CIVIL CASE GUIDELINES REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("ESI")[1]

1. General Principles.

1.01 Purpose.

These ESI Guidelines promote early consultation and resolution of ESI issues to avoid court intervention, thereby promoting reasonable and efficient discovery of electronic information, while minimizing costs, delays, and burdens to the parties and the courts. With the introduction of amended Rule 1.280 on January 1, 2025, these Guidelines place a greater emphasis on proportionality, and practitioners and the courts are encouraged to review and utilize precedent and committee notes regarding Fed. R. Civ. Pro. 26 when addressing and resolving ESI discovery issues.

1.02 Cooperation, Consultation, and Information Exchange.

1.02.1 Cooperation. The parties should cooperate on ESI matters, such as the collection, preservation, production, search of, and authentication, to avoid discovery disputes. See. e.g.: *The Sedona Principles, 3d ed: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, The Sedona Conference Journal*, Vol 19, No. 1 (2018) (Comment 3.g. Communications with opposing counsel and the court regarding ESI should be informed and candid.").

1.02.2 Mandatory Consultation. Consultation between counsel during ESI discovery has long been the norm, to fashion mutually accepted ESI collection, search, and production protocols, thus avoiding or narrowing disputes. Now, as of January 1, 2025, counsel now have a "good faith" duty of consultation before bringing a discovery dispute to the court via motion. See *In re Amendments to Florida Rule of Civil Procedure 1.510 and New Florida Rule of Civil*

[1] June 20, 2025. The Electronic Discovery and Digital Evidence Committee ("EDDEC") and the Rules Committee of the Business Law Section of the Florida Bar, in a joint project, have developed and adopted these guidelines.

Procedure 1.202, No. SC2024-0662 (December 5, 2024).

Specifically, Amended **Rule 1.202(a)** mandates that "(a) Duty. Before filing a non-dispositive motion, the movant must confer with the opposing party in a good-faith effort to resolve the issues raised in the motion." SubSection (b) of **Rule 1.202** further requires a "*Certificate of Conferral*" containing certain language describing the nature of the good faith consultation.

While in new **Rule 1.202** the Court did not specify exactly *what* "good faith" means, Practitioners and the Court can find substantial guidance as to what the Court considers good faith consultation effort from the text of the consultation certification required under the new Rule 1.202(b). Therein the requisite language for the certification includes: "*I discussed the relief requested*", with a required description of the "*method of communication and date*", "*on the resolution of all or part of the motion.*" In the event an opponent does not respond to party's request for consultation, then Rule 1.202(b) certification requires "*describing with particularity all of the efforts undertaken to accomplish dialogue with the opposing party prior to filing the motion.*" [emphasis added].

1.02.3 Exchange of Information.

Early and transparent dialogue concerning an ESI plan, of and informal exchange of ESI can assist parties in reaching meaningful agreements and honing the factual and legal issues in a case.

1.03. Proportionality.

Each case is unique, and, and the ESI requested must match the case's needs (i.e., be proportional to the needs of the case).

1.03.1 Rules 1.280.

During dialogue and when promulgating discovery, objecting to discovery, and resolving discovery disputes, keep in mind that **Rule 1.280(c)(1)** requires counsel and the courts to consider proportionality in all discovery requests and disputes:

(c) Scope of Discovery. Unless otherwise limited by court order, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering [:]

- 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, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable. [format added for clarity].

Further, new **Rule 1.280(e)(2)** places limitations on the discovery of ESI, requires the parties and the courts to consider "*undue burden or cost*", and allows for the *shifting of costs* from the producing party to the propounding party. Specifically, that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.

Specifically, under new **Rule 1.280(e)(2)(A) & (B),** the Court "must limit the frequency or extent" of ESI discovery if it determines that:

(A) the discovery sought is unreasonably cumulative,
or duplicative, or can be obtained from another source,
or in another manner.
that is more convenient,
less burdensome, or less expensive;

(B) the burden or expense of the discovery outweighs its likely

benefit,
considering the needs of the case,
the amount in controversy,
the parties' resources,
the importance of the issues at stake in the action, and
the importance of the discovery in resolving the issues.

1.03.2 Best Practices for Promulgating ESI Discovery.

1. ESI discovery should prioritize clarity, relevance, and utility. Counsel should avoid unnecessary boilerplate, redundant requests, vague definitions, unlimited time periods, and conclusory statement within a discovery requests. A court can later choose to allocate costs back to the propounding party for improper discovery. See, e.g.: 763 So.2d 1197, 1200 n.5 (4th DCA 2000) ("Of course the mere fact that a trial judge has allowed burdensome discovery to proceed does not forestall later reallocation of the costs incurred when the prevailing party seeks to tax costs at the end of the case. In taxing costs, the trial judge has considerable discretion, and it is *certainly within such discretion to determine at the end of the case that overly burdensome discovery requests* by the losing party should be compensated to some extent by allowing specific requests for costs incurred thereby. It will be at this stage that the parties can have full review of the issues dealing with the allocation of those costs.") [emphasis added].

Focus instead on actionable terms and well-defined processes tailored to the specifics of the case.

2. Similarly, boilerplate and general objections are ineffective and specifically disfavored. See. e.g.: *Topp Telecom, Inc. v. Atkins,* 763 So.2d 1197, 1199 (4th DCA 2000); *Florida Power & Light Co. v. Thomas,* 838 So. 2d 1240(1st DCA 2003); *Carson v. City of Fort Lauderdale,* 173 So.2d 743, 744 (2d DCA 1965); *Guzman v. Irmadan,* Inc., 249 F.R.D. 399 (S.D. Fla. 2008) (collecting cases).

3. Avoid Redundant or Unnecessary Content.

Refrain from including general reminders of existing obligations under the applicable Rules (e.g., "discovery must be reasonable or proportional"). Such boilerplate adds bulk without practical value. Statements urging "good faith" or "cooperation" are unlikely to influence behavior if those principles aren't already being followed. Conclusory factual statements within the discovery requests also have no utility.

4. Define Only What Matters.

Use definitions for critical and frequently referenced terms only, particularly in suggested ESI protocols. Be cautious when referencing external glossaries (e.g., Sedona Conference materials).

- Ensure you agree with all positions presented in the referenced glossary.

- Specify the exact edition of the glossary, as positions may shift significantly between editions (e.g., metadata standards).

- A better approach is to incorporate only the specific definitions needed directly into the protocol.

1.03.3 Technology Competence.

In 2010, Florida Bar Ethics Opinion 10-2 was issued, making it clear that Professional Rule of Responsibility 4-1.1 required attorneys, in providing "competent representation" to possess the "legal knowledge, skill, thoroughness, and preparation." The Opinion notes that the Comment to Rule 4-1.1 emphasizes "that a lawyer should keep abreast of changes in the law *and its practice*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject." [emphasis in original]. Ethics Opinion 10-2 then concludes with the warning that "*Counsel and parties must be familiar with relevant systems and tools, including common eDiscovery platforms and data handling protocols*." [emphasis added].

In January 2016, the Florida Supreme Court amended the

Florida Rules of Professional Responsibility regarding lawyer competency, and included including a comment to make clear that competent legal representation includes technological competency. The Court imposed a mandatory CLE requirement to that end.

Accordingly, it should not be an acceptable excuse that counsel does not know about ESI or associated technology.

2. ESI Case Management.

2.01 Duties and Responsibilities.

The ESI component of a dispute generally has several phases and accompanying duties and responsibilities. Some of these duties are triggered even before a case is filed, and all which must be considered early by counsel and their clients. These duties all have an effect on one another. When assessing ESI discovery compliance, courts should inquire as to whether best practices were followed at a given stage of a dispute.

2.02 Duty to Hold and Preserve.

Generally, once a party "reasonably foresees" that a dispute has arisen, then the duty to hold and preserve ESI is triggered. See, e.g.: *Am. Hospitality Mgmt Co. v. Hettinger*, 904 So. 2d 547, 549 (4th DCA 2005), holds ("a defendant could be charged with a duty to preserve evidence when [the defendant] could reasonably have foreseen the claim") and see *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (2d DCA 2012) (citing *Hettinger* and aligning with federal preservation case law). See also *Zubulake,* 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003)(finding that the duty to preserve attaches "when a party should have known that the evidence may be relevant to future litigation").

2.02.1 Counsel Has a Duty To Supervise the ESI Process.

Further, counsel have a duty to supervise ESI process. See, e.g.: EEOC v. M1 5100 Corp., No. 19-cv-8132, 2020 WL 3581372, at *2 (S.D.Fla. July 2, 2020), wherein Judge Matthewman explained that:

> The relevant rules and case law establish that an attorney has a duty and obligation to have knowledge of, supervise, or counsel the client's discovery search, collection, and production. *It is clear to the Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to "self-collect" discovery without any attorney advice, supervision, or knowledge of the process utilized*. There is simply no responsible way that an attorney can effectively make the representations required under Rule 26(g)(1) and yet have no involvement in, or close knowledge of, the party's search, collection and production of discovery. [emphasis added].

[Fl.R.Jud. Admin. 2.515 (similar to the intent of federal Rule 26(g)(1)) provides that the signature of an attorney certifies that the "*there is good ground to support the document*"] [emphasis added].

See further *Byte Federal, Inc. v. Lux Vending, LLC,* Case No. 8:23-cv-102-MSS-SPF. (M.D.Fla. May 1, 2024)("Moreover, while Cardamone's client might be unfamiliar with electronic discovery practices, *it is its counsel's responsibility to assist with this process*.") [emphasis added].

Best practice is therefore that a a hold and preserve directive be deployed early in a case by each attorney to his or her clients.

2.01.2 Counsel Should Consult Regarding Preservation of ESI.

- Parties must preserve ESI as required by law and should discuss preservation efforts early in the case.

- Proportionality should guide what ESI to preserve.

- Preservation notices aren't mandatory but, if used, should be specific and clear.

- Any disputes about preservation should be first resolved by a

meet and confer conference. If unresolved, the matter should be brought to the Court.

2.02 Meet and Confer Conference.

Parties should hold a conference to discuss ESI matters early in the litigation. Now that Rule 1.202 requires a Certificate of Conferral before a discovery motion is filed, by holding a meet and confer conference, the parties can address ESI issues before they erupt into full-blown disputes. A good time for this conference would be after **initial disclosures** are exchanged pursuant to Rule 1.280(a)(1).

The goal of this conference should be to help parties align on sources, scope, production format, search methodologies, and methods to streamline discovery. Topics to cover should include:

- Scope and sources of preserved ESI (e.g., custodians, date ranges).

- Production format and any related challenges.

- Search techniques and phased discovery.

- Potential need for a protective order, confidentiality order or "clawback" agreement to safeguard privileged information (see, e.g.: F.R.E. 202 and Federal Rule 502(d)). It must be noted, and that Fla. R. Civ. P. 1.285 does not mirror 502(d) Federal Rule 502 clawback language. Any clawback agreement in Florida state court must be stipulated between the parties and does not have the universal effect of a Federal Rule 502(d) order in federal court. The strength of the stipulated Florida clawback is determined by its terms.

- Cost-saving and efficiency opportunities.

2.03 Methodology For Collection of ESI.

Where and how ESI has been and continues to be stored by the parties is often an issue, which in turn drives in what form production is made, as well as how searches are made.

Counsel should consider sharing a "data map" of relevant systems and tools (e.g., software, devices, document management systems, cloud services, and backup routines).

Also, exchanging key personnel charts and relevant ESI policies may aid understanding. Early transparency can assist the parties greatly, and these initial exchanges should include: include:

- A data map of relevant systems (e.g., software, devices, document management systems, cloud services, and backup routines);
- Disclosure and exchange of existing policies on data retention, use of personal devices and deletion;
- Identification of key custodians and data repositories; and
- Relevant systems and tools (e.g., software, devices, document management systems, cloud services, and backup routines).

2.04 Identify E-Discovery Liaisons.

The parties should each identify and exchange ESI liaisons, who would be persons knowledgeable about the parties' respective ESI systems, protocols and procedures, and discovery efforts. The liaison should assist in resolving disputes and explain ESI procedures and technologies.

Each case should have an ESI Liaison and their information should be exchanged at the beginning of the case.

2.05 Production of ESI.

Early agreement on preservation, the format of production and related considerations of privilege, search methodology, and cost shifting will avoid unnecessary disputes later.

- Format: Agree on a production format; if no agreement is reached, the requesting party may specify a reasonable format. See Rule 1.350(b).

- Native Format and Metadata: ESI should generally be produced in native format, which would tend to include accompanying metadata.

- Privilege Logs: Discuss the scope of privilege logs and any agreed exclusions. See Rule 1.280(b)(6) and 1.280(c).

- Search Methodologies and Litigation Hold: Consider whether litigation hold materials and search methodologies will be disclosed.

- Proportionality. Proportionality principles of 1.280(c) and 1.280(e) should be specifically considered.

- Cost-Shifting: Each party covers their production costs unless otherwise agreed or ordered by the Court.

- Integrity of ESI: ESI integrity must be maintained from collection to production, allowing for confirmation of authenticity throughout litigation.

2.05 Resolving ESI Disputes.

Rule 1.202 requires that *the parties must confer* before presenting unresolved ESI disputes to the Court as soon as possible. Timeliness of conferral by a party claiming a discovery deficiency can lead to the Court deciding waiver has occurred. Conversely, lack of cooperation or failure to appoint or make available an ESI liaison may lead a Court to impose sanctions on the party with deficient ESI production.

3. Expectations of the Courts and Counsel

3.01 Preparedness of Counsel.

See **1.03 Technology Competence, herein.**

All counsel must be familiar with:

- Rules 1.202 and 1.280, effective January 1, 2025;
- Applicable Rules of Judicial Administration;
- Applicable Rules of Professional Responsibility;
- Divisional Instructions and Standing Discovery and Case Management Orders;
- Local Administrative Orders.

Other Resources of which counsel should be aware include:

- Federal Rules of Civil Procedure on ESI (e.g., Rules 26, 33, 34, 37, and 45) and Rule 502 of Federal Evidence, and all Committee Comments thereto; and
- The Sedona Conference Principles.

3.02 Special Considerations for ESI.

Discovery of ESI brings its own special set of concerns and potential issues, including but not limited to (i) the timing of hold and preserve demands, (ii) the method of collection and search, (iii) the mode of production, (iv) cost, (v) confidentiality, (vi) inadvertent production, and (vii) claw-back. See. e.g.: *The Sedona Principles, 3d ed: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, The Sedona Conference Journal*, Vol 19, No. 1 (2018) (Comment 3.g. Communications with opposing counsel and the court regarding ESI should be informed and candid.").

Rule 1.202 now has codified the "If a discovery dispute arises, counsel must actually speak to one another (in person or via telephone) and engage in reasonable compromise in a genuine effort to resolve their discovery disputes before seeking Court intervention."

ESI discovery is sufficiently cumbersome and expensive without

laying over that process difficulty in communications and conduct between counsel. Rule 1.202 should go a long way to promoting professionalism and cooperative conduct throughout state practice which has been the aspirational standard in the federal ESI discovery space for some time.

3.03 Best Practices for ESI-related Communication.

With Rules 1.280 and 1.202 having lifted off the runway for 2025, and reflecting upon what has worked best in dialogue in federal practice, a few suggested best practices are as follows:

1. **Call first:** there is a lot to be said for speaking colloquially to an adversary, while the tone and tenor of an email or text can lose important meaning just when you are trying to promote agreement;

2. **Follow up accurately in writing:** once the call is made and discussion had, accurately email back to your adversary what was agreed upon and discussed. Write that email immediately. This provides a good benchmark should recollections later differ, or a dispute arises, and is available for handy reference when drafting your Rule 1.202 consultation certification.

3. **Take what you can get:** consultation requires give and take, so if you can agree with your adversary on narrowing some of the issues, then do so, and then consider whether you truly need to bring a motion on what remains in dispute. It is surprising what falls by the wayside as unnecessary once you make headway in a dispute.

4. **Respect judicial resources:** this is a corollary to the third best practice. Consider what time and other resources a state court judge has to deal with your motion and its issues. You may find that by honing the issues through substantial consultation with your adversary, your success rate for helpful rulings from the court increases dramatically on what you do ultimately bring before the court.

5. **Your credibility before the court matters:** only bring what is truly necessary before the court. Consider best practices 3 and 4 before coming to the court with a multitude of issues.

As Chief Justice Roberts said in his 2015 Year-End Report on the Federal Judiciary: "***I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics***."

4. MORE INFORMATION

4.02 Locations of ESI

See Appendix 1.

4.03 Suggested ESI Discussion Topics

See Appendix 2.

4.04 Sample Production Protocols / Metadata Reference Guide Sample: Stipulations Establishing ESI Protocol / and More.

1. United States Courts (www.uscourts.gov)
    - The official website of the U.S. federal judiciary offers access to the Federal Rules of Civil Procedure (FRCP), particularly Rule 34, which governs document production, including ESI. It also provides court-specific guidelines, sample forms, and judicial opinions that can inform production protocols.
2. The Sedona Conference (www.thesedonaconference.org)
    - A leading nonprofit focused on advancing law and policy in e-discovery and ESI. It offers publications like "The Sedona Principles" and sample ESI protocols, which are widely respected in litigation for establishing best practices in production.
3. Department of Justice (www.justice.gov)
    - This site provides resources like the "Recommendations for ESI Discovery Production in Federal Criminal Cases" from the Joint Electronic Technology Working Group

(JETWG). While criminal-focused, it includes practical ESI production protocols adaptable to civil litigation.

4. Practical Law (via Thomson Reuters) (legal.thomsonreuters.com)
    - Offers a "Document Production Protocols in Federal Civil Litigation" Practice Note (subscription required). It includes detailed guidance and sample provisions for drafting ESI production protocols, addressing format, metadata, and privilege issues.
5. American Bar Association (www.americanbar.org)
    - The ABA's Litigation Section and e-discovery resources provide articles, sample agreements, and guidelines on ESI production protocols. It's a trusted source for attorney-drafted materials and best practices.
6. Relativity (www.relativity.com)
    - As a leading e-discovery platform, Relativity provides free educational resources, including sample ESI production workflows and protocols.
    - What You'll Find: White papers, blog posts, and downloadable templates in the "Resources" section, often tied to real-world litigation scenarios.
    - Relevance: Bridges technology and law, offering modern, tech-savvy protocol examples for business attorneys.

These websites are authoritative, widely recognized in the legal community, and provide either direct samples or critical information to help you craft ESI production protocols, have Metadata Reference Guide, and also provide sample: Stipulations Establishing ESI Protocol for your guidelines.

LOCATIONS OF ESI

As a reminder, ESI (Electronically Stored Information) refers to any evidence stored in electronic form. Today, it's everywhere, especially in devices we use daily. Below is a simple list of the most common locations ESI can be found.

Common ESI Locations

1. Cell Phones (The #1 Storehouse of ESI)

- Text Messages: Conversations, including deleted messages that might still be recoverable.
- Photos and Videos: Evidence of events, timestamps, and locations stored in phone galleries.
- Apps: Chat apps (WhatsApp, Snapchat, Facebook Messenger), social media apps, and even navigation apps (e.g., Google Maps).
- Call Logs and Voicemail: Records of who was called and when.
- Cloud Backups: Phones often sync data automatically to services like iCloud or Google Photos.

2. Traffic and Security Cameras

- Traffic Cameras: Recordings from intersections, toll booths, and red-light cameras that may capture vehicles, accidents, or related events.
- Surveillance Cameras: Security footage from businesses, homes (e.g., Ring or Nest doorbell cameras), and public spaces
- Dashcams and Bodycams: Found in vehicles or worn by individuals like police officers or private security.

3. Social Media

- Social Media Profiles: Posts, comments, photos, and videos on platforms like Facebook, Instagram, and TikTok.
- Private Messages: Direct messages (DMs) from platforms like Instagram, Twitter (X), and Snapchat.
- Stories: Temporary content on apps like Snapchat and Instagram that might be saved elsewhere.

4. Emails

- Work and Personal Emails: Including sent, received, and even unsent drafts.
- Attachments: Important files and documents sent via email.

5. Computers and Laptops

- Downloaded Files: Photos, videos, spreadsheets, and presentations.
- Browser History: Evidence of searches, visited websites, or online purchases.
- Work Applications: Collaboration tools like Microsoft Teams or Slack that store chat logs and shared files.

6. Wearables and Other Smart Devices

- Smartwatches: Synced text messages, call logs, and even health data like heart rate or steps taken.
- Home Devices: Smart assistants (e.g., Alexa, Google Home) may store voice commands and logs.

- Fitness Trackers: GPS data and activity logs from devices like Fitbit or Garmin.

7. Vehicles

- Telematics: Built-in GPS and tracking logs (e.g., location history, speed, and routes).

- Infotainment Systems: Call logs, messages, or media files synced from connected phones.

8. Cloud Storage

- Services like Google Drive, Dropbox, iCloud, or OneDrive store files, backups, and shared folders.

- Auto-Synced Content: Often, phone or computer data (e.g., photos, documents) is saved here without the user realizing it.

9. USB Drives and External Storage

- Small devices like USB sticks or external hard drives often store critical files, photos, and videos.

Appendix 2: Key Topics for ESI Discussions

Preservation

Key Issues: Identify main case issues and sources of relevant ESI.

Custodians and Sources: Determine key custodians and data sources; consider prioritizing based on relevance.

Date Ranges: Define timeframes for data preservation.

Data Mapping: Share organizational charts or data maps for custodian information, if available.

Data Scope: Identify ESI sources to preserve, covering all relevant locations (on-site, cloud, mobile devices, etc.).

Inaccessible Repositories: Note any data repositories that are costly to access; decide if they will be preserved.

Policies: Discuss policies for data management, retention, BYOD, and data deletion.

Non-Custodial Repositories: Identify shared drives or other group repositories for preservation.

Deletion Suspension: Confirm that automatic deletions of relevant data have been halted.

Preservation Methods: Review the process for preserving data, including chain of custody, metadata, and audit trails.

Third-Party Data: Identify any third parties with relevant ESI and plan for data preservation.

Disputes: Raise any unresolved preservation disputes needing court guidance.

ESI Liaison

Appointment: Decide if each side will designate an ESI liaison.

Role: Define the liaison's responsibilities in managing ESI throughout the case.

Collection

Scope: Identify what has been preserved and what will be collected.

Collection Process: Agree on how data will be collected and processed.

Phased Approach: Consider phased collection to improve efficiency.

Exceptions: Establish a plan for handling collection issues that cannot be easily resolved.

Search

Search Methods: Agree on methods (e.g., keywords, tech-assisted review) for finding responsive ESI and filtering non-responsive data.

Search Protocol: Determine if a search protocol needs court approval.

Production

Format: Define the production format, including:

- Metadata fields to be provided.
- OCR requirements for non-searchable files.
- Load file format and Bates numbering.

- Specific files to be produced in native format.
- Imaging preferences.
- Phased production, if applicable.
- Delivery media.

Security and Privacy: Address any privacy or security concerns in ESI production.

Privilege

Privilege Protocol: Develop a plan for managing privileged information, potentially including a court order under Fed. R. Evid. 502.

Privilege Logs: Agree on the format and scope of privilege logs.