

## Considering Meet and Confer? The Practical Application of Federal Rule 26(f)



# Considering Meet and Confer?

## An Overview of the Practical Application of Federal Rule 26(f)

- **Understanding** Meet and Confer
- **Understanding** Electronically Stored Information
- **Understanding** Electronic Discovery Tasks
- **Understanding** Meet and Confer Tasks
- **Translating Understanding into** Execution

# Understanding Meet and Confer

Developing a Baseline for Understanding

Drivers  
Dictionary  
Documentation

Definition

# Understanding Meet and Confer - Definition

## General Definition

meet and confer n. a requirement of courts that before certain types of motions and/or petitions will be heard by the judge, the lawyers (and sometimes their clients) must "meet and confer" to try to resolve the matter or at least determine the points of conflict. *Source: Law.com Dictionary*

## Characteristics

- Defining in Approach
- Collaborative in Nature
- Preparation Intensive
- Binding in Agreement

## Key Points

- Requirement
- Pre-Motion/Petition
- Meet to Determine and/Resolve Points of Conflict
- Objective of Accelerating Judicial Process

# Understanding Meet and Confer – Drivers in Relation To eDiscovery

## Federal Rules of Civil Procedure (FRCP) – Rule 16

- Rule 16(b) - parties must “meet and confer” at least 21 days before the scheduling conference which, in turn, must occur within 120 days of filing a lawsuit.
- Rule 16(b) - scheduling order must include “provisions for disclosure or discovery of electronically stored information (ESI).

## FRCP – Rule 26

- Rule 26(a) - explicitly defines ESI as discoverable.
- Rule 26(f) - mandates early meet-and-confer sessions specifically to resolve eDiscovery issues.
- Rule 26(b)(5) – addresses inadvertent production of privileged information during eDiscovery.
- Rule 26(b)(2) - provides guidance regarding claims that ESI is unduly burdensome to produce.

## FRCP – Rule 34

- Rule 34(a) – addresses the scope of ESI to include information type and location.
- Rule 34 (b) – addresses and provides guidance concerning the production of ESI.

## Key Points

- FRCP developed in 1938.
- FRCP comprised of 86 rules.
- FRCP Amendments on December 1, 2006 address ESI requirements.
- FRCP Rule 26(f) is the “center of gravity” for Meet and Confer.

# Understanding Meet and Confer - Documentation

## Form 35 – Report of Parties Planning Meeting

- Standardizes discovery agreements.
- Designed to avoid delays centered around discovery.
- Provides reminder/documentation of requirement to address ESI (Rule 26(f)).

## Meet and Confer Checklist Guide – Ten Considerations

*Recommended That Firms Develop Internal Checklist To Guide Meet and Confer Planning*

1. Preservation Practices
2. Scope of Discovery
3. Accessibility
4. Production of Metadata
5. Costs & Burdens
6. Forms of Production
7. Privilege Issues & Waiver
8. Variations from FRCP Rules
9. Inventory of Opponent's IT Infrastructure
10. Other Info that may be Important to eDiscovery

# Understanding Meet and Confer - Dictionary

## Need Agreed Upon ESI “Vocabulary”

- To ensure common understanding of ESI Terms.
- To serve as a reference point for clarification of ESI definition issues.
- To simplify and accelerate discussion during the 26(f) Meet and Confer Conference.

## Potential References for ESI Terms

- American Document Management Glossary of Terms  
<http://www.amdoc.com/glossary.php>
- Electronic Discovery Reference Model Glossary  
<http://www.edrm.net/wiki/index.php/Glossary>
- The Sedona Conference Glossary (2007)  
[http://www.thesedonaconference.org/content/miscFiles/TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf)

# Understanding Electronically Stored Information

Developing a Baseline for Understanding

Experts  
Estimation  
Examination

Elements



# Understanding Electronically Stored Information - Elements

## Definition of Electronically Stored Information

While not specifically defined in the FRCP, electronically stored information, or ESI, is defined in the November 2006 issue of The Third Branch (Newsletter of the Federal Courts) simply as "...all information in computers".

## Elements of ESI

- Data Structures - Structured | Unstructured
- Data Formats - Still Image | Moving Image | Sound | Textual | Web Archive | Generic
- Data Volume - Uncompressed | Compressed
- Data Security - Unencrypted | Encrypted
- Data States - Active | Static | Residual

## ESI Technology Focus Framework

- Creation - enables the creation of ESI.
- Connectivity - infrastructure that connects communication and storage nodes of ESI.
- Communication - enables the dissemination of and collaboration on ESI.
- Conduct (Management) – enables functional area management of ESI.

# Understanding Electronically Stored Information - Examination

What are the general categories of ESI in relation to ESI examination?

- Accessible\*: "Information deemed 'accessible' is stored in a readily usable format." (Zubulake)
- Unreasonably Accessible: Information not stored in a reasonable usable format.

What are the potential preservation and production implications of accessible/ unreasonably accessible ESI?

- Accessible - Need to preserve and to produce.
- Unreasonably Accessible - Need to preserve and understand requirements for production.

What electronic media may need to be examined for ESI\*?

- Active, Online Data (Typically Accessible)
- Nearline Data (Typically Accessible)
- Offline Storage/Archives (Sometimes Accessible, Sometimes Unreasonably Accessible)
- Backup Tapes (Typically Unreasonably Accessible – Sometimes Accessible)
- Erased, Fragmented, or Damaged Data (Typically Unreasonably Accessible)

\* *Continuum of Accessibility is not defined in the FRCP as it may change over time.*

# Understanding Electronically Stored Information - Experts

## Why the need for determining Meet and Confer eDiscovery experts?

- Allows for the selection of a primary eDiscovery advisor for the responsible attorney of record.
- Allows for the selection of an eDiscovery liaison to facilitate Meet and Confer coordination and communication.
- Allows for the proactive selection and training of Rule 30(b)(6) experts.

## Who might be selected as an eDiscovery expert/liaison?

- Attorney (In-House or Outside Counsel)
- Third Party Consultant
- Company/Organization Employee

## What are the typical characteristics of an expert eDiscovery liaison?

- Technical familiarity with party's electronic systems and capabilities.
- Technical understanding of eDiscovery.
- Familiarity with and ability to establish "chain of custody" for all ESI.
- Prepared to participate in eDiscovery dispute resolutions and litigation.

# Understanding Electronically Stored Information

What are some of the available tools for eDiscovery task estimation?

- Pages in a MB/GB e-Discovery Calculator - Lexbe  
<http://www.lexbe.com/hp/Pages-Megabyte-Gigabyte.aspx>
- eDiscovery Predictive Pricing Estimator (Volume, Time, Cost) OrangeLT®  
[http://orangelt.us/technology/pricing\\_estimator/](http://orangelt.us/technology/pricing_estimator/)
- Backup Tape Liability Management – Renew Data  
<http://www.renewdata.com/backup-tape-liability-calc.php>
- JurInnov Electronic Discovery Calculator  
[http://www.jurinnov.com/electronic\\_discovery\\_calculator/](http://www.jurinnov.com/electronic_discovery_calculator/)
- Exchange Related E-Discovery Cost Calculator – Mimosa Systems  
[http://www.mimosasystems.com/html/ediscovery\\_worksheet.htm](http://www.mimosasystems.com/html/ediscovery_worksheet.htm)

# Understanding Electronic Discovery Tasks

Developing a Baseline for Understanding

Collection  
Processing  
Review  
Analytics  
Production



# Understanding Electronic Discovery Tasks - Collection

## What is Collection?

The collection of data can be simply defined as the acquisition of potentially relevant electronically stored information (ESI) in the electronic discovery process.

## Key collection considerations:

- What is the scope of the data in question?
- What is the structure of the data?
- What is the format of the data?
- What is the state of the data?
- How does one "Connect" to the data?
- How does one get to Active State data?
- How does one maintain the Static State data?
- How much data will be acted upon?
- Is the data encrypted?
- What capabilities will be needed to display information?
- How will data reports and/or files be provided to requestor?
- How will the data be stored after being acted upon?

# Understanding Electronic Discovery Tasks - Analytics

## What is Analytics?

Analytics, in the realm of electronic discovery, is the leveraging of data through the use of a particular functional process to enable context-specific insight that is actionable.

## What are some of the key tasks in Analytics?

- Locating of data to be analyzed.
- Indexing of located data.
- Searching of indexed data.

# Understanding Electronic Discovery Tasks - Processing

## What is Processing?

Any operation or set of operations which is performed upon data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

## What are some of the key tasks in Processing?

- Chain of Custody Security and Tracking
- Data Staging
- Data Filtering
- Deduplication
- Metadata Extraction
- Full Text Extraction
- Exception Handling
- Data Conversion
- Load File Production



# Understanding Electronic Discovery Tasks - Review

## What is Review?

The culling process that produces a dataset of potentially responsive documents that are then examined and evaluated for a final selection of relevant and/or responsive documents and assertion of privilege, confidentiality, etc., as appropriate.

## What are the two major phases of electronic discovery document review?

- First Level Review
- Second Level Review

## Where does Review fit in the overall cost of eDiscovery?

Legal review of ESI remains the single most financially expensive portion of the electronic discovery process - in fact, depending on one's source of reference, the cost of review can comprise up to 80% of the total cost of eDiscovery.

# Understanding Electronic Discovery Tasks - Production

## What is Production?

The process of delivering to another party, or making available for that party's review, documents and/or ESI deemed responsive to a discovery request". In even simpler terms, "Production" can be understood as the "delivery of data or information in response to an interrogatory, subpoena or discovery order or a similar legal process.

## What are the typical Production Formats?

- Native Format
- Near Native Format
- Near Paper Format
- Paper Format

## What Are Some Of The Primary Drivers Of ESI Production?

- FRCP Rule 34(a) – addresses the scope of ESI to include information type and location.
- FRCP Rule 34 (b) – addresses and provides guidance concerning the production of ESI.

# Understanding Meet and Confer Tasks

Developing a Working Knowledge of Meet and Confer

Meeting  
Follow-Up  
Preparation

# Understanding Pre Meet and Confer Preparation

## Initiating Preservation

### Trigger: Reasonable Anticipation of Litigation

Zubalake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (Zubulake IV)

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

### Tasks: Logical Preservation Considerations

1. Document Data/Time/Reason for Trigger Event
2. Temporarily Suspend Document Destruction Policies
3. Meet with Litigation Hold Planning Team\* to Establish Litigation Hold Strategy
4. Review Document Retention Plan and Procedures
5. Review Litigation Hold Procedures
6. Identify Potentially Relevant Custodians (By Name and By Role)
7. Identify Legal And Technology Leads for Specific Litigation Hold Effort
8. Prepare and Disseminate Litigation Hold Letters to Relevant Custodians\*\* (Name/Role)
9. Adjust/Amend Document Destruction Policies as Appropriate
10. Follow Up with Potentially Relevant Custodians (Name/Role) to Confirm Understanding of Hold Letter

\* Minimum of Potential Matter Lead (Legal), eDiscovery Team Lead, IT Team Lead, Records Management Team Lead.

\*\* Send Copy To Opposing Counsel if Opposing Counsel Activated “Trigger”.

# Understanding Pre Meet and Confer Preparation

## Scoping Data and Resources

### Target: What data is to be preserved?

Zubulake IV, 220 F.R.D. at 217 - a party need not “preserve every shred of paper, every e-mail or electronic document, and every backup tape” before or during actual or threatened litigation.

Trevino, supra, 969 S.W.2d at 957 – a party must preserve “what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of pending discovery sanction.”

### Tasks: Logical Data Scoping and Resource Considerations

- Determine where the data to be preserved is located.
- Determine the size of the accessible volume of data to be preserved.
- Determine what resources may be needed to collect accessible data.
- Determine the need for access to inaccessible data.
- Estimate the potential resources that may be needed to collect inaccessible data.
- Determine who might be able to serve as a potential expert (– 30(b)(6) –) witness for the electronic discovery effort.

# Understanding Pre Meet and Confer Preparation

## Estimating Costs

Target: Understanding of Potential eDiscovery Costs in Terms of Time, Risk, and Money

Tasks: Logical eDiscovery Cost Planning Considerations

### *Time Considerations*

- Does it appear that opposing counsel has an evidential basis for pursuing the case?
- What type of electronic discovery resources will be needed to conduct a complete document review?
- Based on FRCP 26(f), what are the timeline requirements for "Meet and Confer" preparation?
- Based on potential evidence and resource requirements, will it be more cost effective to settle or pursue?

### *Risk Considerations*

- Will the electronic discovery approach reduce the risk of missing potentially responsive documents?
- Will the electronic discovery technologies used minimize risks associated with the transfer of data between organizations and platforms?
- Will the electronic discovery effort be conducted in a legally defensible manner?

### *Cost Considerations*

- Based on time requirements and acceptable risk, what is the best electronic discovery approach congruent with firm and client financial resources and cost management objectives?
- Do we have the electronic discovery systems and expertise in place to conduct the electronic discovery tasks using the best electronic discovery approach congruent with client financial and cost management objectives?

# Understanding Pre Meet and Confer Preparation

## Determining Plan/Proposal

Target: Develop a Recommended Discovery Plan for presentation to opposing counsel at the Meet and Confer Meeting.

Tasks: Logical Discovery Plan Preparation ( Requirements and Time/Risk/Cost Estimates )

### *Timing Considerations*

- Verify date/time of FRCP Rule 16(b) Scheduling Conference
- Coordinate with Opposing Counsel on date/time for Meet and Confer Conference\*

### *Plan/Proposal Considerations*

- Determine best case Discovery Plan (What would you like to do?)
- Determine most objective Discovery Plan (What would you expect to do?)
- Determine worst case Discovery Plan (What are your limits of plan acceptance?)

### *Document Considerations*

- Develop Form 35 "Drafts" for each Plan (Guidelines for Form 35 Completion/Negotiation)
- Prepare and Submit Disclosures as required by FRCP 26(a)

\* Required as soon as possible, NLT 21 days prior to Scheduling Conference (FRCP Rule 26 (f)(1)).

# Understanding Meet and Confer Tasks

## Meet and Confer Meeting

### *Preservation Considerations*

- Define/Determine Data Scope
- Define Accessible and Unreasonably Accessible Data
- Define/Determine Handling of Unreasonably Accessible Data

### *Electronic Discovery Issues*

- Determine Handling of Duplicates, Masters, and Attachments
- Determine Keyword Search Terms and Search Methodologies
- Determine Cost Shifting Approach

### *Production Considerations*

- Determine Production Formats
- Determine Production Priorities
- Determine Approach for Special Markings (Privacy Act, Confidential/Data Secret, Bates Schema)

### *Privilege Considerations*

- Determine Handling of Sensitive Data (Privacy Act, Confidential/Secret Data)
- Determine Need for Clawback Agreement
- Determine Need for Quick Peek Agreement



# Understanding Meet and Confer Tasks

## Post Meet and Confer Follow Up

### *Verify*

- Litigation Hold Compliance (Update and Audit)
- Keyword Searches (Test)

### *Document*

- Litigation Hold Efforts
- Complete Form 35
- Complete Proposed Scheduling Order (As Required By Court)

### *Report*

- Submit Form 35 To Court (Typically within 14 Days of Meet and Confer Conference)
- Submit Proposed Scheduling Order (As Required By Court)

# Translating Understanding into Execution

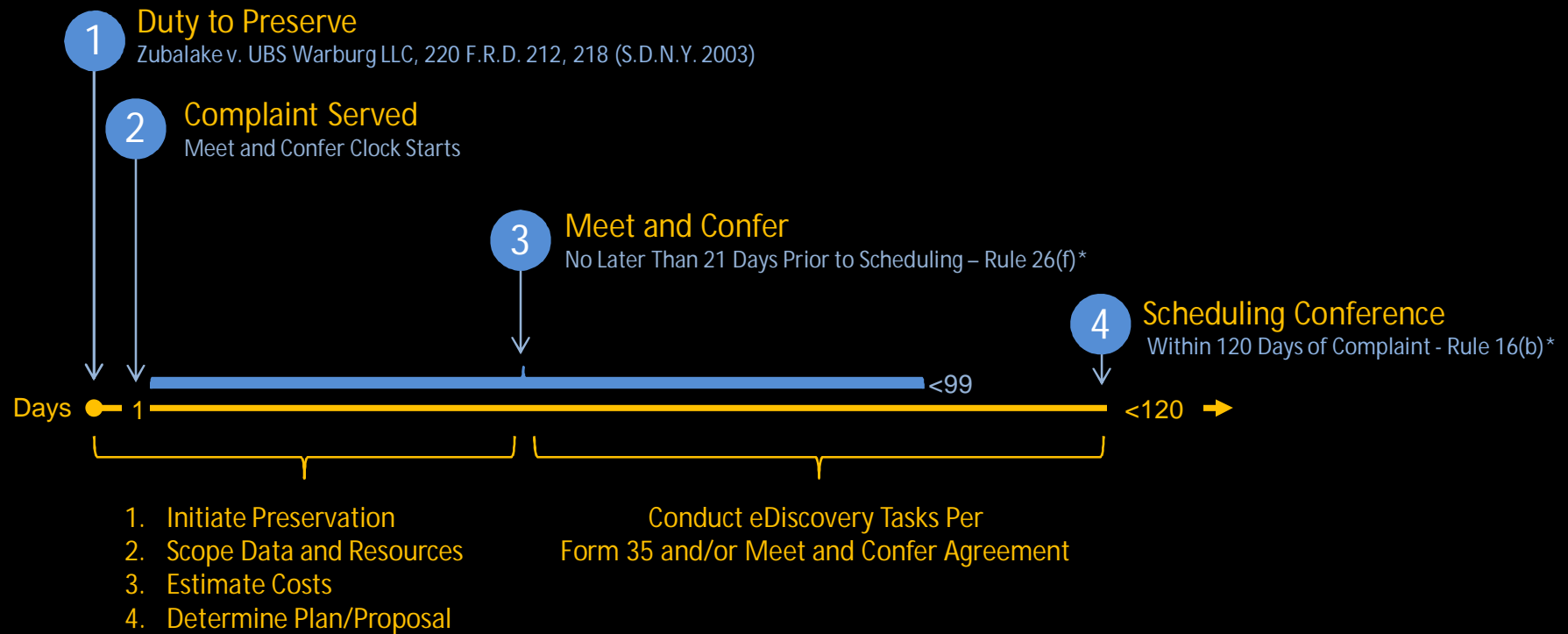
Timelines, Tools, and Tactics

CaseLaw  
Reading  
Example  
Checklists



# Translating Understanding into Execution

## The Sequence and Chronology of Meet and Confer



\* Unless Otherwise Directed By The Court

# Translating Understanding into Execution

## Checklist for Meet and Confer Tasks (Examples)

- Fios: <http://snurl.com/e7gns>
- ieDiscovery: <http://snurl.com/e7got>
- LexisNexis: <http://tinyurl.com/d77a4t> (Litigation Readiness)
- Merrill Corporation: <http://tinyurl.com/cjjdep>
- Pitney Bowes: <http://tinyurl.com/clebpi>

# Translating Understanding into Execution

## Case Law Considerations

- **In Re: Seroquel Products Liability Litigation, 2007.** (M.D. Fla. July 3, 2007)

Lack of a meaningful meet and confer and purposeful sluggishness leads to failure to comply with numerous discovery obligations and potential sanctions.

- **Toussie v. County of Suffolk, 2007.** (E.D.N.Y. Dec. 21, 2007)

County's "Foot Dragging" in Discovery and Failure to Implement Legal Hold Warrant Monetary Sanctions, but not Default Judgment or Adverse Inference Instruction

- **O'Bar v. Lowe's Home Centers, Inc., 2007.** (W.D. N.C. May 2, 2007)

Based upon the previous disputes between the parties, the court stated it anticipated issues arising as to the discovery of data through various types of computer programs maintained by defendant. Thus, in order to assist the parties in conducting discovery of electronically stored information ("ESI"), the court set out detailed guidelines that would govern the parties.

# Translating Understanding into Execution

## Additional Reading - Books

- Discovery of Electronically Stored Information – Surveying the Legal Landscape  
Ronald J. Hedges/BNA Books
- The Discovery Revolution – E-Discovery Amendments to the Federal Rules of Civil Procedure  
George L. Paul and Bruce H. Nearon/ABA Publishing
- Electronic Discovery and Digital Evidence: Cases and Materials  
Shira Scheindlin, Daniel Capra and The Sedona Conference/West Publishing
- A Process of Illumination – The Practical Guide to Electronic Discovery  
Mary Mack, Esq./Fios
- E-Discovery: Current Trends and Cases  
Ralph C. Losey/ABA Publishing

# Translating Understanding into Execution

## Additional Reading – Articles/Papers

- The Duty To Preserve Electronic Data In The Paperless Age - Preserving Electronic Documents  
Aisha Shelton Adam /The Practical Litigator - <http://tinyurl.com/dxn7ed>
- E-Discovery - The Long and the Short of "Accessibility "  
John Coughlin/Duane Morris E-Discovery Alert - <http://tinyurl.com/dmt17a>
- Prepare for an Effective Meet and Confer DataBased Advisor  
Linda Kish/DataBased Advisor - <http://tinyurl.com/d6creu>
- 2009 Meet & Confer Toolkit  
i.e.Discovery Professional Tool- <http://www.iediscovery.com/offer/Default.aspx>
- One Hundred Days of Discovery - Preparing for the 26(f) Meet & Confer Scheduling Conference  
Pitney Bowes White Paper - <http://tinyurl.com/clebpj>

## Presenter Background

Ronda Raymond | VP of Operations and E-Discovery Solutions  
19 Years Litigation Support Industry Experience  
IKON | MidnightRun | OrangeLT™







Good for you.  
Great for your clients.



**ORANGE**  
LEGAL TECHNOLOGIES

OrangeLT.com

info@orangelt.com