

Ad Hoc Committee for Electronic Discovery

The Ad Hoc Committee for Electronic Discovery has developed a default standard for the discovery of electronically stored information. The Ad Hoc Committee includes the following members:

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Chief Judge Robinson expresses her gratitude to the Ad Hoc Committee members for their continuing work on this project.

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**DEFAULT STANDARD FOR DISCOVERY OF
ELECTRONICALLY STORED INFORMATION ("E-DISCOVERY")**

1. **Introduction.** It is expected that parties to a case will cooperatively reach agreement on how to conduct e-discovery consistent with Fed. R. Civ. p. 34.¹ In the event that such agreement has not been reached by the Fed. R. Civ. P. 16 scheduling conference, however, the following default standards **shall apply** until such time, if ever, the parties conduct e-discovery on a consensual basis.

2. **Discovery conference.** Parties shall discuss the parameters of their anticipated e-discovery at the Fed. R. Civ. P. 26(f) conference, as well as at the Fed. R. Civ. P. 16 scheduling conference with the court, consistent with the concerns outlined below. More specifically, prior to the Rule 26(f) conference, the parties shall exchange the following information:

- A list of the most likely custodians of relevant electronically stored information, including a brief description of each person's title and responsibilities.
- A list of each relevant electronic system that has been in place at all relevant times² and a general description of

¹See also the references to electronic discovery in Rules 26, 37, and 45.

²For instance, in a patent case, the relevant times for a patent holder may be the date the patent(s) issued or the effective filing date of each patent in suit.

each system including, but not limited to, the nature, scope, character, organization, and formats employed in each system. The parties should also discuss whether their electronically stored information is reasonably accessible. Electronically stored information that is not reasonably accessible may include information created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval otherwise involves undue burden or substantial cost.

- The name of the individual responsible for retention of that party's electronically stored information ("the retention coordinator"), as well as a general description of that party's retention policies for the systems identified above (see ¶ 7).

- The name of the individual who shall serve as that party's liaison for e-discovery ("e-discovery liaison") (see ¶ 3).

- Provide notice of any problems reasonably anticipated to arise in connection with e-discovery, e.g., email duplication.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above by the time of the Rule 26(f) conference, the parties shall either agree on a date by which this information will be mutually exchanged or submit the issue for resolution by the court at the Rule 16 scheduling

conference.

3. **E-discovery liaison.** In order to promote communication and cooperation between the parties, each party to a case shall designate an e-discovery liaison through which all e-discovery requests and responses shall be made. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

- Familiar with the party's electronic 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 court notes that, at all times, the attorneys of record shall be responsible for compliance with e-discovery requests. However, the e-discovery liaisons shall be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

4. **Timing of e-discovery.** Discovery of electronically stored information shall proceed in a sequenced fashion.

- 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).

- Electronic searches of information identified as not reasonably accessible shall not be conducted until the initial search has been completed. 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).

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

5. **Search methodology.** If the parties intend to employ an electronic search to locate relevant electronically stored information, the parties shall disclose any restrictions as to the scope and method which might affect their ability to conduct a complete electronic search of such information. The parties shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched with the assistance of the respective e-discovery liaisons, who are charged with

familiarity with the parties' respective systems. The parties also shall reach agreement as to the timing and conditions of any additional searches which may become necessary in the normal course of discovery. To minimize the expense, the parties may consider limiting the scope of the electronic search (e.g., time frames, fields, document types).

6. **Format.** If, during the course of the Rule 26(f) conference, the parties cannot agree to the format for production of their electronically stored information, as permitted by Fed. R. Civ. P. 34, such information shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF), unless unduly burdensome or cost-prohibitive to do so. When a text searchable image file is produced, the producing party must preserve the integrity of the underlying electronically stored information, i.e., the original formatting, the metadata and, where applicable, the revision history. After initial production in text searchable image file format is complete, a party must demonstrate particularized need for production of electronically stored information in native format.

7. **Retention.** Within the first thirty (30) days of discovery, the parties should work towards an agreement (akin to the standard protective order) that outlines the steps each party shall take to segregate and preserve the integrity of all relevant electronically stored information. In order to avoid

later accusations of spoliation, a Fed. R. Civ. P. 30(b)(6) deposition of each party's retention coordinator may be appropriate.

The retention coordinators shall:

- Take steps to ensure that e-mail of identified custodians shall not be permanently deleted in the ordinary course of business and that all other electronically stored information maintained by the identified custodians shall not be altered.

- Provide notice as to the criteria used for spam and/or virus filtering of e-mail and attachments; e-mails and attachments filtered out by such systems shall be deemed non-responsive so long as the criteria underlying the filtering are reasonable.

Within seven (7) days of identifying the relevant custodians, the retention coordinators shall implement the above procedures, and each party's counsel shall file a statement of compliance as such with the court.

8. **Privilege.** Electronically stored information that contains privileged matter or attorney work product shall be immediately returned if such information appears on its face to have been inadvertently produced or, if there is notice of the inadvertent production, within thirty (30) days of such notice.

9. **Costs.** Generally, the costs of discovery shall be borne by each party. However, the court will apportion the costs of electronic discovery upon a showing of good cause.

10. **Discovery disputes and trial presentation.** At this time, e-discovery disputes shall be resolved and trial presentations shall be conducted consistent with each individual judge's guidelines.