

In *Impact Engine, Inc. v. Google LLC*, 2020 WL 1939023 (S.D. Cal. Apr. 21, 2020), Magistrate Judge Bernard G. Skomal declined to determine the appropriate number of custodians and search terms to govern production of ESI, finding that the parties had not followed local court rules and failed to follow the processes set forth in Fed. R. Civ. P. 34.

In this discovery dispute, the parties contested both the preservation of ESI and the ESI search protocol in their Fed. R. Civ. P. 26(f) filing with the court. With respect to ESI preservation, the plaintiff requested that the magistrate judge order the defendant to preserve all ESI from instant messaging or chat applications used by employees during the scope of their work related to the products at issue in the litigation, claiming that these messages were likely to contain information relevant to the case. The defendant countered that such preservation should not be required as it would be overly burdensome compared to the needs of the case and given the unlikelihood of the messages' containing relevant information not also included in employee emails. Finding that neither party had adequately addressed the merits of the issue or followed chamber procedures for addressing discovery disputes, the competing motions were denied. *Id.* at *1.

With respect to the ESI search protocol, the magistrate judge again found that the parties had not followed the local rules for raising discovery disputes and characterized the disagreement as “centered around the number of custodians for email and non-email ESI searches, and the number of search terms per custodians.” *Id.* at *2. Fed. R. Civ. P. 34 governs requests for production of documents and does not distinguish between physical paper and electronic information. Rule 34 requires the requesting party to make a request and the producing party to comply or object. To the extent Rule 34 does address ESI production, it does not require a requesting party to identify custodians or search terms. “The parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.” *Id.* at *2. Magistrate Judge Skomal stated that the parties should work to come to an agreement as to how relevant ESI should be identified and produced, which may or may not include the use of search terms, in accordance with the terms of Rule 34.

Magistrate Judge Skomal declined to decide the number of custodians and search terms appropriate for the matter and directed the parties to follow the process dictated by Rule 34: “That is discovery: a party requests information and the burden is on the producing party to locate and produce it or object legitimately to production.” *Id.* at *3.