E-Discovery Quarterly: The Perils Of Digital Data Protocols

By **Tom Paskowitz, Colleen Kenney and Matt Jackson** (April 15, 2025)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent disputes over stipulated protocols governing how parties in litigation preserve, collect and produce electronically stored information.

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"An ESI Protocol agreement is supposed to make the discovery process more efficient and expedient, but that certainly has not been the situation in this case."[1]

This gem from the U.S. District Court for the Southern District of Florida's March 19 decision in 777 Partners LLC v. Leadenhall Capital Partners LLP reflects the somewhat contradictory nature of stipulated protocols governing the treatment of electronically stored information in litigation.

Principle 3 of the Sedona Principles for addressing electronic document production advises that, "[a]s soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information."[2]

Comment 3.c to the principles expands on this concept, noting that early discussion among the parties regarding the format in which their data is stored, data delivery specifications and the options for the forms of production "can result in an agreed upon protocol governing the production of ESI and avoid downstream misunderstandings or disputes."[3]

This guidance is consistent with the Federal Rules of Civil Procedure, which require that the parties discuss the form of ESI productions in connection with the Rule 26(f) conference, and include the parties' views and proposals on ESI in a discovery plan or in the form of an ESI protocol.[4]

Many courts also have guidelines and templates that parties are required or encouraged to use to talk about how ESI will be preserved, collected and produced.[5]

This article surveys a number of recent federal court decisions that are seemingly at odds with the foregoing principles and expectations because they address disputes involving ESI protocols.

Do we even need an ESI protocol?

Parties to litigation do not always agree that a protocol governing the production of ESI is necessary.

Such a dispute was the subject of a Jan. 8 decision from the Southern District of Florida in Zarfati v. Artsana USA Inc.[6] The parties in Zarfati disputed whether a protocol governing

the production of ESI was necessary or proportional to the needs of the case.[7]

When the defendant refused to enter into an ESI protocol, the plaintiffs filed a motion requesting the court to order the protocol, over the defendant's objection.[8]

The defendant raised several objections to the entry of an ESI protocol, including that the one-sided protocol the plaintiffs proposed would "require[] the Parties to 'waste time negotiating search terms, which custodians should be searched, and [from] which data sources'" the defendant should collect.

The plaintiffs' proposed protocol also would require that emails be collected "when material responsive to these requests can be gathered through a directed ask or collection."[9]

Quoting the Sedona Principles, the defendant argued that it was "best situated [as the producing party] to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing" its own ESI.[10]

The court overruled each of the defendant's objections to the plaintiffs' proposed ESI protocol, finding that it was "inclined to implement a thorough ESI protocol that facilitates the full and efficient disclosure of discoverable ESI" in light of the complex nature of the litigation seeking over $5 million in damages.[11]

The court found no problem with entering a one-sided ESI protocol directed to the defendant's ESI, because the defendant had not identified "any information about any discovery requests propounded on Plaintiffs that involve the production of extensive ESI or otherwise substantiate the notion that Plaintiffs' ESI will be at issue."[12]

The court stressed that "the discovery process, particularly when ESI is involved, is intended to be collaborative," and that the local rules and the ESI checklist for the Southern District of Florida "encourage parties to collaborate with one another at the earliest stages of the case to think about and discuss the impact of ESI on the potential discovery," and "informally discuss" the sources and collection of ESI.

But in this case, the defendant had not shared how it intended to "preserve, search for, and collect the responsive ESI in the case."[13]

On the substance, the court rejected the defendant's argument that it "has carte blanche to decide the manner in which it searches for and gathers discoverable ESI," finding that "a producing party's right to set its own protocol for producing ESI is not unconstrained, as the protocol it follows must be reasonable."[14]

While acknowledging that "[a] producing party is 'best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information,'" the court noted that the defendant had "not address[ed] how it would conduct a reasonable inquiry when searching its materials."[15]

Ultimately, the court found that "a robust ESI protocol appears appropriate" and would "aid the parties in identifying discoverable ESI."[16]

Again relying on the Sedona Principles, the court further concluded that "a comprehensive ESI protocol will help 'each party fulfill[] its discovery obligations without direction from the court or opposing counsel' by setting forth procedures that dispel ambiguities that might otherwise give rise to discovery disputes between the Parties requiring the Court's

intervention."[17]

More recently, on March 19, the U.S. District Court for the Northern District of California resolved a similar dispute regarding the scope of a proposed ESI protocol.

In Andersen v. Stability AI Ltd.,[18] the defendants' proposed ESI search protocol consisted of one paragraph that did not address disclosures or discussions regarding the scope of preservation, disclosure of search methodology, or search-term hit reports.[19]

Regarding search methodologies, the court recognized that "the responding party is generally best situated to evaluate procedures and methodologies appropriate for producing their own ESI," but noted that "[t]he mere disclosure of [information regarding search methodologies] does not run afoul of" this principle.[20]

Accordingly, the court entered an ESI protocol that required the parties to disclose "the search terms, keywords, date limitations, and custodians, and [to] specify what custodial and non-custodial sources that the search methodology will or was run against."[21]

The court also ordered as part of the protocol that the parties would hold "an early meet and confer conference" to discuss "the retrieval parameters identified ... [and] to engage in meaningful cooperation that reduces the costs and risk associated with ESI production."[22]

The court reached a similar conclusion with respect to search-term hit count reporting, adopting the plaintiff's proposed language requiring that search term hit reports be provided as part of the meet-and-confer process regarding search terms.[23]

The court reasoned that "[t]he effectiveness of meet and confers depends on the parties' candor, and this is especially true when the parties are addressing potential search terms."[24]

What am I getting myself into?

Recent court opinions demonstrate the importance of understanding the implications of the provisions in one's ESI protocol before agreeing to specific terms.

For instance, in Gagne Technical Services Inc. v. Presutti,[25] the parties agreed to the terms of an ESI protocol governing the searching of the defendants' ESI. Among other things, the protocol called for the use of a third-party vendor to conduct the search, and required the defendants to identify the devices, accounts and network locations to be searched.[26]

Consistent with this protocol, the parties agreed on an outside vendor, and identified the devices, accounts and networks to be searched. However, the defendants later changed their mind and sought to perform the required searches themselves, arguing that the use of a vendor would be too costly and could result in the disclosure of information that would violate the defendants' contractual confidentiality obligations.

On March 11, the U.S. District Court for the Western District of Pennsylvania rejected both concerns. With respect to the defendants' argument that an external vendor would be too costly, the court noted that "[w]hen Defendants entered into the ESI Protocol, they agreed that it would be conducted by an outside vendor," and the "[d]efendants were made aware of the cost estimates before selecting the vendor."[27]

The court found that, having agreed to use an external vendor, the "[d]efendants cannot now object to the costs."[28]

The court similarly overruled the defendants' separate objection that they needed to conduct the searches internally to avoid violating contractual confidentiality obligations.[29] The court pointed out that the defendants "acknowledged in the protocol [that] they understood that the ESI search could yield confidential documents."[30]

The court therefore reasoned that the defendants would have "considered their business practices, including the existence of contracts with third parties, as well as their methods of storing ESI, before agreeing to the protocol."[31]

In an earlier case, Orlando Health Inc. v. HKS Architects Inc.,[32] the defendant had negotiated and agreed on an ESI protocol that included provisions regarding the production of custodial emails, but ultimately never signed it. When the plaintiff brought a motion to compel, the defendant relied on the lack of an ESI protocol to oppose the motion.

On Dec. 23, 2024, the U.S. District Court for the Middle District of Florida rejected this argument, finding it "unpersuasive and bordering on disingenuous."[33]

After describing the lengthy negotiations surrounding the ESI protocol; the defendant's agreement to the protocol, notwithstanding the lack of a signature; and the defendant's failure to raise the lack of a protocol at any prior time, the court concluded that the defendant "chose to pursue a litigation strategy of changing its mind with respect to an ESI Protocol and unilaterally limiting production."[34]

Based on these facts, the court granted the plaintiff's motion to compel additional productions and for sanctions.[35]

Did I really agree to that?

Recent decisions also reflect the importance of an ESI protocol once it is entered, and the perils of any failure to comply.

For example, in the 777 Partners LLC case, the Southern District of Florida was faced with a situation where the plaintiffs had not disclosed any of their search terms, in violation of the parties' stipulated ESI protocol.[36]

The court found the plaintiffs' failure "highly improper," because "[w]hen a party agrees to do something in an ESI Protocol, as Plaintiffs did here, the Court expects them to live up to their agreement."[37]

As a result, the court granted the defendants an extension of the discovery deadline, as well as attorney fees and costs.[38]

On March 13, the Northern District of California addressed a similar dispute and denied a motion to compel in Zurich American Insurance Co. v. Chevron U.S.A. Inc.,[39] overruling the plaintiffs' objections when the defendant withheld nonresponsive attachments to responsive emails because the parties' ESI protocol permitted withholding.[40]

In 4WEB Inc. v. NuVasive Inc. before the U.S. District Court for the Southern District of California, the plaintiffs had moved to compel the defendant to review and produce responsive, non-email ESI from individual custodians in response to the plaintiffs' document

requests.[41]

The parties' ESI order provided that "[g]eneral ESI production requests under Federal Rules of Civil Procedure 34 and 45 ... shall not include e-mail or other forms of electronic correspondence," and required the parties to propound specific email production requests that followed certain procedures for those requests.[42] The order also limited "'e-mail production requests to a total of five custodians per producing party for all such requests' and 'to a total of five search terms per custodian per party.'"[43]

The defendant argued that this stipulation "appl[ied] to all custodian ESI."[44] The plaintiffs countered that the ESI order addressed only email ESI, and did not modify the defendant's obligations under Rule 34 to produce non-email ESI from its custodians.[45]

The court ruled on March 17 that the parties' ESI order applied only to email ESI and not to other forms of ESI, because its scope was limited to "'e-mail production requests' seeking production of 'e-mail and other forms of electronic correspondence.'"[46]

What lessons can we learn from these decisions?

The decisions discussed above demonstrate that while ESI protocols can serve the intended purpose of making "the discovery process more efficient and expedient," in the words of the 777 Partners decision, a failure to engage early in the process of negotiating a protocol on an informed basis can lead to significant inefficiencies in the form of discovery disputes and motion practice. Several key lessons emerge from these cases.

Engage regarding ESI early.

Counsel should engage on ESI at the outset of any scheduling or discovery discussion, both internally with the client and externally with the opposing party. A complete understanding of court-required provisions or protocols should be a starting point.

It is also important to address any limitations or issues so as to minimize discovery disputes later in the process. And if disputes regarding the need for, or content of, a protocol are unavoidable, submitting those disputes to the court as early as possible will avoid unnecessary delay later in the process.

Know your protocol.

When negotiating an ESI protocol, it's important to understand how each provision will work with your specific ESI and systems.

Understanding this will help you avoid situations like the one that befell the defendant in Gagne Technical Services, who may not have considered the cost of implementing the ESI protocol before signing it, or the defendant in 4WEB, which may have failed to understand the scope of the agreement it reached.

Follow the protocol.

Although it should be obvious, it is critical to understand and comply with all provisions in your ESI protocol. The decisions above — and many that preceded them — reflect that courts expect strict adherence to the provisions of an ESI protocol, and the failure to treat your ESI consistent with your agreement, like the plaintiffs in 777 Partners, will lead inevitably to disputes.

Conversely, following your ESI protocol will be defensible even where it differentiates from normal practice, like the defendant Zurich American with its nonresponsive attachments.

And if you discover an issue with your ESI protocol, it is better to address that issue directly, either through compromise with your opposing party or a motion to amend the ESI protocol.

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[1] 777 Partners LLC v. Leadenhall Capital Partners LLP, No. 24-cv-81143, 2025 WL 865603, *3 (S.D. Fla. Mar. 19, 2025).

[2] The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 SEDONA CONF. J. 1 (2019).

[3] Id. at Cmt. 3.c, 79.

[4] See Rule 26(f)(3)(C).

[5] For just one example, see the Northern District of California's Guidelines for the Discovery of Electronically Stored Information and ESI checklist for use during the Rule 26(f) meet and confer process, both available at https://www.cand.uscourts.gov/forms/e-discovery-esi-guidelines/.

[6] No. 24-cv-21372, 2025 WL 50373 (S.D. Fla. Jan. 8, 2025).

[7] Id. at *1.

[8] Id.

[9] Id. at *3.

[10] Id. at *2.

[11] Id.

[12] Id.

[13] Id. at *3.

[14] Id. at *2.

[15] Id.

[16] Id. at *4.

[17] Id.

[18] Andersen v. Stability AI Ltd., No. 23-cv-00201-WHO (LJC), 2025 WL 870358 (N.D. Cal. Mar. 19, 2024), 2025 U.S. Dist. LEXIS 50848.

[19] Id. at *2-6.

[20] Id. at *3.

[21] Id.

[22] Id.

[23] Id. at *5.

[24] Id.

[25] Gagne Technical Services Inc. v. Presutti, No. 2:24-cv-71, 2025 WL 776125 (W.D. Pa. Mar. 11, 2025).

[26] Id. at *1.

[27] Id. at *4.

[28] Id. The court in Morse Electric, Inc. v. Stearns, Conrad and Schmidt, Consulting Engineers, Inc., No. 22-91-JWB, 2025 WL 548461, *2 (E.D. Okla. Feb. 10, 2025) relied on similar reasoning in finding that the plaintiff could not avoid the cost associated with complying with an ESI order because the plaintiff "was provided with an opportunity to either agree with Defendant on how to produce ESI or to file its own plan" but "failed to do so" and "did not object when Defendant requested that the court adopt its proposed plan."

[29] Id.

[30] Id.

[31] Id.

[32] Orlando Health Inc. v. HKS Architects Inc., No. 24-cv-693-JA-LHP, 2024 WL 5202797 (M.D. Fla. Dec. 23, 2024).

[33] Id. at *6.

[34] Id.

[35] Id.

[36] Id. at *2.

[37] Id. at *3. In a separate opinion, the court lamented that "[a]n ESI Protocol Order is supposed to streamline the production of" ESI, but "[i]ronically, in this case, the ESI Protocol Order has had the opposite effect—it has not resulted in any significant cooperation and has simply given the parties and their counsel one more thing to fight about during the discovery process." 777 Partners LLC v. Leadenhall Capital Partners LLP, No. 24-cv-81143, 2025 WL 942414, *4 n.2 (S.D. Fla. Mar. 28, 2025).

[38] 2025 WL 865603 at *4.

[39] Zurich American Insurance Company v. Chevron U.S.A. Inc., No. 24-cv-02733-JSC, 2025 WL 808467, *2-3 (N.D. Cal. Mar. 13, 2025).

[40] See also iGolf, Inc. v. Bushnell Holdings, Inc., No. 23-cv-01595-L-BJC, 2024 WL 5479811 (S.D. Cal. Nov. 26, 2024) (ordering the plaintiff to correct its document production to conform with provisions in the parties' ESI protocol requiring provision of color copies of documents and properly grouping families of documents together).

[41] 4WEB Inc. v. NuVasive Inc., No. 24-cv-01021-JLS-MMP, 2025 WL 834507, *4 (S.D. Cal. Mar. 17, 2025).

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] Id. at *5. The court also found that the limited scope of the ESI order was not contrary to its stated purpose to "streamline ESI discovery" because "the Court sees the ESI order as working in conjunction with the Federal Rules to facilitate and streamline discovery." Id.