit of the attorney who was not expert on document search and retrieval was insufficient to show undue burden under Rule 26(b)(2)(B)); Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532RSL, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008) ("[T]he responding party should present details sufficient to allow the requesting party to evaluate the costs and benefits of

courts, such as those noted below, now require the parties to discuss—with different levels of specificity—whether ESI is not reasonably accessible.

| *Local Rules Regarding Accessibility of Data* | |
|---|---|
| Western District of Pennsylvania Local Rule 26.2.C.4 | [At the Rule 26(f) conference, the parties should discuss the] [a]ccessibility of ESI, including but not limited to the accessibility of back-up, deleted, archival, or historic legacy data.[91] |
| District of Maryland Suggested Protocol ¶ 8.E | [At the Rule 26(f) conference, the parties should discuss] [i]dentification of ESI that . . . is not reasonably accessible without undue burden or cost, . . . and the reasons . . . that the ESI . . . is not reasonably accessible without undue burden or cost, the methods of storing and retrieving that ESI, and the anticipated costs and efforts involved in retrieving that ESI.[92] |
| District of Kansas Guideline 12.a | Counsel should attempt to determine if any responsive ESI is not reasonably accessible . . . .[93] |

### *I. Costs and Cost Allocation*

Although the rule that the producing party pays for the costs of its own discovery still prevails, courts are becoming more sensitive to the cost issues raised by e-discovery. In particular, courts are pushing litigants to refrain from wasteful discovery disagreements[94] by using the meet-and-confer process to define the

searching and producing the identified sources."); O'Bar v. Lowe's Home Centers, Inc., No. 5:04-cv-00019-W, 2007 WL 1299180, at *5 n.6 (W.D.N.C. May 2, 2007) ("No party should object to the discovery of ESI pursuant to Fed. R. Civ. P. 26(b)(2)(B) on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with particularity, and not in conclusory or boilerplate language. Wherever the term 'reasonably accessible' is used herein, the party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention.").

91. W.D. PA. LOCAL CT. R. 26.2.C, http://www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

92. *Suggested Protocol for Discovery of Electronically Stored Information ("ESI")*, *supra* note 16, at 20.

93. *Guidelines for Cases Involving Electronically Stored Information [ESI]*, *supra* note 50, at 5.

94. In particular, courts are increasingly wielding the Sedona Conference Cooperation Proclamation as a club to compel obdurate attorneys to reach agreements on discovery matters. *See, e.g.*, Tadayon v. Greyhound Lines, Inc., No. 10-1326 (ABJ/JMF), 2012 WL 2048257, at *6 (D.D.C. June 6, 2012)

reasonable scope of discovery (which opens the door to cost shifting for unreasonable requests) and to find creative ways to reduce the burdens of discovery through shared vendors, common repositories, limited privilege logs, and effective use of technology.[95] For example, the Northern District of California has prepared Guidelines for the Discovery of Electronically Stored Information, which, in part, highlight the potential utility of exploring

> [o]pportunities to reduce costs and increase efficiency and speed, such as by conferring about the methods and technology used for searching ESI to help identify the relevant information and sampling methods to validate the search for relevant information, using agreements for truncated or limited privilege logs, or by sharing expenses like those related to litigation document repositories.[96]

### *J. ESI in Custody or Control of Third Parties*

The fact that ESI resides in the possession of a third party does not necessarily alleviate a party from the burdens of preservation and production. If ESI is in the "possession, custody, and control"[97] of a litigant, arrangements will have to be made to preserve, collect, and ultimately review these data.

ESI in the custody or control of third parties raises issues that go far beyond the run-of-the-mill outsourcing of core functionalities (e.g., payroll, HR). In the era of mobile devices, increasing amounts of company data reside with third parties.

(announcing a new "sheriff in town" and compelling the parties to reach agreements on discovery matters); Moore v. Publicis Groupe, 287 F.R.D. 182, 184 (S.D.N.Y. 2012) (endorsing the approach that the counsel seek agreement with opposing counsel on the use of predictive coding); Am. Fed'n of State Cnty. & Mun. Emps. v. Ortho-McNeil-Janssen Pharms., Inc., No. 08-cv-5904, 2010 WL 5186088, at *5 (E.D. Pa. Dec. 21, 2010) (admonishing parties for failing to cooperate during discovery and ordering them to resolve discovery disagreements).

95. One federal judge, Judge Waxse (D. Kan.), has a creative way of pushing the litigants to find reasonable solutions: he informs the litigants that he will videotape their next meet and confer and determine who is being reasonable. *See* Jason Krause, *Rockin' Out the E-Law*, 94 A.B.A. J. 48, 48 (2008).

96. *Guidelines for the Discovery of Electronically Stored Information*, *supra* note 31, at 2.

97. FED R. CIV. P. 34(a)(1).

For example, an employee using an iPhone for work may have (inadvertently) stored relevant company information in the iCloud. Some companies now use Gmail as their e-mail system, which results in company e-mails being stored on Google's servers. While some of these e-discovery issues will be resolved through contractual terms between the company and the third party, each third-party data source will have to be investigated to determine the proper approach for preservation, collection, and production. At least one federal court (the District of Kansas) has attempted to address this issue, providing that "[c]ounsel should attempt to agree on an approach to ESI stored by third parties," including "files stored on cloud servers [and] social networking data."[98]

### *K. Confidentiality and Protective Orders*

Many cases will involve confidential information. In order to prevent disclosure of confidential information, parties should consider entering into a protective order to govern who has the right to view and use this confidential information. In many cases, this protective order can also include provisions regarding the inadvertent production of privileged information.[99]

### *L. Forensic Preservation & Searching*

Forensic preservation[100] and searching will not be needed for most cases. However, some cases may include issues that require or call for forensic methods, such as employment cases or cases involving theft of data. If forensic searching becomes necessary, the parties should attempt to agree on the collection and search protocols, privacy and privilege protections, and how the data is to be reviewed. That said, as noted by *The Sedona Principles*, forensic preservation should be considered an extraordinary measure due to the burdens and costs involved.[101]

98. *Guidelines for Cases Involving Electronically Stored Information [ESI]*, *supra* note 50, ¶ 19, at 7.

99. *See, e.g.*, D. MINN. LOCAL CT. R. Form 5.

100. Forensic preservation involves making an exact bit-by-bit copy of a computer drive, including slack and unallocated space. Forensic preservation is more expensive and time consuming than typical preservation activities.

101. THE SEDONA CONFERENCE, *supra* note 58, at 47 (comment 8.c.) ("While [forensic data collection] is clearly appropriate in some circumstances, it should

### *M. Pretrial Discovery Conference Checklist*

With the above in mind, the goal of the following sample checklist is to provide a roadmap for discussion with opposing counsel during the initial pretrial discovery conference about ESI and the process the parties will undertake to preserve, review, and produce relevant ESI.

In general, both the court and the parties will be better served by clear and open communications at this early stage of litigation. In order to effectively discuss ESI, it is imperative for counsel to go into the pretrial discovery conference with a fair amount of knowledge of his or her client's preservation efforts, electronic systems, and procedures for maintaining ESI. Thus, to be the most efficient and effective, this checklist should be used in conjunction with the litigation-hold checklist in order to fully address all preservation questions.[102]

In addition, it likely will be beneficial to go into the discovery conference with an already prepared draft of a proposed order with applicable deadlines and proposed ESI protocols (such as custodian lists and key word lists). Preparing an agenda beforehand, and circulating it to opposing counsel, will also be beneficial both in terms of time and in controlling the discussion.

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *Preservation & Litigation Hold* | • Confirm that the litigation hold and preservation notice were issued and when they were issued.<br>• Discuss to whom the litigation hold was issued.[103]<br>• Discuss any potential updates to hold.<br>• Discuss the routine destruction practices (to understand and set expectations about which documentation is no longer available). |
| *Relevant Sources & Types of Documents* | • Discuss the clients' relevant electronic system and uses.<br>• Discuss the typical software used (e.g., Outlook, Lotus Notes, Word, WordPerfect, Excel, Access).<br>• Discuss any special software and databases.<br>• Discuss any inaccessible data. |

not be required unless exceptional circumstances warrant the extraordinary cost and burden. When ordered, it should be accompanied by an appropriate protocol or other protective measures that take into account privacy rights, attorney-client privilege, and the need to separate out and ignore nonrelevant information.").

102. *See supra* Part I.C.

103. *See supra* text accompanying note 29.

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *Collection & Search Protocol, Including Sources to Collect From & Any Search Limitations* | • Discuss the custodians list.<br>▪ Create or discuss custodian list, including, for example: (1) criteria for custodians, (2) number of custodians to be searched, (3) which party is responsible for choosing the custodians, (4) ability of opposing counsel to add or subtract custodians, and (5) procedure to follow in case of dispute regarding the number or identity of custodians.<br>• Discuss the collection and search limitations.<br>▪ Possible limitations:<br>o Date range;<br>o De-duplication (global or within custodian);<br>o Other limitations used to filter information, such as limitations tied to metadata (e.g., field or file types to be searched);<br>o Use of predictive coding/key words:<br>• Process for creating a key word search or other filter protocol, including: (1) responsibility for suggesting key words, (2) review and editing rights, and (3) procedure to follow in case of dispute regarding the key words;<br>• Testing, sampling, and vetting of proposed key words and filters.<br>o Limitations on whether backup, archival, legacy, or deleted ESI will be searched;<br>o What search data will be shared (e.g., responsiveness rates, de-duplication reports, "hit reports");<br>o Any variance to the general process (e.g., by specific custodian or type of data). |
| *Metadata* | • Identify what, if any, metadata fields will be preserved or produced.<br>• Discuss any known metadata issues, including corruption. |

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *Production Protocol: Format* | • General production format (i.e., native; image only; image and text; image, text, and metadata; paper);<br>• Provision of a load/unitization file (and format of the load or unitization file (e.g., Summation DII and .csv));<br>• Any exceptions (e.g., generally produced image and text, except Excel spreadsheets or PowerPoint presentations produced in native format; native production upon request due to quality of image);<br>• Searchability of redacted ESI files (i.e., production of redacted documents with remaining text searchable);<br>• Handling of encrypted or password-protected ESI;<br>• Bates-numbering scheme, including handling Bates numbering of documents produced in native format;<br>• Production media (e.g., CD, DVD, hard drive). |
| *Production Protocol: Timing* | • Phased/bifurcated (e.g., class certification discovery followed by merits discovery);<br>• Rolling production;<br>• Any prioritization (e.g., by custodian or data sources);<br>• Deadlines. |
| *Privileged or Protected Material* | • Discuss the timing of production of privilege log;<br>• Discuss the date range limitation on logging privileged material (e.g., no need to log once complaint filed);<br>• Discuss the level of detail for privilege log;<br>• Discuss the procedure in case of inadvertent production:<br>▪ Nonwaiver agreement;<br>▪ Clawback procedure (e.g., document returned upon request; availability of a motion to compel production and procedure for such a motion). |
| *Not Reasonably Accessible Data* | • Disclose any data sources and the type of data that will not be collected due to inaccessibility. |
| *Costs & Cost Allocation* | • Discuss the potential costs of collecting, searching, and producing ESI;<br>• Discuss any upfront shifting and sharing of ESI costs and basis for shifting or sharing (i.e., one party demands ESI discovery over and above the norm; at this early stage, this would not include a discussion of cost shifting as a sanction for failure to produce or dilatory tactics);<br>• Explore any possible cost-saving measures (aside from previously discussed limitations to scope)—examples:<br>▪ Common e-discovery vendor and creation of protocols to ensure no unauthorized access to opposing party's information;<br>▪ Shared document repository. |

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *ESI in Custody or Control of Third Parties* | • Identify any client data maintained externally, and discuss collection and production efforts and timing. |
| *Confidentiality & Protective Orders* | • Discuss types of confidential data and basis for confidentiality designation;<br>• Propose protective order (consider preparing draft in anticipation of the conference). |
| *Forensic Preservation & Searching* | • If the case calls for forensic discovery, counsel should discuss possible forensic preservation and searching methods, including:<br>▪ Identification of a vendor to undertake forensic efforts;<br>▪ Discussion of the role of the vendor (i.e., joint, court expert, retained by one party);<br>▪ Collection protocols and limitations;<br>▪ Search protocols and limitations;<br>▪ Review (and timing of review) of search results by producing party;<br>▪ Production of search results and format.<br>• Retention of searched information;<br>• Costs and cost sharing. |
| *Other Potential Issues* | • Identify any translation issues:<br>▪ Protocol;<br>▪ Potential cost saving: joint translator service.<br>• Identify any ESI located internationally (and discuss applicability of foreign data privacy laws, for example). |
| *Continuing Communication* | • Consider scheduling periodic discovery conferences to discuss discovery status and issues. |

### *N. Conference with the Court*

The goal of this final sample checklist is to provide a possible roadmap for issues to address with the court during the initial pretrial conference regarding the parties' positions and agreements about ESI, and for possible inclusion in a court-approved protocol or order concerning ESI. Of course, in order to fully address these issues with the court, it is necessary to first discuss them with opposing counsel. Generally speaking, though, the actual discussion with the court will not include all of the topics discussed with opposing counsel given the more limited time available. That being said, the court may request that counsel submit proposed ESI protocols in which case the parties can address a broader range of topics.

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *Preservation & Litigation Hold* | • Confirm the litigation hold and preservation notice were issued;<br>• Discuss when the litigation hold was issued and to whom;[104]<br>• Discuss any need for a court-issued preservation order.[105] |
| *Collection & Search Protocol, Including Sources to Collect from & Any Search Limitations* | • Discuss in any protocol or court order regarding the custodians list; for example,<br>▪ Need for court order regarding (1) the number of custodians to be searched; (2) which party is responsible for choosing the custodians; (3) the ability of opposing counsel to add or subtract custodians; and/or (4) the procedure to follow in the case of a dispute regarding identity of custodians.<br>• Discuss in any protocol or court order regarding collection and search limitations and any variance to general process (e.g., by specific custodian or type of data). |
| *Metadata* | • Identify in the potential protocol or court order what, if any, metadata fields will be preserved and produced. |
| *Production Protocol, Including Format & Timing* | • Address in the protocol or court order the format of production; (note that this could also be addressed in the document requests.)[106]<br>• Discuss the timing and deadlines for production, including any phasing or prioritization of discovery. |
| *Identification & Logging of Privileged & Redacted Material* | • Address in the protocol or court order the timing of production of privilege log and detail to be provided therein;<br>• Address and codify the procedure in case of inadvertent production; for example:<br>▪ Nonwaiver agreement;<br>▪ Clawback procedure (e.g., document returned upon request; availability of a motion to compel production and procedure for such a motion). |

104. *See supra* text accompanying note 29.

105. While it is certainly up to counsel to demand or accede to a request for a court-issued preservation order, some consideration should be given to the fact that such an order subjects a potentially non-preserving party (possibly through inadvertence) to sanctions for contempt. *See, e.g.*, FED. R. CIV. P. 37(d). Generally speaking, unless there is a concern about preservation, such an order may not be necessary.

106. *See* FED. R. CIV. P. 34(b)(1).

| *Issue* | *Potential Topics to Discuss* |
|---|---|
| *Costs & Cost Allocation* | • Discuss the potential costs of collecting, searching, and producing ESI;<br>• Address or tee up arguments regarding any upfront shifting and sharing of ESI costs and basis for such shifting or sharing. |
| *Not Reasonably Accessible Data* | • Address and include, as necessary, in the protocol or court order the identity of any data sources and the type of data that will not be collected due to inaccessibility. |
| *Confidentiality & Protective Orders* | • Address the need for and submit the proposed protective order. |
| *Continuing Communication* | • Address any need for scheduling periodic discovery conferences to discuss the discovery status and issues. |

## IV. CONCLUSION

In a perfect world, lawsuits would be won and lost on their merits. In the real world, however, a significant percentage of lawsuits never even reach the merits because of mistakes and errors made during discovery. For some litigants, the discovery conference can mark the beginning of a long and painful process whereby discovery issues begin to derail the case with accusations of spoliation, discovery motion practice, misrepresentations to the court, and endless meet and confers. No checklist can guarantee smooth sailing, but litigants who come prepared to address all the topics set forth in the Litigation-Hold, Pretrial-Discovery-Conference, and Court-Conference Checklists stand a much better chance of avoiding the horror stories that have come to typify discovery in the electronic age.