

SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM

**PROPOSED PRINCIPLES
FOR DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION**



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Overview of Principles

- 1.01 – Purpose
- 1.02 – Cooperation
- 1.03 – Discovery Proportionality
- 2.01 – Meet & Confer / Dispute Resolution
- 2.02 – E-Discovery Liaisons
- 2.03 – Preservation Requests & Orders
- 2.04 – Scope of Preservation
- 2.05 – Identification of ESI
- 2.06 – Production Format
- 3.01 – Education
- 3.02 – Resources

Principle 1.01 - Purpose

- Secure just, speedy, and inexpensive determination of cases
- Promote early resolution of ESI disputes *without Court intervention*

Phase 1: 10/1/2009 – 5/1/2010

May 2010

- 7th Circuit Annual Conference
- FJC Conference (5/8/2010)

Phase 2: 6/1/2010 – 5/1/2011

Principle 1.02 - Cooperation

Legal representation NOT compromised by cooperation

Failure to cooperate:

- increases costs
- risks possible sanctions

cf. Sedona Conference[®] "Cooperation Proclamation"

Principle 1.03

- Discovery Proportionality

Proportionality Standard: burden vs. benefit

ESI requests and responses should be:

- reasonably targeted
- clear
- as specific as practicable

Principle 2.01

- Meet & Confer, Dispute Resolution

(a) *Prior to* the initial status conference with the Court, counsel shall meet and discuss :

- (1) *identification* of relevant & discoverable ESI
- (2) *scope* of discoverable ESI to be preserved
- (3) *formats* for preservation and production of ESI
- (4) potential for conducting discovery in *phases or stages* to reduce costs and burden
- (5) procedures for handling *inadvertent production* of privileged information and other *privilege waiver* issues

Principle 2.01

- Meet & Confer (cont'd)

(b) ESI Disputes presented to Court at or before initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference

(c) Attorneys for each party should review and understand how client's data is stored and retrieved

(d) Court may require additional discussions and sanctions if counsel or parties fail to cooperate and participate in good faith

Discuss ESI *early* and *often*

Principle 2.02

- E-Discovery Liaisons

Meet and confer process aided by participation of e-discovery liaisons for purposes of meeting, conferring, and attending court hearings on ESI

E-discovery liaisons can be attorneys (in-house or outside counsel), third party consultants, or employees of the party

Principle 2.02

- E-Discovery Liaisons (cont'd)

Liaisons must be:

- (a) *prepared to participate* in e-discovery dispute resolution;
- (b) *knowledgeable* about the party's e-discovery efforts;
- (c) *familiar* with party's electronic systems and capabilities;
- (d) knowledgeable on technical aspects of e-discovery, document storage, organization, format issues, and information retrieval technology, including search methodologies

Principle 2.03

- Preservation Requests & Orders

(a) Vague / overly broad preservation requests should not be sought or entered

Information sought should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C)

If used, preservation letters should be designed to ensure preservation of relevant and discoverable information

Principle 2.03

- Preservation Requests(cont'd)

(b) *Preservation Requests/Letters* should facilitate cooperation by including:

- (1) names of parties;
- (2) factual background of potential legal claims
- (3) identify potential causes of action;
- (4) names of potential witnesses / people reasonably anticipated to have relevant evidence;
- (5) relevant time period

Principle 2.03

- Preservation Requests (cont'd)

(c) *Responses* should provide useful information re: preservation efforts, including:

(1) identifying information responding party is willing to preserve and steps being taken

(2) identifying any disagreement(s) with the request to preserve; and

(3) identifying any further preservation issues that were not raised.

(d) Notwithstanding above, preservation requests and responses NOT REQUIRED in all cases.

Principle 2.04

- Scope of Preservation

(a) Parties and counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control

Which steps are reasonable & proportionate varies according to facts specific to case

Address preservation issues at case outset, and continue to address them as the case progresses and understanding of issues / facts improves.

Principle 2.04

- Scope of Preservation (cont'd)

(b) Before initiating discovery re: preservation & collection efforts of other parties, must confer on:

- (i) specific need for such discovery, including relevance to issues likely to arise in litigation; and
- (ii) suitability of alternative means for obtaining the information.

Deponents not exempt from answering questions concerning preservation and collection of their documents, ESI, and tangible things.

Principle 2.04

- Scope of Preservation (cont'd)

(c) Meet & Confer participants should be prepared to discuss claims and defenses, including:

- specific issues
- time frame
- potential damages
- anticipated discovery requests (*targeted*)
- potential preservation issues

Identification of issues should be *specific*

Principle 2.04

- Scope of Preservation (cont'd)

(d) Categories of ESI generally not discoverable:

- (1) deleted, slack, fragmented, unallocated
- (2) ephemeral data (e.g. RAM)
- (3) temporary internet files, history, cache, cookies,
- (4) file and other system metadata
- (5) backup data / duplicative / accessible elsewhere
- (6) ESI not utilized in ordinary course of business

N.B. – Forensicon makes no representations herein as to the appropriateness or applicability of these limitations as to all cases

Principle 2.04

- Scope of Preservation (cont'd)

Justifying “extraordinary affirmative measures”:

- Discuss at Meet & Confer
- Expert affidavits in support
 - Rationale
 - Cost
 - Time
- Reasonable suspicion / corroborating evidence
- Imaging not necessarily an “extreme measure”
- Remember proportionality

Principle 2.04

- Scope of Preservation (cont'd)

(e) When preservation efforts disputed, the parties/counsel must meet and confer:

Fully explain reasons for believing additional efforts are, or are not, reasonable and proportionate

If parties are unable to resolve preservation issues, raise ***promptly*** with the Court.

Principle 2.05

- Identification of ESI

(a) Rule 26(f) conference = discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion:

(1) De-duplication:

- within each custodian
- across all custodians

Principle 2.05

- Identification of ESI (cont'd)

(2) Filtering:

- file types
- date ranges
- sender / receiver / custodian
- search terms

(3) using keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies

Principle 2.06 - Production Format

(a) Rule 26(f) conference:

make good faith effort to agree on the format(s) for production of ESI

- native
- other reasonably usable form

If counsel / parties unable to resolve production format issue, raise *promptly* with the Court

Principle 2.06

- Production Format (cont'd)

(b) ESI in databases:

- *Query* for discoverable information
- Output as specific *reports*
- Other *usable* exportable data

Principle 2.06

- Production Format (cont'd)

(c) ESI /documents not already text-searchable *need not* be made text-searchable

(d) Requesting party responsible for *incremental* *cost* of creating its copy of requested information.

Discuss cost sharing for optical character recognition (OCR) or other “upgrades” of paper documents or non-text-searchable electronic images

Principle 3.01 - Education

Judges expect counsel to:

(1) Familiarize with the electronic discovery provisions of FRCP, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize with the Advisory Committee Report on the 2006 Amendments to the FRCP, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf

(3) Familiarize with these Principles.

Principle 3.02 - Resources

Sedona Conference[®] publications

¹ <http://www.thesedonaconference.org/>

Additional materials available on court web sites

² <http://www.ilnd.uscourts.gov/home/>

Other organizations

³ <http://www.7thcircuitbar.org>, www.fjc.gov
(under Educational Programs and Materials)

Educational info re: discovery of ESI

⁴ <http://www.du.edu/legalinstitute>

Recap of Principles

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