

Western District Court Elevates E-Discovery

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There is a growing insistence among the judiciary for "cooperation" among counsel at all stages of litigation. In the Western District of Pennsylvania in particular, some judges have placed a strong emphasis on cooperation as it relates to e-discovery and counsel's meet-and-confer obligations under Federal Rule of Civil Procedure 26(f) and Local Civil Rule 16.1A and its Appendix. These views have been expressed to practitioners both in the context of court conferences and in public pronouncements at continuing legal education programs and e-discovery group meetings.

Now more than ever, it is critical that lawyers establish and maintain their own, as well as their client's, credibility with the Court throughout litigation, and that may require significant attention at the outset of litigation to e-discovery issues even before the initial Rule 26(f) Conference takes place.

While some litigators may think that this requires only a quick phone call and a few exchanges of a draft 26(f) Report with opposing counsel, some judges in the Western District of Pennsylvania have expressed different views on the subject. Some of these judges expect counsel for all parties to meet in person, engage in meaningful conversations about the issues in the case, and collectively analyze each aspect of the form 26(f) Report set forth in Appendix to Local Rule 16.1A. In addition, many of these judges expect that, prior to the 26(f) Conference, counsel for all parties should consider and discuss in some detail, topics such as:

- Their respective clients' electronic data systems, back-up systems, and more generally, where their clients store their data and in what formats;
- Non-documentary sources of potential evidence, including voicemail, video, tweets, blogs, social networking posts, and instant messages as part of the e-discovery process;
- Preservation issues, including the estimated cost of their client's preservation efforts; and
- Search terms for e-discovery.

With regard to search terms, a simple list of search terms may not be enough for the Rule 26(f) Conference. Some judges may want to know the "analytics" behind the terms, including whether those search terms have been tested against a client's technology and what sort of results the tests have produced. If lawyers fail to meet certain judges' expectations the first time around, they could be required to file an amended 26(f) Report.

Beyond the 26(f) Conference, many judges in the Western District of Pennsylvania have expressed their preference that the parties reach out to their chambers directly the moment a discovery dispute arises, instead of waiting several months down the road and filing motions to compel. Some judges have also embraced the idea of utilizing discovery sampling or have engaged in cost-shifting to solve disputes about search terms. Similarly, some judges now refer parties to e-discovery special masters to resolve discovery disputes or require monthly status conferences on discovery to keep the litigation on track. The Western District of Pennsylvania has been a pioneer in setting up an E-Discovery Special Masters program, and three Reed Smith partners (David Cohen, Jeffrey Bresch, and John McIntyre) have been approved to serve as E-Discovery Special Masters -- the highest number of approved Special Masters from any law firm.



All in all, many judges in the Western District of Pennsylvania have led the way in raising the bar when it comes to e-discovery and meet-and-confer obligations. While knowing the Local and Federal Rules is a good starting point for litigators, it is also essential to know a judge's expectations regarding Rule 26(f) Reports and Conferences.

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