

Advancing the Goals of a “Just, Speedy, and Inexpensive” Determination of Every Action: The Recent Changes to the District of Kansas Guidelines for Cases Involving Electronically Stored Information

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REGENT UNIVERSITY LAW REVIEW



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DETERMINATION OF EVERY ACTION: THE RECENT CHANGES TO THE DISTRICT
OF KANSAS GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED
INFORMATION

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VOLUME 26

2013–2014

NUMBER 1

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ELECTRONICALLY STORED INFORMATION

*Judge David J. Waxse**

INTRODUCTION

As most parties and counsel agree, litigation today is a method of resolving disputes that is too costly and time consuming for most parties involved. I see that on a day-to-day basis in my case management work as a Federal Magistrate Judge. The Federal Judicial Center (“FJC”) has also recognized this issue. As part of its 2010 conference on civil litigation held at Duke Law School (“Duke Conference”), the FJC presented its findings on a research study of the cost of civil litigation in federal court. Those findings confirmed the existence of the problem, as well as a consensus in the civil justice system for the need for solutions to this problem.¹ More specifically, effective solutions are needed to find ways to effectuate the purposes of the Federal Rules of Civil Procedure—“to secure the just, speedy, and inexpensive determination of every action and proceeding.”²

Before discussing solutions, it helps to understand some of the causes of the problem. There are several causes, but three of the major ones are (1) the volume of electronically stored information (“ESI”) involved in litigation, (2) the lack of technical competence by counsel, and (3) the lack of cooperation among counsel in litigation. In an effort to respond to the resulting problems caused by lack of lawyer technical

* David J. Waxse is a United States Magistrate Judge in the District of Kansas. The author thanks Ken Withers, Director of Judicial Education for The Sedona Conference, for his insight and support, as well as the author’s law clerks, Brenda Yoakum-Kriz and Dan Ostaszewski, and intern Kurtis Wiard, for their assistance with editing and revising this Article. The views expressed in this Article are those of the author alone and not the United States District Court for the District of Kansas.

¹ See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & THE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 3–4 (2010) [hereinafter CIVIL LITIGATION CONFERENCE REPORT] (summarizing the conference); EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 7 (2010); THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 14–21 (2010).

² FED. R. CIV. P. 1.

competence and lack of cooperation, the United States District Court for the District of Kansas has recently revised its Guidelines for Cases Involving ESI (“New Guidelines”).³ These New Guidelines are attached as Appendix A to this Article.

I. WHY ESI HAS MADE LITIGATION MORE EXPENSIVE AND TIME-CONSUMING

A. *Volume of ESI*

Looking first at the problem of volume, the FJC publication, “Managing Discovery of Electronic Information: A Pocket Guide for Judges,” states:

It is a fact of modern life that an enormous volume of information is created, exchanged, and stored electronically. Conventional documents originate as computer files, e-mail is taking the place of both telephone calls and postal letters, and many, if not most, commercial activities are transacted using computer-based business processes. Electronically stored information (ESI) is commonplace in our personal lives and in the operation of businesses, public entities, and private organizations.⁴

To put that in numerical terms, one study estimates that a typical corporate user sends or receives about 110 e-mail messages per day.⁵ Since an average e-mail contains one and one-half pages of text,⁶ that equates to approximately 165 pages of e-mail messages per user, per day. This can translate into multiple gigabytes of ESI in complex litigation. To put that in perspective, one gigabyte is equal to 75,000 pages of text, or a pick-up truck full of paper.⁷ Just one DVD can store 4.7 gigabytes of information, or 350,000 pages.⁸ Since the amount of data

³ See U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013) [hereinafter NEW ESI GUIDELINES] (explaining that the purposes of the Guidelines are “to promote . . . the resolution of disputes regarding the discovery of ESI without Court intervention” and to foster principle of cooperation) (reprinted in Appendix A).

⁴ BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 1 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf).

⁵ THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2010, at 3 (Sara Radicati ed., 2010), available at <http://www.radicati.com/wp/wp-content/uploads/2010/04/Email-Statistics-Report-2010-2014-Executive-Summary2.pdf>.

⁶ E-DISCOVERY TEAM, <http://e-discoveryteam.com> (last visited Oct. 30, 2013) (see section in right-hand column, entitled “How Much Data Do You Have”).

⁷ *Id.*

⁸ *Id.*

created doubles approximately every 18 months,⁹ we are moving beyond gigabytes and are now dealing with terabytes (1000 gigabytes) and petabytes (1000 terabytes, or 250 billion pages of text)¹⁰ of ESI, so the problem continues to grow.

B. Lack of Technical Competence

A second contributing factor to why ESI has made litigation more expensive and time-consuming is the general lack of technical competence by counsel. As a judge responsible for case management, I have observed too many lawyers who do not have the necessary competence with technology to properly represent their clients in litigation that involves e-discovery. Rule 1.1 of the ABA Model Rules of Professional Conduct has always required that lawyers “provide competent representation to a client.”¹¹ As a result of concerns about lawyers’ lack of technical competence, in August 2012, the Commission on Ethics 20/20 (“Commission”) submitted Report 105A to the ABA House of Delegates.¹² In its report, “the Commission concluded that competent lawyers must have some awareness of basic features of technology,” and recommended an amendment to the comments of Model Rule of Professional Conduct 1.1 (Competence) emphasizing “that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology.”¹³ The Commission also concluded that, “in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment.”¹⁴ The Commission cited, as an example, a lawyer who does not know how to use email or create an electronic document as one who “would have difficulty providing competent legal services in today’s environment.”¹⁵

⁹ See Gil Press, *A Very Short History of Big Data*, FORBES.COM (May 9, 2013, 9:45 AM), <http://www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data> (citing JOHN F. GANTZ ET AL., IDC, *THE EXPANDING DIGITAL UNIVERSE 3* (2007)) (noting that data was estimated to double every eighteen months between 2006 and 2010 based on projected growth rates).

¹⁰ E-DISCOVERY TEAM, *supra* note 6.

¹¹ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012); MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

¹² AM. BAR ASS'N COMM'N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES 105A 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

¹³ *Id.* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

The Commission also noted that the comments “already encompass[] an obligation to remain aware of changes in technology that affect law practice,” but concluded that making this explicit, by adding “the phrase ‘including the benefits and risks associated with relevant technology,’ would offer greater clarity in this area and emphasize the importance of technology to modern law practice.”¹⁶ While the proposed amendment “does not impose any new obligations on lawyers,” it “is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.”¹⁷

In response to the Commission’s report, the ABA House of Delegates approved the following comment, labeled “Maintaining Competence,” to Rule 1.1:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.¹⁸

C. Lack of Cooperation

Adding to the problems of ESI volume and lack of technical competence is the failure of counsel to cooperate in the discovery process. This was one of the conclusions of the Duke Conference, which resulted in a consensus recommendation that courts should encourage cooperation in the discovery process.¹⁹ This is also the position of The Sedona Conference,²⁰ as indicated by its development of The Sedona Conference Cooperation Proclamation in 2008 (“Cooperation

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ AM. BAR ASS’N COMM’N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES 105A REVISED 3 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended_authcheckdam.pdf (amending Comment 6 of Rule 1.1 by inserting “including the benefits and risks associated with relevant technology”); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2012) (amending Comment 6 by resolution 105A and renumbering it as Comment 8).

¹⁹ CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 4.

²⁰ *Frequently Asked Questions*, THE SEDONA CONFERENCE, <https://thesedonaconference.org/faq> (last visited Oct. 30, 2013) (introducing The Sedona Conference as a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights).

Proclamation”).²¹ The Cooperation Proclamation begins with this observation:

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (“ESI”). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.²²

Several courts have now written opinions promoting cooperation.²³ Judge Paul Grimm, in *Mancia v. Mayflower Textile Services Co.*,²⁴ wrote:

Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process—lawyers, judges and the public at large—and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production*, recently issued a *Cooperation Proclamation* to announce the launching of “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.” . . . In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.²⁵

²¹ THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008) [hereinafter COOPERATION PROCLAMATION], *available at* <https://thesedonaconference.org/publication/sedona-conference%C2%AE-cooperation-proclamation>.

²² *Id.*

²³ *See, e.g.*, Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012); DeGeer v. Gillis, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010); William A. Gross Constr. Assoc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822, at *4–6 (D. Kan. Dec. 23, 2008).

²⁴ 253 F.R.D. 354 (D. Md. 2008).

²⁵ *Id.* at 363 (footnotes omitted) (quoting COOPERATION PROCLAMATION, *supra* note 21, at 1).

I have endorsed and used the Cooperation Proclamation to educate counsel with respect to their discovery obligations. In *Gipson v. Southwestern Bell Telephone Co.*, a case where more than 115 motions and 462 docket entries were filed over the course of less than a year, I noted that many of the motions filed by counsel addressed matters that the parties should have been able to resolve without judicial involvement.²⁶ After reminding the parties of the Court's goal to administer the Federal Rules of Civil Procedure ("Rules") in a "just, speedy and inexpensive" manner,²⁷ I then directed counsel to read the Cooperation Proclamation in order to help the parties and counsel understand their discovery obligations.²⁸

II. RECENT CHANGES TO THE DISTRICT OF KANSAS ESI GUIDELINES

In an effort to respond to these problems impeding the "just, speedy, and inexpensive determination of every action,"²⁹ the District of Kansas has recently substantially modified its Guidelines for Cases Involving Electronically Stored Information.³⁰ As a result of the efforts of a committee, comprised of judges and practicing lawyers³¹ appointed by Chief Judge Kathryn H. Vratil, the District's existing ESI guidelines, originally promulgated on February 1, 2008, were expanded from five guideline sections to twenty-six sections.³² This Article discusses some of the more important changes made to promote competence and cooperation.

A. Title

First, the title of the New Guidelines has been changed from "Guidelines for Discovery of Electronically Stored Information (ESI)" to "Guidelines for Cases Involving Electronically Stored Information [ESI]."³³ This change was made to emphasize that the New Guidelines

²⁶ See *Gipson*, 2008 U.S. Dist. LEXIS 103822, at *4.

²⁷ *Id.* (quoting FED. R. CIV. P. 1).

²⁸ *Id.*

²⁹ FED. R. CIV. P. 1.

³⁰ Compare NEW ESI GUIDELINES, *supra* note 3, with U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI) (2008) [hereinafter OLD GUIDELINES] (evidencing a major revision even if only the number of sections are considered: there are twenty-six in the New Guidelines and just five in the OLD GUIDELINES).

³¹ The committee members are Judge Karen Humphreys, Judge David Waxse, Angel Mitchell, George Hanson, and Michael Jones.

³² Compare NEW ESI GUIDELINES, *supra* note 3, with OLD GUIDELINES, *supra* note 30.

³³ Compare NEW ESI GUIDELINES, *supra* note 3 (brackets in original), with OLD GUIDELINES, *supra* note 30.

cover more than e-discovery. One significant change to the guidelines is the addition of provisions detailing what counsel should consider prior to the filing of litigation. These provisions are discussed in more detail below.³⁴

B. Introduction

The New Guidelines now include an Introduction section that covers both the purpose of the New Guidelines and the principle of cooperation. Section 1 sets forth the purpose of the New Guidelines:

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines.³⁵

Not only does this new purpose section explicitly remind counsel of the obligations of Rule 1, it also reminds them of the proportionality principle contained in the Rules. One of the conclusions of the Duke Conference was that the concept of proportionality is too often either not followed by counsel or not enforced by the court.³⁶ Proportionality is discussed in both Rule 26(b)(2)(C) and 26(g)(1)(B)(iii).³⁷ Specifically, Rule 26(b)(2)(C) requires the court to limit the frequency or extent of discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”³⁸

Rule 26(g) also implicates proportionality by requiring the attorney or the unrepresented party to sign every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection.³⁹ Rule 26(g) provides that by signing the discovery request, response, or objection, the attorney or party “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,”⁴⁰ it is “neither unreasonable nor unduly burdensome or expensive, considering the

³⁴ See *infra* Part II.D.

³⁵ NEW ESI GUIDELINES, *supra* note 3, § 1 (citing FED. R. CIV. P. 26(b)(2)(C)(iii), (g)(1)(B)(iii)).

³⁶ See CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 8.

³⁷ See FED. R. CIV. P. 26(b)(2)(C), (g)(1)(B)(iii).

³⁸ *Id.* 26(b)(2)(C)(iii).

³⁹ *Id.* 26(g)(1).

⁴⁰ *Id.*

needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”⁴¹

The intent of the proportionality reference is to remind counsel that one of the best ways to reach a “just, speedy, and inexpensive” determination is to actually consider proportionality in each step of the discovery process.⁴² The same message has to also reach the judge that is providing case management. With about one percent of civil cases in federal court going to trial, most of the time and money is being spent in discovery and not trial.⁴³

The New Guidelines now have a separate section setting forth the principle of cooperation: “An attorney’s representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions.”⁴⁴ The New Guidelines then refer to the Cooperation Proclamation,⁴⁵ endorsed by eight judges from Kansas,⁴⁶ and the article “Cooperation—What Is It and Why Do It?” by David J. Waxse.⁴⁷

C. Definitions

Unlike the former guidelines, the New Guidelines contain a definitions section. For general terms, the New Guidelines recommend

⁴¹ *Id.* 26(g)(1)(B)(iii).

⁴² *See id.*; Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH., no. 1, art. 2, Fall 2012, at 39, <http://jolt.richmond.edu/v19i1/article2.pdf>.

⁴³ *See, e.g.*, CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 4, 7; Sheri Qualters, *Two Federal Judges Offer Differing Takes on Declining Civil Trial Numbers*, N.Y. L.J., Sept. 20, 2010, at 2.

⁴⁴ NEW ESI GUIDELINES, *supra* note 3, § 2.

⁴⁵ COOPERATION PROCLAMATION, *supra* note 21.

⁴⁶ The judges that have endorsed the Cooperation Proclamation are the Hon. J. Thomas Marten, U.S. District Court for the District of Kansas, Wichita; the Hon. Kenneth G. Gale, U.S. District Court for the District of Kansas, Wichita; the Hon. Karen M. Humphreys, U.S. District Court for the District of Kansas, Wichita; the Hon. James P. O'Hara, U.S. District Court for the District of Kansas, Kansas City; the Hon. Gerald L. Rushfelt, U.S. District Court for the District of Kansas, Kansas City; the Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka; the Hon. David J. Waxse, U.S. District Court for the District of Kansas, Kansas City; and the Hon. Gerald J. Elliott, Johnson County District Court, Olathe. NEW ESI GUIDELINES, *supra* note 3, § 2 n.2.

⁴⁷ NEW ESI GUIDELINES, *supra* note 3, § 2 (citing David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH., no. 3, art. 8, Spring 2012, at 1, <http://jolt.richmond.edu/v18i3/article8.pdf>).

consulting the current Sedona Conference Glossary⁴⁸ and The Grossman-Cormack Glossary of Technology-Assisted Review.⁴⁹ The definitions section also sets out a separate section for Form of Production:

Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).

Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the “native format” of the document. Native format refers to the document’s internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a “static format,” such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.

Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.⁵⁰

A separate definitions section is also provided for meta and embedded data. This section defines metadata and embedded data as follows:

“Metadata” typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file’s author, dates of creation and modification, location on the drive, and filename. Other examples of metadata include spreadsheet formulas, database structures, and other details which, in a given context, could prove critical to understanding the information contained in the file. “Embedded data” typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.

Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from “scrubbing”

⁴⁸ THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (Sherry B. Harris et al. eds., 3d ed. 2010) [hereinafter SEDONA CONFERENCE GLOSSARY] available at <https://thesedonaconference.org/publication/The%2520Sedona%2520Conference%25C2%25AE%2520Glossary>.

⁴⁹ Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV., no. 1, 2013, at 8.

⁵⁰ NEW ESI GUIDELINES, *supra* note 3, § 4 (footnote omitted).

either metadata or embedded data without cause or agreement of adverse parties.⁵¹

The metadata section is partially based on *Williams v. Sprint/United Management Co.*,⁵² where the court held:

[W]hen a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.⁵³

D. Prior to the Filing of Litigation

Significant additions to the New Guidelines include areas for counsel to consider prior to the filing of litigation. It is comprised of three sections: identification of potential parties and issues, identification of ESI, and preservation.

Section 6 relates to the identification of potential parties and issues when there is either a reasonable anticipation of litigation or when litigation is imminent.⁵⁴ As footnote 7 in the New Guidelines indicates, these alternative triggers are used because the United States Court of Appeals for the Tenth Circuit “has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated.”⁵⁵ Counsel are urged to keep in mind that other circuits frame the standards differently. Without regard to which trigger is used, Section 6 of the New Guidelines provides as follows if a triggering event has occurred:

[E]fforts should be made to identify potential parties and their counsel to that litigation to facilitate early cooperation in the preservation and exchange of relevant electronically stored information. To comply with Fed. R. Civ. P. 26(b)(1) scope of discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense,” counsel should consider determining the issues that will likely arise in the litigation. They should also consider discussing with opposing counsel which issues are actually in dispute and which can be resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.⁵⁶

The purpose of this new guideline is to explicitly urge counsel to cooperate, even before litigation has been initiated, as one way to reach a “just, speedy, and inexpensive” determination of the action.

⁵¹ NEW ESI GUIDELINES, *supra* note 3, § 5.

⁵² 230 F.R.D. 640 (D. Kan. 2005).

⁵³ *Id.* at 652 (footnotes omitted).

⁵⁴ See NEW ESI GUIDELINES, *supra* note 3, § 6.

⁵⁵ *Id.* § 6 n.7.

⁵⁶ *Id.* § 6.

Another step identified in the New Guidelines, to be taken prior to the filing of litigation, is for counsel to identify the relevant ESI.⁵⁷ This requires counsel to become knowledgeable about their client's information management system and its operation. This step was in the previous version of the guidelines.⁵⁸ The new portion of this guideline now advises counsel to determine "whether discoverable ESI is being stored by third parties for example in cloud storage facilities or social media."⁵⁹

Section 8 of the New Guidelines relates to preservation, a subject that was not covered extensively in the previous guidelines.⁶⁰ The preservation of ESI is clearly one area that has a substantial impact on the "just, speedy, and inexpensive" determination of the action. It has become less expensive to store ESI, but the search costs relate directly to the volume of ESI that has been stored.⁶¹ It is thus important to have a reasonable and proportionate preservation process. In an effort to accomplish that, the New Guidelines provide the following guidance:

In general, electronic files are usually preserved in native format with metadata intact.

Every party either reasonably anticipating litigation or believing litigation is imminent must take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

⁵⁷ See *id.* § 7.

⁵⁸ See OLD GUIDELINES, *supra* note 30, § 1.

⁵⁹ NEW ESI GUIDELINES, *supra* note 3, § 7.

⁶⁰ Compare NEW ESI GUIDELINES, *supra* note 3, § 8 (devoting an entire section to preservation), with OLD GUIDELINES, *supra* note 30, § 4(a) (discussing preservation briefly in one subsection).

⁶¹ See THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 3 (Jonathan M. Redgrave et. al. eds., 2004), available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles> (noting that "there are vastly more electronic documents than paper documents and [that] electronic documents are created at much greater rates than paper documents," causing the amount of discoverable information to increase exponentially); John Didday, Note, *Informed Buyers of E-Discovery: Why General Counsel Must Become Tech Savvy*, 5 HASTINGS SCI. & TECH. L.J. 282, 307 (2013) ("The reason the explosion of document volume is such a problem is that review costs have kept steady while storage and preservation costs have sunk just as quickly as document volumes have increased.").

(a) The categories of potentially discoverable information to be segregated and preserved;

(b) The “key persons” and likely witnesses and persons with knowledge regarding relevant events;

(c) The relevant time period for the litigation hold;

(d) The nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, and native files, and how it should be preserved.

(e) Data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.⁶²

Once again, the goal is for counsel who are technologically competent to cooperate in dealing with the problem of large volumes of ESI to find a process of reaching a “just, speedy, and inexpensive” determination of the action.

E. Initiation of Litigation

The next portion of the New Guidelines relates to the initiation of litigation. Section 9 specifically discusses efforts to narrow the issues after litigation has begun.⁶³ Counsel are urged to cooperate in an effort to narrow the issues that will require discovery:⁶⁴

After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good faith manner, with due regard to the mandate of Rule 1 that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.⁶⁵

The current rule on the scope of discovery is Rule 26(b)(1), which provides in part: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—

⁶² NEW ESI GUIDELINES, *supra* note 3, § 8 (footnotes omitted).

⁶³ *See id.* § 9.

⁶⁴ *See id.*

⁶⁵ *Id.*

including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”⁶⁶ Too often counsel are engaged in a discovery battle on a claim or defense that is not really in dispute. The purpose of this section of the New Guidelines is to urge counsel to attempt to narrow the factual issues that are in dispute and thus eliminate the need to engage in discovery on those issues.

The next section of the New Guidelines suggests that counsel designate an e-discovery liaison in those cases with a substantial amount of ESI.⁶⁷ Section 10, entitled, “E-Discovery Liaison,” states:

To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she should be:

- Familiar with the party’s electronic information systems and capabilities in order to explain these systems and answer relevant questions.
- Knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to electronically stored information.
- Prepared to participate in e-discovery dispute resolutions.

The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information. However, the liaison should be responsible for organizing each party’s e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.⁶⁸

The purpose of this section is to improve the technological competence of counsel by suggesting the designation of a person who has such competence to assist counsel in the e-discovery process. Some judges are asking counsel to involve such liaisons in case management conferences and hearings on e-discovery disputes.

⁶⁶ FED. R. CIV. P. 26(b)(1).

⁶⁷ See NEW ESI GUIDELINES, *supra* note 3, § 10.

⁶⁸ *Id.*

F. Rule 26(f) Conferences

The next sections of the New Guidelines cover what ESI-related issues counsel should consider and discuss at the Rule 26(f) conference.⁶⁹ That Rule requires counsel to confer prior to the scheduling conference and sets out what the parties must consider.⁷⁰ Specifically, Rule 26(f)(2) lists what the parties must consider in conferring:

[T]he nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.⁷¹

Rule 26(f)(3) requires that the parties state their views and proposals on the following in their discovery plan:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).⁷²

Section 11 of the New Guidelines is an effort to make it easier for counsel to comply with both their Rule 26(f) and Rule 34 obligations. It provides some general guidance for counsel at the Rule 26(f) conference with respect to ESI:

At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Fed. R. Civ. P. 34, if the

⁶⁹ See *id.* §§ 11–23.

⁷⁰ FED. R. CIV. P. 26(f).

⁷¹ *Id.* 26(f)(2).

⁷² *Id.* 26(f)(3).

requesting party has not designated a form of production in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should assume that this discussion will be an ongoing process and not a onetime meeting.⁷³

This section stresses that one of the ESI issues requiring cooperation is the designation of the form of production. Also, one planning conference or meeting may not be enough in cases with substantial ESI issues. When disputes have arisen in the past, I have ordered counsel to meet once more in an effort to resolve their differences, with the additional requirement that counsel make a video recording of the conference. After conferring, they can either submit their agreement on the disputed issue, or, if they are unable to reach an agreement, they can submit the video recording. I have yet to watch a video of a conference.⁷⁴

The next two guidelines are ones that urge cooperation in an effort to achieve a “just, speedy, and inexpensive” determination of the action. Section 12 discusses the issues involved in situations where some of the ESI is not reasonably accessible, as discussed in Rule 26(b)(2)(B).⁷⁵ This Rule provides the following specific limitations on ESI:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.⁷⁶

This issue does not seem to generate as many disputes as was anticipated during the revision of the rules as evidenced by there being

⁷³ NEW ESI GUIDELINES, *supra* note 3, § 11. For a more detailed description of topics that may need to be discussed, see Craig Ball, *Ask and Answer the Right Questions in EDD*, L. TECH. NEWS (Jan. 4, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005499729&Ask_and_Answer_the_Right_Questions_in_EDD, reprinted in NEW ESI GUIDELINES, *supra* note 3, at app. A.

⁷⁴ In describing this process in presentations on e-discovery, I explained that I originally did not understand why this worked. After one presentation, a lawyer with a degree in physics told me he knew the reason. He said that lawyers are like particles in physics in that they change when observed.

⁷⁵ NEW ESI GUIDELINES, *supra* note 3, § 12.

⁷⁶ FED. R. CIV. P. 26(b)(2)(B).

only 120 cases retrieved by Westlaw from all federal cases searching for proportionality and Rule 26(b)(2)(C).⁷⁷

Section 13 of the New Guidelines addresses whether counsel should consider the creation of a shared database and use of one search protocol:

In appropriate cases counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using one search protocol with a goal of minimizing the costs of discovery for both sides.⁷⁸

The next New Guideline relates to both cooperation and technical competence. Section 14 addresses removing duplicated data and the “de-NISTing”⁷⁹ of files. It provides that “[c]ounsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI.”⁸⁰ The New Guidelines also advise counsel to discuss the “de-NISTing” of files, which is “[t]he use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user.”⁸¹ Competent counsel using these methods cooperatively can save both time and money in the e-discovery process.

One of the most important steps in the e-discovery process is the actual search for discoverable ESI. To effectively search, ESI requires both technical competence and cooperation. Section 15 of the New Guidelines addresses search methodologies such as technology assisted review (TAR):

⁷⁷ WESTLAW, <http://www.next.westlaw.com> (follow “Search” hyperlink and select “Terms & Connectors” hyperlink; then select “All Federal Cases” database; then enter “proportionality” & “26(b)(2)(C)” in the “Search” box) (last visited Oct. 30, 2013).

⁷⁸ NEW ESI GUIDELINES, *supra* note 3, § 13 (footnote omitted); *see, e.g.*, EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2012 WL 4896670, at *1 (Del. Ch. Oct. 15, 2012) (ordering counsel to “retain a single discovery vendor to be used by both sides” and to conduct document review with predictive coding), *modified by* No. 7409-VCL, 2013 WL 1960621, at *1 (Del. Ch. May 6, 2013) (granting the parties’ request to be released from the prior order requiring the use of a single discovery vendor and predictive coding for document review).

⁷⁹ NIST, which stands for National Institute of Standards and Technology, is a federal agency that works with industries to develop technology measurements and standards. NIST developed a hash database of computer files (“NIST List”) to identify files that are system-generated and generally accepted to have no substantive value in most cases. Sedona Conference Glossary, *supra* note 48, at 36.

⁸⁰ NEW ESI GUIDELINES, *supra* note 3, § 14.

⁸¹ SEDONA CONFERENCE GLOSSARY, *supra* note 48, at 15.

If counsel intend to employ technology assisted review (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.

If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly selected sample of the data being searched.

Counsel also should attempt to reach agreement as to the timing and conditions of any searches which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.⁸²

The next eight sections of the New Guidelines relate to less important issues that should be discussed at the Rule 26(f) conference if applicable to the case. The topics covered are: E-Mail, Deleted Information, Meta and Embedded Data, Data Possessed by Third Parties, Format and Media, Identifying Information, Priorities and Sequencing, and Privilege.⁸³

The final area covered by the New Guidelines is the discovery process. Section 24, which is the first section in this area, relates to the timing of discovery and suggests the following sequence: "(a) Mandatory Disclosure," "(b) Search of Reasonably Accessible Information," "(c) Search of Unreasonably Accessible Information," and "(d) Requests for On-Site Inspections."⁸⁴

Section 25 addresses discovery as it pertains to preservation and collection efforts. It states specifically:

Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Routine discovery into such

⁸² NEW ESI GUIDELINES, *supra* note 3, § 15. There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently-used terms include: technology-assisted review (TAR), computer-assisted review (CAR), predictive coding, concept search, and Boolean search. *See* Grossman & Cormack, *supra* note 49, at 6, 10–12, 26, 32.

⁸³ *See* NEW ESI GUIDELINES, *supra* note 3, §§ 16–23.

⁸⁴ *Id.* § 24.

matters is therefore strongly discouraged and may be in violation of Fed. R. Civ. P. 26(g)'s requirement that discovery be "neither unreasonable nor unduly burdensome or expensive." Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering at least the aforementioned factors. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.⁸⁵

This is one more area where cooperation can help us achieve a "just, speedy, and inexpensive" determination of the action.

Section 26, which is the final section of the New Guidelines, discusses the duty to meet and confer when requesting ESI from non-parties under Rule 45.⁸⁶ Counsel are utilizing this much more with the increased use of social media. Cases which used to be considered asymmetrical, where an individual sued an organization, are becoming more symmetrical as a result of the huge amount of ESI an individual can create and store on social media like Facebook and Twitter.

CONCLUSION

Litigation today is too expensive and costly due, at least partially, to the volume of ESI and the lack of technical competence and cooperation by counsel. The District of Kansas has recently amended its ESI Guidelines in an effort to address these issues and assist counsel in becoming more technically competent and cooperative in cases involving ESI. Hopefully these efforts will advance the goals of "just, speedy, and inexpensive determination" of litigation.

⁸⁵ *Id.* § 25.

⁸⁶ *Id.* § 26.

APPENDIX A

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

GUIDELINES FOR CASES INVOLVING
ELECTRONICALLY STORED INFORMATION [ESI][†]

These guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 1, 16, 26, 33, 34, 37, and 45 relating to the discovery of electronically stored information (“ESI”) and the current applicable case law. In the case of any asserted conflict between these guidelines and either the referenced rules or applicable case law, the latter should control.

INTRODUCTION

1. Purpose

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii) and 26(g)(1)(B)(iii).

2. Principle of Cooperation

An attorney’s representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions. For a more complete discussion of this principle, please review the Sedona Conference Cooperation Proclamation¹ endorsed by seven judges² from Kansas and “Cooperation—What Is It and Why Do It?” by David J. Waxse.³

[†] U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013). The text and footnotes in Appendices “A” and “1,” following, are reprinted from the original documents and, therefore, may not be consistent with traditional legal journal styling or Bluebook format.

¹ <http://www.thsedonaconference.org/dltForm?did=proclamation.pdf>

² Hon. Gerald J. Elliott, Johnson County District Court, Olathe
Hon. Kenneth Gale, U.S. District Court for the District of Kansas, Wichita
Hon. Karen M. Humphreys, U.S. District Court for the District of Kansas, Wichita
Hon. J. Thomas Marten, U.S. District Court for the District of Kansas, Wichita
Hon. James P. O’Hara, U.S. District Court for the District of Kansas, Kansas City

DEFINITIONS

3. General

To avoid misunderstandings about terms, all parties should consult the most current edition of The Sedona Conference® Glossary⁴ and “The Grossman-Cormack Glossary of Technology-Assisted Review.”⁵ In addition, references in these guidelines to counsel include parties who are not represented by counsel.

4. Form of Production

Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).

Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the “native format” of the document.⁶ Native format refers to the document’s internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a “static format,” such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.

Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.

5. Meta and Embedded Data

“Metadata” typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file’s author, dates of creation and modification, location on the drive, and filename. Other

Hon. Gerald L. Rushfelt, U.S. District Court for the District of Kansas, Kansas City

Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka

Hon. David Waxse, U.S. District Court for the District of Kansas, Kansas City

³ <http://jolt.richmond.edu.v18i3/article8.pdf>.

⁴ <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary>.

⁵ Federal Courts Law Review, Vol 7, Issue 1 (2013)

⁶ <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>

examples of metadata include spreadsheet formulas, database structures, and other details which, in a given context, could prove critical to understanding the information contained in the file. “Embedded data” typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.

Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from “scrubbing” either metadata or embedded data without cause or agreement of adverse parties.

PRIOR TO THE FILING OF LITIGATION

6. Identification of Potential Parties and Issues

When there is a reasonable anticipation of litigation or when litigation is imminent⁷, efforts should be made to identify potential parties and their counsel to that litigation to facilitate early cooperation in the preservation and exchange of relevant electronically stored information. To comply with Fed. R. Civ. P. 26(b)(1) scope of discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense,” counsel should consider determining the issues that will likely arise in the litigation. They should also consider discussing with opposing counsel which issues are actually in dispute and which can be resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.

7. Identification of Electronically Stored Information

In anticipation of litigation, counsel should become knowledgeable about their client’s information management systems and its operation, including how information is stored and retrieved. Counsel should also consider determining whether discoverable ESI is being stored by third parties for example in cloud storage facilities or social media. In addition, counsel should make a reasonable attempt to review their client’s relevant and/or discoverable ESI to ascertain the contents, including backup, archival and legacy data (outdated formats or media).

⁷ The Tenth Circuit has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated but has said action should have been taken when litigation is “imminent” in the general litigation context. Judges in the District of Kansas have used both that standard and the standard of when litigation is “reasonably anticipated” in the context of litigation involving ESI.

8. *Preservation*

In general, electronic files are usually preserved in native format with metadata intact.

Every party either reasonably anticipating litigation or believing litigation is imminent⁸ must take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.⁹ Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

(a) The categories of potentially discoverable information to be segregated and preserved;

(b) The “key persons” and likely witnesses and persons with knowledge regarding relevant events;

(c) The relevant time period for the litigation hold;

(d) The nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, and native files, and how it should be preserved.

(e) Data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.

INITIATION OF LITIGATION

9. *Narrowing the Issues*

After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good faith manner, with due regard to the mandate of Rule 1 that the

⁸ Ibid. p.2

⁹ Counsel should become aware of the current 10th Circuit law defining “possession, custody and control”.

rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.

10. E-Discovery Liaison

To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she should be:

- Familiar with the party’s electronic information systems and capabilities in order to explain these systems and answer relevant questions.
- Knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to electronically stored information.
- Prepared to participate in e-discovery dispute resolutions.

The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information.. However, the liaison should be responsible for organizing each party’s e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

AT THE RULE 26(F) CONFERENCES

11. General

At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Fed. R. Civ. P. 34, if the requesting party has not designated a form of production in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should

assume that this discussion will be an ongoing process and not a onetime meeting.¹⁰

12. Reasonably Accessible Information and Costs

(a) The volume of, and ability to search, ESI means that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burden and cost of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

(b) Absent a contrary showing of good cause, e.g., Fed. R. Civ. P. 26(b)(2)(c), the parties should generally presume that the producing party will bear all costs for reasonably accessible ESI. The parties should generally presume that there will be cost sharing or cost shifting for ESI that is not reasonably accessible.

13. Creation of a Shared Database and Use of One Search Protocol

In appropriate cases counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using one search protocol with a goal of minimizing the costs of discovery for both sides.¹¹

14. Removing Duplicated Data and De-NISTing

Counsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular

¹⁰ For a more detailed description of matters that may need to be discussed, see Craig Ball, *Ask and Answer to [sic] Right Questions in EDD*, LAW TECHNOLOGY NEWS, Jan. 4, 2008, accessed on Feb. 1, 2008 at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1199441131702#> and reprinted in these Guidelines with permission at Appendix 1.

¹¹ Vice Chancellor Travis Laster recently ordered counsel to use the same search protocol in *EORHB, Inc., et al v. HOA Holdings, LLC*, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012). He more recently modified his order. See 2013 WL 1960621 May 6, 2013

custodian's data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI.

In addition, counsel should discuss the de-NISTing of files which is the use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user. [NIST (National Institute of Standards and Technology) is a federal agency that works with industry to develop technology measurements and standards.] NIST developed a hash database of computer files to identify files that are system generated and generally accepted to have no substantive value in most cases.¹²

15. Search Methodologies

If counsel intend to employ technology assisted review¹³ (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.¹⁴

If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly selected sample of the data being searched.

Counsel also should attempt to reach agreement as to the timing and conditions of any searches which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.

16. E-Mail

Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol. The scope of e-mail discovery may require determining whether the unit for production should focus on the

¹² <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>

¹³ "The Grossman-Cormack Glossary of Technology-Assisted Review.

¹⁴ There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently used other terms include: (CAR) computer assisted review, predictive coding, concept search, contextual search, boolean search, fuzzy search and others.

immediately relevant e-mail or the entire string that contains the relevant e-mail. In addition, counsel should focus on the privilege log ramifications of selecting a particular unit of production.¹⁵

17. Deleted Information

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.

18. Meta and Embedded Data

Counsel should discuss whether “embedded data” and “metadata” exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

19. Data Possessed by Third Parties

Counsel should attempt to agree on an approach to ESI stored by third parties. This includes files stored on a cloud server or social networking data on services like Facebook, Twitter, and MySpace.

20. Format and Media

The parties have discretion to determine production format and should cooperate in good faith to promote efficiencies. Reasonable requests for production of particular documents in native format with metadata intact should be considered.

21. Identifying Information

Because identifying information may not be placed on ESI as easily as bates stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed.¹⁶ Counsel are encouraged to discuss the use of either a digital notary, hash value indices or other similar methods for producing native files.

22. Priorities and Sequencing

Counsel should attempt to reach an agreement on the sequence of processing data for review and production. Some criteria to consider include ease of access or collection, sources of data, date ranges, file types, and keyword matches.

¹⁵ In re Universal Service Fund Telephone Billing Practices Litigation, 232 F.R.D. 669, 674 (D. Kan. 2005)

¹⁶ For a viable electronic alternative to bates stamps, see Ralph C. Losey, *HASH: The New Bates Stamp*, 12 J. Tech. L. & Pol’y 1 (2007)

23. *Privilege*

Counsel should attempt to reach an agreement regarding what will happen in the event of inadvertent disclosure of privileged or trial preparation materials.¹⁷ If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.

(a) To accelerate the discovery process, the parties may establish a “clawback agreement,” whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. Counsel should be aware of the requirements of Federal Rule of Evidence 502(d) to protect against waivers of privilege in other settings.

(b) The parties may agree to provide a “quick peek,” whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

Other voluntary agreements should be considered as appropriate. Counsel should be aware that there is an issue of whether such agreements bind third parties who are not parties to the agreements. The Court may enter a clawback arrangement for good cause even if there is no agreement. In that case, third parties may be bound but only pursuant to the court order.¹⁸

DISCOVERY PROCESS

24. *Timing*

Counsel should attempt to agree on the timing and sequencing of e-discovery. In general, e-discovery should proceed in the following order.

(a) Mandatory Disclosure

Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) must include any ESI that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). To determine what information must be disclosed pursuant to this rule, counsel should review, with their clients, the client’s ESI files, including current, back-up, archival,

¹⁷ In addition, counsel should comply with current rules and case law on the requirement of creating privilege logs.

¹⁸ See *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010)

and legacy computer files. Counsel should be aware that documents in paper form may have been generated by the client's information system; thus, there may be ESI related to that paper document. If any party intends to disclose ESI, counsel should identify those individuals with knowledge of their client's electronic information systems who can facilitate the location and identification of discoverable ESI prior to the Fed. R. Civ. P. 26(f) conference.

(b) Search of Reasonably Accessible Information

After receiving requests for production under Fed. R. Civ. P. 34, the parties shall search their electronically stored information, other than that identified as not reasonably accessible due to undue burden and/or substantial cost, and produce responsive information in accordance with Fed. R. Civ. P. 26(b).

(c) Search of Unreasonably Accessible Information

Electronic searches of information identified as not reasonably accessible should not be conducted until the initial search has been completed and then only by agreement of the parties or pursuant to a court order. Requests for electronically stored information that is not reasonably accessible must be narrowly focused with good cause supporting the request. See Fed. R. Civ. P. 26(b)(2), Advisory Committee Notes, December 2006 Amendment (good cause factors).

(d) Requests for On-Site Inspections

Requests for on-site inspections of electronic media under Fed. R. Civ. P. 34(b) should be reviewed to determine if good cause and specific need have been demonstrated.

25. Discovery Concerning Preservation and Collection Efforts

Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Routine discovery into such matters is therefore strongly discouraged and may be in violation of Fed. R. Civ. P. 26(g)'s [sic] requirement that discovery be "neither unreasonable nor unduly burdensome or expensive". [sic] Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering at least the aforementioned factors. Nothing herein exempts deponents on merits issues from answering questions

concerning the preservation and collection of their documents, ESI, and tangible things.

26. Duty to Meet and Confer When Requesting ESI from Nonparties (Fed. R. Civ. P. 45)

Counsel issuing requests for ESI from nonparties should attempt to informally meet and confer with the non-party (or counsel, if represented). During this meeting, counsel should discuss the same issues regarding ESI requests that they would with opposing counsel as set forth in Paragraph 11 above.

July 18, 2013

“Article originally published in the Regent University Law Review. Copyright © 2013. Judge David J. Waxse, Advancing the Goals of a “Just, Speedy, and Inexpensive” Determination of Every Action: The Recent Changes to the District of Kansas Guidelines for Cases Involving Electronically Stored Information, 26 Regent U. L. Rev. 111 (2013). All rights reserved. Reprinted with permission.”

APPENDIX 1

ASK AND ANSWER THE RIGHT QUESTIONS IN EDD[‡]*Craig Ball*

Sometimes it's more important to ask the right questions than to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts and plans for production in the FRCP Rule 26(f) conference, the so-called "meet and confer."

The federal bench is deadly serious about meet and confers, and heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are perfunctory, drive-by events. Enlightened judges see that meet and confers must evolve into candid, constructive mind melds if we are to take some of the sting and "gotcha" out of e-discovery. Meet and confer requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions. An hour or two of hard work should lie behind every minute of a Rule 26(f) conference. Forget "winging it" on charm or bluster and forget "We'll get back to you on that."

Here are 50 questions of the sort I think should be hashed out in a Rule 26(f) conference. If you think asking them is challenging, think about what's required to deliver answers you can certify in court. It's going to take considerable arm-twisting by the courts to get lawyers and clients to do this much homework and master a new vocabulary, but, there is no other way.

These 50 aren't all the right questions for you to pose to your opponent, but there's a good chance many of them are . . . and a likelihood you'll be in the hot seat facing them, too.

1. What are the issues in the case?
2. Who are the key players in the case?
3. Who are the persons most knowledgeable about ESI systems?
4. What events and intervals are relevant?

[‡] Craig Ball, *Ask and Answer the Right Questions in EDD*, L. TECH. NEWS (Jan. 4, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005499729&Ask_and_Answer_the_Right_Questions_in_EDD. Reprinted with permission from the 2008 edition of Law Technology News © 2013 AML Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. This article was originally reprinted and included as Appendix 1 to the New ESI Guidelines and, therefore, is also included here in the reprint of those Guidelines.

5. When did preservation duties and privileges attach?
6. What data are at greatest risk of alteration or destruction?
7. Are systems slated for replacement or disposal?
8. What steps have been or will be taken to preserve ESI?
9. What third parties hold information that must be preserved, and who will notify them?
10. What data require forensically sound preservation?
11. Are there unique chain-of-custody needs to be met?
12. What metadata are relevant, and how will it be preserved, extracted and produced?
13. What are the data retention policies and practices?
14. What are the backup practices, and what tape archives exist?
15. Are there legacy systems to be addressed?
16. How will the parties handle voice mail, instant messaging and other challenging ESI?
17. Is there a preservation duty going forward, and how will it be met?
18. Is a preservation or protective order needed?
19. What e-mail applications are used currently and in the relevant past?
20. Are personal e-mail accounts and computer systems involved?
21. What principal applications are used in the business, now and in the past?
22. What electronic formats are common, and in what anticipated volumes?
23. Is there a document or messaging archival system?
24. What relevant databases exist?
25. Will paper documents be scanned, and if so, at what resolution and with what OCR and metadata?
26. What search techniques will be used to identify responsive or privileged ESI?
27. If keyword searching is contemplated, can the parties agree on keywords?
28. Can supplementary keyword searches be pursued?
29. How will the contents of databases be discovered? Queries? Export? Copies? Access?
30. How will de-duplication be handled, and will data be re-populated for production?
31. What forms of production are offered or sought?
32. Will single- or multipage .tiffs, PDFs or other image formats be produced?
33. Will load files accompany document images, and how will they be populated?

34. How will the parties approach file naming, unique identification and Bates numbering?

35. Will there be a need for native file production? Quasi-native production?

36. On what media will ESI be delivered? Optical disks? External drives? FTP?

37. How will we handle inadvertent production of privileged ESI?

38. How will we protect trade secrets and other confidential information in the ESI?

39. Do regulatory prohibitions on disclosure, foreign privacy laws or export restrictions apply?

40. How do we resolve questions about printouts before their use in deposition or at trial?

41. How will we handle authentication of native ESI used in deposition or trial?

42. What ESI will be claimed as not reasonably accessible, and on what bases?

43. Who will serve as liaisons or coordinators for each side on ESI issues?

44. Will technical assistants be permitted to communicate directly?

45. Is there a need for an e-discovery special master?

46. Can any costs be shared or shifted by agreement?

47. Can cost savings be realized using shared vendors, repositories or neutral experts?

48. How much time is required to identify, collect, process, review, redact and produce ESI?

49. How can production be structured to accommodate depositions and deadlines?

50. When is the next Rule 26(f) conference (because we need to do this more than once)?