

Using Early Case Assessment to Effectively Prepare for a 26(f) Conference

The use of Early Case Assessment (ECA) tools is a familiar topic to most, but the value of ECA in preparing for the 26(f) “meet and confer” is just gaining appreciation. The Federal Rules of Civil Procedure (FRCP) and some states now mandate that attorneys meet and discuss “any issues about preserving discoverable information” as well as develop a “discovery plan” to lay the groundwork for discovery. To develop this plan, the attorneys must already be aware of the whereabouts and nature of their own clients’ discoverable documents, and must be prepared to ask questions about their opponents’ electronically stored information (ESI), electronic systems and data preservation actions. In order to be fully prepared for this conference, an attorney needs to know as much as possible about the location and volume of the data and the logistical challenges that surround the collection of ESI, as well as the client’s preferences regarding document review. The more informed the attorneys are on each of these issues, the more capable they will be to address potential problems, streamline the discovery process and minimize e-discovery costs. ECA tools have a significant role here, because they allow early analysis into your data set, providing information that may give you the upper hand during your meet and confer.

The Price of Inefficient Meet and Confers

The meet and confer continues to be a challenge for many attorneys. An unsuccessful meet and confer can damage an attorney’s credibility in the eyes of his client, frustrate the judge and opposing counsel, and result in burdensome costs. When the two sides fail to hammer out details during the meet and confer, they will often find themselves spending more time arguing about discovery than the merits of the case itself.

Failure to communicate about the data pool could result in relevant ESI not coming to light. There is also the risk that non-responsive information may be over-produced. When this happens, it can be difficult to determine whether the monetary and legal magnitude of the case is proportional to the expenses associated with e-discovery. The goal of the due diligence achieved through the use of ECA should be to find a balance that will result in cost savings without increased risk or decreased defensibility.

If an attorney attends a meet and confer with little or no preparation, sanctions and adverse rulings can result. Judges are becoming increasingly impatient with counsel who fail to hold productive meet and confers. e-Discovery is increasingly complex, and judges no longer want to act as referees. In *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), the court imposed fines for failing to cooperate and comply in good faith with Rule 26(f).



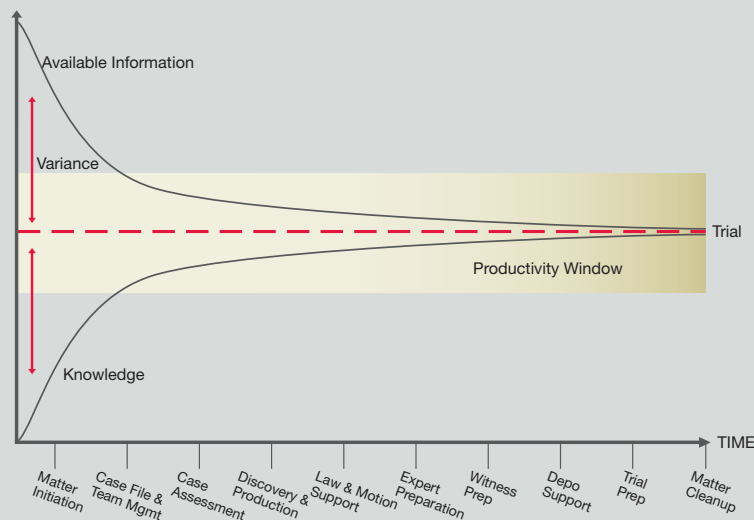
Using Early Case Assessment to Effectively Prepare for a 26(f) Conference

The court may also make discovery-related decisions that are not in the best interests of either party. *Williams v. Taser International*, 2007 WL 1630875 (N.D. Ga. June 4, 2007) is a good example. In that case, counsel was not actually required to hold a meet and confer, since the case was filed before the amended FRCP took effect. Without any sort of understanding about how to conduct discovery, the two sides bickered extensively about how to produce emails held by the defendant. Even after the judge ordered the two sides to hold a meet and confer, they could not come to an agreement and submitted separate plans. The judge found both of these plans lacking and imposed his own protocol to settle the dispute, which was ultimately burdensome for both sides.

Judges may also deny motions based on poor meet and confer practices. In *Mikron Ind., Inc. v. Hurd Windows & Doors, Inc.*, 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008), the judge found that the defendants failed to meet and confer in good faith and denied their motion for a protective order asking the court to shift the costs of producing ESI to the plaintiffs.

LITIGATION CONE OF UNCERTAINTY

A cone of uncertainty is not a new concept. It has been used in software engineering and other industries for decades. The base concept can be applied to the litigation process with little adjustment.



At the earliest stages, there are a large number of unknowns. Legal strategy isn't fully developed and the amount of information can vary. These unknowns result in inefficient effort and questions as to ultimate cost and schedule. ECA tools can help legal teams quickly dispose of useless information, increase their base case knowledge and allow them to spend more time at an optimum level of productivity.

How Can You Make Your Next Meet and Confer More Beneficial to Your Client?

The more information you have about the data, the better you will be able to negotiate for a review and production that is favorable to your client. When the data is first received, there is too much uncertainty about what the data set contains. Using ECA tools to become intimately familiar with the available pool of data before processing takes some of the uncertainty out of the equation. With more certainty about your data set, you are able to limit the processing and review of certain file types, custodians and data sources and narrow relevant date ranges.

1. Knowing the data set will allow you to more accurately estimate the processing, hosting and review costs. If, after ingestion, you have hundreds of gigabytes that may be relevant and need further review, you can budget for the costs of processing this data and hosting it in a full review platform, and estimate the hours that will be needed for review. If the amount at issue in the case is \$1 million and ECA indicates that the discovery piece will cost about \$750,000, you may decide to settle, negotiate to narrow the data set and/or attempt to shift the costs if your adversary is unwilling to compromise.



Using Early Case Assessment to Effectively Prepare for a 26(f) Conference

2. Knowing what types of data need to be reviewed helps in planning how long the review will take so that reasonable time lines can be established. This information is critical in negotiating production dates. Also, knowing the data types may help determine if reviewers with special skills are required. If, for example, there are foreign language or specialized documents that require specialized attorneys to review, having this information upfront can help you better anticipate not only time and cost, but also the staff that will be needed.
3. Finally, sampling key search terms in advance allows for better negotiation of final terms and may provide support for the use of clustering or other technology-assisted review workflow. Running some of the more obvious word searches prior to the meet and confer will arm you with information for use at the conference. For example, knowing that “John w/3 Smith” yields over 400,000 results may give you the leverage you need to negotiate narrower, more realistic search terms at the meet and confer. A quality ECA tool can easily provide this type of information. You may also find certain search terms retrieve large numbers of irrelevant documents. If you search for the term “stock” in the hopes of finding documents pertaining to stocks and bonds and instead find a preponderance of documents that deal with “inventory stock,” that tells you that that term is over-inclusive and needs to be refined.

A CHECKLIST FOR CHOOSING A GOOD ECA TOOL

When choosing an ECA tool, be sure it allows you to gather and analyze the information you need to fully prepare for a 26(f) conference. A good tool:

- Provides a broad, clear overview of your data set and lists documents per custodian, classifies documents by file type and calculates the total population of the data set.
- Features analytics that show conversational threads across custodians so that you may modify your collection and review strategy.
- Allows key term searches and date filters to identify overly exclusive or inclusive terms.
- Offers easy navigation to quickly locate “smoking guns” or “hot documents.”
- Automates and standardizes meet and confer preparation and execution with repeatable and defensible processes and documentation.

ECA for Meet and Confer Preparation

It is imperative to speak with your clients early on about their technical infrastructure to get a good sense of where the relevant data lives. Once that is established, prepare for the meet and confer by collecting data from key custodians and ingesting it into an ECA tool. This can be done quickly and easily. Since ECA tools do not fully process data like mainstream review tools, it is much quicker and far less expensive to host data in these platforms.

Once the data is ingested, a good ECA tool gives you a broad, clear overview of your data set. It will list all the documents collected per custodian, classify the documents by file type and calculate the total population of your data set. You will also be able to view graphic depictions of your data set which can be printed or emailed for your client. From the tool’s dashboard you can drill down to view specific documents, and searches can be run across the entire population or by custodian, file type, date ranges or other filters. Not all review tools are created equal, so make sure you do proper due diligence on the capabilities of the tool before turning over your data to any vendor.

A quality ECA tool will feature analytics that allow you to view conversational threads across custodians. This permits you to easily follow communication trails that may reveal whether a certain key custodian’s data has not been collected or whether an individual whose data has been collected is not relevant to the matter. For example, if you collect the data for John Smith and analyze his communications to find that he frequently communicated with Jane Doe about relevant information, you know that Jane Doe’s data also needs to be collected and reviewed. On the other side of the coin, if you analyze communication from John Doe and find that he has exchanged only a few emails with Jessica Deer, a custodian whose data has been collected, you may decide that Jessica is not a key custodian and you do not need to further process or review her data.



Using Early Case Assessment to Effectively Prepare for a 26(f) Conference

NOT ALL REVIEW TOOLS ARE CREATED EQUAL

Make sure you do proper due diligence on the capabilities of the tool before turning over your data to any vendor.

An ECA tool allows you to search for key terms and use date filters. As discussed above, it is very useful to have insight into which key terms will be overly exclusive and which ones may be too inclusive. In preparation for initial discussions with opposing counsel, you can use ECA to generate reports based on keyword search terms. Effective ECA services can provide detailed lists of the files that are retrieved by various sets of keyword search terms.

A good ECA tool will also allow for easy navigation so that “smoking guns” or “hot documents” can be located quickly. The ability to run searches through the entire population or by custodian or file type will help identify and locate key documents, which can be printed and shared very early on with your legal team members and your client to inform decisions on whether to go forward or settle.

ECA tools also have the potential to help make meet and confer preparation and execution a more automated, step-by-step process. Tools like Fios Clarify, for example, allow reports to be run on a broad variety of metrics, such as the number of Excel files, emails or unprintable files you have in your entire data population. Clarify also allows all searches and results to be saved so that the sampling process is well-documented. This helps create a process that is both repeatable and defensible.

Using ECA Tools to Cull Data and Save Your Client Money

Instead of processing all the data associated with a case, which can be costly, you can use ECA tools to cull the data by custodian, date, file type and/or key terms. A tool like Fios Clarify allows you to run searches and either bulk tag or tag individual documents that should be further processed and loaded on the chosen review tool. Make sure when choosing a vendor that they have the capability to seamlessly move data not culled out from the ECA to the review tool. By culling the data pre-processing, you are saving the client significant time and expense as the entire population now does not need to be processed, hosted or reviewed.

Conclusion

Effective use of a quality ECA tool in preparation for a meet and confer can assist both strategically and from a cost perspective. Knowing your clients’ data set very early in the discovery process allows you to be much better prepared not only for negotiating custodians and search terms, but also for arguing the merits of the case. These tools are easy to use and economical. They also provide you with a much stronger position when negotiating scope and time line with your adversary, help you streamline the document review and save you and your client many potential headaches.

About Fios, Inc.

Fios has focused solely on electronic discovery since 1999. With more than 4,000 cases completed successfully, Fios is your choice for quality results with complete cost predictability. For more information, visit www.fiosinc.com.

Fios, Inc.
921 SW Washington Street
Suite 850
Portland, Oregon 97205
(503) 265-0700
(877) 700-3467 Toll Free
www.fiosinc.com

