

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

GUIDELINES FOR ESI CONFERENCES

I. Applicability.

These guidelines govern conferences under Fed. R. Civ. P. 26(f) with respect to discovery of electronically stored information (ESI) in:

- A. adversary proceedings to the extent set forth in the Court's *Order Setting Scheduling Conference and Establishing Procedures and Deadlines* and *Order Setting Filing and Disclosure Requirements for Pretrial and Trial*, and
- B. contested matters in which Fed. R. Civ. P. 26(f), is ordered under Fed. R. Bankr. P. 9014(c) to be applicable.

II. Preservation.

A party must preserve ESI (including metadata) – whether hosted locally, on a cloud-based platform, or through a third-party service provider – that may be relevant to pending or reasonably anticipated litigation, with the scope and timing of preservation determined on a case-by-case basis. Preservation discussions should occur as early as possible, but any event no later than the deadline to conduct an ESI conference under Local Rule 7026-2(a). Counsel must be prepared to discuss the good cause for preservation, as well as the costs and burdens of maintaining ESI, including relevant records-management policies.

III. Conduct of ESI Conference.

Parties must conduct an ESI Conference in good faith by the deadlines set forth in Local Rule 7026-2(a). If the status of the pleadings or pending motions prevents a meaningful discussion of specific topics, the parties must set a date to reconvene, exchange supplemental information by a date certain, or present the issue for court resolution. Parties are strongly encouraged to include their clients' information technology personnel and relevant vendors to ensure informed, practical planning.

IV. Required ESI Conference Topics.

The ESI Conference must address the following topics:

- A. Form or forms of ESI most likely to provide the information needed to establish relevant facts and whether alternative forms would satisfy the parties' needs while reducing burden. *See* Fed. R. Civ. P. 34(b).

- B. Locations and sources of relevant ESI, including custodians and their roles and responsibilities, as well as the availability of backups and disaster recovery resources.
- C. Reasonable steps to preserve ESI tailored to the claims and defenses.
- D. Relevant date ranges or time periods.
- E. Manner and forms of preservation and production, including any live database or application-based materials. *See* Fed. R. Civ. P. 34(b).
 - 1. The parties must address, where applicable, the preservation, collection, and production of:
 - a. mobile device messages and collaboration data (e.g., Slack, Teams, Google Chat, etc.) including channels, threads, edits, reactions, and attachments, and consider disabling autodeletion where appropriate;
 - b. social media and disappearing or temporary (ephemeral) messaging platforms (e.g., Signal, WhatsApp, Telegram, etc.);
 - c. ESI from former employees; and
 - d. usage logs, reports, and other data from connected devices and systems, including building access control systems, device access control systems, smart sensors, and other connected devices.
 - 2. Where discoverable information resides in databases, the parties must define the questions sought to be answered by the database queries, identify relevant tables and fields, and agree on export/report formats and data dictionaries before extraction.
- F. Metadata needs, including:
 - 1. the potential relevance of specific metadata fields;
 - 2. the importance of reasonably accessible metadata to facilitate review, production, and use; and
 - 3. the locations of metadata that will be sought.
- G. Accessibility of ESI in the requested form and any related limitations or burdens.

- H. The requesting party's ability to manage and use the requested forms.
- I. Risks of inadvertent disclosure of privileged or confidential material associated with different production forms, and appropriate mitigation measures (e.g., filtering, targeted review).
- J. Practical challenges of redaction in the requested forms.
- K. Relative costs and other burdens of collection, processing, review, and production, and approaches to minimize them (e.g., sampling, phasing).
- L. Search methodologies and volume-reduction strategies, including negotiated terms, sampling, deduplication, quick-peek arrangements, technology-assisted review (TAR), such as predictive coding and the use of artificial intelligence (AI) tools.
 - 1. If a party elects to use TAR or other analytics to cull or prioritize review, the parties must confer regarding high-level process disclosures (e.g., validation sampling framework and quality control (QC) metrics) sufficient to evaluate reasonableness, without requiring disclosure of seed or training sets absent good cause.
 - 2. If a party elects to use AI to cull or prioritize review, the parties should confer regarding which AI tools will be used, the search methodology to be employed, validation/QC processes, the role of human oversight, and the level of transparency of the process for other parties and for the court.
 - 3. Parties should discuss where practical the use of cryptographic hash values as stable unique identifiers in addition to or in lieu of Bates numbering for native files to enhance deduplication and cross-matter consistency.
- M. Whether to allocate or reallocate discovery costs based on proportionality and good cause.
- N. Confidentiality, privilege handling, and inadvertent production, including whether to use a clawback agreement. *See* Local Rule 7026-2(b).
- O. Tiered or phased discovery, with sequential tranches to prioritize the most probative and accessible sources.
- P. Timely and secure disposal of ESI at the appropriate stage, consistent with preservation obligations and any protective orders.

V. Requests, Responses, and Production Procedures

Counsel must have sufficient technical understanding to serve informed and reasonable ESI requests and to provide informed and reasonable responses. To reduce volume and expense, requests should clearly define the scope by topic, custodian, and time period. Responses should state objections with specificity, identify what discovery will be provided and what discovery will be withheld, identify sources searched, and disclose any significant sources not searched to aid case management and proportionality decisions. The following expectations apply to production, costs, limited-access systems, and forensic imaging:

- A. Form of production. The party seeking ESI should specify the form or forms in which ESI is to be produced. *See* Fed. R. Civ. P. 34(b)(1)(C). If a request does not specify a form for producing ESI, ESI must be produced in the form in which it is ordinarily maintained or in a reasonably usable form, which might include text-searchable pdfs or a combination of image, text, data, and load files. *See* Fed. R. Civ. P. 34(b)(2)(E). Testing and sampling are permitted. Ordinarily, each item must be produced once – electronically or on paper – but not both.
- B. Costs. Parties ordinarily bear their own discovery costs, but the court may apportion e-discovery costs for good cause, considering proportionality and the parties' resources.
- C. Limited-access sources. Electronic searches of sources identified as limited-access ordinarily should await completion of the initial search of more accessible sources. Requests directed to limited-access sources must be narrowly tailored and fact-supported. Examples include systems on obsolete media, redundant storage, and sources whose retrieval involves substantial cost.
- D. Inspection and imaging. Direct inspection of an opposing party's systems is the exception, not the rule. Forensic imaging may be permitted only in exceptional circumstances upon a showing by the requesting party of good cause and specific need, and where the requested protocol protects privacy, privilege, and irrelevant information.

VI. Discovery from Non-Parties.

Although Fed. R. Civ. P. 45 as made applicable by Fed. R. Bank. P. 9016 does not require a pre-subpoena conference with a non-party, the issuing party and the non-party should discuss in advance – where practical – the foregoing ESI topics and must do so before production where the subpoena seeks the production of ESI.