

# PUBLICATION

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## New ESI Principles in the District of Maryland

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### I. Introduction and History of the ESI Principles in the District of Maryland

The "ESI Amendments" to the Federal Rules of Civil Procedure went into effect on December 1, 2006. Before that date, The Hon. Paul W. Grimm coordinated with the Federal Court Committee of the MSBA and Federal Bar Association – MD Chapter (the "Committee"), and convened a working group to discuss how best to aid the bench and bar in addressing issues concerning discovery of electronically stored information ("ESI") under the amendments. That group was comprised of members of the judiciary, attorneys with diverse practice backgrounds, including members of the plaintiffs' and defense bars and technical specialists. Judge Grimm formed working sub-committees which drafted a series of detailed practices addressing many aspects of managing ESI. Judge Grimm then circulated the draft to, and met with, a larger cross-section of the bar to discuss and revise the draft. That revised draft was then presented to the court as the proposed "ESI Protocol." Shortly after the 2006 amendments went into effect, the Protocol was posted on the court website as a non-binding series of suggestions that counsel were free to apply to a given case if they found them helpful.

The ESI Protocol was well-received; however, by 2014, it had become outmoded by changes in technology and practice patterns. Therefore, the Committee established a new Sub-Committee to revise the ESI Protocol. This new Sub-Committee<sup>1</sup> included members of the bar and technical experts who graciously volunteered their expertise and time. Proposed "ESI Principles" were drafted by the new Sub-Committee. In drafting the ESI Principles, the Sub-Committee reviewed and considered ESI principles, guidelines and practices from other districts and circuits, incorporated the December 1, 2015 amendments to the Federal Rules of Civil Procedure and Federal Rule of Evidence 502, and consulted with Judges Grimm and Coulson. Thereafter, the ESI Principles were posted for public comment. All comments that were submitted were considered and a revised draft was then presented to the court and posted on the court's website. Like the former ESI Protocol, the ESI Principles are a non-binding series of suggested practices that counsel may use if they are found to be helpful.

### II. The Revision Process and Objectives

After first deciding that the ESI Protocol was outdated, the Sub-Committee met several times to consider the best way to update it. The debate first centered on whether to revise the ESI Protocol or to draft a new document. To inform its decision, the Sub-Committee reviewed ESI principles, guidelines and practices from other districts and circuits, including the Federal, Seventh and Ninth Circuits and district courts in California, Florida, Illinois, Indiana, Kansas, Texas, New York, Pennsylvania and Washington.

In reviewing the approaches taken by these other courts, the Sub-Committee noted areas that were not covered by the ESI Protocol, as well as the wide-ranging manner in which the different courts have addressed challenging topics like metadata, privileges and production specifications. Notably, the review found that several courts, including the Federal Circuit and the Northern District of California, have adopted a series of ESI principles or guidelines, and this general model was adopted by the Sub-Committee as the best approach to recommend for this District. The ESI Principles are, however, unique because they include several appendices that will be described in detail below. These appendices are designed to work hand-in-hand with the ESI Principles and to offer practical guidance that reflects the intent expressed in the Principles.

After the Sub-Committee decided to structure the new documents as a set of principles, it formed several working groups which were assigned to draft portions of the principles; draft the appendices; update the form discovery in the local rules; and review the Local Rules for any potentially inconsistent provisions.

The court posted the ESI Principles to encourage parties to cooperate in conducting electronic discovery "with the goal of reducing cost, burden and delay and to 'secure the just, speedy, and inexpensive determination of every action and proceeding' pursuant to Fed. R. Civ. P. 1." ESI Principle 1.01. Although compliance with the ESI Principles is voluntary, parties are encouraged to cooperate "on issues relating to the preservation, collection, search, review, production, integrity, and authentication of ESI." ESI Principle 1.02. Parties are also encouraged to discuss the Principles, as they are intended to promote the avoidance or early resolution of discovery disputes in cases involving ESI. ESI Principle 1.01.

The Principles recommend cooperative exchanges of information early in litigation, so as to "help insure that conferences between the parties, as well as agreements between the parties, are meaningful." ESI Principle 1.02. To further the objective of reducing the cost of discovery, the ESI Principles explain that parties should apply the proportionality standard set forth in Fed. R. Civ. P. 26(b) to all phases of discovery, including by propounding document requests and responses that are "reasonably targeted, clear, complete, accurate, and as particularized as practicable." ESI Principle 1.03.

### **III. Review of the Major Components of the Principles**

The Principles are designed to flow in a logical manner, to allow practitioners to easily find the principles which apply to a given situation involving ESI, while not losing sight of the major concepts that are applicable to all forms of discovery.

In the first section, titled "General Principles," the overarching concepts are reiterated to reinforce the goals the Principles are drafted to achieve. The reference to Fed. R. Civ. P. 1, as well as the discussion of cooperation, emphasize not only the Rules, but suggested practice in this jurisdiction. Principle 1.02 details the types of information that parties may typically exchange to aid in the management of ESI. The discussion of "Proportionality" in Principle 1.03 suggests that parties should consider the factors set forth in Rule 26(b), and sets the tone for Section II of the Principles.

Section II provides useful and practical guidance for all the phases of electronic discovery. Principle 2.01 outlines five fundamental concepts for the conduct of preservation, providing a roadmap that attorneys of all levels of experience can apply. Four of these five concepts refer to Principle 1.03, which is a common theme in the ESI Principles, that the interpretation of each step of electronic discovery is best viewed with the backdrop of the proportionality paradigm envisioned in the federal rules. Principle 2.02 provides some helpful structure for parties conducting a discovery conference on how to properly and thoroughly consider ESI issues. Because counsel may require technical assistance with complicated ESI discovery, Principle 2.03 suggests that parties consider appointing an e discovery liaison.

Principle 2.04 is a practical tool designed to provide a blue-print for attorneys to use when producing ESI. Naturally, parties cannot always agree on every aspect of the e-discovery process, and Principle 2.05 outlines a process consistent with the local rules for resolving these disputes.

Although brief, Section III serves an important function. As technology becomes more widely used in the discovery process, and attorneys have had more opportunity to experience and learn about ESI, Principle 3.01 explains that all attorneys who practice in the district should be familiar with: (a) the electronic discovery provisions of the Federal Rules of Civil Procedure and the Rules of Evidence, (b) the rules of professional responsibility applicable to electronic discovery and (c) the local rules and discovery guidelines.

The ESI Principles are unique because they include appendices with practical examples that attorneys can use in conducting their own cases. These appendices are valuable resources, generated in collaboration by attorneys from the district with the assistance of information technology, forensic and e-discovery experts from around the country. They are intended to level the playing field by providing those unfamiliar with production specifications a readily-accessible menu of options. The appendices are: (1) Suggested Topics for ESI Discussions; (2) Sample Production Protocols; and (3) Metadata Reference Guide.

Appendix 1 to the ESI Principles sets forth suggested topics for ESI discussions between parties who participate in a conference as contemplated by ESI Principle 2.02. Appendix 1 explains that early discussions are often helpful in cases involving ESI. The suggested topics pertain to preservation of ESI, designation of ESI liaisons, ESI collection, search methodologies, ESI production and assertion of privileges. While every case has unique issues, including with respect to ESI, the topics suggested in Appendix 1 are designed to assist parties in preparing to confer on ESI matters, and serve as a foundation for cooperation between parties.

Appendix 2 offers two different approaches to production formats, the Hybrid Production Protocol (Appendix 2.1) and the Native Format Production Protocol (Appendix 2.2). While both protocols provide details for producing ESI in a format ready to be loaded into industry standard databases, there are differences between the two options. The Hybrid Protocol provides for documents to be produced in image format, with associated searchable text and metadata. This format necessitates upfront expenditures to convert ESI, much of which may never be used in proceedings. By contrast, the Native Protocol allows for ESI to be produced in the form in which it was created, used and stored by the native application employed by the producing party in the ordinary course of business. For example, Microsoft Word documents would be produced in their native ".DOC" or ".DOCX" format. The main difference between these two options is that the Native Protocol may be less burdensome on the parties in terms of time and cost to produce ESI, but it does require parties to be slightly more technically proficient. Whatever production format the parties decide upon, these two options provide solid foundations and identify key considerations.

Finally, for many lawyers, the preservation and production of metadata can be a difficult concept to define and resolve. Metadata is often defined as "data about data" that is created by a computer system or application. Metadata is unlike other discoverable information because its import may flow from its probative value as relevant evidence, its utility in searching, sorting, and interpreting ESI, or both. The Metadata Reference Guide (Appendix 3) is a comprehensive, yet user-friendly, guide that can help counsel understand and navigate many common issues associated with metadata. Appendix 3 defines in everyday language the technical aspects of metadata and important considerations related to the production of ESI. It is advisable that the parties discuss the preservation and production of metadata as early as possible and in conjunction with the format of production.

#### **IV. Accounting for the 2015 Rule Changes**

The 2015 Amendments to the Federal Rules of Civil Procedure emphasize the goal of securing "the just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. To that end, the Rules re-emphasize that the scope of discovery should be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The emphasis on proportionality is also reflected by amendments to specific discovery rules which refer to Rule 26(b)(1). See e.g., Fed. R. Civ. P. 30(a)(2), (d); 31(a)(2); 33(a)(1).

In light of these amendments to the Rules, the ESI Principles were drafted to help implement the requirement of proportionality in e-discovery. For example, Principle 1.03 emphasizes that parties should apply the proportionality standards set forth in Fed. R. Civ. P. 26(b) to all phases of the discovery of ESI. The goal of proportionality in discovery is also reflected in ESI Principle 2.01(b)-(c), pertaining to preservation; ESI Principle 2.02(b)(5), which suggests phasing of discovery, where appropriate; and ESI Principle 2.02(b)(7), which suggests that parties discuss opportunities to reduce costs.

In 2015, Rule 26(f)(3) was amended so as to require parties to address issues about disclosure, discovery or preservation of ESI in the parties' discovery plan. ESI Principles 2.01 (pertaining to preservation of ESI) and 2.02 (pertaining to a conference of the parties) will assist the parties in satisfying this requirement of Rule 26(f).

## **V. The Future of the ESI Principles**

The Sub-Committee realizes that the area of electronic discovery is constantly changing, in part because volumes of ESI continue to grow and technology used to create ESI continues to change. As such, the Sub-Committee will monitor the effectiveness of the ESI Principles by considering "lessons learned" under the ESI Principles and whether revisions are appropriate. The Sub-Committee solicits feedback as counsel use – or choose not to use – the Principles. Comments, suggestions and criticisms may be sent to the Sub-Committee Co-Chairs at: [mberman@wtplaw.com](mailto:mberman@wtplaw.com) (Michael D. Berman); [hfeldman@wtplaw.com](mailto:hfeldman@wtplaw.com) (Howard R. Feldman); [tbarnard@bakerdonelson.com](mailto:tbarnard@bakerdonelson.com) (Thomas Barnard); [dkinzer@bakerdonelson.com](mailto:dkinzer@bakerdonelson.com) (David Kinzer).

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<sup>1</sup> The Sub-Committee was comprised of a number of Maryland attorneys. In addition, significant contributions were made by Craig Ball, Esq., a member of the Texas Bar; Mr. Scott Fischer, a technologist from New York; and Mr. James Shoemaker, a litigation support specialist from Baltimore.