

United States District Court
District of Colorado

**CHECKLIST FOR RULE 26(f) MEET-AND-CONFER
REGARDING ELECTRONICALLY STORED INFORMATION**

In cases involving the discovery of electronically stored information (“ESI”), the Court encourages the use of the following checklist to guide the parties’ initial and ongoing meet-and-confer discussions. 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 claims, defenses, and relevant facts in dispute.
- When the duty to preserve arose.
- Relevant time frames (including the ranges of creation or receipt dates for any ESI to be preserved), geographic locations, and individuals.
- The types of data that may be relevant to the claims and defenses, and the current repositories and custodians of that data.
- Whether legacy, archived, or offline data sources are reasonably likely to contain relevant, non-duplicative information.
- The types or specific sources of ESI (e.g., a category of back-up media or a particular cell phone) that are not reasonably accessible pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The types or specific sources of ESI (e.g., a category of back-up media or a particular cell phone) that a party proposes be preserved or not preserved in light of the claims, defenses, and relevant facts in dispute in the case, and considering the proportionality factors in Federal Rule of Civil Procedure 26(b)(2)(C).
- The types or specific sources of ESI (e.g., a category of back-up media or a particular cell phone) that will be preserved, but that a party proposes will not initially be searched or reviewed in light of the claims, defenses, and relevant facts in dispute in the case, and considering the proportionality factors in Federal Rule of Civil Procedure 26(b)(2)(C).
- Whether there are third-party sources that have relevant information that falls within the preservation obligation and, if so, what actions should be taken to preserve that ESI.
- If a custodian-based approach is used, the number of custodians (individuals) for whom ESI will be preserved and the names and/or general job titles or role of custodians for whom ESI will be preserved (e.g., “John Smith,” “HR head,” “scientist,” “marketing manager,” etc.).
- Systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Whether any automatic or routine document retention or destruction policies, such as on-going erasures of e-mails, voicemails, and other electronically recorded material, should be suspended or modified.

- Any disagreements related to scope or manner of preservation.

II. Liaison

- The benefit of identifying an e-discovery “liaison” or point person on ESI issues for each party. The person most appropriate to serve as a liaison by a particular party will likely vary on a case-by-case and party-by-party basis. For example, a party’s liaison may be the party’s outside counsel, inside counsel, a party representative, or an outside consultant or vendor.

III. Location and Types of Data and Systems

- The types of data in the parties’ possession, custody, or control that may be relevant to the issues in dispute and the description and location of systems in which discoverable information is stored.
- Whether discoverable ESI exists in non-traditional forms (e.g., text messages, social media, cloud-based ESI, etc.) and, if so, whether a party expects to request such ESI.
- The estimated volume of relevant ESI in the parties’ possession.
- Current locations and custodians of relevant data.
- Identification of systems from which discovery may be prioritized (e.g., e-mail, finance, HR systems).
- How discoverable information is stored.
- How discoverable information may be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- The claims, defenses, and relevant facts in dispute
- The importance of the issues at stake in the action.
- The amount in controversy.
- The parties’ relative access to relevant information.
- The parties’ resources.
- The importance of the discovery in resolving the issues.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.
- Costs that the parties may 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.
- Whether there is potentially discoverable ESI that will be preserved, but not searched, consistent with Commentary 1.4 to this court’s Guidelines.

V. Search and Filtering of ESI

- The volume of data that may be collected and processed.
- Methods to de-duplicate the data collected prior to review.
- The search method(s), such as key-word searching or technology assisted review (e.g., predictive coding), that may be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- Whether early case assessment tools and procedures may be used to focus the search or to assist in further refining a search protocol.
- The quality assurance procedures that the producing party will use to verify the accuracy of the chosen search parameters and evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.
- To what extent or under what circumstances the search method should be adjusted or modified (e.g. modification of key word search terms).
- Whether a neutral or appointed master could assist the parties in developing or implementing a reasonable search methodology.

VI. Phasing

- Whether conducting discovery of ESI in phases could result in cost savings or efficiencies.
- The time period during which discoverable information was most likely to have been created or received.
- Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- Custodians (by name or role) most likely to have discoverable information and, therefore, whose ESI will be included in the first phases of document discovery.
- Custodians (by name or role) less likely to have discoverable information and, therefore, from whom discovery of ESI will be postponed or avoided.

VII. Production

- The form or forms in which unstructured ESI (e-mail, presentations, word processing documents, etc.) will be requested.
- The form or forms in which structured ESI (database, collaboration sites, etc.) will be requested. For example, whether ESI stored in a database can be produced by querying the database and producing discoverable information in a report or an exportable electronic file.

- The extent, if any, to which metadata will be requested and the fields of metadata to be produced.
- The production form or forms that ensure(s) that any inherent searchability of ESI is not degraded when produced.
- If files are to be produced in native format, methods for identifying or labeling those files.
- The circumstances under which a requesting party may request ESI in an additional or different form or forms.

VIII. Privilege

- Whether the parties can agree upon 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.