

ESI Checklist & Model Protocols

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JUDGE GENE E.K. PRATTER
United States District Court
Eastern District of Pennsylvania

**CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION (“ESI”)**

In cases in which the discovery of electronically stored information is likely to be a significant cost or burden, the Court encourages the parties to engage in ongoing meet-and-confer discussions and use the following Checklist to guide those discussions. While the Court does *not* expect to receive this checklist from counsel, the Court recommends that all counsel retain a copy of it in the event of subsequent disputes.

The parties’ discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the Checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. 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).
- ☐ The description of data from sources that the party (a) believes could not contain relevant information but (b) has determined, under proportionality factors, should not be preserved.
- ☐ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of emails, voicemails, and other electronically recorded material.
- ☐ The names, 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 the scope or manner of preservation.

II. Liaison

- ☐ The identity of each party’s e-discovery liaison.

III. Informal Discovery Regarding Location and Types of Systems

- ☐ 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.
- ☐ 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.

IV. Proportionality and Costs

- ☐ The nature of the claims made, remedies requested, and damages claimed 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.
- ☐ 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 potentially discoverable ESI that will not be preserved.

V. 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.

VI. Phasing

- ☐ 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 document discovery under Federal Rule of Civil Procedure 34.

- ☐ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ☐ Custodians (by name or role) most likely to have discoverable information and whose ESI will be included in the first phases of document discovery.
- ☐ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ☐ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ☐ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ☐ The formats in which unstructured ESI (email, presentations, word processing files, etc.) will be produced.
- ☐ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ☐ The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

VIII. 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 Federal Rule of Evidence 502(d) Stipulation and Order that addresses inadvertent or agreed-upon production.

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[MODEL] STIPULATED ORDER RE:
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION FOR
STANDARD LITIGATION

VS.

Defendant(s).

This Order will govern discovery of electronically stored information (“ESI”) in this case as a supplement to the Arizona Rules of Civil Procedure, this Court’s protocol for the Discovery of Electronically Stored Information, and any other applicable orders and rules.

The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court’s protocol for the Discovery of ESI.

The parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

The parties have discussed their preservation obligations and needs and agree that preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the

costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- a) Only ESI created or received between _____ and _____ will be preserved;
- b) The parties have exchanged a list of the types of ESI they believe should be preserved and the custodians, or general job titles or descriptions of custodians, for whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and “marketing manager.” The parties shall add or remove custodians as reasonably necessary;
- c) The parties have agreed/will agree on the number of custodians per party for whom ESI will be preserved;
- d) These data sources are not reasonably accessible because of undue burden or cost pursuant to Ariz. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];
- e) The parties agree not to preserve the following sources of data: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents].

5. SEARCH

The parties agree that in responding to an initial Ariz. R. Civ. P. 34 request, or earlier if appropriate, they will meet and confer about methods to search ESI in order to identify ESI that is subject to production in discovery and filter out ESI that is not subject to discovery.

6. PRODUCTION FORMATS

The parties agree to produce documents in ☐ PDF, ☐ TIFF, ☐ native and/or ☐ paper or a combination thereof (check all that apply)] file formats. If particular documents warrant a different format, the parties will cooperate to arrange for the mutually acceptable production of such documents. The parties agree not to degrade the searchability of documents as part of the document production process.

7. PHASING

When a party propounds discovery requests pursuant to Ariz. R. Civ. P. 34, the parties agree to phase the production of ESI and the initial production will be from the following sources and custodians: _____.

Following the initial production, the parties will continue to prioritize the order of subsequent productions.

8. DOCUMENTS PROTECTED FROM DISCOVERY

- a) Pursuant to Ariz. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.
- b) The parties have agreed upon a “quick peek” process pursuant to Ariz. R. Civ. P. 26.1(f)(2) and reserve rights to assert privilege as follows _____.
- c) Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

9. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated:

Counsel for Plaintiff

Dated:

Counsel for Defendant

IT IS ORDERED that the forgoing Agreement is approved.

Dated:

Judge of the Superior Court

NORTHERN DISTRICT OF CALIFORNIA

Case Number: C xx-xxxx

[MODEL] STIPULATED ORDER RE:
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION FOR
STANDARD LITIGATION

Plaintiff(s),

VS.

Defendant(s).

1. PURPOSE

This Order will govern discovery of electronically stored information (“ESI”) in this case as a supplement to the Federal Rules of Civil Procedure, this Court’s Guidelines for the Discovery of Electronically Stored Information, and any other applicable orders and rules.

2. COOPERATION

The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court's Guidelines for the Discovery of ESI.

3. LIAISON

The parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

4. PRESERVATION

The parties have discussed their preservation obligations and needs and agree that preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- a) Only ESI created or received between _____ and _____ will be preserved;
- b) The parties have exchanged a list of the types of ESI they believe should be preserved and the custodians, or general job titles or descriptions of custodians, for whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and “marketing manager.” The parties shall add or remove custodians as reasonably necessary;
- c) The parties have agreed/will agree on the number of custodians per party for whom ESI will be preserved;
- d) These data sources are not reasonably accessible because of undue burden or cost pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];
- e) Among the sources of data the parties agree are not reasonably accessible, the parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];
- f) In addition to the agreements above, the parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. SEARCH

The parties agree that in responding to an initial Fed. R. Civ. P. 34 request, or earlier if appropriate, they will meet and confer about methods to search ESI in order to identify ESI that is subject to production in discovery and filter out ESI that is not subject to discovery.

6. PRODUCTION FORMATS

The parties agree to produce documents in ☐ PDF, ☐ TIFF, ☐ native and/or ☐ paper or a combination thereof (check all that apply)] file formats. If particular documents warrant a different format, the parties will cooperate to arrange for the mutually acceptable production of such documents. The parties agree not to degrade the searchability of documents as part of the document production process.

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Following the initial production, the parties will continue to prioritize the order of subsequent productions.

- a) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.
- b) The parties have agreed upon a “quick peek” process pursuant to Fed. R. Civ. P. 26(b)(5) and reserve rights to assert privilege as follows _____.
- c) Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

This Stipulated Order may be modified by a Stipulated Order of the parties or by the Court for good cause shown.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

Dated: _____

UNITED STATES DISTRICT/MAGISTRATE JUDGE

NORTHERN DISTRICT OF CALIFORNIA

Case Number: C xx-xxxx

[MODEL] STIPULATION & ORDER RE:
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION FOR PATENT
LITIGATION

Plaintiff(s),

VS.

Defendant(s).

Upon the stipulation of the parties, the Court ORDERS as follows:

1. This Order supplements all other discovery rules and orders. It streamlines Electronically Stored Information (“ESI”) production to promote a “just, speedy, and inexpensive determination of this action, as required by Federal Rule of Civil Procedure 1.”

2. This Order may be modified in the Court's discretion or by stipulation. The parties shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil Procedure 16 Conference.

3. As in all cases, costs may be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a party's nonresponsive or dilatory discovery tactics are cost-shifting considerations.

4. A party's meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.

5. The parties are expected to comply with the District’s E-Discovery Guidelines (“Guidelines”) and are encouraged to employ the District’s Model Stipulated Order Re: the Discovery of Electronically Stored Information and Checklist for Rule 26(f) Meet and Confer

1 regarding Electronically Stored Information.

2 6. General ESI production requests under Federal Rules of Civil Procedure 34 and 45
3 shall not include email or other forms of electronic correspondence (collectively “email”). To
4 obtain email parties must propound specific email production requests.

5 7. Email production requests shall only be propounded for specific issues, rather than
6 general discovery of a product or business.

7 8. Email production requests shall be phased to occur after the parties have exchanged
8 initial disclosures and basic documentation about the patents, the prior art, the accused
9 instrumentalities, and the relevant finances. While this provision does not require the production
10 of such information, the Court encourages prompt and early production of this information to
11 promote efficient and economical streamlining of the case.

12 9. Email production requests shall identify the custodian, search terms, and time frame.
13 The parties shall cooperate to identify the proper custodians, proper search terms and proper
14 timeframe as set forth in the Guidelines.

15 10. Each requesting party shall limit its email production requests to a total of five
16 custodians per producing party for all such requests. The parties may jointly agree to modify this
17 limit without the Court’s leave. The Court shall consider contested requests for additional
18 custodians, upon showing a distinct need based on the size, complexity, and issues of this
19 specific case. Cost-shifting may be considered as part of any such request.

20 11. Each requesting party shall limit its email production requests to a total of five search
21 terms per custodian per party. The parties may jointly agree to modify this limit without the
22 Court’s leave. The Court shall consider contested requests for additional search terms per
23 custodian, upon showing a distinct need based on the size, complexity, and issues of this specific
24 case. The Court encourages the parties to confer on a process to test the efficacy of the search
25 terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such
26 as the producing company’s name or its product name, are inappropriate unless combined with
27 narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive
28 combination of multiple words or phrases (*e.g.*, “computer” and “system”) narrows the search

1 and shall count as a single search term. A disjunctive combination of multiple words or phrases
2 (e.g., “computer” or “system”) broadens the search, and thus each word or phrase shall count as a
3 separate search term unless they are variants of the same word. Use of narrowing search criteria
4 (e.g., “and,” “but not,” “w/x”) is encouraged to limit the production and shall be considered
5 when determining whether to shift costs for disproportionate discovery. Should a party serve
6 email production requests with search terms beyond the limits agreed to by the parties or granted
7 by the Court pursuant to this paragraph, this shall be considered in determining whether any
8 party shall bear all reasonable costs caused by such additional discovery.

9 12. Nothing in this Order prevents the parties from agreeing to use technology assisted
10 review and other techniques insofar as their use improves the efficacy of discovery. Such topics
11 should be discussed pursuant to the District’s E-Discovery Guidelines.

12
13 **IT IS SO STIPULATED**, through Counsel of Record.

14 Dated:

15 _____
16 Counsel for Plaintiff

17 Dated:

18 _____
19 Counsel for Defendant

20 **IT IS ORDERED** that the forgoing Agreement is approved.

21 Dated:

22 _____
23 UNITED STATES DISTRICT/MAGISTRATE JUDGE
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