

October 1, 2009

**SEVENTH CIRCUIT
ELECTRONIC DISCOVERY
PILOT PROGRAM**

**PHASE ONE
OCTOBER 1, 2009 - MAY 1, 2010**

STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES

TABLE OF CONTENTS

Seventh Circuit Electronic Discovery Committee.....	1
Chief District Judge.....	1
Chair.....	1
Committee Members (as of October 1, 2009).....	1
Liaisons from the Illinois States Bar Association.....	5
President, Seventh Circuit Bar Association.....	5
Expert Advisors.....	5
Introduction.....	7
Formation of the Committee.....	8
Developing the Principles of the Seventh Circuit Electronic Discovery Committee and Drafting the [Proposed] Standing Order.....	9
Principles Relating to the Discovery of Electronically Stored Information.....	11
[Proposed] Standing Order Relating to the Discovery of Electronically Stored Information.....	17
Phase One - Implementation and Evaluation..... (October 1, 2009 - May 1, 2010)	25

SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM

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INTRODUCTION

The Seventh Circuit Electronic Discovery Pilot Program (“Pilot Program”) was developed as a result of (a) continuing comments by business leaders and practicing attorneys, regarding the need for reform of the civil justice pretrial discovery process in the United States, (b) the release of the March 11, 2009 Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery (“Task Force”) and the Institute for the Advancement of the American Legal System at the University of Denver (“IAALS”),¹ and (c) The Sedona Conference® Cooperation Proclamation.² On the Seventh Circuit Electronic Discovery Committee (“E-Discovery Committee”) are trial judges and lawyers, including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants headquartered primarily in the Seventh Circuit, comprised of the states of Illinois, Indiana, and Wisconsin. The E-Discovery Committee members met for the first time in May 2009 to try to take action to reduce the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of electronically stored information (“ESI”) in today’s electronic world.

That first meeting took place in the E.M. Dirksen United States Courthouse in Chicago on May 20, 2009. At the meeting, interested judges, lawyers, and representatives of bar associations met with key experts on the discovery of ESI, including Mr. Kenneth J. Withers, the Managing Director of The Sedona Conference® of Phoenix, Arizona, who explained the difficult issues posed by the discovery of ESI to the litigation process.

The assembled group then discussed proposed methods of action, and “[t]he committee was formed to consider what can be done to reduce the costs of electronic discovery, and the costs of discovery and litigation more generally.”³

For the next four months, from May through September 2009, various E-Discovery Committee members working in sub-committee groups devoted countless hours meeting and robustly debating issues regarding the discovery of electronically stored information. Based on those discussions, the full E-Discovery Committee produced the Seventh Circuit Electronic Discovery Pilot Program’s Principles Relating to the Discovery of Electronically Stored Information (“Principles”). Those Principles will be implemented and evaluated during Phase One from October 1, 2009 through May 1, 2010.

¹ <http://www.du.edu/legalinstitute/publications2009.html>

² http://www.thesedonaconference.org/content/tsc_cooperation_proclamation

³ Summary of May 20, 2009 Meeting, page 1, by E-Discovery Committee Member Thomas M. Staunton of Miller Shakman & Beem LLP

FORMATION OF THE E-DISCOVERY COMMITTEE

Conceived initially as a committee to work with the United States District Court for the Northern District of Illinois, Chief District Judge James F. Holderman appointed lawyers and non-lawyers, who are experts in the field of ESI, to the E-Discovery Committee which is chaired by United States Magistrate Judge Nan Nolan. The E-Discovery Committee quickly expanded as word and support among members of the legal community in the geographic area of the Seventh Circuit grew. The Seventh Circuit Bar Association provided support and liaison representatives who became members of the E-Discovery Committee. Also, the Civil Practice Section and the Federal Civil Practice Section of the Illinois State Bar Association are represented on the Seventh Circuit Electronic Discovery Committee. Other bar associations, including the Chicago Bar Association and the Federal Bar Association - Chicago Chapter, have lent support to the Seventh Circuit Electronic Discovery Pilot Program.

As of October 1, 2009, the Seventh Circuit Electronic Discovery Committee consists of more than forty experts in the field of electronic discovery. The E-Discovery Committee members include private practitioners from the full spectrum of the bar (plaintiff, defense and government) who are leaders in the area of electronic discovery, in-house counsel at companies that regularly face the challenges of discovery in organizations with large and complex electronic systems, and experts from electronic discovery vendors who regularly collect and process electronically stored information.

With the continuing support and assistance of former Justice of the Colorado Supreme Court, Rebecca L. Kourlis, who is the Executive Director of the Institute for Advancement of the American Legal System at the University of Denver, and Kenneth J. Withers, the Managing Director of The Sedona Conference®, the E-Discovery Committee moved expeditiously in pursuit of its goals and on September 16, 2009 had produced the E-Discovery Committee's Principles Relating to the Discovery of Electronically Stored Information.

**DEVELOPING THE PRINCIPLES OF THE
SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE
AND DRAFTING THE [PROPOSED] STANDING ORDER**

At its initial meeting on May 20, 2009, the E-Discovery Committee members discussed and identified as among the E-Discovery Committee's goals the fostering of a better balance for the "just, speedy and inexpensive" determination of cases as intended by the rules. Fed R. Civ. P. 1.

In the course of their discussions, Thomas M. Staunton of Miller Shakman & Beem LLP agreed to act as the recording secretary of the E-Discovery Committee's discussions and prepare minutes of the meetings. The E-Discovery Committee members identified three major areas of focus and formed three corresponding sub-committees: a Preservation sub-committee, chaired by James Montana, Jr. of Vedder Price Kaufman & Kammholz PC; an Early Case Assessment sub-committee, co-chaired by Karen Quirk of Winston & Strawn LLP and Tom Lidbury of Mayer Brown; and an Education sub-committee, co-chaired by Mary Rowland of Hughes Socol Piers Resnick Dym Ltd. and Kate Kelly of the U.S. Attorney's Office. Each E-Discovery Committee member joined at least one and often two sub-committees. The sub-committees were tasked with developing discovery principles that would be tested in a pilot program. The sub-committees held dozens of meetings, and sub-committee members devoted much time to drafting the Principles between meetings. The full E-Discovery Committee held three meetings after the May 20th meeting (June 24, August 26, and September 16, 2009) to review the progress of the sub-committees as well as to refine and complete the drafting of the Principles and the Standing Order.

The Principles adopted by the Seventh Circuit Electronic Discovery Committee on September 16, 2009 for Phase One of the Pilot Program are set forth below. The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which often are followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify specific issues concerning evidence preservation and discovery that could productively be discussed and resolved early in the case by agreement or order of the court. As a result, the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic or unduly burdensome or costly to preserve or produce.

There have been calls for cooperation in the pre-trial discovery process, such as The Sedona Conference® Cooperation Proclamation. The Principles are intended not just to call for cooperation but to incentivize cooperative exchange of information on evidence preservation and discovery. They do so by providing guidance on preservation and discovery issues that commonly arise and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court. Many of these issues are

readily identifiable before the initial Rule 16 conference and should be raised then. Other preservation and discovery issues that become apparent only after the case has progressed further should be raised as soon as practicable after they arise.

The Principles also provide guidance on education. The E-Discovery Committee will be providing education to the judiciary and the bar concerning the procedural framework for electronic discovery and technical aspects of electronic information storage, preservation and discovery.

Other organizations have similarly offered useful guidance and principles. What makes the E-Discovery Committee's contribution in this area unique is that its Principles will be subjected to testing during the phases of the Pilot Program. Individual district court judges, magistrate judges, and bankruptcy judges in the Seventh Circuit have agreed to adopt the Principles and implement them in selected cases during the Phase One period. This will be done through entry of the [Proposed] Standing Order by the participating judges in the selected cases. Once adopted as standing orders, the Principles will serve as supplemental procedural guidelines to be followed by litigants. The Principles' efficacy will then be evaluated and refined. Phase One of the pilot project will occur from October 2009 to May 2010. The Institute for the Advancement of the American Legal System at the University of Denver is developing questionnaires to assess the efficacy of the Principles. Questionnaires will be completed by the participating judges and by the lawyers who practice before the judges. The results of the IAALS's questionnaires will be presented at the 7th Circuit Annual Meeting in May 2010. In May 2010, the E-Discovery Committee will also evaluate the efficacy of the Principles and refine them as appropriate. Phase Two will then proceed from June 2010 to May 2011. In May 2011, the E-Discovery Committee will then formally present its findings and issue its final Principles.

PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Seventh Circuit Electronic Discovery Pilot Program (Phase One October 1, 2009 to May 1, 2010)

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

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.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a 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.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are:

- (1) the identification of relevant and discoverable ESI;

- (2) the scope of discoverable ESI to be preserved by the parties;
- (3) the formats for preservation and production of ESI;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and
- (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party's e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

- (1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;
- (2) random access memory (RAM) or other ephemeral data;
- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; and

- (5) backup data that is substantially duplicative of data that is more accessible elsewhere;
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Principles

Principle 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and
- (3) Familiarize themselves with these Principles.

Principle 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery¹, additional materials available on web sites of the courts², and of other organizations³ providing educational information regarding the discovery of ESI.⁴

¹ http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110

² E.g. <http://www.ilnd.uscourts.gov/home/>

³ E.g. <http://www.7thcircuitbar.org>, www.fjc.gov (under Educational Programs and Materials)

⁴ E.g. <http://www.du.edu/legalinstitute>

**[PROPOSED] STANDING ORDER RELATING TO THE
DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

UNITED STATES [DISTRICT/BANKRUPTCY] COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION

_____)	
)	
Plaintiff,)	
)	
vs.)	Case No. _____
)	
_____)	Judge _____
)	
Defendant.)	

**[PROPOSED]
STANDING ORDER RELATING TO THE
DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee. Parties and counsel in the Pilot Program with civil cases pending in this Court shall familiarize themselves with, and comport themselves consistent with, that committee's Principles Relating to the Discovery of Electronically Stored Information. For more information about the Pilot Program please see the web site of The Seventh Circuit Bar Association, www.7thcircuitbar.org. If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Principles Relating to the Discovery of Electronically Stored Information, then that party may raise such reason with the Court.

General Provisions

Section 1.01 Purpose

The purpose of the Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information

("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Section 1.02 Cooperation

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.

Section 1.03 Discovery Proportionality

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a 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.

Early Case Assessment Provisions

Section 2.01 Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and the Principles to their specific case. Among the issues to be considered for discussion are:

- (1) the identification of relevant and discoverable ESI;
- (2) the scope of discoverable ESI to be preserved by the parties;
- (3) the formats for preservation and production of ESI;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of the Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Section 2.02 E-Discovery Liaison(s)

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in the Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage,

organization, and format issues, and relevant information retrieval technology, including search methodology.

Section 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of the Principles. Vague and overly broad preservation requests do not further the goals of the Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in the Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Section 2.04 Scope of Preservation

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these

categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

- (1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;
- (2) random access memory (RAM) or other ephemeral data;
- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Section 2.05 Identification of Electronically Stored Information

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Section 2.06 Production Format

(a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Provisions

Section 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting the Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [www.uscourts.gov/rules/EDiscovery w Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf); and
- (3) Familiarize themselves with the Principles.

Section 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery¹, additional materials available on web sites of the courts², and of other organizations³ providing educational information regarding the discovery of ESI.⁴

ENTER:

Dated: _____

[Name]
United States [District/Bankruptcy/
Magistrate] Judge

¹ http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110

² E.g. <http://www.ilnd.uscourts.gov/home/>

³ E.g. <http://www.7thcircuitbar.org>, www.fjc.gov (under Educational Programs and Materials)

⁴ E.g. <http://www.du.edu/legalinstitute>

**PHASE ONE - IMPLEMENTATION AND EVALUATION
(OCTOBER 1, 2009 - MAY 1, 2010)**

At the September 16, 2009 meeting of the Seventh Circuit Electronic Discovery Committee, at which the Principles were voted on and approved for implementation during Phase One of the Pilot Program, the Survey sub-committee was created and Joanne McMahon, Governmental Compliance Leader at General Electric, and Natalie J. Spears of Sonnenschein Nath & Rosenthal LLP agreed to be the sub-committee's co-chairs.

The IAALS, through its Executive Director Rebecca L. Kourlis, agreed to assist in the evaluation of the implementation of the Seventh Circuit Electronic Discovery Pilot Program by judges who volunteer to implement the Principles in select cases filed in the trial courts of the Seventh Circuit by entering the [Proposed] Standing Order incorporating the Principles. The selected cases will be evaluated using objective and subjective measuring tools. The resulting data will be presented at the Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit, which will be held in Chicago on May 2 - 4, 2010. The data will also be available at the Civil Rules Advisory Committee Conference, which will be held at Duke University on May 10 - 11, 2010.

Following that, the Pilot Program will move on to Phase Two, which is planned to be conducted from June 2010 to May 2011.