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BEST PRACTICES

IE Discovery's Stacy Jackson explains how to prepare for a Meet and Confer in order to minimize the risk of sanctions and significantly cut down on the time and money involved with discovery.

What Do You Need for an Initial Status Conference?



By STACY JACKSON

When the Federal Rules of Civil Procedure were revised in 2006, they naturally spurred a great deal of discussion among attorneys and their clients. At the time, though, a change to the rules calling for a prompt Meet and Confer among parties to litigation barely raised eyebrows.

This lack of attention to Rule 26(f) has been surprising, considering that the introduction of the Meet and Confer may be one of the most dramatic changes to the revised Federal Rules. Opposing counsel are now expected to arrive at the table to discuss, among other things, any issues regarding preserving discoverable information and to develop a proposed discovery plan.

Litigants who bungle the Meet and Confer and other aspects of e-discovery can face severe consequences—judges have been imposing sanctions on government agencies and companies that mismanage e-discovery. Additionally, in-house counsel are also being sanctioned for failing to preserve evidence. See *Swofford v. Eslinger*, M.D. Fla., No. 6:08-cv-00066-Orl-35DAB, 9/28/09.

However, those who are prepared for the initial status conference can minimize their risks of sanctions and significantly cut down on the time and money involved with discovery. To ensure that you can use the first 120 days of a lawsuit to your advantage, it's important to plan ahead and understand what is at stake.

A Six-Step Process

With newly compressed litigation time lines, attorneys need to be more organized and prepared than ever before. Back when nearly all potentially discoverable information was stored on paper, the demands were much different. Now, in a world where the amounts and types of data have exploded, the entire process has become much more difficult. Following these six steps can help you more thoroughly prepare to meet with opposing counsel.

The First Step: The Preservation Obligation Attaches. As soon as the lawsuit is filed, counsel must begin to review the client's document retention plan and litigation hold notices, assemble the rapid response team, locate relevant document custodians and business unit managers, send litigation hold notices, and suspend destruction policies as necessary.

The Second Step: Locate, Educate, and Assess. Next, begin interviewing document custodians and business unit managers and advise and educate them about legal hold compliance. Assess possible 30(b)(6) witnesses and determine the scope of the data at issue—what and how much? Judge Scheindlin has again stressed the litigation hold obligations in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Securities LLC*, No. 05 Civ. 9016 (SAS), S.D. N.Y., 1/15/10).

The Third Step: Collection. The method or methods of collection should be the next order of priority—determine who will collect the data, whether a third party or the document custodian. Additionally, address how you will handle duplicate data. Then determine the time and cost to collect. The collection must be prioritized, while the chain of custody is maintained at all times. Document collection procedures must be followed and documented, and the collection must be assessed for what is not there—that is, what has been subject to spoliation.

The Fourth Step: The Review. The time and cost of the restoration should be reviewed, and the data must be culled—processing files have to be removed and de-duplicated. Search terms, such as key words and date ranges, must be developed and agreed upon, and the culling and search term methodology has to be tested. Sample data should be taken while the litigation team reviews the data output and modifies and culls search terms as necessary. Then, counsel must test documents, culling, and sampling procedures.

At this point, you can begin to determine the time and cost of the review.

The Fifth Step: Strategy. Strategy becomes the next step—the litigation team must consider quick peeks or claw backs and cost-shifting arguments, whether offensive or defensive. Are there holes and flaws in the data? Has spoliation occurred? Special markings for data, such as “confidential,” must be considered.

At this step, you need to determine how to treat duplicates and how much to redact, as well as the forms of production. This is also the time to consider whether to have technical professionals attend the Meet and Confer.

The Sixth Step: The Meet and Confer. At this stage, the opposing sides need to agree on how to handle electronic data and discovery and file the Form 35, the discovery plan.

Certainly, this is a daunting task to tackle in 120 days—that's why it makes sense to manage many of these steps proactively before a lawsuit is filed. By preemptively reviewing and updating the client's litigation hold policies, clarifying back-up procedures, and creating a data map to determine where custodians fit into the organizational chart and what technology they have access to, you can save an enormous amount of time and stress once a lawsuit is filed.

The Iterative Approach. Considering the tight time frames involved, it's also worthwhile to consider an iterative approach to the first 120 days of e-discovery. With smaller cases or cases that are repetitive in nature, it might be possible to adopt a “one-stop shopping” approach. But for cases that are larger, more technical or high-profile, using a series of meetings for the Meet and Confer can be more productive and less overwhelming.

For example, in the first meeting, you can discuss preservation issues, the second meeting can deal with e-mail, the next one back-up tapes, and so on until you've had the opportunity to address all the issues of importance to both sides. An iterative approach allows you to deal in segments more thoroughly and to get educated in “installments,” rather than being overwhelmed by the entire process at once.

Cooperation and Competence

Regardless of the scope of the litigation or how your team approaches the Meet and Confer, you need to bring two very important items to the table: a spirit of cooperation and technical competence.

The idea of cooperating with, rather than confronting, opposing counsel requires a mind-shift for most attorneys. This tension comes from the basic nature of our legal system—clients are represented by attorneys who advocate for them; clients don't pay attorneys to help out opposing counsel. However, there is a growing belief that cooperation and zealous advocacy are not mutually exclusive. Not only do the Federal Rules require greater cooperation, but a cooperative approach would better serve clients.

In 2008, The Sedona Conference® issued its “Cooperation Proclamation,” aimed at getting counsel and judges to commit to a more collaborative and less confrontational approach to litigation. The proclamation's goal is to promote open and forthright information sharing, internal and external dialogue, training, and the development of practical tools to facilitate cooperative, collaborative, and transparent discovery. As of January, 45 states and federal judges have signed on to the proclamation. Even the Supreme Court is beginning to address the issue, as Justice Breyer has written the preface to The Sedona Conference's Journal on the Cooperation Proclamation.

Gamesmanship in the discovery process is not appreciated by the courts. In one recent case, *Clement v. Alegre*, 09 C.D.O.S. 12126, a California appeal court upheld a sanction of more than \$6,600 after finding that the plaintiffs in a property dispute had engaged in “gamesmanship” in a deliberate effort to bog down discovery.

“We have no difficulty in affirming the trial court’s determination that in this case plaintiffs forced to court a dispute that was not ‘genuine,’ ” Justice J. Anthony Kline wrote for San Francisco’s 1st District Court of Appeal. “Indeed, the record here strongly indicates that the purpose of plaintiffs’ objections was to delay discovery, to require defendants to incur potentially significant costs in redrafting interrogatories that were clear and that did not exceed numerical limits, and to generally obstruct the self-executing process of discovery.”

Perhaps the best guidance what to cover at the meet and confer comes from Judge Paul W. Grimm in *Man-cia v. Mayflower Textile Servs. Co.*, D. Md., Civil Action No. 1:08-CV-00273-CCB, 10/15/08). His detailed suggestions for what to cover at the Meet and Confer include a phased discovery process that produces the most promising, least burdensome, and least expensive data first.

Technical Competence

Along with a willingness to work cooperatively with opposing counsel, it’s critical for attorneys to be technically competent about e-discovery in order to manage the process in a timely, cost-efficient, and strategic way. Some experts believe that attorney incompetence when it comes to e-discovery is so widespread that it presents a massive ethical crisis across the entire legal profession.

In order to manage the first 120 days of litigation successfully, attorneys should understand basic technology requirements for how data is created, stored, and transmitted. They need to understand technology-related requests: the client’s e-mail system and the rules regarding it; how much e-mail the client has; what back-up system it uses; what is the best way to receive the discovery production; how to collect the data; how to produce the data; how to de-duplicate a search; and the most efficient and practical ways to search.

If you do not have basic understanding of any of these areas, it’s critical to get up to speed. You need to stay abreast of technology, so do your research, don’t be afraid to ask questions and, if necessary, go outside your legal department or organization to get the information you need.

The two questions you need to ask yourself are: (1) can I competently leverage technology to assist my client; and (2) are my knowledge, skills and abilities in relation to technology reasonable?

Preserving Evidence. Technical competence is also required in order to develop a plan to preserve electronic evidence throughout the e-discovery process, and that requires a basic knowledge about the various systems and data repositories throughout the client’s organization.

Often, a reliable network map is a good place to start, because such a map illustrates all the places from which you will be collecting data. A network map is a graphical representation of the location and flow of electronic data. If the client’s IT department and legal department don’t have one, you should make every effort to create one now, before the next big lawsuit is filed.

Not sure if it’s necessary? Consider the common discovery demand for “all e-mail from a particular employee.” Obviously, the first step is to “harvest” the active and archived e-mail files from the employee’s desktop computer. However, the employee’s e-mail can also reside on a laptop, home computer, PDA, e-mail server, back-up tapes of the e-mail server, removable media such as a CD Rom or USB, and multiple e-mail applications such as Yahoo! or Hotmail.

At a minimum you should know:

- The number of locations your client operates in;
- How many servers your client uses;
- Which servers support which application;
- The back-up tape rotation schedule of your client;
- Which back-up tape contains the data from which server;
- IT assets issued to each employee;
- The client’s IT compliance rules;
- The client’s document retention schedule and field implementation; and
- Whether the data is reasonably or not reasonably accessible?

There are other tasks to consider in the first 120 days, such as the processing, review and analysis. You won’t necessarily complete them all, but you need to at least start them in order to prepare for a quick peek or to gain enough information for the Meet and Confer.

Potential Cost Savings. The litigation process is enormously expensive for organizations, considering the volume of data and the costs of reviewing documents. According to one study, at companies with more than \$1 billion in annual revenue, 20 percent or more of litigation expenses went towards preproduction privilege review. Based upon our experience, that figure is low.

In order to cut down on the huge sums of money and time devoted to discovery, the first few months of a lawsuit are critical. By being prepared and ready at the Meet and Confer, you bring tactical and cost-savings advantages to your client. An unprepared legal team, on the other hand, can costs clients dearly in terms of money, time and opportunities wasted.

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