

**Superior Court in Maricopa County: Commercial Court
Checklist for Rule 16(b) Joint Report Discussions Regarding ESI**

The court requires the parties to have a meet-and-confer discussion concerning electronically stored information (“ESI”) at the earliest possible time in the litigation, and followed by ongoing discussions as necessary. The parties’ discussions should occur in the context of the claims and defenses in their particular case. The parties should use this checklist on some of the most common ESI topics to guide their conversations. The applicability of specific topics in this checklist, the sequence in which the parties discuss these topics, and whether the parties should defer discussion of certain topics, often depend on the nature and complexity of the litigation.

1. Liaison: (See the explanation that follows.)

If appropriate, the identification by each party of a person who is knowledgeable about a party’s IT system (also known as an “e-discovery liaison.”)

2. Location and Types of IT Systems and Media:

- Description of systems that store potentially discoverable information
- Location of systems that store potentially discoverable information
- How those systems store potentially discoverable information
- How discoverable ESI can be collected from systems, and the media in which systems store ESI
- Identification of the systems from which the parties will prioritize discovery (e.g., email, finance, HR systems)

3. Preservation of ESI: (See the explanation that follows.)

- The ranges of creation dates, or receipt dates, for ESI that the parties will agree to preserve
- The names, general job titles, or descriptions of custodians for whom the parties will preserve ESI (e.g., “HR head,” “scientist,” “marketing manager,” etc.)
- A list of systems, if any, that contain ESI not associated with individual custodians, such as enterprise databases, that the parties will preserve
- The existence and status of any document destruction policies or activities, such as on-going erasures of e-mails, voicemails, and other electronically-recorded material
- A description of data from sources that are not reasonably accessible and that the parties will not produce or review for responsiveness, but which the parties will nonetheless preserve
- A description of data from sources that (a) a party believes could contain relevant information, but (b) has determined under the proportionality factors in Part 8 will not be preserved
- Any other issues related to the scope of preservation, or the manner of preservation, of ESI

4. Phased Discovery of ESI:

- Whether it is appropriate to conduct discovery of ESI in phases
- Sources of ESI that are most likely to contain discoverable information and, if there is phased production, what the parties will include in the first phase
- Custodians (by name or role) who are most likely to have discoverable ESI, and whose ESI will be included in the first phase of document discovery
- Sources of ESI that are less likely to contain discoverable information, and from which the

parties will postpone or avoid discovery

- Custodians (by name or role) who are less likely to have discoverable information, and from whom the parties will postpone or avoid discovery
- The interaction between document requests under Rule 34 and the ESI methods or protocols of production agreed upon by the parties

5. Search for ESI:

- The time period during which discoverable information was most likely created or received
- The search protocols or methods, 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
- Whether the parties should use Technology Assisted Review (“TAR”), such as predictive coding, to reduce the costs and time for filtering and reviewing ESI
- The quality control method that the producing party will use to evaluate whether production is missing relevant ESI or contains substantial amounts of irrelevant ESI

6. Production of ESI:

- The formats (for example, PDF-searchable, TIFF, native, Load Files, paper, or combinations of the foregoing) in which the parties will produce structured ESI (database, collaboration sites, etc.)
- The formats (see the preceding checkbox) in which the parties will produce unstructured ESI (email, word processing, presentations, etc.)
- The extent, if any, to which the parties will produce metadata, and if so, the fields of metadata the parties will produce
- The production format(s) that will ensure that when ESI is produced, any of its inherent searchability is not degraded
- Whether to engage in deduplication, denesting, or other filtering methods

7. Privilege Considerations: (See the explanation that follows.)

- How the parties will handle the production of privileged or work product protected information
- Whether the parties can agree upon alternative ways to identify documents that are withheld on grounds of privilege or work product, such as identification by category, to reduce the burdens of identification
- Whether the parties will enter into a stipulation and order under Rule 502(d) of the Arizona Rules of Evidence that addresses inadvertent or agreed production, or whether a party will file a motion to address these issues

8. Proportionality and Costs under Rule 26(b)(1)(C):

- The nature and the amount of the claims made by the parties
- The nature and scope of burdens associated with proposed discovery and preservation of ESI
- The importance of particular issues at stake in the litigation as they relate to ESI
- The likely benefit of the proposed discovery
- Limitations on the parties’ resources
- Placing limits on the scope of preservation, or other cost-saving measures
- Costs that the parties agree to share, or will shift, to reduce overall ESI discovery expenses,

such as using a common electronic discovery vendor, a shared document repository, or other cost-saving measures

The Court's Explanations Regarding the Checklist

Generally: The court requires the parties to meet and confer about discovery of ESI at the earliest reasonable stage of litigation. Early discussion will assist the parties in efficiently requesting and responding to ESI discovery, it will reduce costs and delay, and it will assist the court in the event the parties are unable to resolve a dispute concerning ESI. ESI discovery as used in this checklist encompasses affirmative obligations of the parties to disclose ESI even in the absence of a specific discovery request.

Cooperation: The court requires the parties to cooperate on issues relating to the preservation, collection, search, review, and production of ESI. Conducting discovery in a cooperative manner is compatible with zealous representation. Note also that Rule 1 of the Rules of Civil Procedure requires construction of the rules "to secure the just, speedy, and inexpensive determination of every action."

Liaison: In some cases, the parties' meet and confer sessions will be aided by the participation of e-discovery liaisons. Each party in those cases should designate an e-discovery liaison who is knowledgeable about, and responsible for discussing, ESI. The e-discovery liaison could be an attorney (either in-house or outside counsel), an employee of a party, or a third-party consultant. "Knowledgeable" means that this liaison will:

- (a) Be familiar with the technical aspects of e-discovery in the case, including electronic document storage, organization, retrieval technology, and search methodology;
- (b) Know about the location, nature, accessibility, and format of ESI in the case, and the collection, search for, and production of that ESI, or have access to others who know;
- (c) Be familiar with, or be able to learn about, the party's electronic systems and capabilities in order to explain those systems and to answer related questions;
- (d) Be familiar with the party's e-discovery requests;
- (e) Be prepared to participate in e-discovery dispute resolution in order to limit the need for court intervention.

Preservation: A party is not required to use a preservation letter to notify another party of the preservation obligation. However, if a party uses a preservation letter, the court discourages the use of overbroad letters. Instead, such a letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the sending party knows or believes are likely to contain relevant information, and any other information that might assist the receiving party in determining what information to preserve.

Privilege: When discussing privilege and work product, the parties should consider Rule 25.1(f)(2), which provides:

- (1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.
- (2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Proportionality: The proportionality standard in Rule 26(b)(1)(C) should provide direction to the parties in preparing their discovery plan, including the preservation, collection, search, review, and production of ESI. This Rule provides:

The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Disputes: Before bringing a dispute concerning the preservation or discovery of ESI to the court, the parties and their liaisons should fully discuss the issue, and should consider bringing the issue to a special master or to an agreed-upon expert for resolution. If notwithstanding these efforts the parties are unable to resolve the dispute, they should present it to the court at the earliest possible opportunity