

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**[Plaintiff]**

**CIVIL ACTION**

**VERSUS**

**NO: [Case No.]**

**[Defendant]**

**SECTION: "[Section]" (4)**

**PROTOCOL FOR DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION (ESI)**

**I. INTRODUCTION**

*Experience increasingly demonstrates that discovery of electronically-stored information (“ESI”) poses challenges for litigants (both parties and their attorneys) and for courts beyond the issues typically encountered and addressed when dealing with discovery of traditional, hard-copy documents. Recognizing that ESI is now frequently the subject of discovery and that such discovery can be extremely burdensome, time-consuming, and expensive, the Court believes that establishing a framework for anticipating and addressing ESI-related discovery will encourage mutual and cost-effective solutions and speedier and more informed resolution of disputes.*

*In furtherance of these goals, the undersigned magistrate judge has developed this Protocol as a framework that should be used by parties for addressing and resolving a wide range of ESI issues. This Protocol is not intended to be an inflexible checklist. It may be adopted in its entirety by the parties without any changes, or it may be adapted, as appropriate. Not all aspects of this*

*Protocol may be applicable or practical for a particular matter, and if the parties do not intend to seek discovery of ESI, it may not be applicable to a particular case.*

*The Court expects that the parties will consider the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant under the circumstances in deciding on adopting and/or tailoring the provisions of this Protocol.*

## **II. SCOPE OF MODEL PROTOCOL**

This Protocol applies to the ESI provisions of Fed.R.Civ.P. 16, 26, 33, 34, or 37, and, insofar as it relates to ESI, this Protocol applies to Fed.R.Civ.P. 45 in all instances where the provisions of Fed.R.Civ.P. 45 are the same as, or substantially similar to, Fed.R.Civ.P. 16, 26, 33, 34, or 37. In such circumstances, if a Conference pursuant to Fed.R.Civ.P. 26(f) is held, it may include all parties, as well as the person or entity served with the subpoena, if said Conference has not yet been conducted.

If the Conference has been conducted, upon written request of any party or the person or entity served with the subpoena, a similar conference may be conducted regarding production of ESI pursuant to the subpoena. As used herein, the words “party” or “parties” include any person or entity that is served with a subpoena pursuant to Fed.R.Civ.P. 45. Nothing contained herein modifies Fed.R.Civ.P. 45 and, specifically, the provision of Rule 45(c)(2)(B) regarding the effect of a written objection to inspection or copying of any or all of the designated materials or premises.

In this Protocol, the following terms have the following meanings:

- A. “Meta-Data”** means: (i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated, edited, or modified such

Native File; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

Meta-Data is a subset of ESI.

- B.** “**Native File(s)**” means ESI in the electronic format of the application in which such ESI is normally created, viewed and/or modified. Native Files are a subset of ESI.
- C.** “**Static Image(s)**” means a representation of ESI produced by converting a Native File into a standard image format capable of being viewed and printed on standard computer systems. In the absence of agreement of the parties or order of the Court, a Static Image should be provided in either Tagged Image File Format (TIFF, or .TIF files) or Portable Document Format (PDF). If load files were created in the process of converting Native Files to Static Images, or if load files may be created without undue burden or cost, load files should be produced together with Static Images.

### **III. GENERAL PRINCIPLES**

- A.** An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.
- B.** The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating an ESI discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as

practicable.

#### **IV. CONFERENCE OF PARTIES AND REPORT**

Before raising any ESI issues with the court, the parties are to conduct a Conference of Parties to discuss discovery of ESI regardless of whether such a Conference is ordered by the Court. The Conference of Parties should be conducted in person whenever practicable. Within 10 calendar days thereafter, the parties shall file with the Court, a joint report regarding the results of the Conference and if necessary include a request for a status conference to address issues which may need the Court's assistance. After the conference the Court will issue an ESI protocol Order that will govern the course of e-discovery in the case. This process is also encouraged if applicable, in connection with a subpoena for ESI under Fed.R.Civ.P. 45.

The report should, without limitation, state in the section captioned "Disclosure or discovery of electronically stored information should be handled as follows," the following:

1. Any areas on which the parties have reached agreement and, if any, on which the parties request Court approval of that agreement;
2. Any areas on which the parties are in disagreement and request intervention of the Court.

On-site inspections of ESI under Fed.R.Civ.P. 34(b) should only be permitted in circumstances where good cause and specific need have been demonstrated by the party seeking disclosure of ESI (the "Requesting Party"), or by agreement of the parties. In appropriate circumstances the Court may condition on-site inspections of ESI to be performed by independent third party experts, or set such other conditions as are agreed by the parties or deemed appropriate by the Court.

**V. STANDARD FOR ESI DISCLOSURES:**

**A. Need for Prior Planning**

Insofar as it relates to ESI, prior planning and preparation is essential for a Conference of Parties pursuant to Fed.R.Civ.P. 16, 26(f), and this Protocol. Counsel for the Requesting Party and Counsel for the party producing, opposing, or seeking to limit disclosure of ESI (“Producing Party”) bear the primary responsibility for taking the planning actions contained herein. Failure to reasonably comply with the planning requirements in good faith may be a factor **considered by the Court in imposing sanctions.**

**B. Standard for Preservation of ESI:**

A party has an obligation to take reasonable and proportional steps to preserve discoverable information in the party’s possession, custody or control.

1. Absent a showing of good cause by the requesting party, the parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve all discoverable ESI in their possession, custody or control. All parties shall supplement their disclosures in accordance with Rule 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure where that data is created after a disclosure or response is made.
2. It may be necessary for the parties to discuss by telephone before the ESI conference a reasonable request for prior exchange of information which may include information relating to network design, the types of databases, database dictionaries, the access control list, security access logs, rights of individuals to access the system, and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.
3. Prior to the conference the parties counsel should discuss with their clients and each other who will participate including whether one or more

participants should have an ESI coordinator participate in the conference. If one participant believes that the other should have an ESI coordinator participate and the other disagrees, the Requesting Party should state its reasons in writing sent to all other parties within a reasonable time before the conference. If the Court subsequently determines that the Conference was not productive to the absence of an ESI coordinator, it may consider the letter in conjunction with any request for sanctions under Fed. R.Civ. P. 37.

4. To the extent practicable, the parties should, prior to the Conference of Parties, discuss the scope of discovery of ESI, including whether the time parameters of discoverable ESI, or for subsets of ESI, may be narrower than the parameters for other discovery.

**C. Prior to the ESI Discovery Conference of Parties, Counsel for the parties should:**

1. Take such steps as are necessary to advise their respective clients, including, but not limited to, “key persons” with respect to the facts underlying the litigation, and information systems personnel, of the substantive principles governing the preservation of relevant or discoverable ESI while the lawsuit is pending. As a general principle to guide the discussion regarding litigation hold policies, Counsel should consider the following criteria:

**a. Scope of the “litigation hold,” including:**

- (1) A determination of the categories of potentially discoverable information to be segregated and preserved;
- (2) Discussion of the nature of issues in the case, as per Fed.R.Civ.P. 26(b)(1);
  - (a) Whether ESI is relevant to only some or all claims and defenses in the litigation;
  - (b) Whether ESI is relevant to the subject matter involved in the action;
- (3) Identification of “key persons,” and likely witnesses and persons with knowledge regarding relevant events;
- (4) The relevant time period for the litigation hold;

**b. Analysis of what needs to be preserved, including:**

- (1) The nature of specific types of ESI, including, email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, Native Files, and how it should be preserved;
- (2) the extent to which Meta-Data, deleted data, or fragmented data, will be subject to litigation hold;
- (3) paper documents that are exact duplicates of ESI;
- (4) any preservation of ESI that has been deleted but not purged;

**c. Determination of where ESI subject to the litigation hold is maintained, including:**

- (1) format, location, structure, and accessibility of active storage, backup, and archives;
  - (a) servers;
  - (b) computer systems, including legacy systems;
  - (c) remote and third-party locations;
  - (d) back-up media (for disasters) vs. back-up media for archival purposes/record retention laws;
- (2) network, intranet, and shared areas (public folders, discussion databases, departmental drives, and shared network folders);
- (3) desktop computers and workstations;
- (4) portable media; laptops; personal computers; PDA's; paging devices; mobile telephones; and flash drives;
- (5) tapes, discs, drives, cartridges and other storage media;
- (6) home computers (to the extent, if any, they are used for business purposes);

(7) paper documents that represent ESI.

**d. Distribution of the notification of the litigation hold:**

- (1) to parties and potential witnesses;
- (2) to persons with records that are potentially discoverable;
- (3) to persons with control over discoverable information; including:
  - (a) IT personnel/director of network services;
  - (b) custodian of records;
  - (c) key administrative assistants;
- (4) third parties (contractors and vendors who provide IT services).

**e. Instructions to be contained in a litigation hold notice, including that:**

- (1) there will be no deletion, modification, alteration of ESI subject to the litigation hold;
- (2) the recipient should advise whether specific categories of ESI subject to the litigation hold require particular actions (e.g., printing paper copies of email and attachments) or transfer into “read only” media;
- (3) loading of new software that materially impacts ESI subject to the hold may occur only upon prior written approval from designated personnel;
- (4) where Meta-Data, or data that has been deleted but not purged, is to be preserved, either a method to preserve such data before running compression, disk defragmentation or other computer optimization or automated maintenance programs or scripts of any kind (“File and System Maintenance Procedures”), or the termination of all File and System Maintenance Procedures during the pendency of the litigation hold in respect of Native Files subject to preservation;

- (5) reasonably safeguarding and preserving all portable or removable electronic storage media containing potentially relevant ESI;
- (6) maintaining hardware that has been removed from active production, if such hardware contains legacy systems with relevant ESI and there is no reasonably available alternative that preserves access to the Native Files on such hardware.

**f. Monitoring compliance** with the notification of litigation hold, including:

- (1) identifying contact person who will address questions regarding preservation duties;
- (2) identifying personnel with responsibility to confirm that compliance requirements are met;
- (3) determining whether data of "key persons" requires special handling (e.g., imaging/cloning hard drives);
- (4) periodic checks of logs or memoranda detailing compliance;
- (5) issuance of periodic reminders that the litigation hold is still in effect.

**2. Identify one or more information technology** or information systems

personnel to act as the ESI coordinator and discuss ESI with that person;

- a. As used herein, the term “reasonably familiar” contemplates a heightened level of familiarity with any ESI that is identified by opposing counsel pursuant to Paragraph 6 of this Protocol, however, that level of familiarity is conditioned upon the nature of the pleadings, the circumstances of the case, and the factors contained in Fed.R.Civ.P. 26(b)(2) ( C ).
- b. Identify those personnel who may be considered “key persons” by the events placed in issue by the lawsuit and determine their ESI practices, including those matters set forth below. The term “key persons” is intended to refer to both the natural person or persons who is/are a “key person(s)” with regard to the facts that underlie the

litigation, and any applicable clerical or support personnel who directly prepare, store, or modify ESI for that key person or persons, including, but not limited to, the network administrator, custodian of records or records management personnel, and an administrative assistant or personal secretary;

3. Become reasonably **familiar with their respective clients' current and relevant past ESI**, if any, or alternatively, identify a person who can participate in the Conference of Parties and who is familiar with at least the following:

- a. **Email systems**; blogs; instant messaging; Short Message Service (SMS) systems; word processing systems; spreadsheet and database systems; system history files, cache files, and cookies; graphics, animation, or document presentation systems; calendar systems; voice mail systems, including specifically, whether such systems include ESI; data files; program files; internet systems; and, intranet systems. This Protocol may include information concerning the specific version of software programs and may include information stored on electronic bulletin boards, regardless of whether they are maintained by the party, authorized by the party, or officially sponsored by the party; provided however, this Protocol extends only to the information to the extent such information is in the possession, custody, or control of such party. To the extent reasonably possible, this includes the database program used over the relevant time, its database dictionary, and the manner in which such program records transactional history in respect to deleted records.
- b. **Storage systems**, including whether ESI is stored on servers, individual hard drives, home computers, "laptop" or "notebook" computers, personal digital assistants, pagers, mobile telephones, or removable/portable storage devices, such as CD-Roms, DVDs, "floppy" disks, zip drives, tape drives, external hard drives, flash, thumb or "key" drives, or external service providers.
- c. **Back up and archival systems**, including those that are onsite, offsite, or maintained using one or more third-party vendors. This Protocol may include a reasonable inquiry into the back-up routine, application, and process and location of storage media, and requires

inquiry into whether ESI is reasonably accessible without undue burden or cost, whether it is compressed, encrypted, and the type of device on which it is recorded (e.g., whether it uses sequential or random access), and whether software that is capable of rendering it into usable form without undue expense is within the client's possession, custody, or control.

- d. **Obsolete or “legacy”** systems containing ESI and the extent, if any, to which such ESI was copied or transferred to new or replacement systems.
- e. **Current and historical website information**, including any potentially relevant or discoverable statements contained on that or those site(s), as well as systems to back up, archive, store, or retain superseded, deleted, or removed web pages, and policies regarding allowing third parties' sites to archive client website data.
- f. **Event data records** automatically created by the operation, usage, or polling of software or hardware (such as recorded by a motor vehicle's GPS or other internal computer prior to an occurrence), if any and if applicable, in automobiles, trucks, aircraft, vessels, or other vehicles or equipment.
- g. **Communication systems**, if any and if applicable, such as ESI records of radio transmissions, telephones, personal digital assistants, or GPS systems.
- h. **ESI erasure, modification, or recovery mechanisms**, such as Meta-Data scrubbers or programs that repeatedly overwrite portions of storage media in order to preclude data recovery, and policies regarding the use of such processes and software, as well as recovery programs that can defeat scrubbing, thereby recovering deleted, but inadvertently produced ESI which, in some cases, may even include privileged information.
- i. **Policies regarding records management, including the retention or destruction of ESI prior to the client receiving knowledge that a claim is reasonably anticipated.**
- j. **“Litigation hold” policies** that are instituted when a claim is reasonably anticipated, including all such policies that have been instituted, and the date on which they were instituted.

- k. **The identity of custodians of key ESI**, including “key persons” and related staff members, and the information technology or information systems personnel, vendors, or subcontractors who are best able to describe the client’s information technology system.
  - l. **The identity of vendors or subcontractors who store ESI** for, or provide services or applications to, the client or a key person; the nature, amount, and a description of the ESI stored by those vendors or subcontractors; contractual or other agreements that permit the client to impose a “litigation hold” on such ESI; whether or not such a “litigation hold” has been placed on such ESI; and, if not, why not.
4. **Negotiation of an agreement** that outlines what steps each party will take to segregate and preserve the integrity of relevant or discoverable ESI. This agreement may provide for depositions of information system personnel on issues related to preservation, steps taken to ensure that ESI is not deleted in the ordinary course of business, steps taken to avoid alteration of discoverable ESI, and criteria regarding the operation of spam or virus filters and the destruction of filtered ESI.
5. **Standard for Addressing Privilege:**
- The parties are to confer on the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.
- a. With respect to privileged or attorney work product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.
  - b. Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed.

R. Civ. P. 26(b)(3)(A) and (B).

- c. Parties shall confer on an appropriate non-waiver order under Fed. R. Evid. 502. Counsel should also discuss procedures under which ESI that contains privileged information or attorney work product should be immediately returned to the Producing Party if the ESI appears on its face to have been inadvertently produced or if there is prompt written notice of inadvertent production by the Producing Party. The Producing Party should maintain unaltered copies of all such returned materials under the control of Counsel of record. This provision is procedural and return of materials pursuant to this Protocol is without prejudice to any substantive right to assert, or oppose, waiver of any protection against disclosure.
- d. The report should, without limitation, if it proposes a “clawback” agreement, “quick peek,” or testing or sampling, specify the proposed treatment of privileged information and work product, in a manner that, if applicable, complies with the standard set forth in *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), and other applicable precedent.

6. **Other ESI Discovery Protocols:**

- a. **On-site inspection of electronic media.** Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.
- b. **Search methodology.** The Court presumes that in the majority of cases, the use of search terms will be reasonably necessary to located ESI likely to contain discoverable information. Parties shall try to reach agreement on appropriate search terms before any query is performed.
  - (1) A producing party shall disclose what search terms, if any, were used to locate ESI likely to contain discoverable

information. If search terms were not used, a party shall disclose the search methodology used to locate ESI likely to contain discoverable information.

- (2) If search terms were used to locate ESI likely to contain discoverable information, a requesting party is entitled to no more than 5 additional terms or queries to be used in connection with further electronic searches absent a showing of good cause or agreement of the parties. The parties shall confer in good faith on the 5 additional terms or queries. Focused terms and queries, rather than overbroad ones (e.g., product and company names), shall be employed.
- (3) For the purposes of this Protocol, and absent a showing of good cause, search terms returning more than 250 megabytes of data are presumed to be overbroad. The producing party shall search non-custodial data sources, emails, and other ESI maintained by the custodians identified above.

- c. **Format.** The parties shall confer and agree on the format in which they produce ESI and non-ESI. It is presumed that ESI shall be produced to the requesting party with searchable text, in a format to be decided between the parties (e.g., TIFF with a companion text file).
- d. **Metadata fields.** The parties shall confer and agree on whether metadata is to be produced and if so, what metadata will be produced, or whether metadata shall be excluded from discovery.
- e. **Costs.** Generally, the costs of discovery shall be borne by each party. The Court will, however, apportion the costs of discovery among the parties, including discovery of ESI that is not reasonably accessible, upon a showing of unequal burdens, unreasonable

requests, or other good cause.

- f. **No party should object to the discovery** of ESI pursuant to Fed.R.Civ.P. 26(b)(2)(B) on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with particularity, and not in conclusory or boilerplate language. Wherever the term “reasonably accessible” is used in this Protocol, the party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention.

If a party is not reasonably prepared for the Fed.R.Civ.P. 26(f) Conference of Parties in accordance with the terms of this Protocol, that factor may be used to support a motion for sanctions by the opposing party for the costs incurred in connection with that Conference.

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**KAREN WELLS ROBY**  
**UNITED STATES. MAGISTRATE JUDGE**