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What is a "Meet and Confer?"

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As technology has rapidly evolved over the past couple of decades, the information requested during the discovery process has become more sophisticated. On December 1, 2006, Congress amended the Federal Rules of Civil Procedure ("FRCP") in order to compensate for these advancements. In particular, Rules 16 and 26 were amended to include early notice of any e-discovery issues.

Under Rule 26(f), parties **must** "meet and confer" at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). Rule 16(b)(2) states that the Judge must issue the scheduling order within 120 days of when the complaint was *served*. Thus, the "meet and confer" conference must take place within 99 days of filing a lawsuit. It's not 99 days from serving the Complaint?

Proper preparation for the meet and confer conference could be a deciding factor during litigation. As such, understanding ESI vocabulary and issues is essential to an effective meet and confer session. Typically, during a meet and confer conference the parties seek to reveal:

- The ESI that is available;
- Places where ESI may be stored;
- The number of possible custodians;
- Difficulty and costs in producing ESI;
- The formats ESI will be produced in;
- Whether there will be a clawback agreement;
- The timetable for discovery.

These issues, among others, help the parties prepare a report, which is given to the Judge before his scheduling conference. Often, in the Judge's scheduling order he/she will consider what the parties agreed upon during their meet and confer negotiations. Consequently, it is required that the parties participate in the conference in good faith. Rule 37(f) provides a Judge with power to sanction a party for the assessment of costs, including attorney fees, incurred by a party's failure to participate in good faith.

Actual text of FRCP 26(f):

Rule 26(f) Conference of the Parties; Planning for Discovery

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before

a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;
(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and
(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

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