

Best Practices for the Whole Country
Group to meet next month to finalize national
e-discovery draft guidelines

By Christopher Guly for Law Times
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The principles are:

- *Electronically stored information (ESI) is discoverable;*
- *Parties in any proceeding should ensure steps taken in the discovery process are “proportionate” and take into account such aspects as the nature and scope of the litigation, the relevance of the available ESI, its importance to the court’s adjudication in a given case, and “the costs, burden and delay” that may be imposed on the parties;*
- *Counsel and parties should meet as soon as possible – and regularly – regarding the “identification, preservation, collection, review, and production” of ESI;*
- *Parties must take “reasonable and good faith” steps to preserve “potentially relevant” ESI “as soon as litigation is reasonable anticipated”;*
- *Parties should be prepared to disclose all relevant ESI “that is reasonably accessible in terms of cost and burden”;*
- *Absent agreement or court order “based on demonstrated need and relevance,” a party should not have to search for or collect deleted or residual ESI;*
- *Electronic tools and processes, such as data sampling, searching, and/or the use of selection criteria, can be used to identify “potentially relevant” ESI;*
- *Parties should agree “as early as possible” in the litigation process on the format in which ESI will be produced – and come to terms with the format, content and organization of information to be exchanged;*
- *During the discovery process, parties should seek judicial direction on measures to protect privileges, privacy, trade secrets, and other confidential information relating to the production of electronic documents and data;*

- *Parties should also “anticipate and respect the ruled of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums”;*
- *The court should consider imposing sanctions when “a party will be materially prejudiced by another party’s failure to meet any obligation to preserve, collect, review, or produce” ESI – unless the party is default has demonstrated the failure was not “intentional or reckless;” and*
- *“the reasonable costs of preserving, collecting and reviewing ESI will be borne by the party producing it – though in ‘limited circumstances,’ it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.”*