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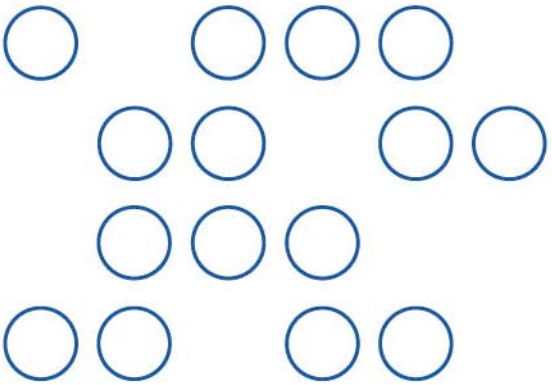
White Paper

One Hundred Days of Discovery

Preparing for the 26(f) Meet & Confer and Scheduling Conference



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Introduction

Newly elected public officials' first 100 days in office have become a traditional and popular performance benchmark. The results can foreshadow events for the remainder of the person's or party's term. In litigation, the first 100 days of discovery lay the foundation of the case, and may predict its course and even its outcome. This paper presents a 100 day road map for the Meet and Confer obligations under FRCP 26(f).

Background to the pending changes to the Federal Rules of Civil Procedure

In 1999, the Civil Rules Advisory Committee undertook a five-year project to answer the following questions:

- What are the differences between paper and electronic documents?
- Do these differences create problems that can or should be addressed by changes to the Federal Rules of Civil Procedure (FRCP)?
- If there are problems that rulemaking can address, what rules can be crafted to suit that purpose?

The Committee was particularly mindful of inconsistent decisions, development of state versions of law and guidelines, and a general confusion on how to properly confront the following five technical challenges:

- Replication (multiple copies of the same document)
- Electronic communications
- Digital information that defies deletion
- Unseen and hidden Electronically Stored Information (ESI)
- Legacy data (backup tapes, difficult-to-access and recover digital media)

Properly addressing each of these technical aspects of ESI requires significant resource and time commitments at the first notice of litigation. Despite the fact that technology has created many extraordinary efficiencies and business advantages, it simultaneously increases the scope, complexity, and costs of litigation. As judges become increasingly educated about these issues, and with the helpful prodding of the newly revised FRCP and aggressive opposing attorneys, attorneys must be proactive in anticipating and preparing for negotiations. While the addition of a new provision (FRCP 26(f)) addresses the topic of electronic discovery generally, it does not discuss the preparatory information required to competently and fully meet counsel's discovery obligations.

This paper addresses the complexities created by the new Federal Rule 26(f) (the Meet and Confer), with a particular focus on defining the steps required of counsel and client. Because ESI presents unusually difficult challenges, counsel must actively confront technical, legal, and logistical issues from the moment of the complaint filing. These issues can be addressed in a staged approach in the context of the litigation lifecycle. In the absence of this ordered approach, preservation steps can be missed (resulting in the loss of important emails), cost evaluations may be based upon inaccurate information, and strategic decisions may be mishandled. The resulting risks are spoliation and malpractice claims.

According to Judge Lee H. Rosenthal,

> *"The new amendments that provoked the least controversy, the expansion of the Meet and Confer under Rule 26(f) and the initial conference with the court under Rule 16, may turn out to be the most important. The amended Meet and Confer requirements serve crucial purposes: to identify potential problems early in litigation and to establish workable electronic discovery protocols. Courts are already expecting parties to come to the Meet and Confer prepared to discuss the details of electronic discovery and can be demanding in what they require counsel to know."*

Lee H. Rosenthal, A Few Thoughts on Electronic Discovery After December 1, 2006, 116 YALE L.J. POCKET PART 167 (2006), http://thepocketpart.org/2006/11/30/rosenthal.html

In much the same way as an attorney might map claims and defenses, the legal team must approach discovery with similar attention, identifying primary issues and prioritizing steps necessary to meet deadlines. This paper divides the first 100 days of discovery into four stages. Each stage references the critical steps appropriate to the stage, and all steps are designed with the goal of preparing client and counsel to competently address issues of cost and strategy at the 26(f) Meet and Confer.

Initiation of Litigation: Day 1-10

- Review Complaint; 26(a) Required disclosures; document requests
  - The amendment to Rule 26(a) clarifies that initial mandatory disclosures also include ESI, and requires a party to disclose ESI that the party may use in support of any claim or defense thus creating an affirmative obligation to disclose.

- Client Meeting: preservation
  - Most jurisdictions impose the duty to preserve documents at the moment counsel can reasonably anticipate litigation. In practical terms, this means that counsel must have a face-to-face meeting with their client's corporate legal department and their client's information technology staff about both high-level and granular topics relating to digital communications, systems, and networking issues. Factors requiring attention include the client's policies and procedures that govern the retention and destruction of documents potentially relevant to the litigation. The Comments in the newly revised Federal Rules state that the preservation obligation may be broader than the production obligation. Therefore, even where there may not be a duty to produce information deemed "inaccessible" (i.e., hard to access and restore) under Rule 26 of the new Federal Rules, there may still be an obligation to set such information and media aside for review at a later date.

- Issue litigation hold to client
  - Electronic discovery can be frustrating because the collection of information potentially responsive to a request can seem limitless. It is not sufficient to identify only paper documents or bankers boxes. The preservation notice or litigation hold must include both paper and ESI, which may be located in a variety of places, including, but not limited to:
    - Laptops
    - Servers
    - Backup tapes
    - Mobile devices
    - Outsourced data application systems

- Intervene in client's routine operation (establish Rule 37(f) good faith)
  - Rule 37(f) was intended to provide limited protection to companies during the time period when litigation may be pending or have commenced. It addresses the reality of computers and networked systems, by providing a limited "safe harbor" for clients who have taken all reasonable steps to protect potentially relevant electronically stored information. The Rule states:

    "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

  - Early and quick action to prevent relevant records from being destroyed is an essential step in the first stage of our Discovery Lifecycle.

- Identify types of files and locations most likely to contain discoverable information
  - List the types of information that may be relevant, a task no different from the approach taken in the discovery of paper documents stored in file cabinets. For instance, electronic files where responsive information is likely to be found may include the following:
    - E-mail messages
    - Attachments to e-mail messages
    - Reports
    - Studies
    - Memoranda
    - Financial data
    - Draft documents
    - Presentations
    - Databases
  - Please note that the list above is not exhaustive and that ESI may be stored in a variety of locations, such as laptop computers, wireless handheld devices, servers, backup tapes, CDs, and DVDs. Locations vary with each enterprise.

- Determine cost of preservation
  - The cost of preserving ESI will vary from case to case. An early cost analysis is critical. For example, limiting or stopping tape recycling can have a substantial impact on the business operation.

- Identify "not reasonably accessible" ESI
  - Being aware of the types of ESI is not enough. Courts now distinguish between reasonably accessible (usually active) information, and not reasonably accessible (usually inactive) information. Information identified as not reasonably accessible is difficult to identify, search, and review, and thus may be unreasonably costly to obtain. Burden and the cost issues associated with inaccessible or hard to locate information were the primary driver for the amendments to Rule 26. Understanding and identifying not reasonably accessible ESI is essential to negotiating burden (cost) shifting or sharing at the Meet and Confer.

- Designate technical authority
  - In addition to the legal obligations, there exist multiple strategic, technical, and project management issues which must be addressed in a timely and competent fashion. The people responsible for technology issues have crucial duties. Discovery obligations belong to both the client and client's counsel. Choosing the right individual(s) or entity with the critical mix of skills and resources is a fundamental decision because the results of that decision are far reaching and counsel may be held responsible for those results. For example, in the highly publicized Morgan Stanley discovery sanctions case, the financial management firm suggested a legal malpractice claim against its outside counsel, primarily because of the discovery issues. Certain States have issued default local standards for electronic discovery. In May 2004, the United States District Court for the District of Delaware issued its "Default Standard for the Discovery of Electronic Documents", which includes provisions for the appointment of an e-Discovery liaison. Erroneous downstream discovery decisions might result in adverse rulings that will undercut the substantive merits of the case. Outside and corporate counsel must designate a team of people well versed in law and technology to be responsible for matter management. Courts increasingly see these roles as critical in order to handle electronic discovery properly.

- Issue preservation notices to opposing counsel
  - When dealing with the opposing party, blanket preservation notices are unlikely to result in success. Specificity is the key. Send explicitly descriptive notices to opposing counsel detailing the ESI to be preserved, and the

expected steps to be taken to ensure its preservation. Specificity is especially important if preservation will require unusual technical procedures. Courts do not routinely require responding parties to take heroic measures without a reason to know such measures are necessary.

After meeting with the legal team and client, issuing preservation holds and notices, and dealing with the various issues raised during the first ten days, it's time to move to the second stage, General ESI Discovery.

General ESI Discovery: Day 10-30

In order to comply with discovery obligations, counsel must identify all information that might lead to the discovery of potentially relevant information; in effect, locating all the information that "touches" the matter. Unfortunately, the innate form and disorganized storage of electronic data does not mirror the requirements of discovery. File structures, e-mail databases, and multiple linkages make it extremely difficult to establish the boundaries of discoverable information. The challenge is to identify the intersection of data requests and the shifting nature of electronic documents. Called "mapping the problem," this involves delving into details of the matter and asking probing questions. This step is designed to help attorneys and the legal support staff identify the location and volume of the potentially relevant ESI and then formulate the proper responses. Attorneys must understand the client's electronic data organization and the policies in place which might impact discovery and, if missed, risk court sanctions. The Advisory Committee Notes acknowledge the differences in volume and complexity between paper and ESI, specifically the distinctions arising from multiple storage types and locations. The Notes to the new Federal Rules recognize the logistical and financial burdens associated with producing certain types of information stored in hard-to-access media that may be expensive to restore. In the absence of a court order or an agreement with the opposing side, therefore, a responding party need not produce information stored on media that it identifies as "not reasonably accessible." However, the party must still "identify, by category and type, the sources containing potentially responsive information that it is neither searching nor producing."

Here is a checklist for the second stage of discovery (day 10-30):

- Determine relevant ESI locations
  - Identify all the possible sources of ESI. This step is essential to meeting the burden of producing all information "reasonably calculated to lead to the discovery of admissible evidence."
- Identify operating systems
  - This information allows technical project professionals to determine locations of information, and the costs associated with procuring that information.
- Assess backup schedules
  - This step is essential to the client's duty to preserve all relevant information. Understanding the backup schedule is an initial and critical element to avoiding potential sanctions under Rule 37(f).
- Categorize data storage methods
  - Data storage methods provide keys to methods of collection and the location of potentially responsive business records.
- Determine key custodians
  - One of the most effective methods for keeping costs to the absolute minimum is using key search strategies such as searching for the information of key custodians, people with potential knowledge of the issues and facts in the case.

- Designate most knowledgeable individuals for the purposes of depositions
  - The use of depositions as an offensive strategy will likely increase. The technology deposition permits a requesting party to better understand and delve into the specific business retention policies and procedures used by the opponent. Appointing a qualified, experienced person as the deponent is an important first step.

- Understand production formats
  - Production formats are a key piece of the required subjects to be discussed at the Rule 26(f) Meet and Confer. Understanding the different production formats will produce agreements that are attuned to the realities of information technology, the current capabilities of the law firms and client, and the cost and strategy implications of each choice. Formats include TIFF, PDF, and Native. The production of metadata should be part of the format discussion.

- Consider online review options
  - Web based repository review systems can be a necessary alternative to on site review, particularly in multi-district litigation. Online review systems allow access to particular case content from remote locations anywhere in the world. Attorneys, paralegals, and information technology professionals in different locations can review, search, redact, and produce information via secure online systems.

- Obtain several vendor bids
  - Judge Shira Sheindlen, the noted author of the well known line of Zubulake decisions, suggested in a mock 26(f) seminar that the parties should consider procuring at least 2-3 vendor bids in anticipation of negotiating with the opposing party on costs and burdens of seeking accessible and inaccessible ESI.

- Develop cost scenarios
  - Cost scenarios for obtaining, culling, reviewing, and producing ESI are now a mandatory step of the e-Discovery process. Courts expect attorneys to do their homework and provide the financial information the court will need to make cost allocation decisions.

- Put in place chain of custody documentation
  - As attorneys and courts become more sophisticated, we can anticipate more aggressive tactics and challenges to a client's method of collecting, managing, and producing information originally created and maintained in electronic format. Tracking chain of custody is an essential element of protecting the information as potential evidence that may have to be authenticated at trial.

- Review spoliation issues; build spoliation defense
  - Preservation and chain of custody issues will often play out in the context of spoliation charges, and represent a significant hammer used by one side against another.

Specific ESI Assessment: Day 30-60

In this stage, the legal team should begin to review initial data sets to prepare more precise cost scenarios and better understand the nature and relevancy of the ESI identified as part of the initial 30 days. This stage is more granular and technical than previous strategic stages and is no less important. Stage three (30-60) will form the basis for arguments against or for burden sharing or shifting, relevancy and privilege discussions, and assessments as to the benefits of carrying out sampling strategies to reduce overall litigation costs:

- Determine best collection methods/personnel/vendor
  - The foundational work in the previous stage should offer a basis for choosing vendors, and endorsing its collection and processing methods.

- Collect hard drives, handhelds, backup tapes, other media
  - This step is best managed by an outside vendor if possible. Collection handled by the client invites challenges of bias and competency from the opposing party. The best way to avoid this thorny issue is by hiring an independent party capable of testifying as to the methodology employed.

- Identify key custodian media
  - It is the courts' role to ensure that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Identifying specific pieces of key custodian media is one way to meet this goal, together with using technology to identify users, files, and word threads likely to produce sources of responsive information.

- Identify and segregate duplicate emails and files
  - Industry estimates predict that duplicate information can reduce the total volume of electronic information by anywhere from 25% to 95% depending on the number of individuals involved in the collection and the nature of the information.

- Test search terms, sampling, and other culling strategies
  - Sampling is specifically referenced in the new FRCP because it is a useful tool in resolving discovery disputes. Failing to use sampling of users, subject areas, and file types, can substantially increase the amount of money spent on the case, and reduce the efficiency of the attorney reviewers.

- Review reports from initial culling work
  - Reports (often provided in easily readable and color coded spreadsheets) can be used to track the success of specific word lists, the progress of the processing itself, and the percentage of duplicate files identified and segregated on a user by user basis.

- Identify types of files
  - File types vary by operating system, which in turn vary from business to business. The nature of the litigation and the claims involved will often indicate that certain file types are more likely to provide relevant information than others.

Prepare for 26(f) Conference: Day 60-100

Rule 26(f) of the new FRCP requires that the parties to the litigation meet and confer in order to examine the issues relating to: (i) the disclosure or discovery of electronically stored information, including the form in which it should be produced; (ii) whether the parties can agree to terms that protect against privilege waiver during production; and (iii) the preservation of discoverable information including electronically stored information. The final steps prior to the 26(f) Meet and Confer focus on preservation, production, and privilege. Plaintiff's attorneys are now sending very comprehensive "pre-Meet and Confer" information requests and the courts expect the parties to come to the scheduling conference with agreed protocols. The following are key elements:

- Prepare and develop strategies for 26(f) Conference
  - Judges across the country have indicated that they will look poorly upon attorneys who have not prepared, or have improperly prepared, for both the 26(f) and the Rule 16 Scheduling conference. The best way to be successful at the 26(f) is preparing for negotiation with a comprehensive legal, strategic, tactical, and technology approach.

- Identify cost shifting issues and draft solutions
  - A proactive strategy that incorporates the information gathered in previous stages will facilitate aggressive negotiations on issues of cost and responsiveness.

- Understand document review capabilities of both sides
  - Law firms vary widely in their technology capabilities and requirements, and there is a wide disparity of resources available to leverage technology. Therefore, the transfer and review of produced ESI will most easily be accomplished when all participants have a full understanding of the capabilities of each party.

- Memorialize good faith activities
  - As implied in Rule 37(f), parties must take early action to preserve their clients' e-mail, business records, and other potentially relevant ESI. Memorializing such a ctivity may provide a good faith defense against spoliation charges and requested sanctions.

- Develop questionnaire for opposing side
  - Attorneys must understand the nature of their client's business records and communications relating to a particular case. In the same way, attorneys will likely want to better understand the opposing side's policies, procedures, and practices that may impact the preservation, maintenance, and production of relevant ESI.

- Determine strategies for protecting privilege
  - As the new rules indicate, parties must discuss issues of privilege at the 26(f) Meet and Confer. Developing s trategies that meet the demands of the litigation while preserving client confidences and privileges are an essential part of the first 100 days of discovery.

- Determine who will attend the 26(f) Conference:
  - Finally, it is becoming more common for information technology professionals and other knowledge specialists to accompany counsel and participate in the 26(f) Meet and Confer. The reason for this trend lies in the increasingly complex nature relating to the information sought. It is a rare attorney or paralegal who can appreciate all the complexities of ESI, and given the risks, many litigators require that competent subject matter professionals be an integral part of Rule 26(f) Conferences.

Effective and efficient preparation for the newly revised 26(f) Meet and Confer employs a forward thinking strategy that utilizes: (i) technology, (ii) individuals with technical knowledge and experience, and (iii) a systematic approach which marries the client's needs to the requirements of the FRCP.

This article is provided for educational and informational purposes only and is not intended and should not be construed as legal advice. Readers should seek their own advice and counsel if they have questions or concerns regarding the subject matter.

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