

Making the Case for Early Case Assessment:

50 Questions to Ask at a “Meet & Confer”

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50 Questions to Ask at a Meet & Confer



- **Ask and Answer the Right Questions in EDD**
- Sometimes it's more important to ask the right questions than to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts, and plans for production in the FRCP Rule 26(f) conference, the so-called "meet and confer."

50 Questions to Ask at a Meet & Confer



- 1. What are the issues in the case?
- 2. Who are the key players in the case?
- 3. Who are the persons most knowledgeable about ESI systems?
- 4. What events and intervals are relevant?
- 5. When did preservation duties and privileges attach?
- 6. What data are at greatest risk of alteration or destruction?

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- 7. Are systems slated for replacement or disposal?
- 8. What steps have been or will be taken to preserve ESI?
- 9. What third parties hold information that must be preserved, and who will notify them?
- 10. What data require forensically sound preservation?
- 11. Are there unique chain-of-custody needs to be met?

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- 12. What metadata are relevant, and how will it be preserved, extracted, and produced?
- 13. What are the data retention policies and practices?
- 14. What are the backup practices, and what tape archives exist?
- 15. Are there legacy systems to be addressed?
- 16. How will the parties handle voice mail, instant messaging, and other challenging ESI?

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- 17. Is there a preservation duty going forward, and how will it be met?
- 18. Is a preservation or protective order needed?
- 19. What e-mail applications are used currently and in the relevant past?
- 20. Are personal e-mail accounts and computer systems involved?
- 21. What principal applications are used in the business, now and in the past?

50 Questions to Ask at a Meet & Confer



- 22. What electronic formats are common, and in what anticipated volumes?
- 23. Is there a document or messaging archival system?
- 24. What relevant databases exist?
- 25. Will paper documents be scanned, and if so, at what resolution, and with what OCR and metadata?
- 26. What search techniques will be used to identify responsive or privileged ESI?

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- 27. If keyword searching is contemplated, can the parties agree on keywords?
- 28. Can supplementary keyword searches be pursued?
- 29. How will the contents of databases be discovered? Queries? Export? Copies? Access?
- 30. How will de-duplication be handled, and will data be re-populated for production?
- 31. What forms of production are offered or sought?

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- 32. Will single or multi-page tiffs, PDF's or other image formats be produced?
- 33. Will load files accompany document images, and how will they be populated?
- 34. How will the parties approach file naming, unique identification, and Bates numbering?
- 35. Will there be a need for native file production? Quasi-native production?
- 36. On what media will ESI be delivered? Optical disks? External drives? FTP?

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- 37. How will inadvertent production of privileged ESI be handled?
- 38. How will trade secrets and other confidential information in the ESI be protected?
- 39. Do regulatory prohibitions on disclosure, foreign privacy laws, or export restrictions apply?
- 40. How are questions about printouts resolved before their use in deposition or at trial?
- 41. How will authentication of native ESI used in deposition or trial be handled?

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- 42. What ESI will be claimed as not reasonably accessible, and on what basis?
- 43. Who will serve as liaisons or coordinators for each side on ESI issues?
- 44. Will technical assistants be permitted to communicate directly?
- 45. Is there a need for an e-Discovery special master?
- 46. Can any costs be shared or shifted by agreement?

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- 47. Can cost savings be realized using shared vendors, repositories, or neutral experts?
- 48. How much time is required to identify, collect, process, review, redact, and produce ESI?
- 49. How can production be structured to accommodate depositions and deadlines?
- 50. When is the next Rule 26(f) conference (because we need to do this more than once)?

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Finally, don't forget that the Rules are to be “construed and administered to secure the just, speedy and inexpensive determination of every action.”

Cooperation is the way to make it happen

➤ *Presented at the 4/22/09 Webinar by*

Hon. David J. Waxse

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