

Sep 12 2018

Ann Frantz

DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

IN RE: DEFAULT STANDARD)
 FOR DISCOVERY OF) Administrative Order No. 174-1
 ELECTRONICALLY STORED)
 INFORMATION)

ADMINISTRATIVE ORDER

1. Introduction. This Administrative Order supersedes Administrative Order No. 174 entered on July 9, 2007. The following default standards shall apply until such time, if ever, the parties reach an alternate written agreement signed by all parties or their counsel governing the conduct of electronic discovery (or “eDiscovery”). The parties shall be prepared to submit any such agreement to the Court promptly upon the Court’s request. In an appropriate case with minimal electronic discovery, the parties may, with the Court’s permission, elect to opt-out of electronic discovery procedures altogether. In any such case, however, if further developments warrant, the Court may apply the standards of this Administrative Order.

2. General disclosures. At or before the Rule 26(f) conference (held before the initial case management conference), the parties shall exchange and discuss the following information:

- a. **Data Custodians.** A list of the most likely custodians of discoverable electronically stored information (ESI) (including individual parties), together with each person’s employer and job title.
- b. **Non-Custodial Data Sources.** A list of any non-custodial data sources (e.g., shared drives, internal servers, enterprise databases or applications) over whom the party has authority likely to contain discoverable ESI.
- c. **Non-Party Data Sources.** A list of any non-party data sources likely to contain discoverable ESI (e.g., third-party email and/or mobile device providers, vendors, contractors, ISPs, social media providers).
- d. **Inaccessible Data.** A list of any data sources likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2). ESI not reasonably accessible may include data created or stored in electronic media no longer in normal use, maintained in redundant electronic storage media, or for which retrieval involves disproportionate cost.
- e. Notice of any known problems with electronic discovery.

If the parties need additional time to have a meaningful discussion of the items in sections 2.a – 2.e by the time of the initial case management conference, the parties shall either agree on a

date by which this information will be mutually exchanged or be prepared to discuss the issues with the Court at the initial case management conference.

3. Checklist. In cases where the discovery of ESI is likely to be at issue, the Court expects the parties to engage in on-going meet and confer discussions on ESI and use the attached Checklist (Attachment A) to guide those discussions.

4. Preservation.

A party has an obligation to take reasonable and proportional steps to preserve discoverable ESI in the party's possession, custody or control. The producing party is best situated to evaluate and defend the methods and protocols appropriate for preserving its own ESI.

- a. The following categories of ESI do not automatically have to be preserved, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:
 - i) Active ESI in a format whose preservation requires modification of the procedures used by the producing party in the ordinary course of business to back up and archive data;
 - ii) Data in metadata fields that are frequently updated automatically; and
 - iii) Other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business, including legacy or not reasonably accessible ESI.
- b. The Court expects the parties to confer regarding particular date ranges, custodians, types of ESI, and sources of ESI both to minimize the costs and burdens of preservation and to ensure that needed ESI is preserved.
- c. If a dispute arises regarding the scope of a party's obligation to preserve ESI, any party may seek an expedited ruling from the Court on the issue. If appropriate, the Court may require a party who has made an overbroad or disproportionate preservation demand to bear some or all of the producing party's expenses in preserving the disputed ESI.

5. Collection. The producing party is in the best position to determine the method by which it will collect ESI. Parties need not collect ESI before they have conferred regarding the form of production at the Rule 26(f) conference. To the extent the parties have a dispute regarding the method of collection, the parties should be prepared to submit promptly such a dispute to the Court for resolution.

6. Search. The producing party is best situated to evaluate the methods and protocols appropriate for searching its own ESI. ESI searches shall be done using methods and protocols selected by the producing party, if reasonable and likely to locate relevant ESI. The Court expects the parties to discuss potential methodologies for identifying ESI for production. To the extent the parties have a dispute regarding search methodology, the parties should be prepared to submit promptly such a dispute to the Court for resolution.

7. Form of Production. If, during the course of the Rule 26(f) conference, the parties cannot agree to the form(s) of production, ESI shall be produced in a form or forms that is reasonably usable and proportionate, considering such factors as the cost of the form(s) of production, the volume of ESI at issue, and whether there is a need for searchability and metadata. In most cases, the parties need not produce metadata that is not preserved in a “drag and drop” collection. To the extent the parties have a dispute regarding form of production, the parties should be prepared to submit promptly such a dispute to the Court for resolution.

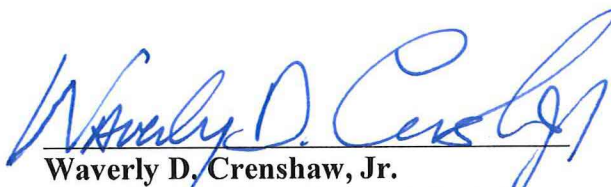
8. Privilege.

- a. The production of ESI shall not constitute a waiver of the attorney-client privilege or work product protection, even though there is a failure to take reasonable steps to prevent production of information covered by the attorney-client privilege or work product protection, or a failure to take reasonable steps to rectify the error.
- b. Parties are not required to include on privilege logs any document generated after the filing of the complaint. If a log is produced, the Court expects the parties to discuss foregoing using traditional document-by-document logs in favor of alternate logging methods, such as identifying information by category or including only information from particular metadata fields (e.g., author, recipient, date). Compliance with the logging provisions of this section shall not constitute a waiver of any privilege or protection.
- c. No provision of this Order limits the authority of the Court to issue a non-waiver order on other terms and conditions pursuant to Fed. R. Evid. 502(d).

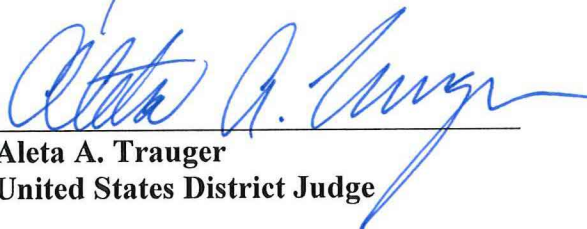
9. Costs. The costs, including attorney fees and vendor fees, of eDiscovery normally shall be borne by the producing party. However, the Court may apportion the costs of eDiscovery upon a showing of good cause. The Court, on motion of one of the parties, will consider the following non-exclusive factors in determining whether any or all eDiscovery costs should be borne by the requesting party: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits of obtaining the information.

12. Court Order. Nothing in this Order limits the authority of the Court to issue an eDiscovery order on other terms and conditions. This Order may be amended, in whole or in part, by further Order of the Court.

It is so **ORDERED**.



Waverly D. Crenshaw, Jr.
Chief United States District Judge



Aleta A. Trauger
United States District Judge



William L. Campbell, Jr.
United States District Judge

**ATTACHMENT A –
CHECKLIST FOR RULE 26(f) MEET AND CONFER REGARDING ESI**

The discussions and use of this checklist 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.
- A list of any data sources likely to contain discoverable ESI that a party asserts is not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved under Fed. R. Civ. P. 26(b)(2).
- A description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, should not be preserved.
- Whether or not to continue any document destruction program, such as ongoing erasures of e-mails and other electronically-recorded material.
- The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.).
- A list of the most likely custodians of discoverable ESI for whom ESI will be preserved.
- A list of any non-custodial data sources likely to contain discoverable ESI that will be preserved.

II. Proportionality and Costs

- The amount and nature of the claims being made by either party.
- The nature and scope of burdens or costs 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.

- The availability of relevant ESI from other sources.

III. Informal Discovery About Systems

- Description and location of systems in which discoverable information is stored.
- How discoverable information is stored.

IV. Search

- The volume and searchability of any likely relevant ESI.
- The search method(s) that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.

V. 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 material to proof of claims and defenses raised in the pleadings.
- Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- Custodians (by name, employer and/or job title) most likely to have discoverable information material to proof of claims and defenses raised in the pleadings.
- Custodians (by name, employer, and/or job title) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.

VI. Production

- The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- Whether there is a need for searchability.

VII. 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 Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

VIII. Miscellaneous

- Whether there are any known problems with electronic discovery.
- Whether the parties agree that all correspondence, discovery requests and the like may be exchanged by electronic mail.