



Massachusetts Rules for Ediscovery: A Two-Page Guide

Amended Rule 16: Unrepresented Parties. The first sentence of Rule 16 specifically states a court may order unrepresented parties to appear at a conference. The amendments do not alter the language of Rule 16 allowing a court to order a conference at its discretion.

Amended Rule 16: Pre-Trial Procedure: Formulating Issues. The Amendment adds three specific discovery provisions for consideration at a pre-trial conference: (1) the timing and extent of discovery, (2) preservation and discovery of ESI, and (3) procedures for asserting claims of privilege/protection after production.

New Rule 26(b)(5)(A): Privilege Log. This section affirms the requirements and procedures of a privilege log and is identical to pre-Amendments Rule 26(b)(5).

New Rule 26(b)(5)(B): Information Mistakenly Produced; Claim of Privilege. This rule provides procedure for a party to assert a claim of privilege *after* information is produced in discovery. Although, nothing in the rule precludes the parties from modifying the procedures set forth in the rule. If the claim is contested, the rule permits any receiving party to present the matter to the court for resolution. After notification, a receiving party shall promptly return, sequester, or destroy the specified information; and shall not disclose the information until the claim is resolved. In resolving the claim, the court should determine whether (1) the disclosure was inadvertent, (2) the holder of the privilege took reasonable steps to prevent disclosure, and (3) the holder promptly took reasonable steps to rectify the error. The producing party must preserve the information until the claim is resolved.

New Rule 26(b)(5)(C): Effect of a Ruling. Privilege/protection must be upheld by the court in a written order, otherwise the disclosure is considered waived in the present matter as well as any other proceedings.

Amended Rule 26(c): Protective Orders. Upon a motion by a party, or a person from whom discovery is sought, the court may make any order to protect a party or person. The rule expressly delegates authority to the court to order “sharing of costs,” in light of the expenses associated with electronic discovery.

New Rule 26(f)(1): Definition. The Amendments define “inaccessible” ESI as information from sources the party identifies as not reasonably accessible because of undue burden or cost.

New Rule 26(f)(2)(A): Conference as of Right. Unlike the Federal Rules, the Massachusetts version of Rule 26(f) *does not require* the parties to “meet and confer.” However, *either party* has the right to *demand* a conference within 90 days after service of the first responsive pleading. If the request is made within 90 days, the parties must confer in person, via phone, or electronically, no later than 30 days after service on each party. The request must be served on all parties, but shall not be filed with the court.

NOTE: The term “pleading” is defined by Rule 7(a); an answer by a defendant is considered a responsive pleading that would trigger the right to serve a request for a conference, whereas a motion to dismiss does *not* trigger a right to serve a request for a conference.

New Rule 26(f)(2)(B): Conference by Agreement of the Parties. 90 days *after* the service of the first responsive pleadings, a party may still serve a request to confer about ESI on each party, but shall not file the request with the court. If the parties agree to confer, the results must be filed with the court in accordance with Rule 26(f)(2)(C). If within 30 days after the request all parties do not agree to confer, any party may move the court to conduct a conference pursuant to Rule 16.

New Rule 26(f)(2)(C): Purpose of ESI Conference Among the Parties. This section of the rule provides a non-exhaustive list of topics parties are instructed to discuss during a conference – including form of production, metadata, and preservation of information – concluding that parties should address, “any other issues related to the discovery of [ESI].” Within 14 days after a conference by right, or by agreement, the parties *must* file with the court the plan and a statement concerning any issues upon which the parties cannot agree.



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New Rule 26(f)(3): ESI Orders. A court may enter an order on any issue relating to the discovery of information, even if the parties have not conferred. A court may enter an order governing ESI pursuant to any plan referred to in subparagraph (2)(C), following a Rule 16 conference, upon motion of a party or stipulation of the parties, or sua sponte, after notice to the parties.

New Rule 26(f)(4)(A),(B), and (C): Limitations on Inaccessible ESI. Any party objecting to the discovery of *inaccessible* ESI [see Rule 26(f)(1)] must specify the reason for the objection and has the burden of showing inaccessibility. The court, however, may order discovery if the requesting party shows the likely benefits outweigh the burdens, considering the amount in controversy, resources of the parties, as well as the importance of the issues and the requested information's value in resolving them. Discovery of inaccessible information may be conditioned at the courts discretion; e.g. limited in scope and costs allocated.

New Rule 26(f)(4)(D) and (E): Limitations on Accessible ESI. The court can limit the frequency or extent of discovery of *accessible* ESI if it is in the interest of justice. Factors bearing on the decision include (1) whether the information can be obtained from a more convenient, less burdensome, or less expensive source, (2) whether the discovery sought is unreasonably cumulative or duplicative, (3) whether the party seeking discovery had ample opportunity by discovery in the proceeding to obtain the information, or (4) whether the likely burden/expense of the proposed discovery outweighs the likely benefit.

New Rule 34(b)(2)(B): Responding to a Request for Production of ESI. If a responding party objects to the requested form of production, or if no form was specified, the responding party *must* state the form(s) of intended production.

New Rule 34(b)(2)(C): Producing the Documents or ESI. If the form of production is not specified a responding party shall produce ESI in the form(s) in which it is ordinarily maintained or a reasonably usable form. A responding party need not produce ESI in more than one form.

New Rule 37(f): Failure to Provide ESI. This section creates a safe harbor provision for ESI that is lost due to routine or good-faith operation of an electronic information system. A party is not permitted to exploit routine operations to escape discovery obligations when a party is under a duty to preserve information because of pending or reasonably anticipated litigation. The rule is not intended to change any existing law regarding a duty to preserve.

New Rule 45(b): Subpoena - For Production of Documentary Evidence. This rule recognizes the time and expense a subpoena places on third-parties, who are often without counsel and have no stake in the outcome of the litigation. The rule further provides, while a subpoena may command the production of ESI, the attorney responsible for issuing the subpoena must take reasonable steps to avoid imposing undue burden or expense.

New Rule 45(f)(1): Subpoena - Producing Documents or ESI. If the form of production is not specified, a subpoenaed party shall produce ESI in the form(s) in which it is ordinarily maintained or a reasonably usable form. A responding party does not have to produce ESI in more than one form. The responding party bears the burden of showing inaccessibility – should they object to production on those grounds – and a court may still order production under the limitations of Rule 26(f)(4).

New Rule 45(f)(2): Subpoena - Claiming Privilege or Protection. Information mistakenly produced by a subpoenaed party, which is subject to a claim of privilege or protection, is subject to the same “clawback” provisions and procedures set forth in Rule 26(b)(5)(B) and (C).