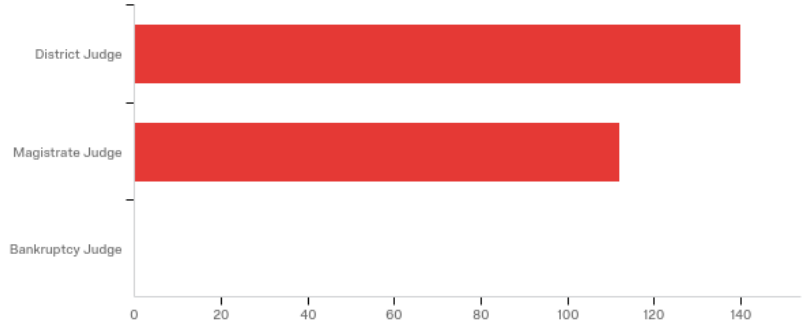
Exterro/EDRM Survey

E-Discovery Missteps and Remedies

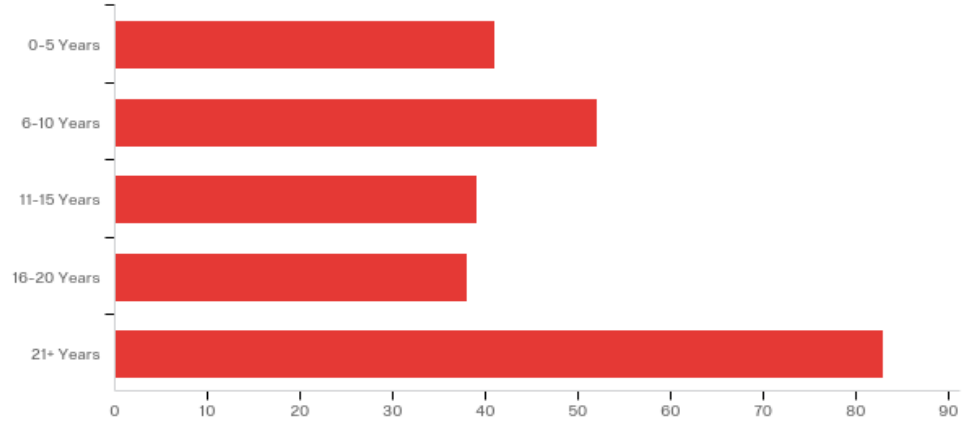
3 - Jurisdiction: Which best describes your role?



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Jurisdiction: Which best describes your role?	1.00	2.00	1.44	0.50	0.25	252

#	Answer	%	Count
1	District Judge	55.56%	140
2	Magistrate Judge	44.44%	112
3	Bankruptcy Judge	0.00%	0
	Total	100%	252

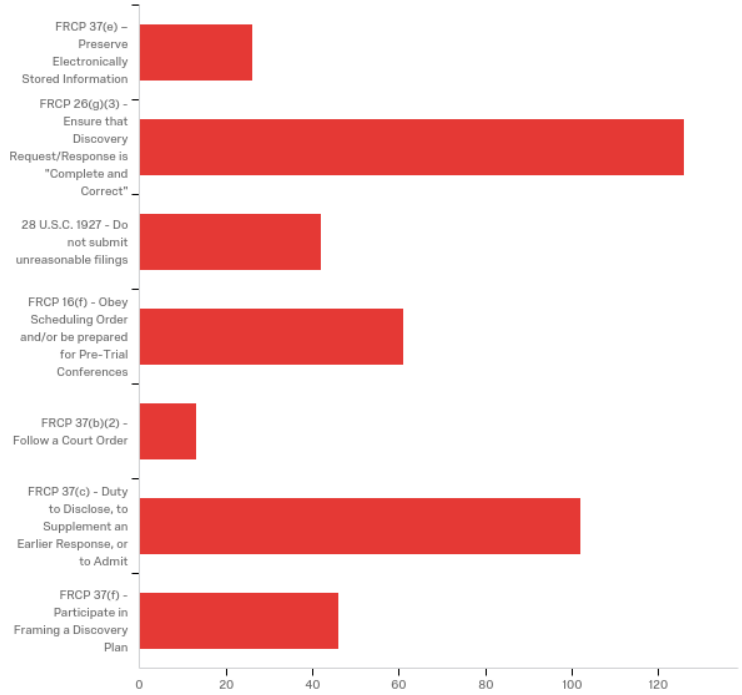
4 - Years Experience (on the bench):



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Years Experience (on the bench):	1.00	5.00	3.28	1.50	2.24	253

#	Answer	%	Count
1	0-5 Years	16.21%	41
2	6-10 Years	20.55%	52
3	11-15 Years	15.42%	39
4	16-20 Years	15.02%	38
5	21+ Years	32.81%	83
	Total	100%	253

5 - In your opinion, which e-discovery rules do attorneys neglect to comply with most often? (Select top two)



#	Answer	%	Count
1	FRCP 37(e) – Preserve Electronically Stored Information	6.25%	26
2	FRCP 26(g)(3) - Ensure that Discovery Request/Response is "Complete and Correct"	30.29%	126
3	28 U.S.C. 1927 - Do not submit unreasonable filings	10.10%	42
4	FRCP 16(f) - Obey Scheduling Order and/or be prepared for Pre-Trial Conferences	14.66%	61
5	FRCP 37(b)(2) - Follow a Court Order	3.13%	13
6	FRCP 37(c) - Duty to Disclose, to Supplement an Earlier Response, or to Admit	24.52%	102
7	FRCP 37(f) - Participate in Framing a Discovery Plan	11.06%	46
	Total	100%	416

5a - Additional Comments:

Attorneys Neglecting e-Discovery Rules

Neglect/Abuse

- Lawyers spend too much time pursuing unnecessary discovery to generate billable hours.
- Too many slick answers designed to mislead.
- Many litigators read the rules of Civil Procedure in law school, and haven't read or followed them since. In our district there is a new phenomenon used by defense counsel called "raise as many 'affirmative defenses' as possible in the answer." Most so-called affirmative defenses are unrelated to those set forth in the Rules and raise a perplexing problem for the plaintiff due to limits on discovery, particularly depositions and interrogatories. The solution I have used at the preliminary pretrial conference is to give defense counsel a choice of poison: eliminate factually unfounded affirmative defenses or plaintiff gets an additional five interrogatories for each affirmative defense asserted.
- If compliance with Rule 34(b)(2) had been an option, that's what I would have selected. The most common failure I see is the failure to communicate clearly and specifically in objections and responses whether information is being withheld and, if so, on what specific grounds and within what parameters did they choose to respond.
- I am always amazed at how many times order deadlines are not followed, and no request for extension is ever submitted to the Court. I tell practitioners at the Rule 16 conference that if they have trouble meeting a

deadline, they must ask for an extension before the deadline blows by, and they must give me a good cause reason to grant the extension even if they have agreed amongst themselves to the extension. I am also very reasonable about granting extensions when the request is timely and accompanied by a good cause explanation. However, I often don't find out about deadlines being missed until I have a follow-up prescheduled status conference.

- It has been my experience that many lawyers continue to disregard the requirements of Rule 34(b)(2)(B) and (C).
- Many lawyers continue to "rubber stamp" case management reports, focusing only on requested deadlines while neglecting discovery plans tailored to the claims and defenses.
- Attorneys in small cases do not meaningfully confer.

Common Mistakes

- In small to mid-size cases, lawyers fail to realize that everything is "e" and don't pay any attention until they are not getting what they need (from the other side or from their own client), by which time it may be gone.
- The responding parties often fail to confer with the other side before collecting ESI, which then causes the responding parties to become more entrenched in their initial ESI discovery position at the unnecessary expense of collecting the wrong ESI.
- The corollary is a failure to file targeted, reasonably limited discovery requests and to file reasonable objections and produce the parts that are not objected to.
- Often times, the discussion and scope of discovery seems to be an after-thought, not well thought out and jointly discussed by the parties at the early stages.
- The most common problem I see is failure to comply with the 2015 amendments, for example, asserting a variety of general objections with no specific explanation or support. They do this even though I explain at the outset of a case that general objections are no longer permitted.
- For discovery (as opposed to mandatory disclosure under 26(a)), 26(g) does NOT require responses to be "complete and correct," but rather consistent with the rules and not unreasonable nor unduly burdensome. Even with that caveat, discovery demands are often burdensome and 34(b)(2) responses still use boilerplate language, despite the 2015 amendments to the rules.
- Many counsel still do not grasp the concept that they must collaborate and cooperate in the discovery process.
- FRE 502 is technically not an e-discovery rule, but it is generally ignored or not even known to exist.

Judges' Frustrations

- My most common frustration has been the use of boilerplate objections and imprecise responses that make it impossible to tell whether the response is complete and what were the metes and bounds of the production that was made.
- Many attorneys treat the Rule 16 conference as a "drive-by" rather than a serious hearing where they need to come prepared to discuss all aspects of the case.
- Lawyers think that they can make countless amendments to the scheduling order. I don't mind changing the order multiple times, but most judges will not do this.
- Generally sloppy responses.
- Lawyers continue to assert inappropriate discovery objections: vague, generalized.
- Attorneys ask for everything, including the kitchen sink, which creates needlessly expensive battles the clients must pay for. The clients would be better served if the attorneys thought about what they really needed, discussed what they needed with opposing counsel, and then focused on asking for and producing that information. Unlike the attorneys, who believe the object in discovery is to get as much information as possible while providing as little as possible, the Court's objective is to get the relevant facts out on the table so that informed decisions can be made.
- Spoliation motions; boilerplate objections.
- This is a fairly frequent issue.
- Wildly over-broad discovery requests engender boilerplate objections and then the matter is dropped in the judge's lap.

- Parties need to understand what they are asking for and why. Parties need to understand (and explain) costs & timing. Parties need to explain why phased, staged, or sampling discovery won't work, so that full-bore discovery is absolutely necessary.

Attorney Compliance

- Lawyers comply with all of above.
- None of these is recurrent. I do my own discovery, and attorneys are concerned that I might draw an adverse inference about their case if they engage in discovery abuse.
- I've had no problems of any sort.
- The great majority of cases in this district do not raise discovery issues. Also, lawyers in this area who practice in federal court have a custom of avoiding discovery disputes. There are a few cases each year (5-10) with discovery problems, mostly because the issues ate difficult and there is a lot of money at stake.
- None of the above.
- I have surprisingly few e-discovery disputes. Occasionally the parties argue over search terms and additional custodians. But on the whole, they are experienced lawyers who comply with the rules and are able to agree on the manner and scope of discovery.
- In our District, our Local Rules substantially preclude any of the above problems, although sometimes practitioners fail to consult the Local Rules.

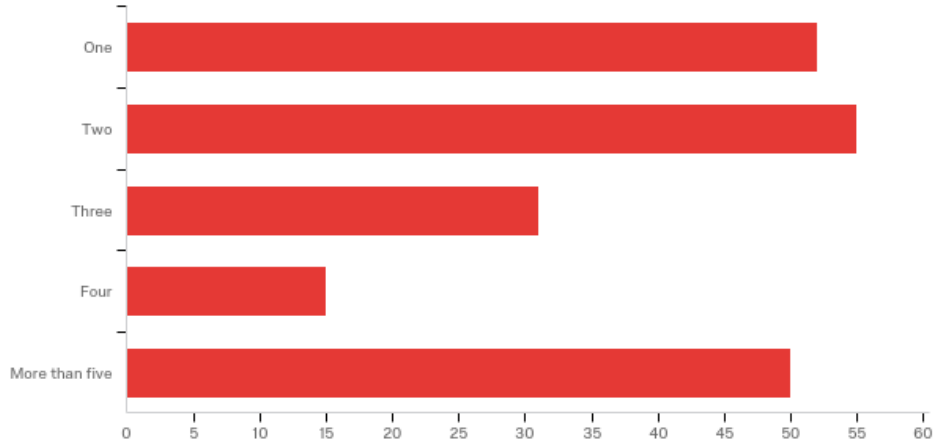
Clarifications

- If the question relates to all cases, then my answer is as above. If only to the complex cases, it would be very different. The number of needless filings seems to go up, as the completeness of responses goes down, in direct correlation with the amount of money at issue. This is not so for the less complex cases.
- Ironically (maybe) the more complicated the e-discovery is likely to be, the more likely the attorneys are to do what they are supposed to do vis-a-vis formulating a plan. When e-discovery is not particularly complicated, the attorneys are frequently unprepared and unrealistic.
- None of the above. The biggest issues that arise are disputes between the parties concerning search terms. I haven't encountered many problems of the sort identified above.
- I do not think most lawyers violate these rules on purpose. I think most lawyers fail to understand how electronic systems work so they inevitably have clients who wind up overwriting information that would be available with proper preservation. Similarly, it's hard to know when and how to supplement when electronic systems are continuously producing new information.
- Adding the word "adequately" – i.e., they do participate some, but not enough.

Suggestions

- Active case management by the court minimizes these short-comings.
- The Rule 37(f) planning conference by the parties is vital to e-discovery. Parties can discuss format issues and scope issues before embarking on the massive task of gathering and reviewing large amounts of electronic data. Questions about search techniques (key-word or TAR search methods) can be ironed out. At a comprehensive planning conference, a written discovery protocol can be put in place as part of the court's scheduling order.

6 - In the past 12 months, how often have you had to take affirmative action (e.g., require additional conferences either in camera or unsupervised or issue a warning or sanction) in a case to address an e-discovery problem?



#	Answer	%	Count
1	One	25.62%	52
2	Two	27.09%	55
3	Three	15.27%	31
4	Four	7.39%	15
5	More than five	24.63%	50
	Total	100%	203

6a - Additional Comments: On what basis?

Affirmative Action to Address an e-Discovery Problem: On What Basis?

On the Basis of Misconduct, Neglect, or Rule Violations

- Failure to be specific in responses and objections as to what was being withheld; failure to make a diligent search or to use means reasonably calculated to find responsive information; inability of both parties to meet and confer productively on a reasonable plan for identifying and gathering responsive information.
- Failure to comply with court orders, failure to confer at all, failure to produce sufficiently or timely, over-objecting.
- Usually, one side has (often repeatedly) delayed or just plain failed to produce required e-discovery, often even in response to a discovery order.
- On at least two occasions, it involved the failure of counsel to supervise an individual client in preserving and searching for ESI in hard drives, thumb drives, and personal email accounts.
- Failure to comply with a deadline to review and produce ESI. Failure of counsel to confer before bringing a dispute to the court's attention.
- Failure to use appropriate search terms.
- Incomplete productions, and failure to ensure that clients have reviewed all possible locations for ESI before producing.
- I usually have a couple of problem cases, that involve a lot of e-discovery, and which involve a lot of discovery motions. My answer relates to only two cases, but we've had a lot of hearings.
- Privilege review; overbroad objections.
- Not providing full and complete answers to supplement on a timely basis.
- Poorly thought out search parameters and search terms; failure of a party's attorney to oversee/supervise ESI review and production; inordinate delays in production and/or excessive costs paid to vendors.
- Failure to disclose.
- Incomplete responses.
- Use of discovery information outside of the case.

- Usually the problem is unnecessary obstructive behavior by counsel, often based on not having a full understanding of the obligations upon counsel relating to e-discovery, and particularly not understanding their own clients' e-discovery holdings and practices.
- Attorneys interpose boilerplate objections and then, when the motion to compel is filed, come forth with the specificity that should have been in the original objections. Attorneys claim the client's system cannot produce the information requested or that the cost of isolating and producing the information will be more than $1 million. Later, we find out this isn't true. Firms with e-discovery experts have far fewer problems than firms that don't. Lawyers get into trouble due to ignorance far more often than they do because of calculated conduct.
- I held an evidentiary hearing necessary to determine whether response to e-discovery request was complete, in light of allegations of suppressing responsive documents. I routinely have telephonic or in-person conferences to explore less drastic claims that e-discovery responses are inadequate.
- General noncompliance.
- Failure to produce everything as ordered.
- Failure to produce all electronic discovery responses to requests.
- Lack of knowledge by attorneys; failure to understand clients' ESI and search implications.
- Failure to produce documents after a direct order to do so.
- Mostly, the disputes center on providing incomplete responses and making improper objections in which counsel refuses to produce discovery.
- Request was too broad.
- Lawyers claim that they “overlooked” deadlines or obligations in my scheduling orders.
- There are still too many discovery abuses. Despite the rule amendments, some counsel still make overbroad requests, some counsel still make boilerplate or improper objections or responses, and some just don't sufficiently confer in good faith in an effort to streamline the discovery process. Things are improving, but slowly.
- Scope, delay, managing phased discovery.
- All involving one lawyer in a single case. Repeated failure to comply with discovery and court orders.
- Poor requests and responses. Attorneys use boilerplate pleadings and fail to actually confer. Failure to use their IT EXPERTS.

On the Basis of a Dispute

- Inability of counsel to agree to search terms; non-e discovery issues such as protective orders and privilege disagreements.
- Frequently, issues arise with search terms that the parties are unable to resolve without judicial intervention.
- Disagreements as to scope of electronic discovery to be produced and failures to properly plan for ESI prior to the initial pretrial conference.
- Failure to agree on the terms of a search.
- Generally, my conferences are to hash out the parameters of discovery or to deal with cost-sharing for discovery outside of that which is provided for in the Rules. I've only had to sanction one lawyer for intentional spoliation.
- Parties cannot agree on the scope of discovery. Generally, they did not work together to narrow the search terms or custodians whose email should be searched. There seems to be a lack of communication regarding what one side wants and what the other side thinks is discoverable. Defendants seem to produce what they want without conveying the limit on the search. Plaintiffs fail to ask for reasonable scope initially. Each side thinks it is reasonable and the other side is wrong. Many of my discovery conferences are a result of lack of telephone or in person communication. Instead, parties play games with emails and letter writing campaigns.
- Typically, this comes from an initial "over-promise" on the producing party's part (due to a failure to understand what, from a production standpoint, is easy or hard given the client's systems architecture), an initial "stonewall" on the producing party's part without proposing a reasonable alternative, or a requesting party wanting ESI for ESI's sake, rather than as a way to advance the theory of the case.
- Disagreements on search terms and scope.
- Most frequent dispute is over the ESI discovery protocol---custodians, temporal scope, search terms, etc.

- General problems with inability to agree on parameters of production or slowness of production once parameters are agreed upon.

On the Basis of Communication Issues

- Incomplete or untimely responses; failure to meet and confer; privilege issues.
- Failure of lawyers to effectively confer on an issue.
- Too broad of requests or lack of agreement on search terms.
- Attorneys still do not communicate adequately and confer as much as needed to winnow down issues that truly need court intervention.
- Counsel tend not to prepare an e-discovery plan at the time they meet to prepare the Case Management Report. When they are nearing a discovery deadline, they discover that the volume of e-discovery is too great to timely complete discovery and, sometimes, that ESI was not identified and preserved.
- Parties are not working cooperatively and do not meet and confer in good faith.
- Follow-up meeting to confer after both sides hadn't adequately done so.

To Provide Guidance

- Give guidance on scope of discovery.
- Inexperienced counsel.
- On occasion I have held informal conferences to direct one or more parties to refine and identify their e-discovery.

Regular Practice

- These conferences are outlined in our local rules.
- In the more complex cases, more conferences are often necessary. Sometimes this includes requiring counsel to meet and confer with the IT people participating. Sometimes it means bringing them in, even if I do not join them, just so they can hammer things out on a face-to-face basis.
- Require counsel to confer on discovery issues in general. Consider expert exclusions for late disclosures.

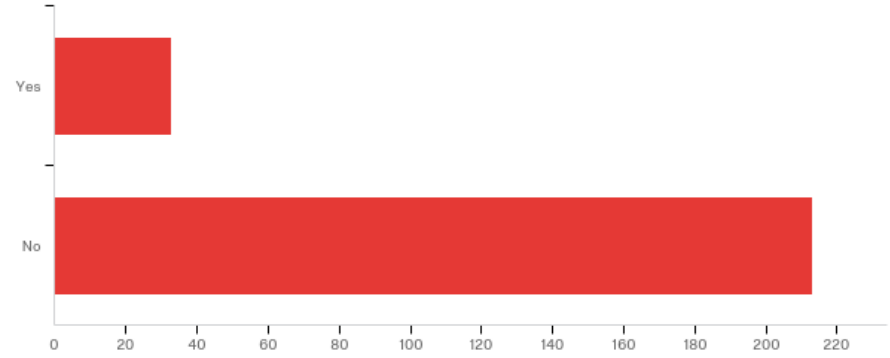
On the Basis of Privilege Issues

- In camera inspection to determine whether documents were properly designated as attorney eyes only and attorney-client documents.
- I recall a handful (less than 5) disputes that required my intervention, but no abuse or violation of the rules. I have had problems more often with privilege issues, and parties withholding material they should not or being sloppy in their privilege review. The underlying documents are typically e-documents, but this is not an e-discovery problem.
- In large cases I find that the most difficult issue for the court to deal with is attorney-client privilege. In large corporations, the email string always cc's the in-house counsel. The attorney who is collecting the material for discovery/disclosure purposes (and it is usually a very new attorney--never the trial counsel) stamps all pages having this cc on it "privileged." I have been confronted with 90,000 privileged documents.
- Overly aggressive assertion of privilege in response to e-discovery requests. Massive e-discovery results in massive privilege logs (750,000 entries in one particular case) that present difficult problems for the requesting party and the court to assess whether the claims of privilege are proper. A giant haystack makes finding a few needles very daunting, and this creates an incentive for producing parties to be overly aggressive in claiming privilege. The larger the haystack, the harder to find a few relevant documents or pieces of data.

Basis Unspecified

- About once a year--sanctions usually not necessary.
- I am a recall USMJ and have not dealt with discovery issues for the past 8 months, so the number is lower than it would be if I were still handling discovery matters 12 months a year.
- This is a tricky question, because many discovery disputes have some e-discovery connection, although the central issue might not directly be one of e-discovery. Therefore, my answer may be an under-estimate. I probably hear a dozen motions to compel each year in complex litigation cases, many of which may touch on e-discovery in varying degrees.
- Most of these instances concerned a single case.

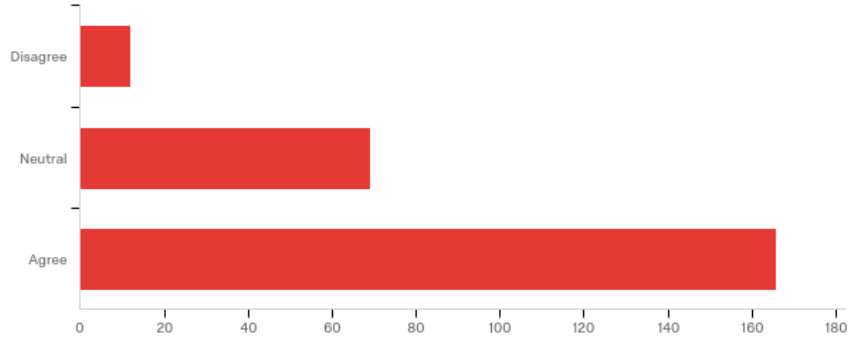
7 - In the past 12 months, have you sanctioned a lawyer for e-discovery misconduct?



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	In the past 12 months, have you sanctioned a lawyer for e-discovery misconduct?	1.00	2.00	1.87	0.34	0.12	246

#	Answer	%	Count
1	Yes	13.41%	33
2	No	86.59%	213
	Total	100%	246

7a - Would you consider using your inherent authority if Rule 37(e) did not apply for e-discovery sanctions?



#	Answer	%	Count
1	Disagree	4.86%	12
2	Neutral	27.94%	69
3	Agree	67.21%	166
	Total	100%	247

7b - Additional Comments:

Use of Inherent Authority

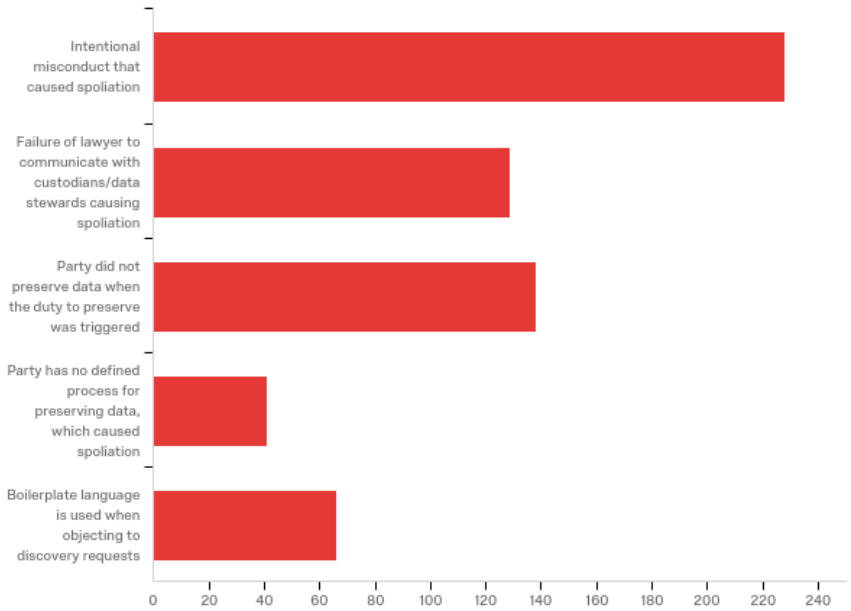
Use of Inherent Authority Dependent on Conduct

- Judges have a duty to take reasonable steps to ensure compliance with rules and to ensure cooperation and transparency (as necessary) in the process to reveal the relevant information in the case.
- Parties ask for sanctions but are usually not entitled to them. Sanctions requires a violation of the Court's order, not just a violation of a discovery request.
- I would consider arguments on the topic and find the debate on attorney's fees for a Rule 37(e) motion interesting.
- Depending on the facts, either a sanction under Rule 37(e) or a sanction under inherent authority may be appropriate.
- Depends on the level of offending conduct.
- "Consider" is the operative word here. Whether I would actually "exercise" inherent authority is a fact-intensive consideration.
- This would appear to me to be a last-ditch solution.

Use of Inherent Authority vs. Rules Generally

- Inherent authority use ought to be rare.
- It is always preferable to have a specific rule rather than to rely on the court's inherent authority.
- My inclination would be to avoid using inherent authority to sanction. There seems to be plenty of options under Rule 26(g) and 37 for sanctions.
- Inherent authority is a slippery concept and something I try to avoid using.
- I'm not sure I have inherent authority after the amendments. Is this a trick question?
- Lean heavily toward Rule 37(e) and its authority.
- I would not use inherent authority if Rule 37(e) did not apply because the rule is intended to eclipse inherent authority.
- I view "e-discovery" the same as I do conventional "paper" discovery.
- I have done so.

8 - Under which circumstances are you most likely to impose a sanction to address an e-discovery problem? (check all that apply)



#	Answer	%	Count
1	Intentional misconduct that caused spoliation	37.87%	228
2	Failure of lawyer to communicate with custodians/data stewards causing spoliation	21.43%	129
3	Party did not preserve data when the duty to preserve was triggered	22.92%	138
4	Party has no defined process for preserving data, which caused spoliation	6.81%	41
5	Boilerplate language is used when objecting to discovery requests	10.96%	66
	Total	100%	602

8a - Additional Comments: What specific misconduct is the biggest culprit for e-discovery sanctions?

Overall

Spoliation Generally

- Spoliation of evidence can often be the biggest impediment to ascertaining the truth about what happened.
- Spoliation.
- Spoliation.
- Spoliation.
- Spoliation.

Intentional Misconduct

- In large part, my response will be dictated by the importance of the information, whether the misconduct was intentional, and whether the information is available otherwise.
- Intentional deletion of emails.
- Low-level sloppiness will not result in sanctions with me. I would only consider sanctions for intentional violations, although curative instruction, closely tailored to what is needed, may be necessary.
- Trying to hide sources of e-discovery; attorney's failure or lack of interest in learning the client's electronic record-keeping systems.
- In our Circuit, it has to be intentional.
- Violating a previously issued Court Order on e-discovery.
- Lawyer intent to ignore discovery obligation.
- Noncompliance with time frames. Spoliation of evidence issues.
- Intentional deletion or disposal of data.

- Ignoring requirements.
- Intentional misconduct.
- False response.
- A negligent or intentional failure to avoid spoliation of relevant e-discovery material.
- Intent to spoil.
- Intentional destruction of documents.

General Neglect/Lack of Knowledge

- Failure for attorney to follow rules in regard to preserving and producing ESI.
- Failure to cooperate and be knowledgeable about e-discovery issues.
- Failure of due diligence with client before making representations about E discovery to the court.
- General inattention to or ignorance of opponent's requests.
- Failure to conduct a reasonable search for responsive ESI.
- Lack of an honest effort to get the job done.
- Laziness. Counsel and the parties must grapple with these issues at the earliest possible time.
- Lack of information and knowledge by counsel.
- Failure to understand client's system architecture at an early point so as to be able to find and produce responsive information in an efficient manner.
- Failure to adequately search for ESI, followed by representing to opposing counsel that the search has been thorough.
- Failure to do adequate search.
- Ignorant lawyers and in-house lawyers who misinform out-house lawyers.
- Counsel failing to gain an understanding of the information held by the client.
- Harm to other side; Doubling down with misrepresentations out of sloppiness or worse.
- Failure of counsel/client to determine the universe of possibly relevant documents.

Failure to Communicate/Preserve

- Failure of lawyers and/or individuals within an organization to communicate the preservation obligations.
- Failure to direct a client to preserve evidence after the attorney was on notice.
- Failure to preserve due to poor communication, or none at all.
- Failure to preserve.
- Indifference to tailoring proportional requests for e-discovery, and indifference to preservation obligations.
- Failure to confer on search terms/custodians - resulting in the "sanction" of an expanded search.
- Failure to properly meet and confer regarding search terms and custodians.
- Failure to preserve.
- Failure to preserve data.
- Failure to communicate to custodians, causing spoliation.
- For case-altering sanctions: failure to impose or monitor litigation holds or other preservation steps.
- Failure of lawyer to communicate with stewards.
- Failure to communicate litigation holds (and their entire scope) to counsel.
- Failure to preserve.
- Didn’t preserve.
- Failure of communication, both between counsel, between counsel and their client, and also between the various departments in a corporation such as legal and IT or legal and the business custodians.
- Failing to cause data to be preserved by client when duty was triggered.
- Failure to preserve.
- Failure to supervise vendors/failure to communicate expectations and requirements to clients.
- Failure of lawyers to communicate with clients and custodians.
- Failure to communicate with client early in dispute about ESI issues.
- Breakdown in communication between those who understand discovery and those who understand electronic document storage.
- Failure to give appropriate instructions for preserving documents, and then failure to follow up with the client.

- The biggest culprit probably is the failure to preserve data.
- Lack of early in-depth conversations between lawyers and clients' about what the lawsuit is about and where discoverable evidence is likely stored; corporate execs who delegate responsibility to subordinates to preserve, collect, etc., without informing the subordinates about what the case is about and what info is discoverable; failure to suspend business as usual practices until a reasonable plan is in place; a “business is war” attitude that sometimes results in intentional destruction.
- Adequate preservation is necessary to ensure the reliability of the discovery process.
- Failure to communicate duty to preserve to relevant custodians/data stewards.

Failure to Disclose

- Failing to disclose, sometimes inadvertently and sometimes consciously.
- Stalling or avoiding the need to develop a workable plan for disclosing information while protecting truly confidential or privileged information.

Boilerplate Language

- I waive the objections when boilerplate objections are used.
- I have sanctioned for use of boilerplate objections where nothing further was relied upon to support the objection.
- Boilerplate objections.
- Objection to routine requests.
- I actually see relatively few spoliation issues, except in trade secret cases where it's alleged that the defendant, typically a departing employee, deliberately wiped hard drives, etc. in an attempt to cover his tracks. The most common problem I see is the use of boilerplate language in objecting to requests and a corresponding obfuscation as to what the party did or did not search for or produce. I won't typically grant sanctions right off the bat, other than to disregard the boilerplate objections, but if they don't get it after the first lecture, then I'll award fees. I'm more willing to award fees if the requests themselves were appropriately focused rather than boilerplate and "kitchen sink" in nature.
- Boilerplate language.
- I detest boilerplate discovery responses.
- Not focusing response; boilerplate objections; not thinking strategically in meet & confer (digging in on position, rather than getting some discovery now, and continuing to refine request).

Too Much Reliance on Client

- Letting the client do the collection and review on its own (the Broadcom/Qualcomm problem).
- Failure of counsel to independently verify all electronic discovery responsive to reasonable requests have been produced/preserved.
- Relying on clients to look for responsive discovery and accepting their response uncritically.
- Boilerplate acceptance of client's excuses for not producing discovery, or lack of adequate supervision of overly broad discovery requests.
- Attorneys turning over and solely relying upon their clients’ collection and preservation of ESI.

Judge Does Not Often Sanction

- I am not a big sanctioner. It takes a lot for me to grant a request for sanctions, and I do it in only the most extreme cases. That said, when I have ordered responses, then revisited and order compliance and there is none, I have no choice.
- Generally, I would not hold attorneys accountable for their clients' misdeeds unless there's reason to believe the attorney should have known about client misconduct and failed to timely act upon that knowledge.
- I try to avoid imposing sanctions, if possible, because this can often invite satellite litigation that increases costs and delay. I would consider other sanctions in specific cases.
- I sanction only in egregious circumstances, so the determination is very fact specific.
- I do not care to sanction parties or lawyers unless absolutely necessary. Most of the time, the problems are ignorance. Education is better.

8b - Additional Comments: What advice would you give legal teams looking to minimize their risk of sanctions?

Minimizing Sanctions

Earlier/Improved Preservation

- Promptly have the client preserve potential evidence, especially surveillance that is written over periodically.
- Need a written discovery preservation and collection plan, with client buy-in, at the beginning of case -- well before the time of the Rule 26(f) conference.
- Stay on top of things. Preserve evidence.
- Be sure proper materials are maintained.
- Notify the client to send an email to all relevant employees to preserve all ESI.
- Err on the side of preservation.
- Advise clients not to destroy ANY evidence, including disputed discovery requests.
- Early contact with custodians (what is there), and instruction (preserve and in what form).
- Early communication to client about preservation duty is a must.
- Take reasonable steps to preserve and document, without hiding evidence favorable to the other side; attempt to repair mistakes as soon as realized and as best as possible; cooperation and some transparency about reasonableness of efforts.

Increased/Improved Disclosure

- Address ESI early and fully disclose nature of information held electronically so that the parties and the court can more efficiently address the scope of discovery which will be allowed.
- Document and disclose what they are doing.
- Where you are unsure, err on the side of disclosure. Withholding information/evidence invites suspicion and litigation over the matter. Preserving a privilege is one thing, but often, there is no real strategic advantage to be gained by suppressing information that is not truly harmful to the client.
- Answer discovery fully and completely without the usual reservations that are obstructionist.

Verification

- Trust but verify.
- Verify.
- Trust but verify.

Communication/Cooperation with Opposing Counsel; Developing a Plan

Work diligently with opposing counsel and a professional IT person to search for and preserve e-discovery.
Have face-to-face discussions with counsel regarding discovery issues and develop a mutual plan to get the case ready for trial within the court deadlines.
Ensure that clients preserve the proper scope of information. Confer with adversary to determine what the appropriate scope is. Involve the court if necessary.
Be more cooperative in discovery. It appears a trend that the parties intentionally delay discovery on matters that are clearly discoverable.
Meet and confer before you start searching, reviewing, etc.
Be responsive. This means understanding not only your client's data storage and retrieval systems but also those of your adversary. I tell them to do their ESI meet and confer AFTER they have been served with written requests so that they know the information that is sought and can then figure out what is available and at what effort.
Immediately advise opposing counsel of e-discovery issues in an effort to reach joint approaches to resolve same; failing that, seek timely court relief by filing an appropriate motion, including seeking an in-camera conference with the court about a client's violations that border on privileged matters.
Talk to opposing counsel early, negotiate holds, advise of scope of holds, and talk personally to custodians.
Follow the rules and at least attempt to maintain a good working relationship with your opponent.
Be proactive in creating a discovery plan, and meeting and conferring with opposing party to create efficient and effective mechanisms for disclosing and searching information.

Sit down with clients to have a discussion about what discovery is required. Sit down with your adversary to explain what you will and won't do as part of discovery.
Work collaboratively with opposing counsel. Save your fighting for trial or summary judgment. The key in discovery is to quickly and efficiently produce what is reasonable and proportional. This requires the cooperation of counsel and oversight by the court.
Establish a protocol in advance in a conference that includes opposing counsel and IT personnel, and follow that protocol.
Have a plan, make sure the client knows the plan, don't produce mass quantities of material without making sure it's useable and understandable. Get the Court involved early, rather than after it's all balled up. If Court can't address your problem adequately, ask for a Special Master. Don't be snarky— be civil and collegial.

- ## Communication/Cooperation with Court

Throw away the boilerplate language and communicate clearly in responses what you did and how the scope of your response varies, if at all, from the scope of the request. In addition, before reflexively objecting to and limiting scope, think about what you may want to use down the line to prove your own case. Finally, partner with the client and the vendor (if there is one) to make sure everyone is on the same page.
Communicate with clients to confirm adherence to e-discovery rules through our local rule and developing case law.
Work diligently with clients to obtain the necessary information. Be frank with the court on all issues.
RTFR and RTFO (read the rules; read the order).
Follow the rules.
Follow the rules.
Follow my court order.
Know the judge—know the rules.
Partner with the client - neither should abdicate responsibility and assume the other is taking care of it. Make sure that objections and responses communicate clearly the metes and bounds of the response if the party is not producing everything requested. Even if I overrule an objection and order further responses, I'm unlikely to grant sanctions if the objection was specific and if the response was clear about what was and was not being produced.
Stop using boilerplate language. Communicate honestly, thoroughly, and substantively in the discovery process.
Read the court rules and follow the court's orders carefully.

- ## Communication/Cooperation with Client

Talk to their client about the importance of doing what the law and the court require regardless of their personal opinion about the need for the information or the inconvenience.
Be attentive to the risk of spoliation by thoroughly advising clients of their obligations to preserve ESI.
Understand the client's electronic data and who the key custodians are and cooperate with opposing counsel.
Educate your clients regarding their duty to preserve and make sure it happens. Educate your clients about the kind of sanctions that can be imposed against them if there is spoliation.
Be proactive and advise clients early regarding e-discovery obligations.
Understand their obligations and promptly communicate with their clients about such obligations.
Be forthright with the discovery. Do not engage in gamesmanship. Know what your client can and cannot produce - and in what time frame such can be produced.
Communicate with your client and don't enable their attempts to obstruct or ignore discovery requests.
Legal counsel needs early and frequent contact with their clients about preservation. Understand the client's preservation system and train business custodians in their obligations of preservation.
Be forthright and communicate clearly with the client and custodians.
Know the rules and promptly advise your client.
Client education on protocols and discovery holds.
Identify the heart of the lawsuit and identify who with your client knows what documents are maintained and where. Then work with that person to figure out what the universe of responsive documents is.

- ## Oversight

  Greater oversight of clients; making sure clients have established preservation procedures in place; have a defined, particularized e-discovery agreement in place with opposing counsel.
  Document efforts to preserve; ensure that litigation holds are sent to correct custodians; regularly follow up with custodians; engage the IT department early in the process; do not rely solely on custodians for email preservation.
  Lawyers need to get involved and not leave it to their clients. The IT personnel who understand systems need to be involved early in the process. Don't delay. It is not a game.
  Make sure the lead trial attorney remains involved in the discovery process.
  Have a e-document retention plan/policy in place and promptly issue a litigation hold.
  Implement a written e-discovery plan of action for accumulation, preservation and dissemination of information.
  Designate a member of the legal team and client team to serve as collection specialists and to hold his own team members accountable. Transparency to the court is critical.
  Developing a protocol to use with clients, which includes monitoring clients' compliance with preservation obligations.
  Do not blindly take your client's word for it that producing the requested ESI is too expensive or burdensome. Do not make this claim without first verifying the cost or burden actually involved.
  Have Senior lawyer actively involved in discovery plan and oversight.
  Counsel should exercise close and daily control over handling of client's data though direct communication with all potential custodians to make sure they understand what must be preserved and why.
  Put everything in writing, follow up, and don't just "set it and forget it." Counsels' duties for electronic discovery do not end with a litigation hold notice.

- ## Expert Assistance

  Meet with client's IT people as soon as possible to find out what they can do and what you will need.
  Hire a consultant that knows what he/she is doing.
  Retain a professional to advise.
  Hire a professional consultant to work with client in preserving and producing electronic data.
  Learn how systems work. Develop a reasonable protocol. Hire a pro to help. Follow the protocol.
  Hire well-qualified expert companies or individuals to maintain documents and impose litigation holds.
  Confer with IT EXPERTS early and often.

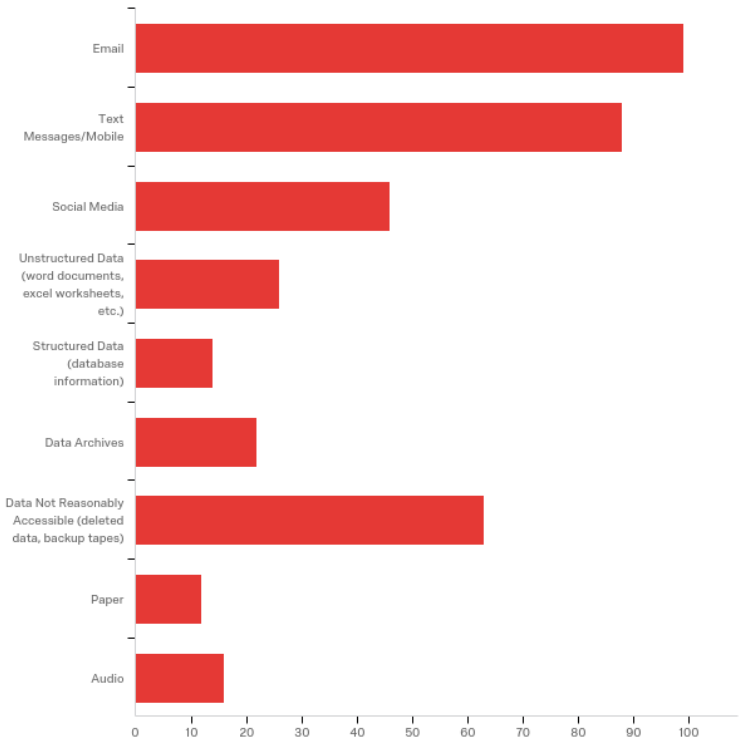
- ## Education

  Accept that e-discovery is here to stay and learn how to approach it from the get-go.
  Be aware of your obligations and implement at the lawyer and client level.
  Be thoroughly familiar with the Federal Rules, the Local Rules, and the practices of the individual assigned judge.
  Spend extra time at the front end ascertaining the universe of ESI.
  Be proactive; figure out what is easy/hard for your client before you commit to (or resist) a discovery position.
  Learn the basics of e-discovery; do not hesitate to take on assistance if counsel does not understand those basics.
  Learn about the clients' e-discovery practices and holdings.
  Early (pre-discovery) understanding of e-documents issues.
  Understand the data available; don't simply stonewall. Support claims of lack of proportionality w/concrete evidence.

- ## Behave Diligently and Ethically

  Do their job properly on discovery.
  Be thorough and proactive. Some folks like to cut corners.
  To paraphrase from the pre-electronic discovery era, dot your i's and cross your t's.
  Keep in mind the goal--preparing the case for trial--and make an honest effort to ask for, and produce, materials that correlate with that goal.
  Think: What do we really need? Is this really too difficult to produce or are we just being ornery?
  Be diligent and forthright.
  Follow the rules and Code of Conduct.
  Lawyers should be mindful to play by the Golden Rule.

9 - In the past 12 months, what data types have you seen most often spoliated? (Pick your top 3)



#	Answer	%	Count
1	Email	25.65%	99
2	Text Messages/Mobile	22.80%	88
3	Social Media	11.92%	46
4	Unstructured Data (word documents, excel worksheets, etc.)	6.74%	26
5	Structured Data (database information)	3.63%	14
6	Data Archives	5.70%	22
7	Data Not Reasonably Accessible (deleted data, backup tapes)	16.32%	63
8	Paper	3.11%	12
9	Audio	4.15%	16
	Total	100%	386

9a - Additional Comments: How can legal teams minimize their risk of spoliating these data types?

Minimizing Risk of Spoliation

- ## Increased Communication/Cooperation

  Instruct the client promptly to preserve the footage and give a copy to counsel.
  Preservation requests to client and active communication with client regarding the importance of maintaining the integrity of ESI.
  Communicate effectively with clients to insure they are aware of the requirements of e-discovery.
  Make sure that employees understand that information sent on company equipment, even if it is used for personal purposes, may be subject to discovery (e.g., iPhones).
  Early contact with all custodians; lecture them regarding their duties to preserve, and repeat over and over.
  Again, be proactive about advising clients of the duty to preserve at the earliest moment.
  Make sure clients understand from the outset what their obligations are.
  Ensure that personnel understand the scope of a litigation hold and the consequences of violating one.
  The attorneys must investigate storage and preservation or relevant custodians at the outset, and cooperate with opposing counsel to determine what is relevant and should be preserved.
  Again, sit down with clients and adversaries so it is clear what you're going to do.
  Ongoing and early communication with company custodians is essential.
  Alert client to needs.
  Make sure client understands definition of ESI, and scope of preservation obligation. The attorney should make sure they understand client's systems, and any imminent changes in data storage.
  Clearly communicate detailed instructions regarding duty to preserve at the earliest feasible date.
  Early education of client will help
  Talk to the clients and insist on talking to the people who actually understand the client's data systems, and then follow up. Have early discussions with opposing counsel about what is reasonably accessible, and proportional to the case. Ask for a case management conference with the court early on if the parties can't reach agreement on an ESI protocol, scope of preservation, search and production, what storage devices should be included and number of custodians for whom preservation, collection and production is sought.

- ## Better Planning/Early Involvement

  Companies need a document retention/destruction plan that accounts for this type of data, and to have a means to suspend any destruction as soon as a duty to preserve is triggered. Embedded files (images, other documents) in PowerPoint presentations and email messages is a big problem, as those items tend to "fall off" the documents as they are forwarded within an organization.
  Pay attention at an early stage.
  Archive policies, appropriate and timely legal holds.
  Put freeze memos out immediately and chronicle all possibly relevant information at the first hint of a case.
  Do the appropriate due diligence and implement an appropriate retention plan.
  Lawyers need to get involved in securing data as soon as possible.
  Early involvement with the client, usually as soon as law firm knows of event. But instruct the client to preserve whenever an event occurs that might result in litigation.
  The minute a suit is contemplated or filed, work with clients to preserve.
  Preserve hard drives when transitioning to another computer.
  Provide early and complete advice regarding litigation holds.
  Be proactive with clients.
  Use care.
  Imposition of prompt preservation efforts rather than waiting months until receipt of discovery requests and deciding what is there and what should be saved.
  Advise clients to have a clear and transparent system for what is preserved and what is not in the business at hand, and a second clear and transparent system for what is preserved in the event of litigation, and how that preservation is handled. Such systems must be consistently enforced.

Work directly and continuously with the client's IT personnel and potential custodians of relevant data to make sure they know what must be preserved and why. The client's understanding of the "why" (how data may fit into the issues of the litigation) helps the client avoid failing to appreciate the relevance of data not otherwise noted for preservation.
I have not labelled the absence of documents spoliation. The issues are generally lack of meaningful document retention processes. The major problems I see are in small businesses.
Have systems in place.
Have in place an adequate preservation plan. And counsel for the parties need to insure preservation at the outset of their representation. This should be documented by counsel.
Counsel needs to be proactive from the outset and then continue to monitor electronic discovery. Clients need to be cross-examined about electronic discovery issues. They will be by opposing counsel.

- ## Oversight

  Control your clients.
  Document and disclose data collection and retention procedures.
  Be skeptical of client assurances or representations about the availability of requested data.

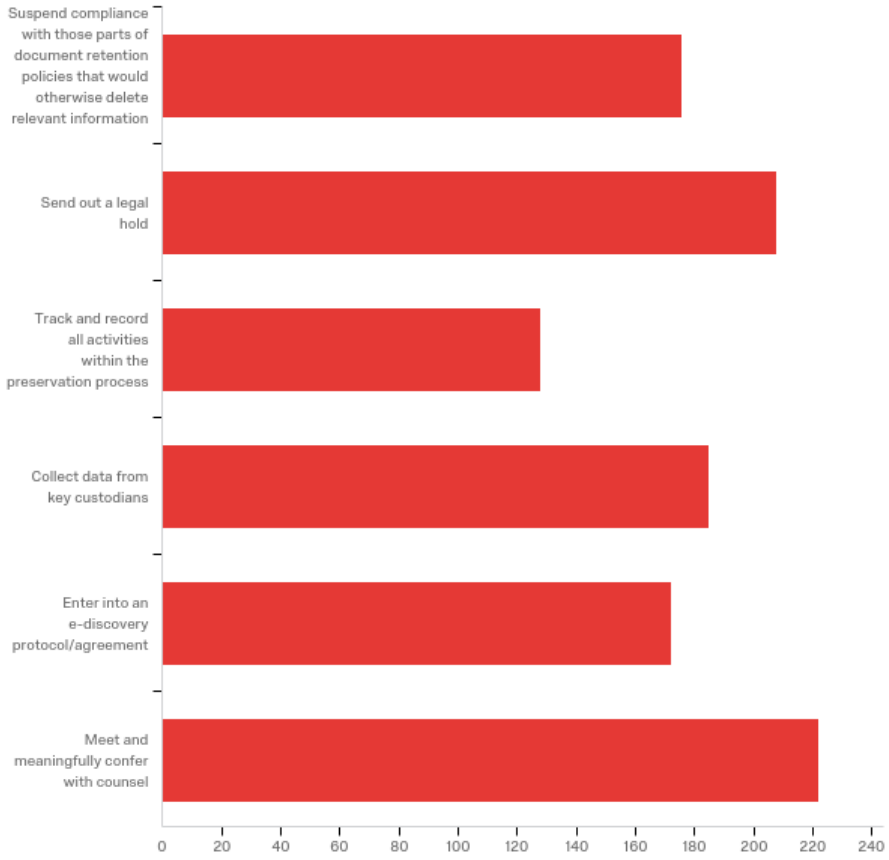
- ## Experts/Education

  Communicate better and earlier with IT.
  They need good consultants who can work closely with in-house IT staff.
  Stay on premises of client long enough to understand system and interdict destruction.
  Understand the data available from the lawyer’s own client and take steps to obtain it.
  Use IT department or an individual to explain and monitor discovery with counsel.

- ## Other Spoliation Issues

  Frequently, an issue arises over what a commercial website looked like on a given date, especially in the context of copyright and trademark infringement cases. I was not sure which of the above selections in question 9 would encompass such evidence.
  We have problems with video spoliation, which is not listed as an option. Parties who are regularly subject to litigation and counsel all need to be better at preservation upon first inkling that a claim is brewing.
  The issue appears to be preservation of data for personal devices used for company business.
  My biggest problem in the last year was the failure to locate and preserve video surveillance recordings.
  None and I had better not see spoliation. I am confident it has happened, but it has to be discovered
  I have seen in context of criminal cases as well.
  Video tapes often are overlooked.
  Video recordings very frequently not preserved.
  Video (in prisoner cases)
  Video Surveillance

10 - Which of the following steps do you expect legal teams to comply with to meet their e-discovery obligations? (Choose all that apply.)



#	Answer	%	Count
1	Suspend compliance with those parts of document retention policies that would otherwise delete relevant information	16.13%	176
2	Send out a legal hold	19.07%	208
3	Track and record all activities within the preservation process	11.73%	128
4	Collect data from key custodians	16.96%	185
5	Enter into an e-discovery protocol/agreement	15.77%	172
6	Meet and meaningfully confer with counsel	20.35%	222
	Total	100%	1091

10a - Additional Comments:

Compliance Steps

- ### All Steps Important

  All these are necessary.
  Good lawyers do all of this.
  All of these steps are necessary for an effective and efficient e-discovery process.
  All those actions are important.
  Most lawyers do all of these.
  All are important.
  All the above are useful. The protocol/agreement is the lowest ranked.

- ### Often-Missed Steps

  Too many lawyers do not meet and confer - choosing to send "zinger" emails instead.
  Adverse parties often do not have meaningful conferences regarding discovery, whether electronic data or otherwise. This is the biggest issue with discovery.

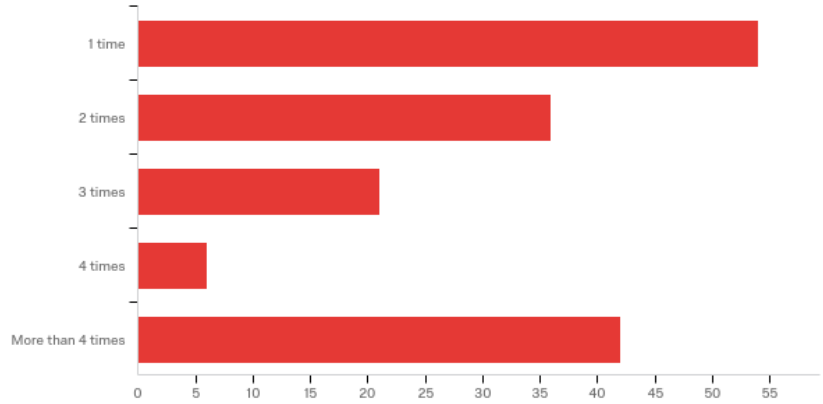
- ### Other Important Steps

  All of the above. Also, it is critical that counsel understand the technical aspects of their client's data storage and retrieval so that they can know that their instructions are being carried out.
  These are all important parts. Also, try to understand that you are not just playing defense or fulfilling obligations under the FRCP here. You need stuff to support your case. Invariably, that is going to include ESI. So there are huge strategic advantages to getting one's arms around this so that your client has the best chance to win the case.

- ### General Comments/Suggestions

  Not every case requires a formal protocol or agreement.
  I often refer parties to the 7th Circuit e-discovery protocol, even though I am not in the 7th Circuit.
  Legal teams should regularly review the state of discovery and re-evaluate their position.
  In my experience the very best way to ensure compliance with the rules is for counsel to meet and make a good faith effort to agree on production as well as a reasonable plan for exchange of ESI.
  Meet and confer, and agreements with opposing counsel have the potential to avoid most disputes, at least when both sides understand how systems work.
  E-discovery protocol is great for the right case, but simpler smaller cases may not need it.
  The changes to Rule 37(e) make so much sense in adopting a reasonable vs. perfection standard, recognizing the need for proportionality, recognizing that data is often stored in multiple locations, focusing on curative measures vs. punitive sanctions, and doing away with the presumption that lost information was unfavorable to the party that lost it. The advisory committee notes are especially helpful in explaining the rationale for the changes. If the district courts don't heed the Chief Justice's 2015 report on the importance of active and early judicial management our courts will increasingly become inaccessible as a practical matter to litigants of even substantial means because of the enormous cost, and the scorched earth approach to discovery that litigators think is essential. I regard this as an access to justice issue. I also agree with CJ Roberts that the 2015 amendments to the rules are a substantial stride towards a better federal court system, but accomplishing the goal of Rule 1 will only occur if the entire legal community--bench, bar, and academia--participate and change the legal culture placing a premium on the public's interest in a speedy, fair and efficient system of justice.
  It is much easier to preserve than to defend against a spoliation motion. Such motions are time consuming, expensive, and risky.
  Meet and confer early and often.

11 - In the past 12 months, how often have you entered a preservation order specifying how much ESI to preserve?



#	Answer	%	Count
1	1 time	33.96%	54
2	2 times	22.64%	36
3	3 times	13.21%	21
4	4 times	3.77%	6
5	More than 4 times	26.42%	42
	Total	100%	159

11a - Additional Comments:

Preservation Orders

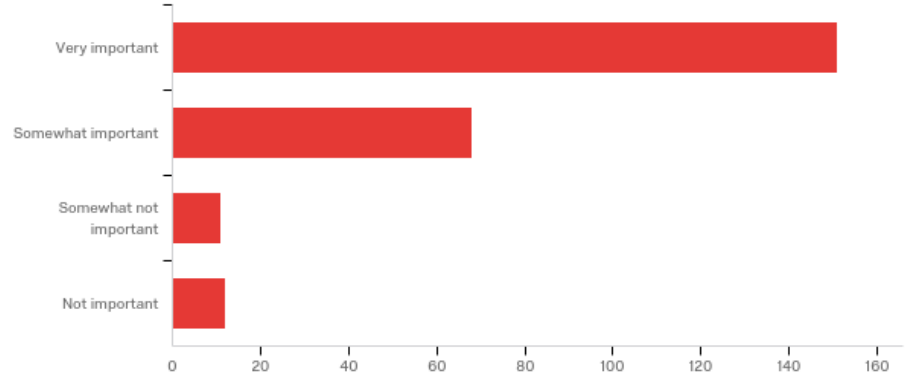
- #### Party Input

  Generally, I discuss this with the parties at an initial pre-trial conference or a subsequent status conference, and we generally reach an agreement.
  Usually the order is a stipulated order following conference of counsel (I have only been on the bench for 6 months).
  My recollection is that counsel submitted a preservation order that was agreed upon by all counsel.
  Typically, on request of parties who have been proactive and met and conferred.
  I don't recall having to issue an order as opposed to making sure parties have addressed between themselves.
  Counsel and litigants would be wise to contract with e-discovery experts or vendors to insure proper preservation.
  More often than not I am told by the attorneys that ESI is not at issue and no preservation order is sought. I do not understand how ESI isn't at issue in every case, but I don't think it is my job to point that out.

- #### Typical Use

  This is standard in my case management plans.
  They are commonly used in many types of litigation now
  I include a preservation order in my standard discovery order that is filed in all cases.
  I routinely enter agreed protective orders that address ESI; I can't say for certain how many of them address "how much ESI to preserve."
  I have not entered an order regarding the quantity of data to be preserved. I have entered orders regarding the number of initial custodians.
  Generally, these orders are done orally at pretrial conferences, when there is a misappropriation claim or allegations of fraud. I cannot recall exactly how often I have issued such orders.
  I address ESI at the initial Rule 16 conference. It sets the tone.
  We have a local rule that instructs litigants on E- discovery protocol and procedure.

12 - How important is it for legal teams to know your expectations when it comes to managing e-discovery activities?



#	Answer	%	Count
1	Very important	62.40%	151
2	Somewhat important	28.10%	68
3	Somewhat not important	4.55%	11
4	Not important	4.96%	12
	Total	100%	242

12a - Additional Comments:

Importance of Knowing Judge's Expectations

- #### Why It Is Important

  I doubt that the judiciary has yet reached a reasonable level of uniformity in this field, so it's a good thing to know how a given judge approaches such issues.
  I imposed sanctions in a civil case that was tried last month in which the defendant had deleted stored information after notice from the plaintiff (Department of Justice) to preserve the information.
  Every judge is different in understanding e discovery and dealing with it.
  A competent lawyer should read some of the discovery orders entered by the judge to whom the case is assigned so that she knows the judge's views on common discovery issues.

- #### No Special Expectations Beyond Rules

  I apply the rules.
  My requirements align with the rules and interpreting case law.
  Read the Rules and try to comply with their spirit, cooperating with all counsel.
  They should follow the rules and know what they need to produce.
  The rules are my expectations, so they need to simply apply rules.
  I have no special expectations beyond those in the rules and caselaw.
  I don't think of the duty to preserve or the production of e-discovery to be judge-specific.
  It should be standard practice...not just for my court.
  I don't think my "expectations" are anything other than comply with the rules and act reasonably.
  Not necessarily "my" expectations, but the expectations of the court regarding reasonableness and documentation.
  Just follow the rules and the scheduling order that is entered in the action.
  Not my expectations per se, but the expectation of the law and the court generally.
  The rules are the key. My expectation is that parties comply with the applicable rules.
  I believe I do not impose unique requirements. I am trying to get parties/legal teams to comply with the rules.
  My personal expectations are not important because they overlap completely with what the Rules require and what good judgment dictates.
  It is most important that they understand what the law requires.

Knowing my expectations is the same as knowing the applicable federal rules, as further elucidated in our guidelines and checklist for meet and confer.
I would expect preservation of documents to not be judge-sensitive.
Expectations do not matter, compliance with rules is what matters.
My expectations in this area have always mirrored the Federal Rules of Civil Procedure. That's what they need to be concerned with.

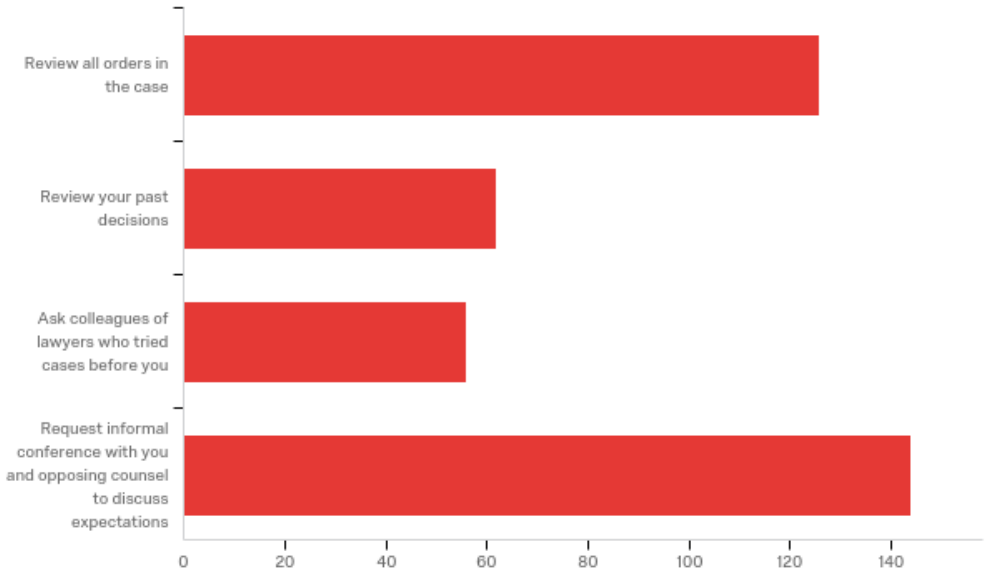
- ## Cooperation Expected

Sophisticated counsel generally engage in reasonable agreements among themselves as they appear to be more familiar with e-discovery protocol. Attorneys who are not as familiar should continue to educate themselves on these issues and be aware of the expectations of any particular judge.
My expectations are that the parties comply with the federal rules and our local guidelines for professional conduct, and that they meaningfully and cooperatively meet and confer as often as necessary to avoid seeking court intervention.
The important part is the parties' expectations. If the parties are satisfied with ESI discovery, the court will not be alerted to any issue and there is no court intervention. The most important thing the parties can do is to confer about the ESI protocol as soon as possible to learn each side's expectations.
The lawyers usually agree on the protocol.
Expectations are most important in terms of communications with opposing counsel and court, and the court's procedures for resolving discovery disputes without formal motions
My expectation is that parties will cooperate.
I am not the most important person in the process; counsel should work together on these issues, without my interference, unless it is impossible to do so.
I take a proactive role in discovery and it is important for legal teams to understand that fact. They must read and adhere to standing discovery orders and specific discovery orders, as well as the amended rules.

- ## Judge Discusses Expectations

If the parties have a disagreement, I invite them to submit a joint letter to me describing their disagreement and the reasons supporting each side. Then, I have a phone conference and resolve the issue.
This is why we address e-discovery with our initial pretrial conference which is conducted as soon as all parties are present in the case and enquire as to ESI and the protection of such information.
At the initial pretrial conference, I remind lawyers about their obligation to make sure their clients have put in place litigation holds. Of course, the litigation holds should already be in place, but I figure it can't hurt to mention it at the start of the case.
My practice is to maintain written Policies and Procedures which are easily accessed through the Court website which outlines my expectations, but which will be modified at the Rule 16 or earlier due to the specific needs of the cases.
They need to know I expect them to handle this appropriately and that if there is a problem, I will promptly address it myself, not through a magistrate judge. And they need to know I comply with Rule 37 on awarding fees.
This is a matter expressly covered with counsel in person at the time of the Rule 16 preliminary pretrial conference.
I make sure they understand my expectations by using a standard discovery order and explaining them in a telephone Rule 16 conference in every case.
In large e-discovery cases, I hold regular in-person conferences with the attorneys to make sure they understand me and I understand them. These conferences have been as often as monthly. Occasionally I have also added weekly telephonic conferences. Communication between the lawyers and with the court is important in keeping small problems from growing rapidly.
I invite discussion of these issues at the initial appearance so we are working off the same sets of expectations.
As a judge handling discovery issues, I try to be painfully transparent, so everyone knows my expectations.
Counsel should never be surprised by how I handle ESI issues.
I'll tell them at scheduling conference & we'll have regular status conferences. Parties don't have to guess.

13 - What are the best ways for a lawyer to learn your e-discovery expectations? (check all that apply)



#	Answer	%	Count
1	Review all orders in the case	32.47%	126
2	Review your past decisions	15.98%	62
3	Ask colleagues of lawyers who tried cases before you	14.43%	56
4	Request informal conference with you and opposing counsel to discuss expectations	37.11%	144
	Total	100%	388

13a - Additional Comments:

Best Ways to Learn Judge's e-Discovery Expectations

- Research and Review

  Review local rules and defaults.
  My standing orders and the court's model ESI order/guidelines refer to these expectations.
  Follow local rule.
  Read the rules.
  Local rules provide the model order.
  Our court endeavors to have uniform requirements rather than individual chambers rules. All courts should endeavor to do so for the sake of the practitioners and for achieving maximum compliance with reasonable requirements.
  Know the rules. Be prepared to discuss relevance/burden etc.
  Learn and use the local rules.
  Read the Rules, both the Federal Rules and the Local Rules.
  Review case law in the district; it is constantly evolving.
  Research post-2015 amendments and case law.
  Posting protocols on websites and putting expectations in early orders.
  I have standard orders and published policies and procedures.
  Talk to the Courtroom Deputy Clerk.
  I think I have repute in my district for being knowledgeable and fair about e-discovery.
  Our District has posted ESI Guidelines.
  Review the court's policies and procedures.
  Read my scheduling order, guidelines for trial, etc.

Read my practice pointers and notice of Rule 16 conference. Read the chapter I wrote for the Minnesota CLE e-discovery deskbook.
Individual rules of practice.
My expectations are that the rules are followed--unless counsel confer and cannot agree, they should not need a conference to be able to meet expectations. They should read my judicial preferences on our court webpage as stated in the scheduling order.
My district adopted ESI local rules, which are referenced on my web page, scheduling orders and in my in-person scheduling conference
Comply with the requirement in the Case Management Report meeting to prepare an e-discovery plan.
Read standing orders on my web site.
Read the local rules.
I strongly oppose individual judge-by-judge "expectations." I think all judges and courts should be bound by national standards. Individual local rules and "standing orders" are to be discouraged.
We maintain our chambers on the court's website. It includes practice guidelines, which discuss ESI issues.
Look at my policies and procedures online.
We try to keep general orders up to date on this subject. All are posted on the Court's website.
Pay attention at scheduling and status conferences.
Read and follow the federal rules and commentary.
Read the Rules of Civil Procedure and comply.
I issue a discovery order in every case which lays out my views on discovery and what is expected of counsel.
Failures to comply create problems for counsel. The best things that attorneys can do is review some of my prior discovery orders and opinions, and if they are unclear on something, ask for a discovery conference.

- ## Communication with Court

E-discovery is addressed in detail at the initial pretrial conference. We also have mandatory informal conference with the court prior to the filing of any discovery motions.
If I think the case will involve a lot of e-discovery, I try to address expectations at the Rule 16, but I would hope that counsel would bring it up themselves if I fail to mention it.
Most of my decisions are not published or even written in any detail. I don't have time to do so. And -- Sometimes written decisions are sui generis.
I address my expectations during the in-person Initial Conference. In addition, as previously referenced our local rule specifically spells out these requirements.
I talk about my expectations at CMC and any discovery conference.
Discuss during scheduling conference.
I have no standing orders and place a premium on cooperation.
I cover the duty of cooperation in the first case management conference.
Rule 16 conference.
Initial pretrial conference.
I try to be very clear at the initial conference in telling counsel what is expected of them, and again, if issues arise.
I try to make my expectations clear at the initial Rule 16 conference.
My expectations are typically set out in agreed orders presented by counsel. Counsel should be aware of the protocols to which they have agreed.
At the initial conference, a discussion should be had about expectations and how to handle disputes.
I issue an order in every case that has the Court’s Expectations in the title.
I hold a conference in all cases to state my expectations as stated in my discovery order.
I require telephone conference with a joint statement of the issue before any discovery motions are filed. Try to decide issue during call. Saves time and keeps case moving.
Attend initial scheduling conference and be proactive there; read my standing orders; request mid-litigation discovery status conferences.
Because expectations vary greatly depending on the case, an informal conference is the best way to proceed in any given case.
We discuss this, in more or less detail depending on the case, at the initial scheduling conference.
If I see a case headed off the rails, I will set a hearing to educate the lawyers about what I expect.

I discuss this at the initial Rule 16 conference and the parties are directed to discuss it as part of the joint discovery plan.
Ask questions during scheduling conference.
Usually done at Rule 16 conference.
Discuss at initial appearance.
I post my standing orders online at my webpage. The best way to address these issues is to vet them at the Rule 16 conference. Unfortunately, counsel is often unprepared to intelligently discuss the issues at that time which surprises me.

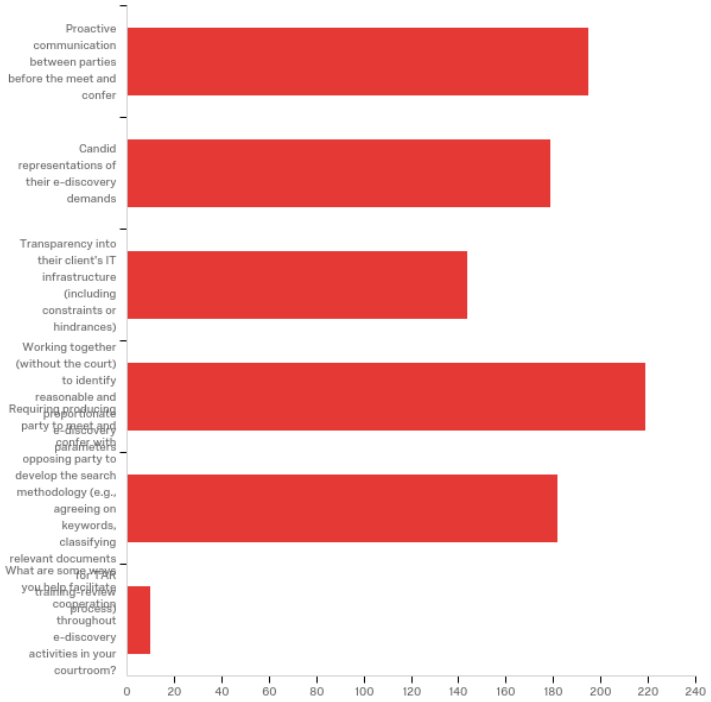
- ## Communication with Opposing Counsel

Generally, I would allow the parties the first attempt to design their e-discovery protocol so as to meet the needs of the particular case. I become involved to address particular issues as they appear in the case.

I would welcome these if there are significant disagreements about how e-discovery was going to proceed. I would hope that in the majority of cases, the parties work through all of this by themselves. It is still an uncommon occurrence to me to be involved in an e-discovery dispute given the number of cases moving through our district. I think that starts with an expectation that the parties will work through their differences in a reasonable fashion, while providing ready access to a judge when complications arise.

I do not think my expectations are the most important -- it is counsel's reasonable agreements that are most important.

14 - Reported case law says cooperation between parties in e-discovery negotiations is the best way to facilitate efficient and cost-saving e-discovery practices. What do you consider the important components of cooperation? (Check all that apply.)



#	Answer	%	Count
1	Proactive communication between parties before the meet and confer	20.99%	195
2	Candid representations of their e-discovery demands	19.27%	179
3	Transparency into their client's IT infrastructure (including constraints or hindrances)	15.50%	144
4	Working together (without the court) to identify reasonable and proportionate e-discovery parameters	23.57%	219
5	Requiring producing party to meet and confer with opposing party to develop the search methodology (e.g., agreeing on keywords, classifying relevant documents for TAR training-review process)	19.59%	182
7	What are some ways you help facilitate cooperation throughout e-discovery activities in your courtroom?	1.08%	10
	Total	100%	929

14a - Additional Comments: What are some ways you help facilitate cooperation throughout e-discovery activities in your courtroom?

Facilitating Cooperation

- #### Formal Conferences/Hearings

  Make expectations clear during a joint conference.

  At CMCs I always raise the issue of e-discovery and probe -- i.e., it's not a box-checking exercise for the CMC statement.

  Scheduling conference at the outset of litigation.

  I spend time with counsel at the Initial Conference (after directing them in the IC scheduling order to discuss the scope of their clients' e-discovery, ensuring preservation has been attended to, discussing specific methods of production [e.g., hard copy, CD in searchable software format, .tif, .pst, .pdf]). I then send them off to talk to the clients and then meet again with each other to reduce their agreement concerning production to a writing that is submitted to me to be reviewed and "so ordered."

Simply speaking directly to the lawyers during a scheduling conference or other hearing to emphasize the importance of careful preservation of ESI and cooperation in disclosing ESI.
I usually solve discovery issues with unrecorded telephone conferences. About 2-3 times a year, I have in-court conferences and decide all issues from the bench without opinion.
Prompt conference to address any problem when it comes up.
Parties may request a conference with the assigned magistrate judge at any time.
Regular conferences and clear written and verbal orders of what the court requires of the parties.
Candid discussions about related cost issues in e-discovery at all levels and ways to minimize those and other burdens of retention, preservation, format, platforms, production, etc.
Hold evidentiary hearings designed to tell which lawyer is telling the truth.
Approving proposed, agreed protocols at an end stage of the litigation.
At the initial case conference, we set a schedule for formal agreements and for bringing various kinds of e-discovery disputes to the court that remain unresolved by the meet and confer process.
Hold a proactive scheduling conference.
It is a topic I identify in my order setting the case management conference, I require it to be addressed in the Rule 26(f) report, and I discuss it at the conference.
I bring this subject up at the first case management conference, and I see counsel every 90 days during the case to facilitate this and other matters.
Individual and live Rule 16 conferences and live quickly scheduled pre-motion conferences to resolve discovery disputes.
Staying on top of disputes; addressing ESI and its storage at the IPTC.
Discussing the positions of the parties and the expectations of the court at the Rule 16 initial pretrial conference. Then, I invite follow up conferences, as necessary.
I review the state of ESI discovery, based upon the joint discovery plan, during the case management conference.
I talk about e-discovery issues in our very first conference. I encourage parties to meet and confer. I give the parties strict time deadlines within which to either solve their discovery disputes or bring them to me for resolution.
Regular discovery conferences to identify and address problems as soon as possible. Insistence on a "meet and confer" process prior to the filing of any discovery motion.
This is all part of effective case management, and it starts with a promptly-scheduled case management conference. I also schedule regular status conferences as appropriate to monitor the pace of discovery in complex cases. I encourage informal contact with the court before a discovery motion is filed. And I require the parties to confer voice-to-voice (no emails) on contested issues before a discovery motion is filed.
Early conferences help if there is a problem. But they must notify me that there is a problem. I guess pre-motion conference is the answer.
I hold regular scheduling and case management conferences, especially in complex cases, and ask a lot of questions about whether they've had in depth discussions about ESI issues with the client and with opposing counsel. If they can't answer the questions, I give them instructions and have them come back in 30 days or less to report on their progress and keep following up to avoid the near the close of discovery "surprise" revelations about ESI issues that often pop up during depositions.
I discuss ESI issues at the Rule 16 conference. Additionally, on occasion, I will have stand-alone discovery conferences in cases that require that level of supervision.

- ## Continuous Open Communication

This is very difficult when lawyers do not understand e-discovery. I have continued hearing until they talk.
Early address of e-discovery and open policy regarding informal conferences with court regarding any discovery issue, including e-discovery.
Approaching the court at the earliest instance of barriers to communication or production of information.
Ba available for counsel's telephone calls - joint calls - to identify problems.
Open communication is essential.
I make myself available for informal, in chambers conferences with counsel.
Give parties space and time in my courtroom.

I am available for an informal telephonic conference to discuss any problems or disagreements the parties encounter at any point in the case.
Hold live initial scheduling conferences, and additional special statuses as needed.
Meetings in person with attorneys/reps who have final authority to make decisions.
Be available and have a magistrate judge also available.
Have informal teleconferences with the district judge or magistrate judge when a discovery issue arises. This is much quicker than formal motions to compel.

- ## Meet and Confers

Strongly encourage meet and confers.
1. Detailed meet and confer, which is then described in the Rule 26(f) Report. 2. Detailed discussion at the ICMC.
Have the parties in to conduct their meet and confer.
Order early meet & confer regarding identifying/searching ESI.
I have used a number of tools: have the IT people participate in the meet and confer; order parties to confer in person or by phone, rather than in writing; require the ESI conference before responses are due; consider sampling to narrow down parameters.
There are few things more helpful than meaningful, professional "meet and confer" sessions between experienced counsel.
Requiring the parties to do what the Federal Rules and our Local Rules require: Meaningful meet and confer, courtroom discussion of cost and proportionality -- asking Plaintiff, for example, how much of the cost it is willing to shoulder to obtain certain information.
1. Invite discussion of the matter even when the parties do not raise it. 2. Order or encourage meet and confer even before problems arise. 3. Set a tone of civility.
I am not convinced that the parties necessarily need to meet and agree on a search methodology, although if they are willing to that's often helpful. But sometimes that conversation can devolve into a long, drawn-out disagreement in which the opposing party (who doesn't necessarily know the best ways to search the responding party's own documents and data and who isn't paying for it in any event) insists on search terms or methodologies that don't fit and, in the meantime, discovery is at a standstill. On the other hand, if they can reach agreement efficiently, it can either reduce the likelihood of disputes down the line, or at least give the producing party "cover" if those disputes arise notwithstanding the agreement. But ultimately, the responsibility is on the responding party to come up with an approach that gets at the right stuff in a reasonable fashion.

- ## Incentivizing Cooperation

I keep ordering parties to work together and agree on search terms, etc. before doing the searches, to avoid wasting a lot of time. But often the lawyers are more interested in litigating than in working together.
Require the parties to meet in person to discuss discovery and put the disputes in a short letter to the court before they can seek relief.
I insist on attorney cooperation and following of Rules. I just expect it and the attorneys comply.
Encouraging early engagement; stating expectation of cooperation; honoring cooperative practices.
To extent possible, the parties agree early in the case to identify competent vendors along with a realistic methodology. The court monitors the progress and requires counsel to promptly request a conference if differences cannot be resolved.
Our court has a meet-and-confer culture that extends to many areas of civil (and even criminal) practice. For e-discovery, we have adopted a local rule identifying duties to meet and confer and disclose the client's computer-based and other digital systems and information storage, in detailed ways including persons with knowledge of the client's information systems, and to confer about the types of information that may be sought in the case, and to attempt to agree on computer-based and other digital discovery matters including a list of topics, including who shall bear the costs of preservation, production and restoration (if necessary) of any digital information. The results of this e-discovery conferral are put into the parties' proposed joint discovery plan under a local civil rule, submitted prior to the initial scheduling conference. This rule places the burden on counsel "to understand how information is stored and how it can be retrieved." The parties are required to apply the proportionality rule to their discovery plan, including electronic discovery under the local rule, to avoid extravagant positions in requesting or declining e-discovery.

Require that they meet and confer! Inviting parties to submit [but not too frequently] issues to me via email. Both facilitate getting ahead of any issues.
I bring it up at the scheduling conference. I encourage an early meeting between counsel in seminars to new lawyers. I insist on compliance with Rule 26(f)'s directives as to which topics need to be addressed in the discovery plan.
I schedule an informal conference with counsel early in the discovery process to discuss expectations regarding e-discovery. I make it clear to the attorneys that I expect them to cooperate and conduct e-discovery in accordance with our discussions. I let them know that I am always delighted to intervene and resolve their discovery disputes, any hour of the day or night, including weekends; but I make it very clear that I have been known to make both sides unhappy with my rulings. As a trial lawyer for almost 25 years before I became a judge, I remind the attorneys that I consider myself somewhat of an expert in resolving discovery disputes and that, while I may not always be right, I am never in doubt. This admonition may explain why the attorneys almost always seem to resolve their own discovery problems, without the need to involve me. Of course, the e-discovery disputes in the District are not nearly as complex as those involved in many other districts, which makes it easier for the attorneys to sort things out without judicial intervention.
I give them choices: either cooperate, or I will put a Special Master in place to oversee the process.
My expectations usually accomplish the mission.
I make it very clear I expect attorneys to work together cooperatively on e-discovery parameters. I also almost never send discovery disputes to the Magistrate Judge to resolve. Forcing the parties to come to the DJ with discovery disputes has the benefit of exerting subtle pressure to work out problems without judicial intervention.
I require counsel to personally confer, not just by email. They must talk to each other on the phone, by video conference or in person before filing motions. I additionally often require Joint Notices to be filed of what conferral was done, what the issues are, what the parties' positions are, and what needs to be resolved at the hearing. I then require counsel to confer at the hearing if necessary, and I pointedly ask them about their positions. Lack of justification for a discovery position can lead to sanctions.
Making it clear that I expect the parties to work through their differences and be reasonable. When things bubble up to me, they will get a common sense and efficient solution.

- ## Substantive Help/Advice

Narrowing search time frame; suggesting "hit lists" or other methods that will give the parties an idea of the volume of documents to expect; hearing from an IT specialist about challenges the party is having; in some cases, having regular status conferences to address e-discovery issues.
Our local rules about e-discovery are robust and I appoint e-discovery special masters in difficult cases.
Discuss, give guidance on making request/response more proportionate.

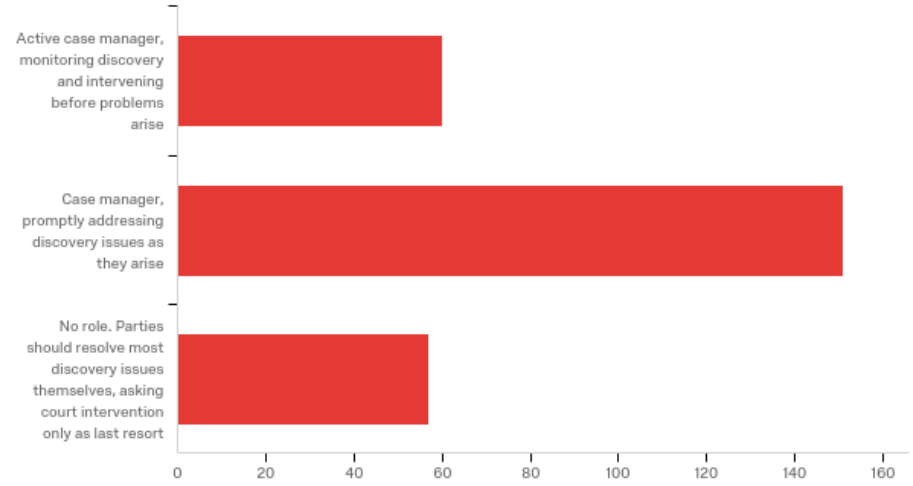
- ## Expert Involvement

By appointing an E-Discovery Master in appropriate cases to monitor and/or mediate disputes.
I enter an ESI discovery order when I don't see an ESI plan, requiring counsel to appoint ESI professionals with knowledge of the client's data preservation structure and require these professionals to attend discovery conferences when there are ESI disputes. I also encourage counsel to request a 502(d) order which, surprisingly, most counsel do not ask for.
Where the litigation involves companies with business clients, I have required the parties to have the IT experts from each side to be involved with the meet and confer. When the IT personnel from each side meet and confer, they tend to be much better than the lawyers at identifying and solving the problems that arise in identifying and retrieving relevant electronically stored information.
Requiring counsel to confer along with IT personnel to narrow disputes and requiring all conferring persons to be present for in-person hearing if they are unable to resolve their disputes.
Require that all exhibits for hearings and trials be digitized and presented digitally.

- ## Encourage Attorneys to Read and Understand Rules

Understanding potential issues before the Rule 26(f) conference.
I routinely refer lawyers to the Sedona Cooperation Proclamation and Sedona materials on the specific issues they may have.
Following the 7th Circuit E-Discovery Pilot Program requirements.

15 - What role should judges play in the e-discovery process?



#	Answer	%	Count
1	Active case manager, monitoring discovery and intervening before problems arise	22.39%	60
2	Case manager, promptly addressing discovery issues as they arise	56.34%	151
3	No role. Parties should resolve most discovery issues themselves, asking court intervention only as last resort	21.27%	57
	Total	100%	268

15a - Additional Comments:

Judge's Role

- ## Proactive Role

  My view is that all discovery should be supervised and directed in order to reduce time and cost that necessarily accompanies an adversary approach.
  Case management includes ensuring parties are meeting and conferring adequately regarding discovery.
  I think it is important to be proactive, to enforce the rules, and to get counsel to play nice during the discovery process. It is much easier to deal with a discovery problem at the outset than to let it fester and erupt on the eve of the discovery cut-off date.
  There's a fine line between active case management and hyperactive case management. I strive for the former but know that I can stray into the latter on occasion.

- ## Minor or No Role

  Ideally parties should be required to make a real effort to resolve issues on their own. Judicial resources should not be expended on resolving discovery disputes until the parties have first made a substantial effort on their own
  I'm happy to do either one, but I prefer if the parties work together and only request court intervention when necessary.
  If I wanted to be a "case manager", I would have gone to work as an insurance adjuster and skipped going to law school. Lawyers are charged under the Rules with conducting discovery in an open and expeditious fashion and to act in good faith in resolving the discovery disputes that inevitably arise. As a last resort, I am always happy to intervene and get things back on the right track. When called upon, it does not take me long and it leaves a lasting impression with the attorneys.
  There will come a time, after clients accept the value of cooperating with the adversary, that there will be fewer disputes regarding court intervention. But we remain mostly in an environment where appearing tough trumps common sense and cost.
  If the Court is required to get involved, then the award of legal expenses per Rule 37 is appropriate.
  After a Pretrial conference and entry of CMSO, the court's role should be limited.

If the parties know that I will promptly resolve disputes on reasonable terms, they usually resolve most of them on their own. Completely hands-off approaches leave the parties to a Wild West mentality and bad things tend to happen. Too much intervention risks generating issues that might not arise between the parties themselves.

- ## Minor or No Role Until Problems Arise

Court should actively inquire and offer services of the court if the parties anticipate problems. Usually counsel is aware of any barriers to e-discovery and are working on them in anticipation of the joint initial pre-trial and discovery scheduling conference with the trial court.

Every case is different, and the judge's role is therefore different as well. We do not have the luxury of proactive involvement but should get involved when a problem has been fully vetted and remains unresolved.

Actually, I think it's somewhere between the first two. I don't want to monitor discovery and intervene before the parties even have a problem, but I do frequently check in with the parties to make sure they're moving forward, to give them some directional guidance if asked, and to make sure they meet and confer over any disputes is not just dragging on and eating up the schedule.

Try to get in early on case management when it becomes apparent the parties are struggling to reach cooperative discovery agreements.

When the parties cannot resolve their discovery disputes, the court should promptly address the issues.

The caveat is that the parties are in the best position to keep the ball moving forward, but the Court should be readily accessible when needed to act quickly. Towards that end, I make it clear to the parties that if they cannot work through it, they can raise their dispute by short letter so that I can act on it quickly, hold a telephone conference or hearing if necessary, or ask for more briefing if I think I need it.

I actually come down between the 2nd and 3rd choices; I do not think I should actively manage the case, if counsel is capable of handling issues themselves. Frankly, I don't have time to be an active case manager in every case. If a case becomes a problem – i.e., if the parties are constantly bringing issues to me -- then I will bring in counsel on a weekly basis to make sure the problems are raised and resolved in a timely fashion, but I usually find that a few weeks of that results in counsel cooperating with one another more efficiently and effectively.

Counsel have to notify the Court when issues arise so that they can be promptly addressed.

Actually, somewhere between the second and third. I do not get involved in managing e-discovery unless one or more of the parties demonstrate that they cannot be relied upon to cooperate/comply.

I monitor and intervene early when I can tell by their case management report that they haven't done what they're supposed to at the Rule 26(f) cf and/or when I get a boilerplate report with no particulars and the case is clearly one in which ESI will be an issue. On routine repetitive type (usually diversity) cases like auto accidents, UM/UIM and slip and falls I promptly address discovery issues as they arise.

- ## Depends on Case

The active case manager can be reserved for those cases that will clearly need attention based on the subject matter, voluminous discovery, adverse positions, etc. Not all cases require an inordinate amount of a judge's time.

During initial conferences, lawyers are queried about discovery but often have not really done their homework. I make myself available within a day or two of receiving a letter about any discovery issue. Some parties never come to court because their lawyers understand what is expected and comply. Others think it is their job to delay production and drag out the process. I repeatedly see those lawyers every month.

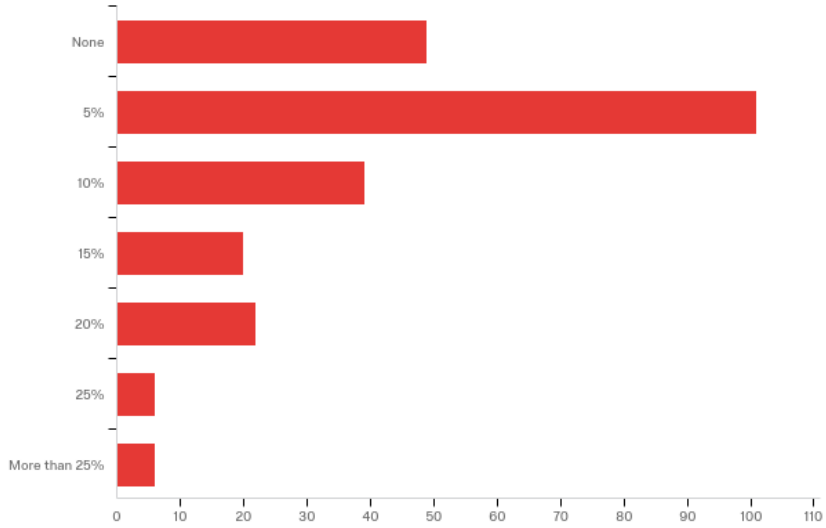
It depends. While the parties should resolve problems themselves, if the case seems likely to breed discovery problems, I think it is helpful to be somewhat proactive in making sure problems are not festering. In a run-of-the-mill case, I think the judge should have no role unless there is an issue that the parties seek help resolving.

Both, or either, depending on the case.

- Effect of Rules

  The meet-and-confer requirement, wherein compliance must be reduced to writing before the initial conference in the case, has worked very well in our court. When counsel have been tardy or indifferent to their discovery obligations, it can be brought to the judge's attention and usually promptly resolved in a conference call or hearing under Fed. R. Civ. P. 37(e) & (f), which we implement in a local rule. The latter requires that the parties confer in one last attempt to resolve the discovery dispute before seeking court intervention; such intervention is then triggered by letter to the judge outlining the dispute and seeking informal resolution in a telephone conference, which avoids motion practice in the large majority of cases.
  This assumes an early understanding by judge and lawyers about ESI issues in this case at the time of the Scheduling Conference.

16 - In the past 12 months, what percentage of the time in civil cases would you estimate you devoted to managing and resolving e-discovery issues?



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	In the past 12 months, what percentage of the time in civil cases would you estimate you devoted to managing and resolving e-discovery issues?	1.00	7.00	2.62	1.46	2.14	243

#	Answer	%	Count
1	None	20.16%	49
2	5%	41.56%	101
3	10%	16.05%	39
4	15%	8.23%	20
5	20%	9.05%	22
6	25%	2.47%	6
7	More than 25%	2.47%	6
	Total	100%	243

16a - Additional Comments:

Time Devoted to e-Discovery Issues

- ### Little Time Devoted to e-Discovery Issues

  Very little.
  Magistrate judges are assigned some civil cases by consent, but because the total is less than 25% of the district judges' civil cases, e-discovery issues do not come up that often.
  A lot of counsel chooses not to do e-discovery in our jurisdiction.
  Only in two civil cases. Total time was less than eight hours.
  This takes up only a small part of my docket.
  A magistrate judge might estimate that 1- 3% of civil case management time involves e-discovery disputes, based on my conversations with several.
  Or less.
  That is probably high. I would say 1%.
  Parties have been generally good about resolving their own ESI discovery issues.
  This low percentage largely reflects the fact that magistrate judges handle these disputes in the first instance and that few of their decisions are challenged by way of objections presented to me. Were I handling discovery disputes myself, the percentage would likely be higher.
  Less than 5%.
  Or less.
  While there are often discovery disputes, they do not center on ESI issues.
  Nothing makes my day more than seeing a fresh batch of discovery disputes. The number of pure ESI disputes remains low for me at this time. I mostly see ESI disputes in patent cases and those involve disputes over custodians and keywords.
  Less than 5%.
  I do all my own discovery disputes. The parties rarely come back.
  Less than 5%.
  E-discovery was a small part of the discovery problems I heard.
  I do not think that problems with e-discovery are as big or widespread as is widely believed. That has not been my experience - and to be clear, I supervise all discovery in my cases and do not refer discovery supervision to magistrate judges.
  My practice is limited to habeas corpus and § 1983 method-of-execution litigation where the lawyers have learned to cooperate, despite high tensions of the subject matter.
  Actually, very little - not none.

- ### More Time Devoted to e-Discovery Issues

  This is my least favorite task. But it seems like it's taking up more and more of my time.
  Almost all discovery now is e-discovery.
  It seems like I spend more time on these issues but that may be because of the nature of ESI disputes. They are high drama and volume issues.
  Have a lot of big cases where we've been doing monthly or bi-weekly status conferences to keep up some progress on search terms, phasing, sampling, etc.

- ### Depends on the Case

  In most cases the local rule resolves all disputes. In a limited number of cases, the disputed issues can be extremely time-consuming for the parties and the Court.
  It depends on the case. Some cases require no e-discovery management, while in other cases the time commitment can be significant.
  I divide lawyers into 3 tiers. The best lawyers, I rarely see because they know what they are doing and work out their discovery issues. In the second tier are good lawyers who need help from time to time. The third tier are the lawyers who don't know what they're doing or don't care, and I see them routinely.

- Time Management Strategies

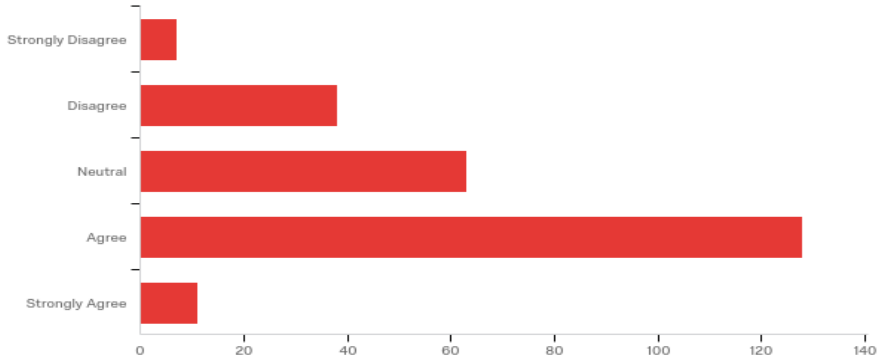
  I try to identify at the time of filing the initial pleadings those cases that may require more attention and set status conferences, even if not requested by counsel.

  It is the rare case in which it is a burden to supervise discovery. The key to management is setting expectations at the beginning of the case and resolving any disputes that arise promptly. I limit discovery disputes to two-page letters, which in many cases prompts a telephone conference with the parties the next day.

  Discovery disputes are not very common part of my caseload or even the culture of my district. However, they do come up. One of my practices, is to make myself available for conferences with the parties upon request. I find that this allows us to address matters quickly.

  Managing and resolving e-discovery disputes is an important role which seems to rise with the rise of new data sources.

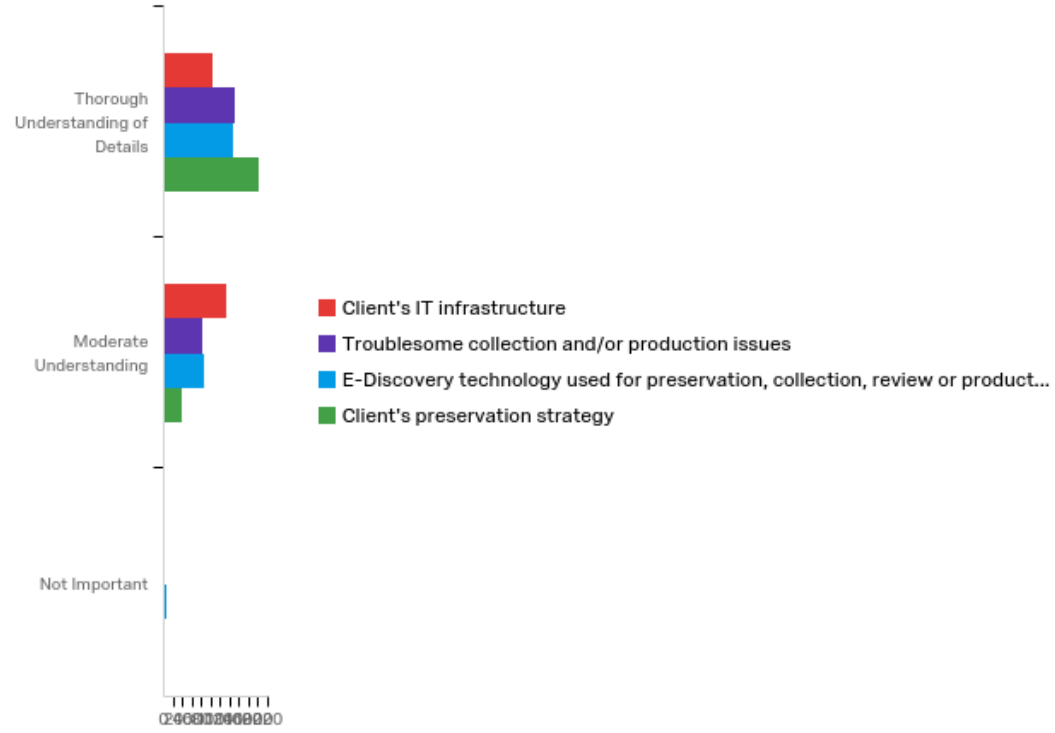
17 - Do you agree with the following statement? In the past 12 months, the lawyers appearing before you have shown an adequate level of knowledge and expertise in e-discovery matters.



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Do you agree with the following statement? In the past 12 months, the lawyers appearing before you have shown an adequate level of knowledge and expertise in e-discovery matters.	1.00	5.00	3.40	0.90	0.81	247

#	Answer	%	Count
1	Strongly Disagree	2.83%	7
2	Disagree	15.38%	38
3	Neutral	25.51%	63
4	Agree	51.82%	128
5	Strongly Agree	4.45%	11
	Total	100%	247

18 - To what extent do you expect outside counsel to understand their client's e-discovery practices and technology concerning the following criteria?



#	Question	Thorough Understanding of Details		Moderate Understanding		Not Important		Total
1	Client's IT infrastructure	42.86%	102	55.88%	133	1.26%	3	238
2	Troublesome collection and/or production issues	65.52%	152	34.48%	80	0.00%	0	232
3	E-Discovery technology used for preservation, collection, review or production	61.25%	147	36.25%	87	2.50%	6	240
4	Client's preservation strategy	84.10%	201	15.90%	38	0.00%	0	239

18a - Additional Comments:

Outside Counsel Understanding of Client's Technology and Practices

- ### What Outside Counsel Should Know

  I think it's more important for counsel to learn what the client's system can and can't do than to learn how it does it.

  Attorneys do not necessarily have to be experts in e-discovery, but should be familiar with the e-discovery concepts related to their client's technology and should interact with the client's IT personnel and other experts as necessary.

  It is very frustrating to have briefing on the burden of production but get total silence when I ask counsel what that burden actually involves. Some attorneys are prepared to answer but a good number are not. It is just too easy to say "burden" without understanding what it means.

  What part of this is NOT a lawyer's job?

  A lawyer is expected to know the client(s) practices.

  May need to identify need for IT expert early on.

  Ignorance of the client's infrastructure, issues in collection, e-discovery technology deployment and preservation are the most serious pitfalls for lawyers.

  Counsel is the face of the client in court. Therefore, to be effective, counsel must know their client.

  I participate in many CLE sessions which are designed to help counsel be competent in all these areas. However, e-discovery changes every day, so counsel (and the court) must continue to keep up with changing technology.

- ### Depends on the Case

  It depends on the situation. If the need should have been anticipated, I would expect more knowledge.

  It really depends on the case, the status of discovery and disputes, and the particular issue.

  The proper balance will depend on the extent to which the client has a sophisticated in-house e-discovery team. The less sophisticated the client is, the more the outside counsel must take responsibility for knowing all of this inside and out.

  This is a tough question. I think counsel's duty to understand the client depends upon the client's sophistication with legal matters and the client's level of cooperation. The less sophistication or cooperation, the more that counsel should become personally involved in the process.

  All these areas are important. But proportionality is also important. And not all cases require the same kind of deep dive.

  It depends on the case. The Court must never forget clients are paying for this. E-discovery must be proportional to what is at issue and what is reasonable in terms of expense to the clients.

  Unless in-house counsel is going to engage in discussion with opposing counsel on these issues, then I expect outside counsel to be well versed in these topics.

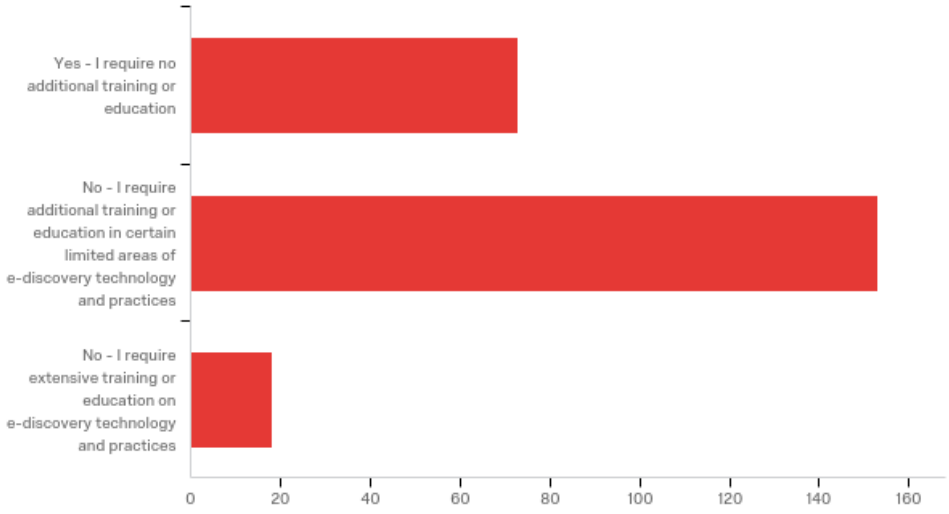
  Also relevant in criminal cases.

- ### Use of Experts

  Can't really answer this question as phrased. In some cases, must be thorough; in others with no hard issues, moderate enough, and in any case outside counsel can rely on an IT expert to thoroughly understand and therefore need only moderate understanding enough to assess that the IT expert is doing a good job.

  Regarding knowledge of technology, I expect the lawyers to have at least a moderate understanding but also to have someone in court who does have the thorough understanding to be able to answer questions.

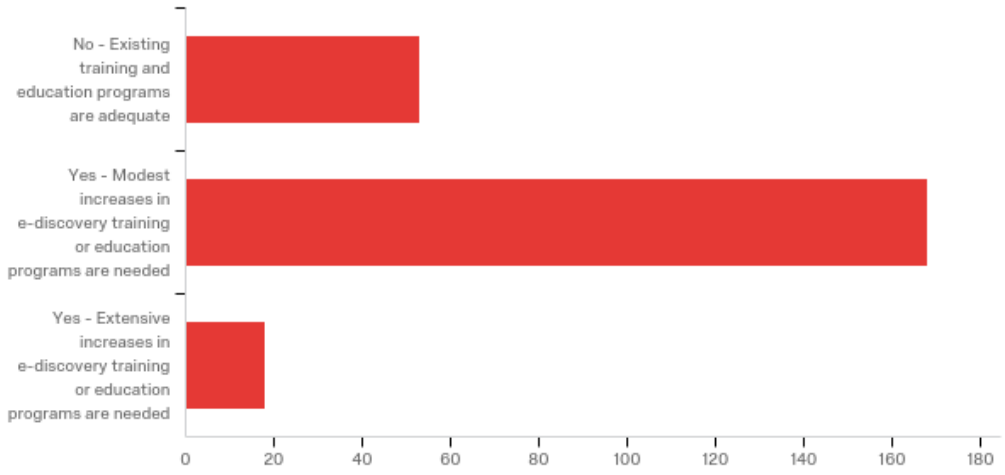
19 - Are you satisfied with your level of knowledge of e-discovery technology and practices?



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Are you satisfied with your level of knowledge of e-discovery technology and practices?	1.00	3.00	1.77	0.57	0.32	244

#	Answer	%	Count
1	Yes - I require no additional training or education	29.92%	73
2	No - I require additional training or education in certain limited areas of e-discovery technology and practices	62.70%	153
3	No - I require extensive training or education on e-discovery technology and practices	7.38%	18
	Total	100%	244

19a - Should federal judges in general be receiving more training and education on e-discovery technology or practices?



#	Answer	%	Count
1	No - Existing training and education programs are adequate	22.18%	53
2	Yes - Modest increases in e-discovery training or education programs are needed	70.29%	168
3	Yes - Extensive increases in e-discovery training or education programs are needed	7.53%	18
	Total	100%	239

19b - Additional Comments:

Judge Satisfaction with e-Discovery Knowledge; Training/Education

- ### Judges Who Are Satisfied

  I recently attended a discovery conference the FJC put on in Florida and it was an excellent overview. I found that I am reasonably aware of the e-discovery issues, as I am on the bench less than 3 years and did quite a lot of e-discovery during the last 15 years of my practice.

  I have a sufficient understanding of e-discovery technology and practices to adequately address the e-discovery issues that arise in my District. I am sure I would need additional training to take on the more complex e-discovery issues that arise in districts that routinely handle far more complex litigation.

  I would require more training and education if I were to directly handle the e-discovery disputes, but since they are handled first by the magistrate judges, the level of training and education available to me is sufficient.

  I said "no" to 19 only because I could always be more knowledgeable. That said, I believe I have an adequate grounding to do my job effectively. I think the Judicial Center offers sufficient courses in e-discovery.

  I am well informed on this because I was a magistrate judge. But most district judges have no experience. And many magistrate judges do not.

  At times, I require IT experts to attend hearings. In a couple of cases the parties' IT employees met and resolved the issues while I continued to talk to attorneys. Too many attorneys make the issue harder than necessary when the rank and file employee can work it out. Attorney tells me it will cost thousands and shut company down for days. When IT head shows up at a hearing it drops to a very reasonable level.

- ### Judges Who Are Not Satisfied

  Meta data....native format issues are often a mystery.

  It is very difficult to assess the level of culpability without knowledge of the systems or processes.

  I'm a computer illiterate. I rely on the parties to explain what is going on.

  As TAR becomes more prevalent in the average case, the federal judiciary is ill-equipped to understand the process and issues surrounding its use.

- ### Continuing Education/Training

  I have a very strong grasp of e-discovery rules and practical realities of e-discovery process from my practice before the bench. However, I am also aware that things evolve very rapidly, and that it is important to keep up. Also, it is important to get education about proportional e-discovery for smaller cases. That is where I see the most problems.

  E-discovery has been around for quite some time and has certainly developed into a specialized area of the law. Given the continued proliferation of e-discovery, judges need to continue to be educated on these issues.

  I'm fairly familiar and don't feel unprepared; but as technology is always changing, continuing education is helpful.

  It is such a moving target that I think training is critical. I often find that I am relying on the attorneys to train me on their issues and they are not even sure of them.

  In private practice, I worked extensively with e-discovery vendors, more so than most current judges. I have recommended that FJC have e-discovery vendors appear at conferences to show judges how much they can accomplish. So far, this has been ignored, as far as I know.

  Technological advances occur at such lightning speed that continuing education is essential.

  Judges like me who were on the bench before e-discovery was a thing would probably benefit from a hands-on training exercise. I think I understand this, but I've never been the one finding and producing materials. The same might be true of judges whose prior work did not involve e-discovery.

  As technology continues its fast-paced evolution, so to should efforts to educate judges.

  As technology develops, I think it's important for federal judges to be kept up to date on how it can be used to make e-discovery more efficient, more accurate, and, hopefully, less costly.

  You can never know too much. The changes in technology and information storage, retention and retrieval change rapidly. Judges need to keep up.

  Technology changes rapidly and training needs to keep pace.

  This is not as easy to answer as it first appears. I have had very few cases in which e-discovery has been an issue. I am not sure a judge in my position should spend a great amount of time on e-discovery training. I would certainly

get substantially more training if I had more issues involving e-discovery. Also, I am not sure how much training other judges are receiving.
As noted in my answer to 18, e-discovery is constantly changing, therefore both counsel and the court, even if they have a certain level of expertise, must continue to learn in order to keep up with the e-discovery area.
In my district magistrate judges handle all discovery disputes so we are the ones who would get the greatest benefit from additional education and training.
The FJC has excellent written resources. It also has a fantastic E-discovery program, albeit a short one. The biggest difficulty is trying to keep up with all the technology changes. And this goes beyond e-discovery. The increased use of big data algorithms affects not only how TAR works on discovery, but also on substantive legal issues. For example, in the criminal arena, probabilistic genome software is presenting not only Daubert issues, but also Confrontation Clause issues, that can only be resolved with some in depth understanding of the technology.
The Federal Judicial Center provides substantial effective training both at live seminars and in online training sessions.
More training is required for the generation of judges on the bench that did not practice law in the digital era. We have taken an active role in bringing experts into our court to present a detailed lecture series on computer science, so that our judges have background knowledge on data creation and storage. I believe that foundation is necessary to a thorough understanding of many of the e-discovery issues we confront.
The FJC has an annual program which was just held in November again, in addition to published and other resources.
There are plenty of training opportunities. It is a matter of making time for them.
Each year, new issues arise in the criminal as well as civil context: discovery of Facebook, cell phone, etc. matters; warrants for social media. Each year will bring new issues that judges need to be familiar with.
Additional e-discovery educational programs would be helpful to all judges, even those who have a great deal of expertise in the area, in order to keep up with the latest law and technology.

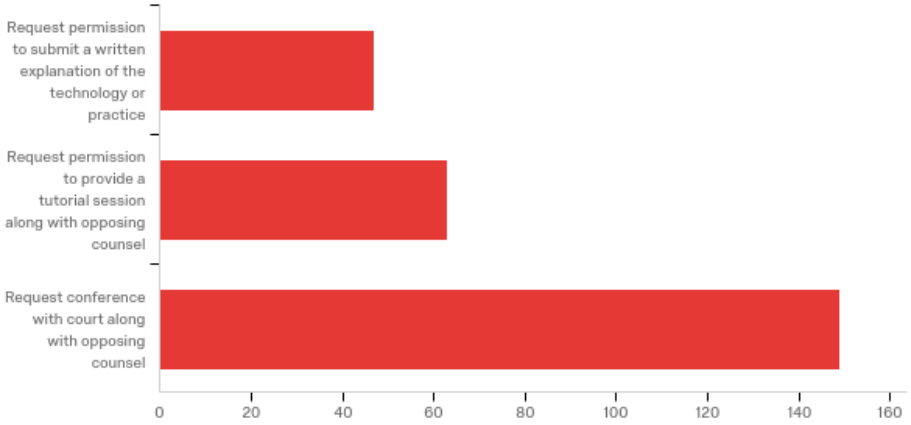
- Potential Reasons for Knowledge Gap

There is a generational issue. More recent appointees, who are often younger judges, are often more interested in and conversant with e-discovery. Also, judges who have practiced as lawyers in the last 10 years are often more conversant with these issues.

The problem is that the judges who are involved in resolving discovery disputes are learning and fairly knowledgeable. The judges who are not involved are more ignorant, I suspect, but do not want the training.

It really depends on the judge. Some know nothing and like it that way. Others are very knowledgeable.

20 - If you would like more information about a certain aspect of e-discovery technology or practice, what is the best way for a legal team to approach you?



#	Answer	%	Count
1	Request permission to submit a written explanation of the technology or practice	18.15%	47
2	Request permission to provide a tutorial session along with opposing counsel	24.32%	63
3	Request conference with court along with opposing counsel	57.53%	149
	Total	100%	259

20a - Additional Comments:

- Obtaining Information from Legal Team

A tutorial should be a topic of discussion at the conference.
The approach will depend upon the level of understanding or expertise needed in the case.
Any of the above.
Any of the above.
Lawyers are too reluctant to offer tutorials. I personally love them.
Each option could be appropriate considering the nature of the case and the quantity of e-discovery involved.
I only need a tutorial if there is a dispute.
Again, it depends on the issue and circumstances.
I'm not sure about this question. I've answered the question assuming a motion of some type is pending, maybe a motion for protective order or motion to compel.
I try to be open to anything counsel is comfortable with.
I want to hear from the experts, not the lawyers.
Have a quick teleconference. That frequently resolves even complex issues.
Often, an IT expert (either internal to the parties or external) is necessary or very helpful.
I'd start with a conference before asking for a tutorial and do my best not to try and conceal my ignorance so I can gauge how steep a learning curve I'm facing.
I will always grant a timely request for a discovery conference.
Counsel can talk to me about these issues anytime.
All 3 would work.