

# Client Alert

E-Discovery Practice Group

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## Predictive Coding: Are Corporations Ready for Transparency?

Please click [here](#) for an article in which we discuss the cost benefits of predictive coding and whether corporations will embrace this technology and the transparency that may be required, such as producing irrelevant documents to the adversary, to obtain these cost benefits.

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## Model Rules and Procedures in e-Discovery *Different Approaches in Different Jurisdictions*

While the Federal Rules of Civil Procedure acknowledge the obligation to produce “electronically stored information” (ESI) in litigation,<sup>i</sup> they do so with the same standard for relevance as traditional discovery – “any nonprivileged matter that is relevant to any party’s claim or defense.”<sup>iii</sup> The resulting scale and complexities of such broad discovery has prompted many jurisdictions to develop a process for addressing electronic discovery issues at the outset of each case, with the goal of preventing disproportionate discovery costs and the inevitable discovery disputes.

Courts have adopted a broad spectrum of approaches in recent years, from specific rules for e-discovery to generic guidelines for crafting specialized e-discovery plans in each case. In addition, some courts have introduced unique ideas for addressing e-discovery issues like document preservation, privilege logs, custodial collections and cost sharing. This article provides a brief overview of different approaches being adopted by courts.

### *Model Rules: The Federal Circuit’s Model E-Discovery Order*

One area of law, which has recently attracted attention in the ESI context, has been patent litigation. At the Eastern District of Texas Judicial Conference in September 2011, Chief Judge Rader of the Federal Circuit Court of Appeals introduced a Model E-Discovery Order and explained that patent cases, in particular, tend to suffer from disproportionately high discovery expenses.<sup>iii</sup> This is because patent cases tend to focus on a relatively small set of key technical and financial documents, and broad-based e-discovery of email and custodial documents is often tangential and of very limited value.<sup>iv</sup> Given the common characteristics of discovery in most patent cases, the Federal Circuit was able to promote very specific rules, such as cost shifting, eliminating the need to produce metadata absent a showing of good cause, and limiting email requests to five custodians with five search terms.

Following the Federal Circuit’s announcement, the Eastern District of Texas largely adopted the Model Order for patent cases in its district, but scaled back the provisions on cost sharing, slightly adjusted the default limits on custodians and search terms, and added specific rules on the format of document productions (TIFF files, etc.).<sup>v</sup> Likewise, the Model Order has been adopted in some patent cases in the Northern District of California, with various tweaks to the limitations on custodians and search terms.<sup>vi</sup>

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The momentum behind the specific e-discovery rules for patent litigation may signal the beginning of a larger shift towards detailed model rules in other areas of civil litigation or agency proceedings, and the growing burden of e-discovery may compel companies to champion similar e-discovery rules as a sensible approach in many non-patent disputes.

## *A Middle Road: The District of Delaware's Default Standard for Discovery*

Many district courts have developed e-discovery rules in recent years (*e.g.*, Kansas, Maryland, Ohio, and Oklahoma),<sup>vii</sup> and one noteworthy pioneer has been the District of Delaware, which introduced a “Default Standard for Discovery” in 2004 and continuously revised it to stay current on ESI issues. Taking a more general approach to e-discovery in all civil litigation, the standard requires cooperation between parties, proportionality in the scope of discovery, and mandates the preservation of discoverable material.<sup>viii</sup>

Delaware's standard simplifies discovery by adopting many common practices by default. For example, with respect to privileged information, the standard excludes materials dated after filing of the complaint, and states there is no waiver for privileged materials produced unintentionally.<sup>ix</sup> The standard also directs parties to discuss whether entire categories of documents can be excluded from the privilege logging process, and whether alternatives to document-by-document logs can be exchanged.<sup>x</sup> In cases with multi-million document productions, this can enable parties to largely avoid the expensive and burdensome task of logging thousands of privileged communications whose existence would be of little or no value in the case. The standard also provides a mechanism for identifying relevant document custodians in the Initial Disclosures, specifies production formats, and includes a process for developing agreed-upon search methodologies.<sup>xi</sup> While Delaware's default standard may not be as specific as the Federal Circuit's Model Order in certain respects, it is relatively detailed. And unlike jurisdictions where a court order is required to impose e-discovery rules, these rules are automatically in effect for all civil litigation.

## *Broad Guidelines: ESI in the Northern District of Illinois and Southern District of New York*

Instead of promoting specific rules, many jurisdictions provide a *process* by which litigants develop an e-discovery plan at the outset of the case. For example, courts in the Northern District of Illinois impose model guidelines that direct the parties to meet-and-confer regarding all e-discovery issues and immediately raise any disputes with the Court.<sup>xii</sup> The court also requires each party to designate an “e-discovery liaison” familiar with its ESI who will participate in meet-and-confers and attend Court hearings on discovery disputes.<sup>xiii</sup> The guidelines also suggest unique approaches to document preservation, such as allowing parties to issue “preservation requests” for particular topics or custodians.<sup>xiv</sup> Transparency about a party's electronic systems and capabilities may also be expected.<sup>xv</sup>

In a similar vein, the Complex Civil Rules Pilot Program in the Southern District of New York requires parties to confer and file a “Joint Electronic Discovery Submission” in advance of the Rule 26(f) conference, at which time the court can resolve any disputes regarding the e-discovery process.<sup>xvi</sup> Preservation also plays a big role in the Pilot Program, and in a break from common practice, the guidelines suggest that parties may be expected to disclose their preservation efforts, as well as “the dates, contents, and/or recipients of ‘litigation hold’ communications.”<sup>xvii</sup> Because the Pilot Program is a process-based – rather than rules-based approach – the Joint Electronic Discovery Submission does not offer default rules for e-discovery. However, it does include a long checklist of e-discovery topics for the parties to discuss, and they must each provide a short statement regarding ESI sources and custodians, searching methodologies, production formats, privilege issues, ESI cost estimates and cost-shifting arrangements.<sup>xviii</sup> The parties must also identify all issues where they “anticipate the need for judicial intervention.”

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## Conclusion

While clients may welcome the cost-savings and efficiencies provided by the variety of e-discovery rules and guidelines increasingly common in litigation, disparities between jurisdictions and an increasing expectation for parties to disclose their document preservation efforts and internal ESI infrastructure requires the close attention of e-discovery counsel. Familiarity with the wide range of e-discovery approaches may enable counsel to best advise clients on these issues, and present judges with practiced alternatives that will “secure the just, speedy, and inexpensive determination” of litigation.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*

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<sup>i</sup> See generally Fed. R. Civ. P. 34(a)(1)(A); Fed. R. Civ. P. 34(b)(1)(C).

<sup>ii</sup> Fed. R. Civ. P. 26(b)(1).

<sup>iii</sup> See Model Discovery Order Adopted by the Federal Circuit Advisory Council, available at <http://www.ca9.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html>.

<sup>iv</sup> *Id.*

<sup>v</sup> See Local Rules for the Eastern District of Texas, Appendix P: Order Regarding E-Discovery in Patent Cases, available at <http://www.txed.uscourts.gov/page1.shtml?location=rules>.

<sup>vi</sup> See, e.g., *DCG Systems, Inc. v. Checkpoint Tech., LLC*, 5:11-CV-03792-PSG, Dkt. 33 (N.D. Cal. Nov. 2, 2011)

<sup>vii</sup> See generally Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues, <http://www.ediscoverylaw.com/promo/current-listing-of-states-that/>.

<sup>viii</sup> See Default Standard for Discovery, Including Discovery of Electronically Stored Information (ESI) at § 1.a-c, available at <http://www.ded.uscourts.gov/court-info/local-rules-and-orders/guidelines>.

<sup>ix</sup> *Id.* at § 1.d.

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.* at §§ 3 and 5.

<sup>xii</sup> See Standing Order Relating to the Discovery of Electronically Stored Information at § 2.01, available at <http://www.ilnd.uscourts.gov/home/assets/documents/webdocs/brown/ESI%20discovery%20order.pdf>.

<sup>xiii</sup> *Id.* at § 2.02.

<sup>xiv</sup> *Id.* at § 2.03.

<sup>xv</sup> *Id.* at §§ 2.01(a)(1) and 2.02(c).

<sup>xvi</sup> See Standing Order, *In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, 1:11-mc-00388-LAP, § II.H (S.D.N.Y. Oct. 31, 2011), available at [http://www.ediscoverylaw.com/uploads/file/SDNY%20Complex%20Civil%20Rules%20Pilot%20\(11-3-11\)\[1\].pdf](http://www.ediscoverylaw.com/uploads/file/SDNY%20Complex%20Civil%20Rules%20Pilot%20(11-3-11)[1].pdf); see also *id.* at Exhibit B (Joint Electronic Discovery Submission).

<sup>xvii</sup> *Id.* at Exhibit B, § 5.

<sup>xviii</sup> *Id.* at Exhibit B, § 6-7.