

## **Considerations for Electronically Stored Information (ESI) Discovery**

1. **Discovery Scope.** Outline the types of information each party intends to seek in discovery. This includes identification of the various topics on which discovery will be sought and identification of the nature and type of documents to be produced, a list of the potentially relevant custodians, and the date ranges relevant to discovery in this matter.
2. **ESI Sources, Volume, and Cost.** For discovery outlined in paragraph 1, the parties should discuss:
  - the types of ESI (e.g. Outlook email, Word documents, Excel spreadsheets, CAD drawings, etc.) implicated by the opposing party's requests (meaning that a party should address the categories and types of information identified by the other party);
  - any proprietary software involved in the production of such ESI;
  - the location of such ESI (e.g., number of servers and their locations, number of hard drives and whether connected to a central server, etc.);
  - the estimated volume of ESI implicated by such requests (e.g., 20 GB of Outlook .pst files, 500 MB of Excel spreadsheets, etc.); and
  - the estimated costs associated with production of ESI; any cost-shifting and cost-saving measures.
3. **Accessibility.** Identify any potential sources of ESI that are "not reasonably accessible" as defined by Federal Rule of Civil Procedure 26(b)(2)(B).
4. **ESI Management Software.** Describe the software each party intends to use to manage any ESI produced in this matter and identify the Information Technology personnel primarily responsible for assisting counsel with the production and management of ESI in this matter.
5. **Metadata.** Identify the potential sources of metadata and each party's anticipated use of metadata in this matter.
6. **ESI Format.** Identify the format in which the parties will produce ESI in this matter.
7. **Discovery sequencing.** Whether the parties agree to the sequencing of discovery in this matter.
8. **Search Protocol.** Whether the parties agree to any protocol for identification and review of relevant ESI (e.g., search terms, predictive coding, exchanging "hit lists," etc.).
9. **Preservation.** Describe what efforts each party will undertake to ensure the preservation of ESI potentially relevant to this matter.
10. **Discovery Proportionality.** Does discovery of ESI in this matter satisfy the proportionality standards set forth in Federal Rule of Civil Procedure 26(b)(2)(C)?
11. **Claw Back Agreement.** Do the parties agree on an unintentional production "claw back" provision?