

eData lawflash

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District Court Issues New ESI Guidelines

The trend toward increased judicial involvement in eDiscovery to lower litigation costs and promote cooperation among litigants takes another leap forward in the Northern District of California.

The U.S. District Court for the Northern District of California recently set the tone in its district for cooperative, efficient, and proportionate eDiscovery by introducing a new package of guidance materials.¹ Included in the guidance materials is the court's "Guidelines for the Discovery of Electronically Stored Information" (Guidelines),² which has the following overriding goals:

- Handling discovery of Electronically Stored Information (ESI) "consistently with Fed. R. Civ. P. 1 to 'secure the just, speedy, and inexpensive determination of every action or proceeding'"
- Promoting "when ripe, the early resolution of disputes regarding the discovery of ESI **without** [c]ourt intervention" (Emphasis added)

Given these stated goals, and the fact that Northern District of California judges will likely refer to the Guidelines and their related materials when resolving discovery disputes, litigants in this district should familiarize themselves with all aspects of the Guidelines, and leverage them in negotiating a proportional and cost-effective discovery plan.

Purpose of the Guidelines

The purpose of the Guidelines is to "encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent," while, at the same time, ensuring proper preservation of evidence and fair adjudication. The district court expressly stated that it expects cooperation among the parties on ESI discovery issues and that such cooperation is not considered a compromise of an attorney's duty to zealously represent his or her clients. Information should be exchanged at the earliest possible stages of litigation, including during the parties' Federal Rules of Civil Procedure (FRCP) Rule 26(f) "meet and confer" conference, and the proportionality standards set forth in FRCP 26(b)(2)(C) and 26(g)(1)(B)(iii) should be applied to each element and stage of the discovery plan. Discovery requests and responses should be "reasonably targeted, clear, and as specific as practicable."

In addition to the Guidelines, the court published the following documents:

- "ESI checklist for use during the Rule 26(f) meet and confer process"
- "Model Stipulated Order Re: the Discovery of Electronically Stored Information," which includes a designation of an ESI discovery liaison for each party
- An updated Standing Order for All Judges in the district, which added paragraphs six and eight requiring that the parties include in their joint case management statement (i) a certification that they have reviewed the Guidelines and conferred under FRCP 26(f) and in accordance with the Guidelines and (ii) a brief report on whether the parties have considered entering into a stipulated eDiscovery order

1. View the district court's guidance materials at <http://www.cand.uscourts.gov/eDiscoveryGuidelines>.

2. View the Guidelines at http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf.

Requirements and Guidance Provided by the Guidelines

The Guidelines provide new standards for the preservation of ESI, including the following requirements:

- Parties should discuss preservation at the outset of the case, or earlier if possible, and continue the discussions periodically.
- Proportionality standards of the FRCP are applied to preservation.
- A preservation letter is not required by parties to notify an opposing party of its preservation obligation, but if it is used, it must be detailed and not overbroad.
- Parties should meet and confer to resolve disputes on preservation and, if that fails, raise the issue promptly with the court.
- Parties should discuss ESI from sources that are not reasonably accessible as well as identify data from sources that could contain relevant information but that should not be preserved due to proportionality concerns.

Additionally, the district court recommended that parties discuss the following at FRCP 26(f) meet-and-confer conferences:

- Source and scope of ESI, including date ranges, identity, and number of potential custodians
- Difficulties related to preservation
- Discovery phasing, so relevant information is likely to be produced first
- Need for protective orders
- Inadvertent production of privileged information and privilege waivers
- Methods and technology for searching for relevant information, including the use of sampling methods, to reduce costs and increase efficiency
- Agreements for truncated or limited privilege logs
- Opportunities to share expenses, e.g., litigation document repositories

The Guidelines also state that, for most cases, each party should designate an eDiscovery liaison who is knowledgeable about and responsible for discussing their respective ESI in order to participate in the meet-and-confer process and any ESI discovery disputes. That liaison should be familiar with and able to explain the party's electronic systems and capabilities and should also be knowledgeable about the technical aspects of eDiscovery, such as electronic document storage, organization, format issues, and retrieval technology, including search methodology.

Implications

With courts across the country increasingly adopting guidelines and model orders for eDiscovery in an effort to foster a more cooperative process, reduce costs, and increase efficiency, more such measures can be expected in the future. Litigants in and beyond the Northern District of California should consider using the Guidelines to evaluate their own best practices and strengthen their position in litigation.

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