

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

Guidelines for Discovery of Electronically Stored Information

These guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 16, 26, 33, 34, 37, and 45, as amended December 1, 2006, relating to the discovery of electronically stored information. In the case of any asserted conflict between these guidelines and the above-referenced rules, the latter shall control.

- 1. Existence of electronically stored information.** Prior to the Fed. R. Civ. P. 26(f) conference, counsel should become knowledgeable about their clients' information management systems and their operation, including how information is stored and retrieved. In addition, counsel should make a reasonable attempt to review their clients' electronically stored information to ascertain the contents, including archival, backup, and legacy data (outdated formats or media).¹

- 2. Duty to disclose.** Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) must include any electronically stored information that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). To determine what information must be disclosed pursuant to this rule, counsel should review, with their clients, the clients' electronically stored information files, including current, back-up, archival, and legacy computer files. Counsel should be aware that documents in paper form may have been generated by the client's information system; thus, there may be electronically stored information related to that paper document. If any party intends to disclose electronically stored information, counsel should identify those individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable electronically stored information prior to the Fed. R. Civ. P. 26(f) conference.

- 3. Duty to notify.** A party seeking discovery of electronically stored information should notify the opposing party of that fact immediately, and, if known at the time of the Fed. R. Civ. P. 26(f) conference, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Fed. R. Civ. P. 34, if the requesting party has not designated a form of production² in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing electronically stored information.

¹For definitions of terms used in these guidelines, *see* Appendix A, The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Discovery (The Sedona Conference® Working Group Series, July 2005 Version) at http://www.thesedonaconference.org/content/miscFiles/publications_html.

²For a discussion of "form of production," *see* Fed. R. Civ. P. 34(b) cmt. to 2006 amendments.

4. Duty to meet and confer regarding electronically stored information. During the Fed. R. Civ. P. 26(f) conference, the parties should confer regarding the following matters:

(a) Electronically stored information in general. Counsel should attempt to agree on steps the parties will take to segregate and preserve electronically stored information in order to avoid accusations of spoliation.

(b) E-mail information. Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol.

(c) Deleted information. Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

(d) “Embedded data” and “metadata.” “Embedded data” typically refers to draft language, editorial comments, and other deleted matter retained by computer programs. “Metadata” typically refers to information describing the history, tracking, or management of an electronic file. The parties should discuss at the Fed. R. Civ. P. 26(f) conference whether “embedded data” and “metadata” exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

(e) Back-up and archival data. Counsel should attempt to agree on whether responsive back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data.

(f) Format and media. Counsel should attempt to agree on the format and media to be used in the production of electronically stored information.

(g) Reasonably accessible information and costs. The volume of, and ability to search, electronically stored information means that most parties’ discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive electronically stored information is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information. If the requesting party intends to seek discovery of electronically stored information from sources identified as not reasonably accessible, the parties should discuss:(1) the burdens and costs of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this informationm such as scope, time, and allocation of cost.

(h) Privileged or trial preparation materials. Counsel should attempt to reach an agreement regarding what will happen in the event privileged or trial preparation materials are inadvertently disclosed. If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.

(1) The parties may agree to provide a “quick peek,” whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

(2) The parties may also establish a “clawback agreement,” whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced.

Other voluntary agreements should be considered as appropriate. The parties should be aware that there is an issue of whether such agreements bind third parties who are not parties to the agreements.³

5. Duty to meet and confer when requesting electronically stored information from non-parties (Fed. R. Civ. P. 45). Parties issuing requests for electronically stored information from non-parties should attempt to informally meet and confer with the non-party (or counsel, if represented). During this meeting, counsel should discuss the same issues with regard to requests for electronically stored information that they would with opposing counsel as set forth in paragraph 4 above.

[October 17, 2006]

³For a detailed discussion on this issue, see Hon. John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2006 Fed. Cts. L. Rev. 6 (Sept. 2006) at <http://www.fclr.org/2006fedctslrev6.htm>.