

Piecing Together the E-Discovery Plan: A Plaintiff's Guide to Meet and Confer



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E-discovery is challenging, but it needn't be complicated by a battle-zone mentality. Take advantage of the meet-and-confer process to ensure that your opponents know what electronically stored information they have and how they should produce it.

Everyone wants e-discovery to be simple. The defendant's tech guru wants it to be simple because he's got too much to do. The defendant's in-house counsel wants it to be simple because she's got budget issues and thinks most claims are frivolous. Outside counsel wants it to be simple because he likes doing things the way he's always done them and doesn't like looking clueless about electronic information.

And you want it to be simple because you need it to be simple. Hiring experts and e-discovery vendors raises the stakes, and a misstep may result in significant cost-shifting to your client. Moreover, if you don't ask the right questions, you're not going to get the right information--and aren't courts starting to sanction lawyers for e-discovery foul-ups?

The problem is e-discovery is not simple. It's complex, technical and tricky. There are no shortcuts--no form, checklist, or script that's going to get the defendant to find the relevant information and turn it over in a reasonably usable way.

Face it: you've got to *fight* to get electronic evidence. You have to know what they've got, what you need and how to ask for it. You must understand the capabilities and limitations of electronic search and the forms of production best suited to the evidence.

Meet and Confer

In 2006, Federal Rule of Civil Procedure 26(f) was amended to require parties to confer about preserving discoverable information and to develop a proposed discovery plan addressing discovery of electronically stored information (ESI) and the form or forms in which it should be produced. The amended rule requires parties to confer about preserving discoverable information and to develop a proposed discovery plan addressing, *inter alia*, discovery of electronically stored information (ESI) and the form or forms in which it should be produced. This conference¹, and the overall exchange of information about electronic discovery, is called "meet and confer."²

The states are rapidly adopting rules of procedure and local practice like the Rule 26(f) meet and confer;³ but even where no such rule exists, state judges often find the federal e-discovery model instructive and grant motions to compel parties to confer on ESI issues.⁴

Sizing Up The Opposition

Opponents weaned on a scorched earth, “take no prisoners” approach to litigation aren’t adapting well to the requisite openness and collaboration of meet and confer. They won’t tell you how they identified and collected responsive data. They’ll refuse to share custodial questionnaires or disclose keywords and filtering mechanisms. Deal with them by making your record and seeking the court’s intervention. Angry judges, sanctions and unhappy clients are the Darwinian factors bringing about the extinction of Obstructasaurus Lex.

Obstructive opponents aren’t your only obstacle. Well-intentioned producing parties present challenges, too, and tend to split into three camps:

Those who accept the duty to preserve and produce ESI, want to do it right, but don’t know how: These opponents are ill-equipped to guide preservation or ask the right questions. Here, be prepared to fill the knowledge gap in a non-threatening manner—a daunting challenge in a profession where few are willing to admit weakness—or find ways to convince your opponent to get expert help. Bringing your own expert to conferences or hearings helps the other side see they are in over their heads.

Those who accept the duty, but know only one way to deal with ESI: These opponents have settled on an approach that worked for them in another case and are determined to employ it in every case. Their method might entail, e.g., over-reliance on custodial collection or a blind devotion to TIFF image production, even when it destroys the integrity of the evidence. Here, you need to understand their approach and determine if it’s going to work. If not, be prepared to demonstrate where it falls short and offer suitable alternatives. The right solution may be a *hybrid* production integrating alternative techniques for categories of ESI that don’t lend themselves to the other side’s approach.

Those who accept the duty, want to do it right and know how: Here, the onus is on you to meet them on the level playing field, so know what you need and be prepared to settle on reasonable and effective methods to identify, preserve, select and produce the information without undue burden or cost. Be ready, and be reasonable.

Preparing for Meet and Confer

E-discovery duties are reciprocal. Just because your client has little electronic evidence, you must nonetheless act to preserve and produce it. At meet and confer, be prepared to answer many of the same questions you’ll pose.

A cardinal rule for electronic discovery is to tell your opponents what you seek, plainly and clearly. They may show up empty-handed, but not because you failed to set the agenda.

Meet and confer is more a process than an event. Lay the foundation for a productive process by communicating your expectations. Send a letter to opposing counsel a week or two prior to each conference identifying the issues you expect to cover and sharing the

questions you plan to ask. If you want client, technical or vendor representatives in attendance, say so. If you're bringing a technical or vendor representative, tell them. Give a heads up on the load file specification you want used or keywords you want searched, if only to let the other side know you've done your homework. True, your requests may be ignored or even ridiculed, but it's not an empty exercise. A cardinal rule for electronic discovery, indeed for any discovery, is to tell your opponent what you seek, plainly and clearly. They may show up empty-handed, but not because you failed to set the agenda.

The early, extensive attention to electronic evidence may nonplus lawyers accustomed to the pace of paper discovery. Electronic records are ubiquitous. They're more dynamic and perishable than their paper counterparts, require special tools and techniques to locate and process and implicate daunting volumes and multifarious formats. These differences necessitate immediate action and unfamiliar costs. Courts judge harshly those who shirk their electronic evidence obligations.

Questions for Meet and Confer

The following exemplar questions address the types and varieties of matters discussed at meet and confer. They're neither exhaustive nor tailored to the unique issues in your case. They're offered as talking points to stimulate discussion, not as a rigid agenda and certainly not as a form for discovery.

1. What's the case about?

Relevance remains the polestar for discovery, no matter what form the evidence takes. The scope of preservation and production should reflect both claims *and* defenses. Pleadings only convey so much. Be sure the other side understands your theory of the case and the issues you believe guide their retention and search.

2. Who are the key players?

Cases are still about *people* and what they did or didn't say or do. Though there may be shared repositories and databases to discover, begin your quest for ESI by identifying the people whose conduct is at issue. These *key players* are *custodians* of ESI, so determine what devices and applications they use and target their relevant documents, application data and electronic communications. Determine whether assistants or secretaries served as proxies for key players in handling e-mail or other ESI.

Like so much in e-discovery, identification of key players should be a collaborative process, with the parties sharing the information needed for informed choices.

3. What events and intervals are relevant?

The sheer volume of ESI necessitates seeking sensible ways to isolate relevant information. Because the creation, modification, and access dates of electronic documents tend to be tracked, focusing on time periods and particular events helps identify relevant ESI, but only if you understand what the dates signify and when you can or can't rely on them. When a document was created doesn't necessarily equate to when it was written, nor does "accessed" always mean "used." For ESI, the "last modified" date tends to be the most reliable.

4. When do preservation duties begin and end?

The parties should seek common ground concerning when the preservation duty attached and whether there is a preservation duty going forward. The preservation obligation generally begins with an expectation of litigation, but the facts and issues dictate if there is a going forward obligation. Sometimes, events like plant explosions or corporate implosions define the endpoint for preservation, whereas a continuing tort or loss may require periodic preservation for months or years after the suit is filed. Even when a defendant's preservation duty is fixed, a claimant's ongoing damages may necessitate ongoing preservation.

5. What data are at greatest risk of alteration or destruction?

ESI is both tenacious and fragile. It's hard to obliterate but easy to corrupt. Once lost or corrupted, ESI can be very costly or impossible to reconstruct. Focus first on fragile data, like backup tape slated for reuse or e-mail subject to automatic deletion, and insure its preservation. Address back up tape rotation intervals, disposal of legacy systems (e.g., obsolete systems headed for the junk heap), and re-tasking of machines associated with new and departing employees or replacement of aging hardware.

6. What steps have been or will be taken to preserve ESI?

Sadly, there are dinosaurs extant who believe all they have to reveal about ESI preservation is, "We're doing what the law and the Rules require." But that's a risky tack, courting spoliation liability by denying you an opportunity to address problems before irreparable loss. More enlightened opponents see that reasonable disclosures that don't prompt objections serve to insulate them from sanctions for preservation errors.

7. What nonparties hold information that must be preserved?

ESI may reside with former employees, attorneys, agents, accountants, outside directors, Internet service providers, contractors, application service providers, family members and other nonparties. Some may retain copies of information discarded by your opponent. Absent your reminder, the other side may focus on their own data stores and fail to take steps to preserve data held by others over whom that have some right of direction or control.

9. What data require forensically sound preservation?

"Forensically sound" preservation of electronic media preserves, in a reliable and authenticable manner, an exact copy of all active and residual data, including remnants of deleted data residing in unallocated clusters and slack space. When there are issues of data loss, destruction, alteration or theft, or when a computer is an instrumentality of loss or injury, computer forensics and attendant specialized preservation techniques are required. Though skilled forensic examination is expensive, off-site, forensically-sound preservation can cost less than \$500 per system. So talk about the need for such efforts, and if your opponent won't undertake them, consider whether you should force forensic preservation, even if you bear the cost.

10. What metadata are relevant, and how will it be preserved, extracted and produced?

Metadata is evidence, typically stored electronically, that describes the characteristics, origins, usage and validity of other electronic evidence. There are all kinds of metadata found in various places in different forms. Some is supplied by the user, and some is created

by the system. Some is crucial evidence, and some is just digital clutter. You will never face the question of whether a file has metadata—all active files do. Instead, the issues are what *kinds* of metadata exist, *where* it resides and whether it's potentially *relevant* such that it must be preserved and produced. Understanding the difference--knowing what metadata exists and what evidentiary significance it holds--is an essential skill for attorneys dealing with electronic discovery.

The most important distinction is between *application metadata* and *system metadata*. The former is used by an application like Microsoft Word to embed tracked changes and commentary. Unless redacted, this data accompanies native production (that is, production in the form in which a file was created, used and stored by its associated application); but for imaged production, you'll need to insure that application metadata is made visible before imaging.

System metadata is information like a file's name, size, location, and modification date that a computer's file system uses to track and deploy stored data. Unlike application metadata, computers store system metadata outside the file. It's information essential to searching and sorting voluminous data and therefore it should be routinely preserved and produced.

Try to get your opponent to agree on the metadata fields to be preserved and produced, and be sure your opponent understands the ways in which improper examination and collection methods corrupt metadata values. Also discuss how the parties will approach the redaction of metadata holding privileged content.

11. What are the defendant's data retention policies and practices?

A retention policy might fairly be called a destruction plan, and there's always a gap—sometimes a chasm—between an ESI retention policy and reality. The more onerous the policy, the greater ingenuity employees bring to its evasion to hang on to their e-mail and documents. Consequently, you can't trust a statement that ESI doesn't exist simply because a policy says it *should* be gone.

Telling examples are e-mail and back up tapes. When a corporate e-mail system imposes an onerous purge policy, employees find ways to store messages on, e.g., local hard drives, thumb drives and personal accounts. Gone from the e-mail server rarely means gone for good. Moreover, even companies that are diligent about rotating their backup tapes and that regularly overwrite old contents with new may retain complete sets of backup tapes at regular intervals. They also fail to discard obsolete tape formats when they adopt newer formats.

To meet their discovery obligations, the defendant may need to modify or suspend certain data retention practices. Discuss what they are doing and whether they will, as needed, agree to pull tapes from rotation or modify purge settings.

12. Are there legacy systems to be addressed?

Like legacy back up tapes, old computers and servers tend to stick around even if they've fallen off the defendant's radar. You should discuss whether potentially relevant legacy systems exist and how they will be identified and processed. Likewise, you may need to

address what happens when a key custodian departs. Will the system be re-assigned, and if so, what steps will be taken to preserve potentially relevant ESI?

13. What are the current and prior e-mail applications?

E-mail systems are Grand Central Station for ESI. Understanding an opponent's current e-mail system and other systems used in the relevant past is key to understanding where evidence resides and how it can be identified and preserved. Corporate e-mail systems tend to split between the predominant Microsoft Exchange Server software tied to the Microsoft Outlook e-mail client on user's machines and Lotus' Domino mail server accessed by the Lotus Notes e-mail client application. A changeover from an old system to a new system, or even from an old e-mail client to a new one, can result in a large volume of "orphaned" e-mail an opponent may fail to search.

14. Are personal e-mail accounts and computer systems involved?

Those who work from home, out on the road or from abroad may use personal e-mail accounts for business or store relevant ESI on their home or laptop machines. Parties should address the potential for relevant ESI to reside on personal and portable machines and agree upon steps to be taken to preserve and produce that data.

15. What electronic formats are common and in what anticipated volumes?

Making the right choices about how to preserve, search, produce and review ESI depends upon the forms and volume of data. Producing a Word document as a TIFF image may be acceptable where producing a native voice mail format as a TIFF is inconceivable. It's difficult to designate suitable forms for production of ESI when you don't know its native forms. Moreover, the tool you'll employ to review millions of e-mails is likely much different than the tool you'll use for thousands. If your opponent has no idea how much data they have or the forms it takes, encourage or compel them to use sampling of representative custodians to perform a "data biopsy" and gain insight into their collection.

16. How will we handle voice mail, instant messaging and other challenging ESI?

Producing parties routinely ignore short-lived electronic evidence like voice mail and instant messaging by acting too late to preserve it or deciding that the retention burden outweighs any benefit. Though it's not especially challenging to preserve voice mail or IM logs if one acts swiftly, defendants tend to demand a particularized need before they'll do so. *When it's relevant*, will the other side archive voice mail messages or activate local logging or packet capture of IM traffic?

17. What relevant databases exist and how will their contents be discovered?

From R&D to HR and from finance to the factory floor, businesses run on databases. When they hold relevant evidence, you'll need to know the platform (e.g., SQL, Oracle, SAP, Documentum) and how the data's structured before proposing sensible ways to preserve and produce it. Options include running agreed queries, exporting relevant data to standard formats like Access databases or XML or even mirroring the entire contents to a review environment.

Because databases are always changing, Michael Arkfeld, author of the respected treatise "Arkfeld on Electronic Discovery and Evidence"⁵ cautions that both sides need to be working from the same database, asking, "Does the database ESI have a concrete beginning or ending date or is it a "rolling" database where data's added and deleted on a continuous basis?"

Database discovery is challenging and contentious, so know what you need and articulate why and how you need it. Be prepared to propose reasonable solutions that won't unduly disrupt operations.

18. Will paper documents be scanned, with what resolution, OCR and metadata?

Paper is still with us and ideally joins the deluge of ESI in ways that make it electronically searchable. Though parties are not obliged to convert paper to electronic forms, they commonly do so by scanning, coding and use of Optical Character Recognition (OCR). You'll want to insure that paper documents are scanned so as to be legible and suited to OCR and are accompanied by information about their source (custodian, location, container, etc.).

19. Are there privilege issues unique to ESI?

Discussing privilege at meet and confer entails more than just agreeing to return items that slip through the net. It's important to surface practices that overreach. If the other side uses keywords to sidetrack potentially privileged ESI, are search terms absurdly overbroad? Simply because a document has the word "law" or "legal" in it or was copied to someone in the legal department doesn't justify its languishing in privilege purgatory. When automated mechanisms replace professional judgment concerning the privileged character of ESI, those mechanisms must be closely scrutinized and challenged when flawed. Asserting privilege is a *privilege* that should be narrowly construed to protect either genuinely confidential communications exchanged for the purpose of seeking or receiving legal counsel or the thinking and strategy of counsel. Moreover, even documents with privileged content may contain non-privileged material that should be parsed and produced. All the messages in a long thread aren't necessarily privileged because a lawyer got copied on the last one.⁶

20. What search techniques will be used to identify responsive or privileged ESI?

Transparency of process is vitally important with respect to the mechanisms of automated search and filtering employed to identify or exclude information, yet opponents may resist sharing these details, characterizing it as work product. The terms and techniques facilitating an attorney's assessment of a case are protected, but search and filtering mechanisms that effectively eliminate the exercise of attorney judgment by excluding data as irrelevant should be disclosed so that they may be tested and, if flawed, challenged. Likewise, if the defendant uses mechanized search to segregate data as privileged, plaintiffs should be made privy to same in case it is inappropriately exclusive, though here, redaction may be appropriate to shield searches tending to reveal privileged information.

21. If keyword searching is contemplated, can the parties agree on keywords?

If you've been to Las Vegas, you know Keno, that game where you pick the numbers, and if enough of your picks light up on the board, you win. Keyword searching ESI is like that. The

other side has you pick keywords and then goes off somewhere to run them. Later, they tell you they looked through the matches and, sorry, you didn't win. As a consolation prize, you may get the home game: a million jumbled images of non-searchable nonsense.

Perhaps because it performs so well in the regimented setting of online legal research, lawyers and judges invest too much confidence in keyword search. It's a seductively simple proposition: pick the words most likely to uniquely appear in responsive documents and then review for relevance and privilege just those documents containing the key words. But according to Jason Baron, Director of Litigation at the National Archives

Never allow opposing counsel to position keyword search as a single shot in the dark. You must be afforded the opportunity to use information gleaned from the first or subsequent efforts to narrow and target succeeding searches.

and Records Administration, "Lawyers are waking up to the fact that keyword searching is subject to profound limitations in terms of accuracy and results."⁷ Thanks to, e.g., misspellings, acronyms, synonyms, IM-speak, noise words, OCR errors and the peculiar "insider" lingo of colleagues, companies and industries, keyword search performs far below most lawyers' expectations, finding perhaps 20% of responsive material on first pass.⁸

Under the rubric of "concept search," technologies employing Google-like analysis are improving both the precision and recall of electronic search, but Baron cautions, "Despite the hype, artificial intelligence, data mining, and content analytics is just not sufficiently advanced to ensure that substantially all relevant documents in a large collection of ESI will be found."⁹ Warts and all, keyword search remains the most common method employed to tackle large volumes of ESI, and a method still enjoying considerable favor with courts.

Baron notes that "keyword searches--indeed, any form of searching--is more effective when employed in an iterative way, as part of a cooperative and informed process."¹⁰ In other words, never allow your opponent to position keyword search as a single shot in the dark. You must be afforded the opportunity to use information gleaned from the first or subsequent effort to narrow and target succeeding searches. The earliest searches are best used to acquaint both sides with the argot of the case. What shorthand references and acronyms did they use? Were products searched by their trade or technical names?"

Collaborating on search terms is optimum, but a requesting party must be wary of an opponent who, despite enjoying superior access to and understanding of its own business data, abdicates its obligation to identify responsive information. Beware of an invitation to "give us your search terms" if the plan is to review only documents "hit" by your terms and ignore the rest.

22. How will de-duplication be handled, and will data be re-populated for production?

ESI, especially e-mail, is characterized by enormous repetition. A message may appear in the mail boxes of thousands of custodians or be replicated dozens or hundreds of times through periodic back up. De-duplication is the process by which identical items are reduced to a single instance for purposes of review. De-duplication can be *vertical*, meaning the

elimination of duplicates within a single custodian's collection, or *horizontal*, where identical items of multiple custodians are reduced to single instances. If production will be made on a custodial basis—and depending upon the review platform employed—it may be desirable to request re-population of content de-duplicated horizontally so each custodian's collection is complete.

23. What forms of production are offered or sought?

Notably, the 2006 Federal Rules amendments gave requesting parties the right to designate the form or forms in which ESI is to be produced. A responding party may object to producing the designated form or forms, but if the parties don't subsequently agree and the court doesn't order the use of particular forms, the responding party must produce ESI as it is ordinarily maintained or in a form that is reasonably usable. Moreover, responding parties may not simply dump other forms on the requesting party, but must disclose the other forms before making production so as to afford the requesting party the opportunity to ask the court to compel production in the designated form or forms.¹¹

Options for forms of production include native file format, quasi-native forms (e.g., a partial export of data from a database), imaged production (PDF or, more commonly, TIFF images accompanied by load files containing searchable text and metadata), hosted (online) production and even paper printouts for small collections. It is not necessary—and rarely advisable—to employ a single form of production for all items; instead, tailor the form to the data in a *hybrid* production. TIFF and load files may suffice for simple textual content like e-mail or word processed documents, but native forms are best for spreadsheets and essential for audio and video. Quasi-native forms are well-suited to e-mail and databases.

A requesting party uncertain of what he needs plays into the other side's hands. You must be able to articulate both what you seek *and the form in which you seek it*. The native forms of ESI dictate the optimum forms for its production, but rarely is there just one option. The alternatives entail trade offs, typically sacrificing utility of electronic information to make it function more like paper documents. Before asking for anything, know how you'll house, review and use it. That means "know your review platform."¹² That is, know the needs and capabilities of the applications or tools you'll employ to index, sort, search and access electronic evidence.

24. How will you handle redaction of privileged, irrelevant or confidential content?

Defendants often seek to redact ESI in the way they once redacted paper documents: by blacking out text. To make that possible, ESI are converted to non-searchable TIFF images in a process that destroys electronic searchability. So after redaction, electronic searchability must be restored by using OCR to extract text from the TIFF image.

A TIFF-OCR redaction method works reasonably well for text documents, but it fails miserably applied to complex and dynamic documents like spreadsheets and databases. Unlike text, you can't spell check numbers, so the inevitable errors introduced by OCR make it impossible to have confidence in numeric content or reliably search the data. Moreover, converting a spreadsheet to a TIFF image strips away its essential functionality by jettisoning the underlying formulae that distinguishes a spreadsheet from a table.

For common productivity applications like Adobe Acrobat and Microsoft Office, it's now feasible and cost-effective to redact natively so as to preserve the integrity and searchability of evidence; consequently, where it's important to preserve the integrity and searchability of redacted documents, you should determine what redaction methods are contemplated and seek to agree upon methods best suited to the task.

25. Will load files accompany document images, and how will they be populated?

Converting ESI to TIFF images strips the evidence of its electronic searchability and metadata. Accordingly, load files accompany TIFF image productions to hold searchable text and selected metadata. Load files are constructed of delimited text, meaning that values in each row of data follow a rigid sequence and are separated by characters like commas, tabs or quotation marks. Using load files entails negotiating their organization or agreeing to employ a structure geared to review software such as CT Summation or LexisNexis Concordance.

26. How will the parties approach file naming and Bates numbering?

It's common for file names to change to facilitate unique identification when ESI is processed for review and production. Assigned names may reflect, e.g., unique values derived from a data fingerprinting process called hashing or contain sequential control numbers tied to a project management database. Native productions don't lend themselves to conventional paged formats, so aren't suited to Bates numbering.

27. What ESI will be claimed as not reasonably accessible, and on what bases?

Pursuant to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure, a litigant must show good cause to discover ESI that is "not reasonably accessible," but the burden of proving a claim of inaccessibility lies with the party resisting discovery. So it's important that your opponent identify the ESI it claims is not reasonably accessible and furnish sufficient information about that claim to enable you to gauge its merit.

Michael Arkfeld warns that, "Some defense attorneys take the position that additional burden or cost associated with any ESI makes it 'not reasonably accessible' and the requesting party must pay for its production." Arkfeld agrees that's a misinterpretation, but one that can prevail when parties or the court don't make the effort to understand the amended rule.

The meet-and-confer session is an opportune time to resolve inaccessibility claims without court intervention--to secure a commitment that the information at issue will be preserved.

The meet and confer is an opportune time to resolve inaccessibility claims without court intervention—to work out sampling protocols, cost sharing and filtering strategies—or when agreements can't be reached, at least secure commitments that the disputed data will be preserved long enough to permit the court to resolve issues.

28. Can costs be minimized by shared providers, neutral experts or special masters?

Significant savings may flow from sharing costs of e-discovery service providers and online repositories, or by eliminating dueling experts in favor of a single neutral expert for thorny e-discovery issues or computer forensics. Additionally, referral of issues to a well-qualified ESI Special Master can afford the parties speedier resolution and more deliberate assessment of technical issues than a busy docket allows.

Endgame: Transparency of Process and Collaboration

Courts and commentators uniformly cite the necessity for transparency and collaboration in electronic discovery, but old habits die hard. Too many treat meet and confer as a perfunctory exercise, reluctant to offer a peek behind the curtain. Some are paying dearly for their intransigence, sanctioned for obstructive conduct or condemned to spend obscene sums chasing data that might never have been sought had there been communication and candor.¹³ Others are paying attention and have begun to understand that candor and cooperation in e-discovery isn't a sign of weakness, but a hallmark of professionalism.

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The outsize cost and complexity of e-discovery will diminish as electronic records management improves and ESI procedures become standardized, but the meet and confer process is likely to endure and grow within federal and state procedure. Accordingly, learning to navigate meet and confer—to consistently ask the right questions and be ready with the right answers—is an essential advocacy skill.

¹ The Fed. R. Civ. P. 26(f) conference must occur “as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)....”

² *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2006) details some of counsel's duties under Fed. R. Civ. P. 26(f):

“[C]ounsel have a duty to take the initiative in meeting and conferring to plan for appropriate discovery of electronically stored information at the commencement of any case in which electronic records will be sought....At a minimum, they should discuss: the type of information technology systems in use and the persons most knowledgeable in their operation; preservation of electronically stored information that may be relevant to the litigation; the scope of the electronic records sought (i.e. e-mail, voice mail, archived data, back-up or disaster recovery data, laptops, personal computers, PDA's, deleted data) the format in which production will occur (will records be produced in “native” or searchable format, or image only; is metadata sought); whether the requesting party seeks to conduct any testing or sampling of the producing party's IT system; the burdens and expenses that the producing party will face based on the Rule 26(b)(2) factors, and how they may be reduced (i.e. limiting the time period for which discovery is sought, limiting the amount of hours the producing party must spend searching, compiling and reviewing electronic records, using sampling to search, rather than searching all records, shifting to the producing party some of the production costs); the amount of pre-production privilege review that is reasonable for the producing party to undertake, and measures to preserve post-production assertion of privilege within a reasonable time; and any protective orders or confidentiality orders that should be in place regarding who may have access to information that is produced.”

³ Noted e-discovery commentator Thomas Allman, a founding member of the Sedona Conference and co-chair the E-Discovery Committee of the Lawyers for Civil Justice, reports that seven states that have adopted e-discovery rules hewing closely to the Fed. R. Civ. P. (Louisiana, Minnesota, Montana, New Jersey, Utah,

Arizona and Indiana). Allman notes another 14 states are considering changes to their court rules to address e-discovery (Alaska, Connecticut, Florida, Illinois, Iowa, Kansas, Maryland, Nebraska, New Mexico, North Dakota, Ohio, Tennessee, Virginia and Washington). See Brett Burney, *Mining E-Discovery Stateside*, Law Technology News (January 18, 2008).

⁴ See, e.g., Conference of Chief Justices, *Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information*, Section 3 (2006), stating that a judge should “encourage” counsel to meet and confer in an effort to agree on e-discovery issues and to exchange information, *inter alia*:

- (1) A list of the person(s) most knowledgeable about the relevant computer system(s) or network(s), the storage and retrieval of electronically-stored information, and the backup, archiving, retention, and routine destruction of electronically-stored information, together with pertinent contact information and a brief description of each person’s responsibilities;
- (2) A list of the most likely custodian(s), other than the party, of relevant electronic data, together with pertinent contact information, a brief description of each custodian’s responsibilities, and a description of the electronically-stored information in each custodian’s possession, custody, or control;
- (3) A list of each electronic system that may contain relevant electronically-stored information and each potentially relevant electronic system that was operating during the time periods relevant to the matters in dispute, together with a general description of each system;
- (4) An indication whether relevant electronically-stored information may be of limited accessibility or duration of existence (e.g., because they are stored on media, systems, or formats no longer in use, because it is subject to destruction in the routine course of business, or because retrieval may be very costly);
- (5) A list of relevant electronically-stored information that has been stored offsite or off-system;
- (6) A description of any efforts undertaken, to date, to preserve relevant electronically-stored information, including any suspension of regular document destruction, removal of computer media with relevant information from its operational environment and placing it in secure storage for access during litigation, or the making of forensic image back-ups of such computer media;
- (7) The form of production preferred by the party; and
- (8) Notice of any known problems reasonably anticipated to arise in connection with compliance with e-discovery requests, including any limitations on search efforts considered to be burdensome or oppressive or unreasonably expensive, the need for any shifting or allocation of costs, the identification of potentially relevant data that is likely to be destroyed or altered in the normal course of operations or pursuant to the party’s document retention policy.

⁵ Michael R Arkfeld, *Arkfeld on Electronic Discovery and Evidence* (2nd Ed. 2007); <http://www.lexisnexis.com/arkfeld/>

⁶ See, e.g., *Muro v. Target Corporation*, 243 F.R.D. 301 (N.D. Ill. June 7, 2007) and *In re Vioxx Products Liability Litigation*, 501 F. Supp. 789 (E.D. La. Sept. 4, 2007)

⁷ Mr. Baron should know, as he is Editor in Chief of The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (2007) and also responsible for searching through 20 million White House presidential emails in response to massive discovery in the *U.S. v. Philip Morris* tobacco litigation.

⁸ See, e.g., The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (2007) (describing the famous Blair and Maron study, which demonstrated the significant gap between the assumptions of lawyers that they would find 75% of the total universe of relevant documents, versus the reality that they had in fact found only 20% of the total relevant documents in a 40,000 document collection).

⁹ Influential Magistrate, Judge John Facciola, mentions concept search in his opinion in *Disability Rights Council of Greater Washington, et. al, v Washington Metropolitan Transit Authority, et. al.* 2007 U.S. Dist. Lexis 39605, citing, George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?* 13 Rich. J.L. & Tech. 10 (2007).

¹⁰ See, e.g., Paul, George L. and Jason R. Baron, "Information Inflation: Can The Legal System Cope?," 13 Richmond Journal of Law and Technology (2006), <http://law.richmond.edu/jolt/v13i2/article11.pdf>. See also, The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production, Comment 11.a (The Sedona Conference@Working Group Series, 2007), available at www.thosedonaconference.org.

¹¹ Fed. R. Civ. P. 34(b)

¹² If a question about your review platform gives you that deer-in-headlights look, you're probably not ready for meet and confer. Even if you're determined to look at every page of every item they produce, you'll still need a system to view, search and manage electronic information. If you wait until the data start rolling in to pick your platform, you're likely to get ESI in forms you can't use, meaning you'll have to expend time and money to convert them. Knowing your intended platform allows you to designate proper load file formats and determine if you can handle native production.

Choosing the right review platform for your practice requires understanding your work flow, your people, the way you'll search ESI and the forms in which the ESI will be produced. A platform geared to review of ESI in native formats must be able to open the various types of data received without corrupting its content or metadata. ESI can be like Russian nesting dolls in that a compressed backup file (.BKF) may hold an encrypted Outlook e-mail container (.PST) that houses a message transmitting a compressed archive (.ZIP) attachment containing an Adobe portable document (.PDF). Clearly, a review platform needs to be able to access the textual content of compressed and proprietary formats and drill down or "recurse" through all the nested levels.

There are many review platforms on the market, including the familiar Concordance and Summation applications, Internet-accessible hosted review environments and proprietary platforms marketed by e-discovery service providers touting more bells and whistles than a Mardi Gras parade.

Review platforms can be cost-prohibitive for some practitioners. If you don't currently have one in-house, your case may warrant hiring a vendor offering a hosted platform suited to the ESI. When tight budgets make even that infeasible, employ whatever productivity tools you can cobble together on a shoestring. You may have to forego the richer content of native production in favor of paper-like forms such as Tagged Image File Format (TIFF) images because you can view them in a web browser.

13 Courts have sanctioned ESI discovery abuse for actions characterized as intentional deception: *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008); gross negligence: *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 2135798 (S.D.N.Y. Aug. 1, 2006); "reckless disregard:" *United Med. Supply Co., Inc. v. United States*, 77 Fed. Cl. 257 (2007); "purposeful sluggishness:" *In re Seroquel Prods. Liab. Litig.*, 2007 WL 2412946 (M.D. Fla. Aug. 21, 2007); "foot dragging:" *Toussie v. County of Suffolk*, 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007) and negligence: *Finley v. Hartford Life and Acc. Ins. Co.*, 2008 WL 509084 (N.D. Cal. Feb. 22, 2008). Increasingly, courts regard the duty to preserve and produce ESI as one mutually shared by client and counsel, and refuse to accept ignorance on either's part as an excuse. See, e.g., *Qualcomm Inc. and Phoenix Four, Inc.*