

# The New Meet and Confer

## Vested Interests and Facilitation Strategies



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## Article Reference:

### *Are Litigators Ready for the New Meet-and-Confer Sessions?*

*Without knowledge of IT for e-discovery discussions, lawyers could run afoul of new Federal Rules amendments*

By Carolyn Southerland

**The National Law Journal (July 25, 2006)**



## References to the Meet and Confer

- ⦿ Ontario Guidelines on E-Discovery – Principle 8:
  - ⦿ *Counsel should meet and confer, as soon as practicable and on an ongoing basis, regarding the location, preservation, review and production of electronic documents, and should seek to agree on the scope of each party's rights and obligations with respect to e-discovery, and a process for dealing with them.*



## References to the Meet and Confer

- ◉ Sedona Principle #3:
  - ◉ *Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities.*



## ***Meet and Confer – The Rationale***

- ④ To save costs to the client
- ④ To save time in the Discovery and therefore the litigation process in order to allow more cases to be heard in a timely manner (remove backlog at Court)
- ④ To facilitate the smooth functioning of the electronic discovery process



## ***Meet and Confer – The Roadblocks***

- ⦿ Lack of understanding of the technical requirements of the electronic discovery process such that a meaningful agreement can be reached
- ⦿ Unwillingness to sit so close to opposing counsel when the litigation has just commenced, feeling the need to retain an adversarial veneer
- ⦿ The use of the Discovery Process as a bludgeon to the other side (delay and cost driving the need/desire to settle)



## Vested Interests Analysis - Overview

1. Acquiring the Required Background Knowledge
2. Instilling Confidence and Empowering Counsel
3. Developing a Discovery Plan
4. Dealing with Issues Around Data Preservation
5. Addressing Issues of Privilege
6. Confirming Form of Production
7. Sharing of Metadata fields



## ***1. Acquiring the Required Background Knowledge***

- ⦿ Plaintiff (data requester).
  - ⦿ It is in their interests to familiarize themselves with their client's data systems.
  - ⦿ By learning from their client's IT experts counsel will be better prepared for the conference since a knowledge of what Electronically Stored Information (ESI) they are seeking and where that kind of data might be found. will enable them to engage in fruitful discussions with their opponent, focusing on the data-storage areas of the company that might yield the most relevant information.



## ***1. Acquiring the Required Background Knowledge***

- ⑥ Defendant (data producer)
  - ⑥ Knowledge of the client's data systems will enable counsel to develop a discovery outline (because certainly the data requesters will be doing the same thing) and start asking their client's IT experts questions based on their infrastructure and policies.
  - ⑥ By learning about their client's systems they will be better able to prepare for the conference.



## ***1. Acquiring the Required Background Knowledge***

- ⦿ If the opponent is “unable” to discuss his or her client’s systems, online resources and/or use of an external consultant may be appropriate.



## ***2. Instilling Confidence and Empowering Counsel***

Neither data requesters nor data producers should be shy about asking questions. The reality is that lawyers don't know what they don't know.

- ⦿ Plaintiff (data requester)
  - ⦿ The lawyers don't know where the data are; even the key players might not know.
  - ⦿ Lawyers must work with the IT representatives (internal or external) to find the data.



## ***2. Instilling Confidence and Empowering Counsel***

- ④ Defense counsel cannot protect their clients from spoliation claims unless they know where the data they need to preserve are located.
- ④ It is in their interests to start asking these questions early in the process.



### **3. *Developing a Discovery Plan***

- ⦿ Both parties need to develop a discovery plan that is workable and reasonable, and that makes economic and practical sense, given the type of case and the nature of the discovery.
- ⦿ Unless counsel knows something about his or her client's data architecture, such discussions at the Meet and Confer will be virtually impossible.
- ⦿ Whatever agreements the parties reach at the Meet and Confer can be used to outline a description of the process for production of electronically stored information (ESI).



### **3. *Developing a Discovery Plan***

- ◉ Defendant (data producer) will have to know what the system capabilities are before they can negotiate reasonable time frames and limits for production. .
- ◉ For example, if the client has a database that contains the sales and inventory information at issue in a contract dispute, the lawyer needs to understand how the database works and its reporting capabilities so that he or she can negotiate with the data requester on a reasonable schedule and form of production of such data.



### ***3. Developing a Discovery Plan***

- ◉ The Plaintiff (data requester) will need to know the same information, so that they can determine whether reports from the database will satisfy their needs or whether they need, for example, to seek an examination of the database itself by an expert hired by them for that purpose.



## ***4. Issues Around Data Preservation***

- ⦿ Electronic data disappears through automated processes such as the automated roll-off of e-mail from systems and "recycling" of disaster-recovery backup tapes.
- ⦿ Material relevant in a case might be subject to such roll-off or recycling processes.



## **4. *Issues Around Data Preservation***

- ◉ For plaintiffs, the Meet and Confer provides the opportunity to identify types of information for preservation, so that the material will be there as discovery progresses.
- ◉ For defendants, reaching agreement with plaintiffs on what must be preserved and what can continue to be disposed of in the ordinary course saves on the expense of preservation and protects against later claims of spoliation.



## ***5. Issues of Privilege***

An understanding of the special problems that production of electronic data poses, such as privilege waiver is critical.

- ◉ Even reviewing a 2000-page box of paper documents could result in inadvertent production of privileged documents. In imposing the same rules and procedures on 100,000 pages of data, even more mistakes can result.



## ***5. Issues of Privilege***

- ⦿ A protocol should include a claw-back clause dealing with privilege that is agreed to by both parties.



## **6. *Forms of Production***

- ⦿ An understanding of the special problems that production of electronic data poses, such as form of production, is required.
- ⦿ Making expectations clear during the Meet and Confer about the form in which one expects to receive discovery avoids the problems later of getting the production in a form incompatible with the database one planned to use for the case.



## **6. *Forms of Production***

- ⦿ Plaintiff (data requester)
  - ⦿ Taking this approach will ensure the plaintiff is equipped to house document collections in-house or make arrangements for remote access via a web-repository to the documentary evidence produced.



## 6. *Forms of Production*

- ⦿ Defendant (data producer)
  - ⦿ The defendant will be able to ensure that further reworking of the data is not required.
  - ⦿ There is also the potential to share costs of hosted databases, etc.



## **6. *Forms of Production***

- ◉ Counsel should have the specifications for the load file required by their database handy at the Meet and Confer (or before) and should share them with opposing counsel.
- ◉ Each side requires this information in order to readily access the data post-production.



## **7. *Sharing Metadata Fields***

- ◉ It is important to agree which metadata fields (such as cc, bcc, created date, modified date, sent date, received date, etc.) will be provided.
- ◉ This will alleviate disagreement, as well as expense for both sides, down the road.



## **7. *Sharing Metadata Fields***

- ④ Using this approach helps to avoid dismissal of claims or sanctions for failure to properly preserve and produce electronic information.
- ④ Lawyers who represent data requesters and those who represent data producers alike can help their clients by preparing to deal with these issue and by following the guidelines and practice directions outlined.



## ***Meet and Confer – Facilitation Strategies***

- ⑥ Understand that the benefit outweighs the cost and that the Courts will heavily penalize any persons not undertaking a Meet and Confer in situations where it is deemed necessary or beneficial
- ⑥ Put away egos for the benefit of the client and the firm:
  - ⑥ Ask questions of IT, Industry Consultants and Litigation Support professionals if you don't know the jargon or understand the technical aspects of electronic discovery and document exchange – get educated!
  - ⑥ Know that you cannot represent the client's best interests if you are not willing to engage meaningfully in a Meet and Confer discussion; do not be adversarial when it is not to your client's benefit, put yourself and your perceptions of the process aside – communicate!



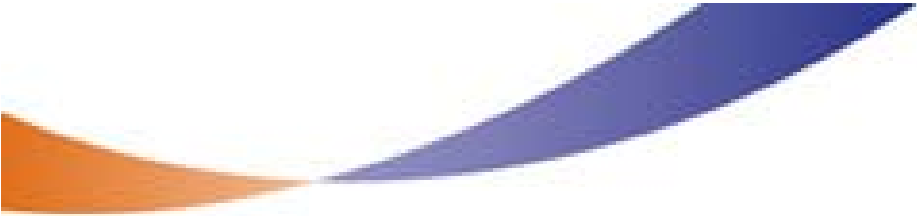
## ***Meet and Confer – Facilitation Strategies***

- ④ Use the strategies that mediators have long used to create an environment conducive to success:
  - ④ Meet at a neutral location, being at either one's office will only increase the feeling of the meeting being between adversarial parties with one having home court advantage
  - ④ Involve food! Everyone is happier and more likely to talk when they are not hungry and breaking bread goes back in history as a means of making peace. It works! So hold the meeting at a venue such as a mediation hosting facility that provides food, or at a meeting room in a hotel and utilize the catering service.



## ***Conclusion***

- ⑥ Allow the rationale to guide you. We are not in an age where we can avoid electronic discovery nor can we ignore the challenges with which it provides litigators, so a Meet and Confer must happen. Use your communication skills and make it enjoyable!
- ⑥ Be prepared. Make sure that you have a draft protocol ready to be discussed and modified at the meeting then finalized and exchanged afterwards. This is where a Legal Assistant's knowledge of the process is essential as they will likely be drafting these documents based on how they prepare and exchange their lists in the various software applications available.
- ⑥ Don't be the test case in Canada where sanctions are imposed for failing to attend or schedule a Meet and Confer! It is common in the U.S. and only a matter of time before it happens to a lawyer here. Don't let the lawyer you work with be that person!

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- ④ “Whether one is a data producer (traditionally defendants) or a data requester (traditionally plaintiffs), the “Meet and Confer” is going to profoundly affect parties' discussions concerning discovery.”