**Electronic Discovery**

Jack Snyder, MD, JD, PhD, FCLM
Past President, American College of Legal Medicine
25 February 2017

---

**Definition**

- Electronic discovery (sometimes known as e-discovery, ediscovery, eDiscovery, or e-Discovery) is the electronic aspect of identifying, collecting and producing electronically stored information (ESI) in response to a request for production in a lawsuit or investigation. ESI includes, but is not limited to, emails, documents, presentations, databases, voicemail, audio and video files, social media, and web sites.

---

**Electronic Discovery - Roadmap**

- Preservation of ESI
- Meet & Confer (Rule 26f) & Initial Scheduling Conference (Rule 16)
- Collection of ESI
- Search & Review of ESI
- Production of ESI

---

**Electronic Discovery - Roadmap**

- Challenges to E-Discovery
- Costs of E-Discovery
- Spoliation & Sanctions
- Ethical Duties
- Privileges
All litigation, even the smallest of cases, involves eDiscovery.

The FRCP (and many state court rules) cover eDiscovery and require litigators and litigants to deal with it as a regular part of litigation.

You must know the basic terminology of eDiscovery (see Sedona Conference Glossary).

Determine the relevant universe of your client’s ESI before the first request for production hits your desk.
Ten E-Discovery Essentials - ABA

• Issue litigation hold letters to custodians
• Send litigation hold warmer letters at frequent but reasonable intervals
• Enter into a production agreement at the onset of litigation
• Update your definitions in your discovery requests (be proactive)
• Understand proportionality (right-sizing) and how it apply to your case
• What review tool will you use, if any? (linear [keywords, sampling], TAR [predictive coding, artificial intelligence])

State Bar of California Standing Committee on Professional Responsibility and Conduct (2015)

• Initially assess e-discovery needs and issues, if any
• Implement/cause to implement appropriate ESI preservation procedures
• Analyze and understand a client's ESI systems and storage

State Bar of California Standing Committee on Professional Responsibility and Conduct (2015)

• Advise the client on available options for collection and preservation of ESI
• Identify custodians of potentially relevant ESI
• Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan (cooperate)

State Bar of California Standing Committee on Professional Responsibility and Conduct (2015)

• Perform data searches
• Collect responsive ESI in a manner that preserves the integrity of that ESI
• Produce responsive non-privileged ESI in a recognized and appropriate manner

N.D. Calif. - Guideline 1.01 (Purpose)

Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using the text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay. These Guidelines should guide the parties as they engage in electronic discovery.

N.D. Calif. - Guideline 1.01 (Purpose)

The purpose of these Guidelines is to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring that information subject to discovery is preserved and produced to allow for fair adjudication of the merits. At all times, the discovery of ESI should be handled by the parties consistently with Fed. R. Civ. P. 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding." These Guidelines also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention.
A) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.

B) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

D) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

C) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.

N.D. Calif. - Guideline 2.01 (Preservation)

- B) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

- D) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

N.D. Calif. - Guideline 1.02 (Cooperation)

- The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties’ Fed. R. Civ. P. 26(f) conference.

N.D. Calif. - Guideline 2.01 (Preservation)

- At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.

- B) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

- D) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

N.D. Calif. - Guideline 2.02 (Rule 26[f] Meet & Confer)

- At the required Rule 26(f) meet and confer conference, when a case involves electronic discovery, the topics that the parties should consider discussing include: 1) preservation; 2) systems that contain discoverable ESI; 3) search and production; 4) phasing of discovery; 5) protective orders; and 6) opportunities to reduce costs and increase efficiency. In order to be meaningful, the meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case. Some of all of the following details may be useful to discuss, especially in cases where the discovery of ESI is likely to be a significant cost or burden.

N.D. Calif. - Guideline 1.03 (Discovery Proportionality)

- The proportionality standard set forth in Fed. R. Civ. P. 26(f)(1) should be applied to the discovery plan and its elements, including the preservation, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider factors that include the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information; the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. To further the application of the proportionality standard, discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

N.D. Calif. - Guideline 2.01 (Preservation)
In most cases, the meet and confer process will be aided by participation of:

- An e-discovery liaison as defined in this Guideline, if a dispute arises involving the discovery of ESI (including metadata). The e-discovery liaison may be an attorney (in-house or outside counsel), an employee of the party, or a third party consultant. The e-discovery liaison should be knowledgeable about the party’s systems, including how potentially relevant data is stored and retrieved. The e-discovery liaison will assist the parties in more efficient and cost-effective discovery, including the location, nature, and accessibility of potentially relevant data.

- The Court, at the request of either party or the Court’s own motion, for the purpose of ensuring that the parties have considered all possible means for addressing a dispute.

- If a dispute cannot be resolved at the e-discovery liaison level, a formal meet and confer will be scheduled by the Court.

- The e-discovery liaison is responsible for maintaining a record of the meet and confer discussions, if appropriate.

- Faith in the meet and confer process, the Court may require additional meet and confer discussions, if appropriate.

- Counsel, or others knowledgeable about the parties’, electronic discovery issues, should be involved in or made available to this process. Counsel, or others knowledgeable about the parties’ electronic discovery issues, should be involved in or made available to this process. Counsel, or others knowledgeable about the parties’ electronic discovery issues, should be involved in or made available to this process. Counsel, or others knowledgeable about the parties’ electronic discovery issues, should be involved in or made available to this process.

- All information, electronic or otherwise, exchanged or produced in a meet and confer process is privileged, as provided by Rule 502(d) or (e), including any Order by the Court. The information exchanged or produced in a meet and confer process is privileged, as provided by Rule 502(d) or (e), including any Order by the Court.

- Any difficulties related to preservation.

- The sources, scope, type, and size of ESI that has been and will be preserved—including data types, identity and number of potentially relevant data elements, and other data that help define the scope of preservation—are privileged, as provided by Rule 502(d) or (e), including any Order by the Court.

- Any difficulties related to preservation.

- The sources, scope, type, and size of ESI that has been and will be preserved— including data types, identity and number of potentially relevant data elements, and other data that help define the scope of preservation—are privileged, as provided by Rule 502(d) or (e), including any Order by the Court.

- Any difficulties related to preservation.

- The sources, scope, type, and size of ESI that has been and will be preserved—including data types, identity and number of potentially relevant data elements, and other data that help define the scope of preservation—are privileged, as provided by Rule 502(d) or (e), including any Order by the Court.

- Any difficulties related to preservation.

- The sources, scope, type, and size of ESI that has been and will be preserved—including data types, identity and number of potentially relevant data elements, and other data that help define the scope of preservation—are privileged, as provided by Rule 502(d) or (e), including any Order by the Court.

- Any difficulties related to preservation.
N.D. Calif. - Guideline 2.04
(Electronic Discovery Liaison(s))

- a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;
- b) Be knowledgeable about the party’s e-discovery efforts;
- c) Be familiar with, or gain knowledge about, the party’s electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with, or gain knowledge about, the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

N.D. Calif. - Guideline 3.01
(Judicial Expectations of Counsel)

- It is expected that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

N.D. Calif. - Guideline 3.01
(Judicial Expectations of Counsel)

- c) These Guidelines and the Court’s Checklist for Rule 26(f) Meet and Confer Regarding ESI and Stipulated E-Discovery Order for Standard Litigation.

Ethical Duties in Electronic Discovery

- Duty of Technological Competence
- Duty of Confidentiality
- Duty to Respect/Preserve Rights of Third Parties
- Duty of Supervision
- Duty of Candor
- Duty of Fairness
- Duty of Cooperation
- Duty of Preservation

N.D. Calif. – ESI Checklist (Preservation)

- The ranges of creation or receipt dates for any ESI to be preserved
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B)

N.D. Calif. – ESI Checklist (Preservation)

- The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved
- Whether or not to continue any interdiction of any document destruction program, such as ongoing measures of e-mails, voicemails, and other electronically-recorded material
N.D. Calif. – ESI Checklist (Preservation)

• The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.)
• The number of custodians for whom ESI will be preserved
• The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases
• Any disputes related to scope or manner of preservation

N.D. Calif. – ESI Checklist (Liaison, Locations, Types of Systems)

• The identity of each party's e-discovery liaison
• Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems)
• Description of systems in which potentially discoverable information is stored.

N.D. Calif. – ESI Checklist (Liaison, Locations, Types of Systems)

• Location of systems in which potentially discoverable information is stored
• How potentially discoverable information is stored
• How discoverable information can be collected from systems and media in which it is stored

N.D. Calif. – ESI Checklist (Proportionality & Costs)

• The amount and nature of the claims being made by either party
• The nature and scope of burdens associated with the proposed preservation and discovery of ESI
• The likely benefit of the proposed discovery

N.D. Calif. – ESI Checklist (Proportionality & Costs)

• Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures
• Limits on the scope of preservation or other cost-saving measures
• Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case

N.D. Calif. – ESI Checklist (Search)

• The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery
• The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI
• Whether it is appropriate to conduct discovery of ESI in phases
• Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery
• Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided

N.D. Calif. – ESI Checklist (Production)

• The formats in which structured ESI (database, collaboration sites, etc.) will be produced
• The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.

MetaData Fields
(e.g., application, document [properties], e-mail, embedded, file system, user-added, vendor added)

• Data Sent: date message was sent
• Time Sent: time message was sent
• Subject: subject line of message
• To: address or addresses of recipient
• From: email address of sender
• CC: address(es) copied on message
• BCC: address(es) blind copied on message

• Attachments: Bates # ranges of attachments
• Bates, Begin: beginning Bates # (UPI) for pg. 1
• Bates, End: Bates # (UPI) for last page
• Attach, Begin: Bates # (UPI) for pg. 1 of first attachment
• Attach, End: Bates # (UPI) for last page of last attachment to parent document

3/10/17
N.D. Calif. – ESI Checklist (Privilege)

- How any production of privileged or work product protected information will be handled
- Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification
- Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production

Database Principles

- Scope of Discovery
- Validity
- Accessibility and Proportionality
- Data Authenticity
- Use of Test Queries and Pilots
- Form of Production

Electronic Discovery - Resources

- https://drive.google.com/file/d/0B00sEdI7vVExVW1TWExhSlRVWU0/view
- https://drive.google.com/file/d/0B00sEdI7vVExQzJ1X2VOQnpURjg/view

Electronic Discovery - Resources