

How to Get a Favorable E-Discovery Outcome

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Understanding the Importance of the Rule 26(f) Conference

Adequate planning can go a long way toward positioning and protecting a party in a lawsuit, especially where it concerns e-discovery. Communication between parties early in litigation, therefore, is an important part of ensuring a client is covered. The Rule 26(f) conference is conducted before the Court issues its Case Management Order. At this conference, the parties discuss a number of issues that are relevant to the discovery process. Federal Rule of Civil Procedure 26(f) now requires attorneys to consider “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” during the pre-trial discovery conference. **Discovery Conference** Prior to the enactment of the rule, having discussions of e-discovery at the early stages of the litigation was not a traditional practice. Now, with the changes to Rule 26(f), discussions regarding e-discovery are a critical component of the discovery conference. At the outset of the case, attorneys need to think carefully regarding how to handle the Rule 26(f) conference in order to position their clients in a more favorable position in the litigation. **Six Issues to Consider** The commentary to Rule 26(f) notes a number of items that should be considered during the discovery conference. The parties may identify six areas of importance that will better assist them in preparing for and participating in the conference:

1. Time period for which discovery will be sought.
2. Various sources of information within a party’s control.
3. Whether a particular source of information is reasonably accessible.
4. The burden and cost of retrieving particular types of information.
5. [Issues related to preservation of information.](#)
6. Issues concerning assertions of privilege, including whether the parties can agree on a procedure for asserting claims of privilege or protection after production.

Steps to Protect Your Client After taking these factors into consideration and before the

conference, counsel should take the following additional steps to ensure that the client is adequately protected.

1. Verify that the litigation hold is in place and that the client is following the litigation hold appropriately.
2. Talk to the client's IT staff regarding the structure of their data architecture and where relevant electronically stored information (ESI) might be stored.
3. Work with the client to identify the key players to the litigation. It is not cost effective to do "global searches" for documents within a client's IT infrastructure.
4. Alternatively, it is much more efficient to identify the key players to the case and determine where those key players store their ESI.
5. Communicate in writing with opposing counsel that you would like opposing counsel to be prepared to discuss e-discovery issues including the opposing party's data infrastructure and relevant custodians to the case.

What to Discuss During the discovery conference, there a number of items that should be discussed and negotiated, including:

- The production format for documents. Consider whether production is going to take place in native format or in TIFF format. Also consider what type of metadata should be produced with the relevant types of ESI.
- Which vendors may be used to marshal and produce ESI in the case.
- Search methodologies that will be utilized to locate relevant ESI. In a document intensive case, counsel may consider using more innovative strategies like predictive coding. If an innovative search methodology is being utilized, it is very important to try to secure opposing counsel's agreement as to the methodology. If opposing counsel does not agree with the proposed search methodology, it may be necessary to consider filing a motion for protective order to ensure that the client's interest is adequately protected.

Finally, it is very important to try to secure an agreement (and ultimately court order) as to what should be done in the event of an inadvertent disclosure of privileged ESI. Clawback agreements should be negotiated early on in order to protect against an inadvertent waiver. Being adequately prepared for the Rule 26(f) conference now requires that counsel be aware of the e-discovery issues that could impact the case. Working with the client before the conference to understand the e-discovery issues in the case and cooperatively working with opposing counsel at the conference can help position your client more favorably in the litigation. Originally published on i-Sight.com's blog: "<http://i-sight.com/best-practice/how-to-get-a-favorable-e-discovery-outcome>."

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