

Sharon D. Nelson | Bruce A. Olson | John W. Simek

Electronically Stored Information (ESI) Protocol

Form 3.11 excerpted from:

[*The Electronic Evidence and Discovery Handbook:
Forms, Checklists, and Guidelines*](#)

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Electronically Stored Information (ESI) Protocol

Form 3.11

Electronic Data Preservation Protocol

UNITED STATES DISTRICT COURT

FOR THE [Name District] OF [Name State]

[Name of Plaintiff],)
) Civil No.
 Plaintiff,)
)
 v.)
)
 [Name of Defendant],)
)
 Defendant.)

Electronic Data Preservation Protocol

1. As used herein, the term "potentially discoverable electronic information" refers to Defendant's and Plaintiff's electronic "documents" that contain or potentially contain

information relating to facts at issue in the litigation, where the term "documents" is used as it is defined in Fed. R. Civ. P. 34(a)

2. During the pendency of these actions, the Defendant and the Plaintiff shall securely maintain, to the extent that they currently exist and may contain potentially discoverable electronic information: (1) e-mail backup tapes and (2) network backup tapes (together, the "Backup Tapes") created in the ordinary course of business during the period from [start date] through [stop date]. The Defendant and the Plaintiff shall be obligated to retain only one day's Backup Tapes among all Backup Tapes created in the ordinary course during a given month, provided that such day's Backup Tapes represent a complete backup of the data contained on the subject servers on that day (as opposed to merely an incremental backup of the subject servers). If only incremental backup tapes have been retained for a given month, then all such incremental tapes shall be retained. All Backup Tapes other than those specifically required to be preserved pursuant to this paragraph and paragraph 3 below may be recycled, overwritten, or erased, as the case may be, pursuant to Defendant's and Plaintiff's otherwise applicable retention schedule.

3. All electronic information or data archived or backed up during the period from [date range] as part of a special backup, i.e., a backup made other than in the ordinary course of business by Defendant or Plaintiff, whether due to system upgrade, transition planning, system migration, disaster recovery planning, or any other reason, that potentially contains potentially discoverable electronic information shall be securely retained, to the extent that they currently exist, for the remainder of the litigation.

4. All current or legacy software and hardware necessary to access, manipulate, print, etc., potentially discoverable electronic information that either is "live" or has been archived or backed up shall be securely retained, to the extent that they currently exist, for the remainder of the litigation.

5. Defendants and Plaintiff shall circulate retention notices designed to ensure the preservation of potentially discoverable electronic and other information to those employees potentially possessing such information. Thereafter, Defendant and Plaintiff shall quarterly renotify their employees of their continuing obligation to preserve such information.

6. Defendant and Plaintiff shall take the following measures to secure and retain, to the extent that it exists, the potentially discoverable electronic information that is on the desktop and laptop hard drives of their respective employees. Either (1) hard drives containing potentially discoverable electronic data shall be retained with all potentially discoverable electronic data contained therein retained intact; or, (2) employees shall be instructed to copy all potentially discoverable electronic information to a secure, backed-up network storage device or backup medium for the remainder of the litigation, making all reasonable efforts to retain all meta-data (file creation dates, modification dates, etc.) associated with the potentially discoverable electronic information at issue. The periodic retention notifications disseminated pursuant to paragraph 5 above shall advise employees potentially possessing potentially discoverable electronic information of their obligation to store discoverable electronic information on a secure, backed-up network storage device or backup medium to ensure its preservation and instruct such employees in the manner of doing so in accordance with this paragraph.

7. Plaintiff, within 15 days of receiving the list of business units referred to below, shall identify by name, title, or departmental category, employees of Defendant for which the Defendant shall be responsible for maintaining the hard drive, or a mirror-image copy (i.e., a bit-by-bit copy) of such hard drive, during the pendency of this litigation.

Defendant, within 15 days of receiving the list of business units referred to below, shall identify by name, title, or departmental category, employees of Plaintiff for which the Plaintiff shall be responsible for maintaining the hard drive, or a mirror-image copy (i.e., a bit-by-bit copy) of such hard drive, during the pendency of this litigation. In no event shall the number of computers subject to the provisions of this paragraph be greater than [insert number] for Defendant and Plaintiff. The hard drives or image copies of such hard drives preserved pursuant to this paragraph shall be labeled to identify the employee who primarily used the computer associated with that hard drive. To facilitate the identification of the appropriate employees, the parties will provide to each other identification by business unit and positions the employees they reasonably believe could have potentially discoverable electronic information. The parties will meet and confer in good faith and exchange additional information as may be necessary to facilitate the identification, and limit the number, of employees for whom the provisions of this paragraph shall be applicable.

8. To the extent that Defendant or Plaintiff have implemented a system for the purpose of preserving external e-mails (e-mails sent to or received by Defendant's or Plaintiff's employees) in an easily accessible form, other than an e-mail server or the Backup Tapes identified in paragraph 2 or 3 above, all e-mails that were created during the period from [date range] that contain potentially discoverable electronic information, and that are

stored on any such system as of the date hereof, shall be preserved during the pendency of this litigation.

9. Within 45 days, Defendant and Plaintiff will provide written answers to the best of their ability to the questions concerning information system and electronic document retention practices set forth in attached Schedule C [omitted]. Should any party believe it cannot in good faith answer any of the questions as posed, the parties will confer to resolve any disputes and, if necessary, seek Court intervention.

10. By agreeing to preserve potentially discoverable electronic information in accordance with the terms hereof, Defendant and Plaintiff are not waiving any objection to the ultimate discoverability of such information at such point when discovery is authorized in these actions.

11. Nothing herein shall be deemed to affect the Defendant's and Plaintiff's obligations to preserve hardcopy documents pursuant to the Court's Case Management Order. If counsel learn that potentially discoverable hardcopy documents were destroyed by a party subsequent to being named as a party in, and receiving a copy of, a complaint pertaining to that public offering, counsel for such party shall notify opposing counsel in writing of such destruction within two weeks of learning so.