

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION**

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PLAINTIFF(S),)	
)	
v.)	
)	CV: _____
)	
)	
DEFENDANT(S).)	

ORDER REGARDING ESI DISCOVERY

As discussed at the last status conference, the parties are ordered to undertake a “Meet & Confer” process, with the goal of promptly assessing what ESI needs and challenges will be in this case.

Before the Meet & Confer, each party is to do the following:

1. review the client’s document retention plan, in order to assess its existence, scope and quality of implementation;
2. identify the client’s “key players” on IT issues and discuss issues such as the client’s network architecture and its process of creating and storing ESI;
3. ensure that the necessary hold notices have been issued and follow up to ensure client compliance; and
4. determine the extent to which any relevant hard copy documents and ESI have been destroyed.

In preparing for the Meet & Confer, each party is to do the following:

5. select key players and any retained forensic experts who would attend the Meet and Confer, it being the Court's expectations that such individuals would attend the Meet & Confer to ensure that questions arising therein can be addressed by those who have IT expertise;
6. determine the scope of the client's ESI, and the extent to which the ESI is "reasonably accessible";
7. establish a collection protocol to ensure that ESI will be collected in a forensically defensible manner that would avoid any suspicion of spoliation, and -- if the scope warrants -- consider using a third-party vendor to assist in proper collection, with scrupulous compilation and maintenance of a chain of custody log;
8. determine what resources would be needed for relevancy and privilege reviews, what the method of redaction will be, and what would constitute a duplicate and a near-deduplicate;
9. compile a suggested list of keyword search terms for discussion at the Meet & Confer;
10. assess the preferred format that you want to receive production from the opposing side, taking into account factors such as the size of production, requests for metadata fields, hosting tools, use of outside vendors, and costs; and
11. prepare suggested confidentiality/clawback agreements for consideration at the Meet & Confer.

At the Meet & Confer:

12. ESI in general. Counsel should attempt to agree on steps the parties will take to segregate and preserve ESI in order to avoid accusations of spoliation.

13. E-mail information. Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol, i.e., search terms and other search methodologies.
14. Deleted information. Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.
15. “Embedded data” and “metadata.” “Embedded data” typically refers to draft language, editorial comments, and other deleted matter retained by computer programs, while “metadata” typically refers to information describing the history, tracking, or management of an electronic file. The parties should discuss whether “embedded data” and “metadata” exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.
16. Back-up and archival data. Counsel should attempt to agree on whether responsive back-up and archival data exist, the extent to which back-up and archival data are needed, and who will bear the cost of obtaining such data.
17. Format and media. Counsel should attempt to agree on the format and media to be used in the production of ESI, and on Bates numbering and/or other identifying markings. Also, consideration should be given to an internet-based repository where data from all parties can be hosted and reviewed.
18. Reasonably accessible information and costs. The Court expects that most parties’ discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information. If the requesting party intends to seek

discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burdens and costs of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

19. Privileged or trial preparation materials. Counsel should attempt to reach an agreement regarding what will happen in the event privileged or trial preparation materials are inadvertently disclosed. If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure within a reasonable time thereafter. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.
 - (A) The parties may agree to provide a “quick peek,” whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.
 - (B) The parties may also establish a “clawback agreement,” whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced.

Other voluntary agreements should be considered as appropriate.

20. Sequence of production. Counsel should address the most efficient process of producing requested ESI. A rolling production should be considered if the volume of production is significant. Further, the parties should consider phasing discovery by producing ESI from sources/custodians that have the most relevant information first.

THE MEET & CONFER MEETING SHOULD TAKE PLACE WITHIN 45 DAYS FROM THE ENTRY OF THIS ORDER. WITHIN SEVEN DAYS AFTER THE MEETING, THE PARTIES ARE TO FILE A JOINT REPORT DESCRIBING THEIR AGREEMENTS AND IDENTIFYING ANY ISSUES REMAINING TO BE RESOLVED.

DONE and ORDERED, this the _____ day of _____, 20_____.

/s/ Robert S. Vance, Jr.
Circuit Judge