

**United States District Court
Southern District of Florida**

**Checklist for Rule 26(f) Conference
Regarding Electronically Stored Information (“ESI”)**

(Original Bullet Points Changed to Letters and Losey Comments put in parenthesis after each list item, are shown in italics and blue font)

In connection with the Federal Rule of Civil Procedure 26(f) conference and in preparing the Local Rule 16.1(b)(2) conference report, the Court encourages the use of the following checklist. The usefulness of any particular topic may depend on the nature and complexity of the matter.

I. Preservation

A. The ranges of creation or receipt dates for any ESI to be preserved. *(In almost every case there is a date before which the ESI is not relevant. In many there is also an after date. Disagreement between parties on date range should be resolved by phased discovery and reservation of rights to object after first phase is completed.)*

B. The description of ESI from sources that are not reasonably accessible because of undue burden or cost and that will not be reviewed for responsiveness or produced, but that will be preserved in accordance with Federal Rule of Civil Procedure 26(b)(2)(B). *(Backup ESI is almost always so protected, unless it has the only copy of important information.)*

C. The description of ESI from sources that: (a) the party believes could contain relevant information; but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved. *(The keyword here is “could.” Maybe it has relevant information, maybe it does not. Also important in determining discoverability under governing proportionality rules is the “importance” of the information to material issues of fact in dispute. You must consider probative value. In my experience with big data most “merely relevant” information is a waste of time. There is too little probative value to most of it to even try to capture it all.)*

D. Whether to continue any interdiction of any document-destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically recorded material. *(Typically the key custodians identified should have their email auto-delete functions turned off, and voice mail, but as to them only, not the whole enterprise. Plus, I cannot recall voice mail ever making a difference in a case. It typically has low probative value.)*

E. The number and names or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager”). *(This is the broad list of key custodians. They are often divided in classes by probable importance of their ESI to the outcome of the case. Although all classes may be preserved, only the most important are actually reviewed, at least at first.)*

F. The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases. *(A list not associated with custodians usually refers to department type servers where a number of people in the department could store documents, to document management systems, or to general databases, such as payroll.)*

G. Any disputes related to scope or manner of preservation. *(You should get these issues resolved asap. Typically you would want to preserve until the issue is resolved, unless the expense is too great or the other side’s position is too unreasonable. But even then you run some risk, and so quick adjudication on issues like this are important.)*

II. Liaison

A. The identity of each party's e-discovery liaison, who will be knowledgeable about and responsible for each party's ESI. *(I always like to see the role and name that I invented back in 2006 – “e-discovery liaison” – used by a court. One of my first e-Discovery “Liaisons” is now a U.S. Magistrate Judge in the Southern District, and a very good one at that, especially in e-discovery.)*

III. Informal Discovery About Location and Types of Systems

A. Identification of systems from which discovery will be prioritized (e.g., e-mail, finance, HR systems). *(Typically the communications between people, the contemporaneous writings, are the ESI with the highest probative value.)*

B. Descriptions and location of systems in which potentially discoverable information is stored. *(Typically this means a description of all IT systems where relevant ESI might be stored, and not just the high value targets like communications. Document management systems and network drives might also be listed here.)*

C. How potentially discoverable information is stored. *(This is a follow-up on the prior checklist item that describes how the ESI is stored. Usually it is stored manually at the discretion of listed custodians. They either save the documents or email or not. Where they save it may also be within their control. They may save it on personal thumb drives, or they may print it out to store. You have to interview the custodians to find out how they stored it. Sometimes the potentially discoverable information is stored automatically by other software systems, such as payroll systems, and sometimes the location is predetermined.)*

D. How discoverable information can be collected from systems and media in which it is stored. *(Usually it is collected by copying. That needs to be done carefully so that metadata is not changed. Not hard to do, but IT expertise is usually required to do it correctly. Forensic collection is usually not necessary, especially collection of double-deleted files and unallocated space, as such ESI is usually protected under 26(b)(2)(B).)*

IV. Proportionality and Costs

A. The amount and nature of the claims being made by either party. *(The monetary value should not be exaggerated by plaintiffs, but usually they feel the need to do so for posturing purposes and other reasons. Suggest this impediment be avoided by disclaimers and reservation of rights. Beyond amount issues, the “nature” of the claims should be carefully understood and discussed with an aim to identifying the actual disputed facts. Discovery should always be focused and have evidentiary value. It is never an end in itself, or at least should not be. Also, do not forget that subject matter discovery is no longer permitted under revised Rule 26(b)(1). It is now limited to claims and defenses that have actually been raised in the case.)*

B. The nature and scope of burdens associated with the proposed preservation and discovery of ESI. *(Try to include actual monetary burden expected, usually with a range, but restrain the urge to exaggerate. Spend time to do this right and get into some detailed metrics. Consult an expert where necessary, but never b.s. the judge. They do not like that and will remember you.)*

C. The likely benefit of the proposed discovery. *(The requesting party should spell it out. Fishing expeditions are not permitted. The old “reasonably calculated” jargon is gone from new Rule 26(b)(1), at least as a definition of scope, and that change voids a lot of case-law on the subject.)*

D. 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. *(In my experience this is very rare, Typically it only makes sense in very big cases and or between co-defendants or co-plaintiffs. There are usually too many confidentiality issues to share a vendor with opposing parties.)*

E. Limits on the scope of preservation or other cost-saving measures. *(Cost savings should always be considered. This is required of all parties, attorneys and judges under the 2015 revision to Rule 1, FRCP. So too is “speedy” and “just.”)*

F. Whether there is relevant ESI that will not be preserved in accordance with Federal Rule of Civil Procedure 26(b)(1), requiring discovery to be proportionate to the needs of the case. *(Typically the answer here is yes, or should be, and some discussion may be required. Preservation is required by law to be reasonable, not exhaustive or perfect. Reasonable means proportionate. Moreover, if ESI is not relevant under the proportionate definitions of revised Rule 26(b)(1) then it does not have to be preserved because only relevant ESI need be preserved.)*

V. Search

A. The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery. *(Please people, exchanging keywords should be just the beginning, not the whole process. It is only one of many possible search methods. Use the Hybrid Multimodal method, which all readers of my blog and books should know pretty well by now.)*

B. The quality-control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI. *(The problem of missing relevant ESI is the problem of Recall, whereas the problem of too much irrelevant ESI is the problem of Precision, but also, to some extent, to the problem of duplication. All good electronic document review experts have a number of different quality control techniques to improve recall and precision. Not an expert? Then perhaps you should consult with one in your firm, or if you have none (pity), then ask your e-discovery vendor.)*

VI. Phasing

A. Whether it is appropriate to conduct discovery of ESI in phases. *(Yes. It is a great way to resolve disagreements by postponing excessive demands for second or third phases. Chances are these other phases will not be necessary because all that is needed is produced in the first phase. Alternatively, the producing party might agree to them if the first production makes their necessity obvious.)*

B. Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Federal Rule of Civil Procedure 34 document discovery. *(Here is where the producing party lists what sources they will search, most often communication ESI such as Outlook Exchange email servers.)*

C. Sources of ESI less likely to contain discoverable information from which discovery will be postponed or not reviewed. *(These are sources that are unlikely to have ESI with strong probative value, if any, but might. There may never be a need to review these sources. As a compromise where there is disagreement put these sources in a later phase. After the first phase is completed it may not be necessary to look for more evidence in these secondary sources.)*

D. Custodians (by name or role) most likely to have discoverable information and whose ESI will be included in the first phases of document discovery. *(Here is where you list the key custodians. In most lawsuits all you will ever need to search is the contents of the mailboxes of these key witnesses, the emails, attachments, calendar items, etc in their email system.)*

E. Custodians (by name or role) less likely to have discoverable information from whom discovery of ESI will be postponed or avoided. *(These are secondary custodians that might possibly have important information, but it is less likely. Typically, if you cannot resolve disagreements on importance, you agree to postpone the disputed custodians to second phases.)*

F. The time period during which discoverable information was most likely to have been created or received. *(Again, limit the review by timing and if you cannot agree, then postpone disputed additional times for second phases.)*

VII. Production

A. The formats in which structured ESI (database, collaboration sites, etc.) will be produced. *(Typically database production is done by spreadsheet reports, or sometimes native. The person in charge of the structured ESI should know.)*

B. The formats in which unstructured ESI (e-mail, presentations, word processing, etc.) will be produced. *(Producing parties should follow the requesting parties format request most of the time, except if they ask for paper production. Paper production is ridiculous and expensive for ESI. Otherwise format should not matter. It is, or should be, a non-issue.)*

C. The extent, if any, to which metadata will be produced and the fields of metadata to be produced. *(A non-issue too. If metadata is part of the document, then produce it. Your vendor can give you a standard list.)*

D. The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced. *(This is a must. In my court it can be sanctionable to change an electronic document so that it is no longer searchable.)*

VIII. Privilege

A. How any production of privileged or work-product protected information will be handled. *(Of course you do not produce it, but you log it.)*

B. Whether the parties can agree on alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification. *(Look for ways to streamline your privilege log. For instance, under other Southern District local rule you never have to log communications made after suit was filed.)*

C. Whether the parties will enter into a Federal Rule of Evidence 502(d) stipulation and order that addresses inadvertent or agreed production. *(You should always have a 502(d) Order whenever you are making an electronic production. Mistakes happen and this is the closest thing we have in the law to a fail-safe. There is no valid reason to oppose this order. Clear enough for you?)*