

Meet & confer checklist

Counsel no longer has the right to rely on the client to comply with proper instructions and advice. Counsel must reiterate the hold instructions on a regular basis and actively monitor the instructions.

Prior to litigation

- Plan early.** Parties must meet and confer within 90 days of filing a complaint or 69 days after the first responsive pleading, whichever comes first. Rule 26(f)
- Review client's document retention policy.** Has your client implemented a formal Document Retention Policy to formalize rules for saving and destroying documents and e-mails? This policy should include electronic information. Also, employees should understand the purpose of the policy and the importance of compliance.
- Determine what is accessible and inaccessible data.** It is wise to prepare a document that lists what electronically stored information (ESI) is reasonably accessible and reasonably inaccessible (based on undue burden or cost). Rule 26(b)(2)
- Prepare and send litigation hold notices.** Clients must prepare for interruption of day-to-day business in order to identify and preserve electronic information at issue in a specific litigation. Litigation hold notices should be sent to key witnesses and custodians and have a list of specific types of ESI to be preserved.
- Beyond the hold.** Counsel no longer has the right to rely on the client to comply with proper instructions and advice. Counsel must reiterate the hold instructions on a regular basis and actively monitor the instructions. When needed, corrective action must be taken to ensure continued compliance.
- Determine if data has been lost or destroyed.** Clients must identify if data that may have been lost or destroyed during a litigation hold was due to routine operation of computer systems. This applies to destruction that occurs despite your "good faith efforts." Rule 37(f) safe harbor protects you as long as your company took the necessary steps to implement a strategic approach to responding to preservation holds and discovery requests.

To prepare for the meet & confer

- Determine the litigation budget.** Establish a litigation budget and obtain approval.
- Determine the size, scope and timeframe of collection.** Understand the size and scope of your ESI by determining the date range that is applicable and the custodians relevant to your case. Interview the document custodians to obtain this information and to inform them about their preservation obligations. Determine if proprietary data needs to be collected and if licenses are required for processing.
- Determine the best method for collection.** For large complex matters, hiring a discovery consultant is the best method. Smaller collections can be handled internally if your IT department can collect the data without altering the metadata.
- Estimate duplicates.** Estimate how many duplicates are in the collection and how best to de-duplicate the collection.
- Determine review timeframes and resources.** Determine what is needed to complete the relevancy and privilege reviews. Determine if redactions will be necessary and the best methods to redact.
- Assess the best production method.** Determine how you want to receive your production and how you want to produce.



- Determine if there is any spoliation or lost data.** Also, determine how best to defend such gaps at the meet and confer.
- Determine whether you will request cost-shifting.** Also, consider how to best defend a cost-shifting request from opposing counsel.
- Determine whether you will request a preservation order.** Also, decide how to best defend against a request from opposing counsel for a preservation order.
- Decide who should attend the meeting.** Do you want an IT representative to attend and/or an outside e-discovery vendor to attend? Decide on a 30 (b)(6) witness who will be able to testify about network configuration and document retention plan.

At the meet & confer

- Agree on scope.** Data custodians, key witnesses, geographic scope and temporal scope.
- Agree on preservation and/or production of unreasonably accessible data.**
- Agree on handling of duplicates.**
- Agree on handling masters and attachments.**
- Agree on keyword search terms.**
- Agree on the form of production.** Native, image only, image and text, paper, direct access, shared database repository, metadata.
- Agree on Bates schema and other markings.**
- Agree on cost-shifting.**
- Agree on production priorities.**
- Agree on how to handle Privacy Act data, confidential and secret data and business sensitive data.**
- Determine if a Clawback Agreement is necessary.**
- Determine if a Quick Peek Agreement is necessary.**

After the meet & confer

- Reissue the litigation hold** if necessary to update information or remind custodians.
- Audit the litigation hold** to ensure compliance.
- Test keyword searches.**
- Document** all litigation hold efforts.

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