

ASSOCIATION OF CORPORATE COUNSEL

Desktop Learning Webcast Transcript
Meet and Confer Toolkit: Practical Advice for Effective Discovery Conferences
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Faculty:

Bill Detamore, Chief Financial Officer, IE Discovery, Inc.

Barton S. Aronson, Partner, Hogan & Hartson LLP

Moderator:

Miriam M. Smolen, Associate General Counsel, Fannie Mae

(Miriam Smolen): Thank you. Welcome, everybody. I'm (Miriam Smolen) with (Fannie Mae), and I am part of the ACC's litigation committee, which is presenting this webcast today on meet and confer toolkit practical advice for effective discovery conferences. Our webcast today is being sponsored by IE Discovery, and we thank them for their sponsorship.

Today we're going to talk about practical tips for preparing and participating in the new meet and confer conference requirements with opposing counsel under the new Federal Rules of Civil Procedure regarding electronic discovery.

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We're going to have our presentation and then an opportunity for questions. If you have questions, you can type them in at any point, and we'll hold them till the end of the presentation, and the question box is on your screen, and also I'd like to remind you under the links box on the left hand side of your screen, you see item one is the webcast evaluation form. I'd just like to remind you now to please fill that out at the end of the session, and also underneath that, you'll see that we have some additional material besides the PowerPoint that we hope will prove helpful to you.

So let me go ahead and introduce our speakers today. We're very grateful that both of these gentlemen have agreed to present on this topic for us because they have very practical advice and tips to provide us. Bill Detamore) is with IE Discovery. He joined IE Discovery in 2001, and he currently serves at the Director of Business Development, designing cost effective discovery management solutions for the company's clientele and helping that clientele overcoming (E Discovery) challenges, and this meet and confer is certainly one of those challenges. (Bill) came to IE Discovery from a Tulsa law firm, (Gabel and Gotwalls), where he was involved in complex commercial litigation experience, and many of you know (Bill) from his frequent speaking

engagements on this topic, and he's also the author of numerous articles on this topic for legal journals and technology journals.

(Bart Aronson) is a partner with (Hogan and Hartson) in Washington, D.C., and I'd just like to thank (Hogan) because they're also a gold level sponsor for ACC in general. (Bart's) practice focuses on class action and other complex litigation matters, primarily in the health care insurance and products liability areas. However, in all of these areas, he has special expertise in advising clients with -- in respect to all aspects of electronic records management and electronic discovery. Some of his main -- major clients in this area include a major disaster relief not-for-profit, one of the nation's largest health benefits companies, and one of the nation's largest insurance companies, and he's helping all of these companies to comply with the new Federal Rules of Civil Procedure governing electronic discovery and in the complicated world of records retention. (Bart's) also an adjunct professor of law at Georgetown University Law Center, and prior to joining (Hogan), he was an Assistant U.S. Attorney in Washington, D.C., so let me say welcome to both (Bill) and (Bart). I'm going to turn the control over to (Bill), and we'll get going.

(Bill Detamore): Thank you, (Miriam). It's really an honor and a pleasure to present this topic. I want to thank ACC for having me and our company participate in this. When (Miriam) and (Bart) and I were contemplating this topic, we really wanted to focus, as (Miriam) mentioned earlier, on the practical tips and tricks for how do

you conduct these meet and confers? There's been quite a bit of -- quite a bit written and quite a bit discussed about how do you prepare for the meet and confer. I -- we don't mean to minimize the importance of that because that is extremely important, but the overall focus of today's webcast is on really once you're at the point of having to conduct a meet and confer, what are some practical tips and practical tricks for making sure that you can conduct that meet and confer as strategically favorable to your client as possible.

I think that (Bart), with his practical experience in participating in many meet and confers since the federal rules were admitted in December, will offer us a good insight from outside counsel in terms of how to work in the meet and confer.

The agenda, as you see, is really broken down by, you know, what the meet and confer is, what -- as in-house counsel, what is in-house counsel's role here, and how does in-house counsel properly prepare and arm its outside counsel and law firms for having a successful meet and confer? We're going to talk about the goal of the meet and confer because in different cases that may be different, and that will drive the strategy of the meet and confer.

We're also going to talk about who should attend the meet and confer, and many people are bringing technology consultants or experts from their IT department to discuss some of the more technical details in the meet and confer. We're going to talk about the considerations there.

We're going to talk about common challenges at the meet and confer that we're seeing in the industry, and some of the ways to handle those challenges.

And then finally, after the meet and confer and maybe perhaps the most important thing is how are you going to document what happened at the meet and confer, and we're going to talk about that as well, and then as (Miriam) said, we're going to have a -- we're going to try to reserve as much time as possible for questions because we think that we're going to get some good questions from the participants, and we want to have some time to answer those questions as well.

So first of all, the meet and confer, it is defined under Federal Rules of Civil Procedure 26, and meet and confers have been around for a long time with the purpose of discussing the parties' claims, possibilities for resolving those claims, et cetera, but as (Miriam) discussed, the focus of this is going to be the recent changes to rule 26F which involve electronically stored information or ESI, and how do you deal with that at the meet and confer? Specifically, how do you deal with the requirements to discuss issues relating to preserving discoverable information, and how do you within the context of the meet and confer work with opposing counsel to define and document a proposed discovery plan?

First of all, within the meet and confer and the resulting discovery plan, I think the most important thing, and the biggest challenge, and an area that we're going to spend a lot of time on today, is really talking about how do the parties reach an agreement on the scope of what's going to be discoverable, and typically a lot of our clients are looking at defining the scope of discovery in ways that are practical and that are cost effective, and some of the ways that we've seen scopes of discovery defined in our practice has been by defining particular business units, departments, or even individuals that may have relevant or responsive information. Also we've seen scopes of -- scope of -- the discovery defined geographically, maybe in terms of market segment, geography, state, locality, that kind of thing.

Also, one of the most commonly overlooked areas in my experience has been the temporal scope limitations on discovery, including not only looking back in terms of what you have right now, but also looking forward in terms of potentially discoverable information that you're going to -- that your organization is going to be producing in the future. How do you handle the data that's going to be produced in the future?

Also you can limit it by system or by -- as well. In discussing the scope of discovery with opposing counsel, we think it's a good idea to get an agreed definition of what duplicate data is. Many parties today are (E duplicating) or removing duplicates from their collections, and I think -- we think it's important to

get agreement with opposing counsel in terms of what logic is going to be employed to define those duplicates.

Many parties today are using automated review technologies based on terms, based on time, based on concepts or phrases to limit the scope of discovery. If you can get an agreement with opposing counsel on what terms are going to be used, that also is very useful and very valuable. The sooner you can get that, the scope agreed to, I think the more cost effective your discovery can be.

Finally, when discovering -- when contemplating all of these limitations on scope or the potential scope of discovery, it's really important to keep in mind what the projected volumes are going to be because a lot of times our clients are surprised by the large amount of electronic data that exists within their organization. We think it's a good idea to understand before you go in the meet and confer and to communicate to your outside counsel before you go into the meet and confer if the scope is such and such, this will be the projected volumes.

Also, a critical component in the discovery plan are what methods are going to be used and the timing of those methods. How are -- when are initial disclosures going to be done? When is written document discovery going to be done? When are depositions going to be done, as well as expert discovery if any is going to be done.

The discovery plan should also address issues regarding preservation to the extent that parties can reach agreement on what needs to be preserved and probably more valuably, what does not need to be preserved. That is very valuable as well.

Finally, the -- there might be some discussions, and we have seen this in our -- in the meet and confers that we have provided advice on, on privilege issues, and some of the ways that we've been able to help our clients overcome some issues with respect to inadvertent productions, and some of those ways are by entering into quick peek agreements, or claw-back agreements. If you intend to enter into those agreements, this is a very good topic to discuss at the meet and confer as well.

And finally for electronically stored information, the form of the production is very important to discuss. That really drives what processes, what technologies and what review methodologies you and your outside counsel or vendor are going to take in terms of collecting, processing and reviewing in preparation for that production.

The meet and confer itself, and (Bart) can speak to this more when he speaks, but the meet and confer itself is really more than just a single meeting or a single conference or hearing. It's really a series of communications, and that's one of the things that I'll want to stress is a lot of our clients, they may go to a case

management conference or a meet and confer conference, but that's really where a lot of times the real work is beginning. That really is sort of a launching point for the real substantive discussions with opposing counsel. Typically the meet and confers that I've seen have been followed up not only by maybe an agreed order that's filed with the court but also by a series of maybe conference calls, letters and e-mails that are forming and documenting and memorializing the existence of the agreements between counsel, so it's a lot more than just a meeting.

I can tell you that this is also where in these follow-up communications, this is also where your IT staff or your technology consultant can come in very well and can help you give you advice on some of these issues behind the scenes, and (Bart's) going to speak to that in his presentation, but it is -- I think it's important to keep in mind that this is more than just a one-time event.

Let's talk a little bit about what your role is as in-house counsel. I really think that in-house counsel has got an opportunity here to really -- in the meet and confer to really set the stage for what's going to happen in the litigation with -- especially with respect to discovery. I mean, effectively in the meet and confer you're defining the rule book by which you're agreeing to play. You're, you know, setting the rules, and at that point, you can either set them to be in your favor or right from the beginning you can set the rule book to be against you, and I think it's really important if you're -- it's really important in -- it's really important as a

advocate for your client that you conduct the meet and confer and reach agreements in ways that will be in your client's best interest.

I think first and foremost, in-house counsel has to be principally responsible, and that the cases support this, principally responsible for insuring proper implementation and compliance with the litigation hold, and litigation holds and preservation holds are a challenge for most organizations today, including most large organizations today, and insurance compliance with them is, it's much easier said than done in most instances, but that is an important aspect of in-house counsel's role.

You know, and I guess secondly I would say that preparing trial counsel and arming your trial counsel with enough information to effectively represent your client in the meet and confer is another critical role of the in-house counsel. I don't think it's appropriate or fair for you to expect outside counsel to know your operations, your IT staff, your systems better than you and better than those that work for your organization, and so it's incumbent upon in-house counsel who are preparing for meet and confers to insure that outside counsel is communicating with and coordinating with knowledgeable IT resources and knowledgeable staff within the organization. I can't stress enough about how handcuffed outside counsel can be if they just don't have the information and aren't prepared for the meet and confer and aren't prepared for the ramifications of what agreements they're making in the meet and confer.

I think one of the most important things to coordinate and to get agreement on going into the meet and confer is what systems the organization has that contain potentially relevant data, how those systems are structured and which systems or which part of those systems the organization considers reasonably accessible and which systems or parts of those systems the organization considers reasonably inaccessible, and why they're inaccessible. This is being prepared to make those decisions up front will give an organization a real advantage and insure that that organization doesn't agree to something that it can't comply with.

Let's talk a little bit about the goal of the meet and confer. I think one of the -- one area that sometimes counsel for large organizations who are largely in defensive discovery postures, that is in a position where their clients have much more information that's potentially discoverable than their opponents, like in class action litigation or other kinds of similar litigation, is that you can use the meet and confer offensively, and to the extent that you can, you should, and you should not overlook that opportunity. To the extent that you can get your opponent to agree what they're going to produce, how they're going to produce it and when they're going to produce that, that's effective, and especially if your opposing counsel isn't as prepared as you are, potentially you can set the rule book to be significantly in your favor up front in the meet and confer.

Obviously, most of our clients are focused and on the defensive aspects of the meet and confer and insuring that they don't agree to something that they simply can't comply with, either practically or cost effectively, and so I think that's an area that we spent most of our time today and we will spend the rest of our time today talking about.

You know, I think the overall goals of the meet and confer differ by organization and differ by litigation to litigation. I mean, I think it's driven by your overall litigation discovery strategy. Some -- we have some clients that have said that they were going to allow their opponents in a particular case full and unfettered access, whatever they want access to, we're going to allow them that. You know, the benefits of that are it's more difficult to be held to be not cooperating. I think that's a risky position to take, but it's one that some clients are taking.

You know, other clients we have are fairly -- have taken a different approach and they've said their goal is really to provide just limited disclosures to very specific individual requests. That is, if the request is vague, they'll answer the request and only the request. You know, this also has advantages and disadvantages. I can tell you that if you're prepared for the meet and confer and for your overall electronic discovery obligations, you can volunteer information to your opponents that you believe is more advantageous to your clients and that might lead to better ultimate results and lead them to potentially propound very specific requests that you want to respond to.

So with that said, I am going to turn it over to (Bart), who is going to discuss specifically at the meet and confer some of his challenges and some of his experiences.

(Bart)?

(Bart Aronson): Thank you, (Bill), and thanks to (Miriam) and ACC for the invitation to participate.

As (Bill) said, let's start with the question of who should be coming to meet and confers. Increasingly because it's a party's burden to provide information about where information is stored, and particularly electronic information, and because bearing that burden is difficult, it requires a wealth of information that lawyers typically don't carry around in their back pocket. People are coming to discovery conferences with technologists, usually to do one or both of two things, either to provide information about your own systems, somebody who can speak the language and say we keep X in the following format, we keep Y in this very different format, and I should say either or both, to ask questions of an adverse party, someone who can ask those questions in the language of tech speak, somebody who can say we want this and we think it's in the following format, and the upside of bringing a technologist to the discovery conference I think are fairly obvious. You have an obligation when you show up at one of these to speak the

language, to be knowledgeable. That's a difficult burden to bear. Having a technologist there makes it easier to bear the burden. It makes it easier in two senses. First, such a person is more likely to have the information, but second, if they don't, if they say, "I don't know. I'll get back to you," that goes down easier from a technologist than it does from a lawyer because if somebody who's supposed to know these systems doesn't know something, the implication is, hey that is really a difficult question and it's something that we need to get back to you on.

I think it's critical in thinking about whether to bring technologists to the table, to think about the potential downsides of doing so, and the downside should be just as obvious as the upside. With apologies to any of the technologists who may be on the phone, people in the IT department who are camera ready are generally not thick on the ground in the IT department, and the danger is that they'll view the questions and the issues raised in a discovery conference in the same way that they view the problems that they address in their jobs. That is to say, it's a problem. It's a problem to be solved. But the discovery conference is not just a problem to be solved, it's a strategic enterprise, and therefore you want to make sure if you're going to bring somebody that they are able to say, "Let me think about that," that they're able to qualify their answers, that they're able to be silent when it's appropriate to be silent.

No matter how much you prepare somebody to do that, if it's not their natural inclination, then you should seriously consider bearing the burden as the attorney, having outside counsel bear the burden as the attorney, give them the information they need, and leave the technologists out of it. Usually the discovery conference on these issues occurs very early in litigation. There isn't time, generally speaking, to train someone, not just in all the systems, because of course your inside technology people, especially at a large company, they don't know all the systems, right? They know the e-mail system but they know nothing about the financial systems. You -- not only do you have to train them in -- to be knowledgeable about those systems that may be addressed at the meet and confer, but you also have to essentially train them for their depositions because if they're going to be active participants in a discovery conference, it's -- and they're going to respond to questions from opposing counsel, even if they're going to respond after a little chit-chat with you with the mute button on, you're still essentially preparing them for a deposition. You run great risks if you don't.

And we all know how hard it is to prepare people and how time consuming it is to prepare people for their depositions, and you should consider that it's just as hard and just as time consuming to prepare a technologist for that kind of meeting.

Now a lot of people in -- I don't know about a lot, but in numerous discovery conferences I've been involved in, people have brought technologists and said

they're here to listen, not to talk. They're here because they'll vacuum up the information better than the lawyer. I think that that's also very dangerous. It's very dangerous because if someone directs questions to that person and they don't answer, the letter you're going to get back the next day memorializing the conference is going to say you had someone knowledgeable on the phone and you wouldn't let them answer the questions over and over and over again, and increasingly as parties try to turn litigation into battles over electronic discovery, battles over spoliation, try to create side shows to detract from the merits. By having someone on the phone who can't speak, you've just put an arrow in that quiver. You've given them an opportunity to paint you as obstructionist, and so the advice is that while there are circumstances in which it could be very valuable to bring a technologist, it is fraught, I think, with danger, and although it seems easier because it requires a lot less of your resources to educate a tech person to be ready for the conference on the tech issues than it does to educate the lawyer to be effective on the tech issues, I think that's probably resources well spent given the dangers of having the technologist.

Now, it's not uncommon in a discovery conference to deal with counsel who don't know a lot about your systems. After all, much of your systems -- a lot of information about your systems are not public information, and even if you've provided an initial disclosure, they still might not have a lot of information, at least enough information to be very knowledgeable. Nonetheless, the general rule, although the burden appears to be related to the paper so that, for example, rule

26A1B is about that written initial disclosure providing the other side with information about categories of electronic information, generally speaking courts are putting the burden on the lawyer, at every stage, early on in litigation to be forthcoming to provide information about systems to in a sense facilitate discovery, not just resist it.

My own view is that you should use the unprepared opposing counsel as an opportunity, and in saying so, let me propose sort of the following framework. When it comes to discovery, and not just electronic discovery, you can obviously at one end take the view that they're not getting anything out of you and they have to ask for everything and they have to ask right, and that's obviously a daunting proposition for the other side. It's meant to be. It's an expensive proposition for the other side. It's meant to be.

At the other end of the spectrum, there's the view that you should be managing their discovery. You should tell them what they want, and it's particularly with respect to electronic discovery where the other side can wreck real havoc, not just with getting information, but in mucking around inside your company, in all kinds of ways. You should seriously consider the value of managing what they want, and what that means is when they come to a discovery conference unprepared for what -- unprepared because they don't have their own discovery plan, you should come prepared, not just with your discovery plan but with your version of their discovery plan. You should come ready to tell them what they

want and how they can get it from you, and you should consider what the conduit is going to be for that information. Remember that discovery can proceed informally through the lawyers, or it can proceed formally, and they can certainly send you interrogatories. Tell us about all the systems that have information about X. They can take depositions, and that happens everyday now, and it's increasingly common, depositions of technologists who know about your company's systems. In virtually every instance where I've been confronted with this situation in the last year, my clients have chosen for the information to go to the other side as informally as possible. They would rather a 10-page letter written by a lawyer describing sources of electronic information than a deposition of one person in the technology department because they want control over how the information goes across the transom, and so when the other side is unprepared, that's an opportunity for the lawyer to say, "Here's what we've got. You want to know about X and we've got X here." You're not saying, "That's the only place we've got it." You're simply saying, "Here's one place that you can get it," and you're telling them what they want, and if you can get them to say yes to your characterization of what they want, then you may have directed them towards sources that you want them to pull from, not the sources that you're trying to keep completely out of their view.

Now there's obviously a danger in taking this sort of approach, and the danger is if you're the teacher, then you have the obligation not to mislead, and if you tell them the only place you can get information that you want is in system X and six

months later they find out about system Y, you're going to be in trouble in a way you wouldn't be if they simply took a deposition and didn't ask the right questions. So you have to be cautious. Nonetheless, my own view is that you should come prepared to a discovery conference ready to tell them what they want and how they can get it from you and in a way that steers them towards where you want them to go, not where they might want to go.

Very commonly, in addition to asking for live systems, we want your live e-mails, we want your live financial systems, we want your claims processing systems, whatever kind of systems you have that they want access to, the other side wants backup information, archival information, that sort of thing, and very often there are costs and difficulties related to that kind of information that do not exist with respect to the live environment. Here the critical point is to educate the other side as to the limits of what's in those systems. Backup systems typically only have a limited amount of very recent information. Most of it should be captured in the live environment and should be subject to your litigation hold, and educating them about the costs of, not just of restoring backup tapes which are real enough, but also restoring them in a searchable way or pulling them out of rotation, in fact, that's how backup systems usually work, and putting new tapes into rotation. Those are all costs that you shouldn't have to bear.

You should also force them to articulate a rationale. Why those backup systems? Because very often they simply won't have a rationale behind well, we

want to make sure we get everything. We want to be very cautious, a sort of belts and suspenders approach. Discovery should never be a belts and suspenders approach when you're the party resisting discovery. The touch stone is reasonableness and you should never abandon it.

Consistent with that touch stone, very often companies are the subject of litigation by, say, individuals, right? The named plaintiff in a class action where you've got a lot and they've got a little, and no matter how much discovery you send them, you could blanket the earth with discovery requests, they just don't have all that much to give you.

In that situation, again, it's critical to insist that discovery be reasonable. It's critical to insist to pick up a theme that (Bill) referred to earlier, or earlier, that all the parameters which are appropriate come into play, and here again you want to have your vision of what they want and you want to understand what's expensive and what isn't. I'll give you a simple example. Generally speaking, when we're talking about producing e-mail, we negotiate (1) custodians, whose e-mails, and then (2) search terms so that we're not going to review all of (John's) e-mails, we're only going to review (John's) e-mails to the extent they contain the following 20 search terms. Simply put, custodians are expensive, search terms are cheap, right? And this is especially so if you've got people in different parts of the country or different parts of the world using different systems. You give away five search terms, you haven't given away much. Give away five

custodians, now you've got a problem because every individual keeps their e-mail separately, every individual will have moved some of their e-mails into archives on desktops, and that takes real time, and so you have to remember where is it expensive to do things and where is it comparatively cheap, and drive that process by being liberal with this, by being liberal when it comes to what search terms you're willing to run, and being less so when it comes to how many custodians.

Similarly, you want to go in with a plan for where in the company, that may be a geographic issue, it may be a business unit issue, where in the company that you are prepared to go, recognizing that hey, if all the bad documents are in the field, then you should be very generous with what you produce at corporate headquarters, and you need to make the case to the other side about how expensive it is to go into the field, how burdensome that is, how the technology -- how the internal resources for collecting information in the field are not nearly as -- not as set up and not as efficient as the resources for collecting from headquarters. You want to put in place -- you want to suggest to them the parameters that benefit you and you want to talk up the burdens. You'll be surprised how often if you come in with a proposal, which is by no means your first proposal, at which your first proposal, it's not your last proposal, but if you come in with a proposal and then you back down, back down, back down, once you've done that two, three or four times, they'll begin to think about acquiescing, and as long as you've plotted those out so that you're willing to go from, say, you

first offer headquarters, and then when they push back, you offer just the regions, and then when they push back, you offer certain field offices but not others. Once you've structured it so that you've made what appear to be a series of concessions, the mere fact of making the first concession, the second concession, the third concession, the fourth concession, is likely to mean that the negotiation will stop before the place that you don't want to go, so you should come in with that attitude.

The other thing you should come into when there is a great disparity of information is recognizing, again to pick up on a theme that (Bill) mentioned) the difference between information and systems. You may have the same information in multiple systems, but information tends to be, as with the term custodians, fair. Information is often cheap, systems are expensive. To pull a single piece of information from a system that you otherwise wouldn't go to is likely to be dramatically more expensive than pulling more information from a system that you are already going to path, and so you need to educate the other side. You need to have a plan about where you want data and information to come from, and then you need a strategy, you need an explanation for why it's so much cheaper and so much better to go to system A and why you're willing to fight to the death with respect to system B. The fewer systems you pull from, the cheaper this process is going to be.

You need to, as (Bill) emphasized, you need to do your best going into this to understand what is this going to look like after you've got an agreement. It's one thing to say we'll search our live environment for the following custodians, but obviously you don't want to do that if you don't have knowledge about how exactly we can extract information from our live systems. The nightmare scenario, of course, is that you go to the IT department and they say, "That's going to shut us down for 24 hours." Well, no one can be shut down for 24 hours, and that's really an unrealistic example, but depending on the types of information, you may get into trouble when you're trying to pull for litigation and also do the business of the company.

And of course there are formatting issues, too, so that you want to take information from one system and they've asked for it, you know, in a simple Excel spreadsheet, and it turns out that you have no ability to convert that information into a simple spreadsheet, so you want to come in not just talking about information but about the form in which information will come. You also want to recognize that just as it may be difficult for you to fulfill your obligations, and so you want to be knowledgeable about what they mean in advance. So, too, you want to try to steer the discovery so that what they get is useless, and the best way to do that, I think a little bit counter intuitively, is to insure that they're educated about what it is that they're going to get.

For example, if you've provided them with a data dictionary from a system and, you know, there are 400 fields and you've said we'll pull 20, if they know about all 400, if it turns out six months later that the 20 they pulled are completely useless that their experts can't do what they wanted to do, can't write their damages model the way they wanted to write it, and they come back and ask for five more fields, the appropriate response is too bad. You can only give that response, though, if they actually knew about the other fields they wanted and they simply didn't pick them.

My own experience is that parties are early in the litigation, they're not very sophisticated about what it is that they want, and so very often if you flood them with information and you force them to choose quickly and you agree that those choices are the last choices because you're not going to do another data pull, you're not going to pay for it, and you've memorialized that agreement, very often mistakes that are made in the first few months of litigation will come back to haunt them 18 months later when they've got, just to continue with the example, a crazy damages model that doesn't really allow them to get to the result they wanted.

So very often a discovery plan that doesn't work for them is, well, that's exactly what you want, and the way to -- but you need to set it up. You need to be strategic about it. You need to be willing to say, "Sure," at that discovery

conference. “We’ll hand over the data dictionary and you can pick, but recognize we’re only doing this one time.”

On the flip side, when what you get from them is meaningless, you need to be sure, or one thing you can consider doing in the discovery conference is being a bit more forthcoming about why you want something. The downside is you’ve shown your cards, and that’s risky business. The upside is if you’ve told them that you expect the information to enable you to do X, Y and Z, if the information doesn’t enable you to do that, they’re on notice and it can be their problem, and you want to try to put yourself in a position where it isn’t their -- it isn’t your problem, it’s their problem, and so you need to provide wiggle room for yourself in insuring that if things don’t go well, if their searches turn up nothing when they were supposed to turn up the world, you’ve got the ability to go back and say, “Well, yes, but you didn’t just agree to run searches, you agreed to provide X, and running searches was just one way to proving X,” and then on the flip side, you want to do the reverse to them. You want to insure that when they’ve gotten nothing from you, you’ve papered it so that that’s all they’re entitled to because they had all the information that they could reasonably have asked for.

Finally, when the conference is over, and by that all I mean is, you know, when the first discussion is over and everyone’s hung up the phone, and I have the same advice for discussions number two, three, four and 12, you should seize the pen. There is absolutely zero upside in allowing the other side to

memorialize an agreement, and although it can be time consuming and expensive, I think my own view is that the best understanding with outside counsel is that outside counsel will always be responsible for memorializing the agreement because it's in those memorializations that everything happens.

So just to give you one example, very often you'll have a lengthy negotiation about getting electronic information. It's very important, one of the principles that you want to enforce is you'll only do anything once, so you're going to produce information from system X, Y, Z, you're not going to be pulling from that system three, four, five times. Pulling is hard. Pulling is expensive. It requires writing programs. It requires validation. It requires storing data. It's real work and it's expensive, and so as you're negotiating what you're going to give them from X, Y, Z systems, you want to be writing letters that say, "We need, you know, when we reach agreement, we'll begin the process," because otherwise six months later they ask, "Aren't you done because we've only been haggling about this one small aspect," and the answer is, "No, we haven't even started. See our last five letters. We've said consistently once we're -- once we've reached final agreement on all issues, we'll begin the process." If you haven't done that, then six months after -- the six months into this negotiation if they say, "We want it tomorrow," and you say, "You can only have it in six months," they're going to look a lot better in front of the court because it's much more reasonable for them to understand that you've been doing it on an ongoing basis unless you've memorialized the fact that you're not.

In general, you want to be as specific as possible when you're memorializing in order to provide as little wiggle room as possible, and remember that as I said before, with the importance of providing you with an out if things don't go well, when you're memorializing what they're going to do for you, you want to consider saying things like, you know, the purpose of this we broadly agree is to enable us to do X, or that's obviously very awkward, the language to that effect. Something that will enable you to come back six months later and say, this isn't what we agreed to. Obviously when it comes to what they want, you're doing the reverse and being absolutely as specific as possible, and with that, (Miriam), let me turn it back to you.

(Miriam Smolen): Great. Let me suggest if anybody -- just to remind you, if anybody has questions, on the left hand side at the bottom you have a questions box. If you click on the little blue arrow next to the word "questions", you can type in a question, so let me go ahead and start while we're receiving some additional questions. We do have some to start with.

Both of you have spoken about ways to protect yourself, your company or your client's company. What are some of the biggest mistakes that you see companies engaging in, and I guess this is both. (Bart), you've mentioned a few as you've gone through in trying to advise us on how to protect ourselves, but what are some of the mistakes that either your clients have made or you see the

other side making that end up either being incredibly inefficient or costly? (Bill),
why don't I turn it back to you to start?

(Bill Detamore): Sure. You know, I think the agreement regarding what the scope of discovery is going to be cannot be emphasized enough, and really what I see commonly is just unprepared counsel going to meet and confers with really no real substantive knowledge about what it is that they should be volunteering to produce or volunteering to disclose to the other side or even real substantive information about what data and what responsive information, relevant information they have, and when you're unprepared like that, sometimes you get put under pressure to make decisions and enter agreements that otherwise prove either impossible to meet or very, very costly and time consuming, and that happens more often than I'd certainly like, but it is common, and so I guess that's the biggest mistake that I see is just unprepared counsel who agree to scope and maybe deadlines that are really difficult or impossible to meet.

(Miriam Smolen): (Bart)?

(Bart Aronson): I think one of the biggest things -- one of the single biggest items is extracting electronic data twice. Very often people will pull data without having permitted the technologists to do absolutely everything that they need to do in order to satisfy themselves, or they haven't papered the agreement in a way that makes clear that we're only going to the X, Y, Z system once. You want these 20

fields, you got them, but you're never getting anything else without a big fight, and very often, although my experiences in IT the first answer to how long will this take is, "Forever." Once you get -- once you've gotten forever down to, you know, 21 days or two months and you've identified precisely how many people are going to be doing this, how many people is it reasonable, right? The company's not in the business of responding to litigation. The company does what the company does, and courts will understand that, but once you've gotten it down to we've got one person devoted 50 percent of the time to writing a program to extract data from this system, and it's going to take so long, and then they're going to get the data, and then we're going to validate it, once you've gotten a pretty detailed plan about what it means to pull data, you have to defend that plan. You have to defend that amount of time before the plaintiffs, and then you have to defend it in front of the court, and if you don't, if you rush, if you say to the technologists, "Just get it done and get it done fast," six months later you'll be pulling the data again, and what had been a, you know, half a person salary for three weeks or four weeks plus \$25,000 in vendor-related costs, you've now exactly twice that.

(Miriam Smolen): OK. OK. Let me -- we've had a few questions on resolving ESI disputes and where judges come into it, so let me just kind of combine this into a brief three-part question.

If you don't agree, if you can't come to an agreement or if the dispute just goes on and on, and so then your timeliness of completing the meet and confers is becoming the issue, who's going to arbitrate? Is there a dispute resolver besides to either going to the magistrate or the judge, and if you're going to a magistrate and judge, how educated have they become? We know that there are many -- actual several magistrates in this country who've become expert in this area. What are you seeing in terms of the federal judiciary or the state judiciary in terms of their education in this area to resolve it, and how does the lack of education sometimes put, you know, additional burdens on people who have to produce, and then finally, if there's any real jurisdictional differences in the way that courts are approaching these issues. (Bart), why don't you start?

(Bart Aronson): I haven't seen jurisdictional differences. I've seen stylistic differences, and everything depends upon your magistrate. You'll learn early in a case if there's a lot of sideshow litigation, is this someone who thinks everybody gets everything or is this someone who's prepared to listen? Assuming that you've got someone -- if you've got someone who's not prepared to listen, I'm not sure you get it -- you take a different approach. You just -- you don't bet as heavily, but since you are going to need to educate judges and since if you reach an impasse, there's really no one but the magistrate, it seems to me that the two critical components are education and reasonableness. Don't submit an electronic discovery dispute to a court without a declaration from someone who is knowledgeable about the IT issues and, this is harder, prepared to get on a plane

and sit in a courtroom and be questioned by a judge. The goal is to educate the judge about what you're prepared to do, sound reasonable, educate the judge as to what they want you to do, and it will obviously be shockingly unreasonable, and you need to have someone who can do that on paper in a full and well-developed declaration, and then you need to have somebody who recognizes that some day they may have to defend those statements in court, and so it's very important to probe before you file that declaration because again, very often just as the technologist will give you your first answer as, you know, "You can have that next year," and the next answer is, "You can have it in 21 days," this person needs to understand that will not fly in a courtroom. They don't -- this is not a business situation. They need to give the right answer the very first time. You need to find that person before you file that first declaration in that first discovery dispute.

(Miriam Smolen): OK.

Let me ask (Bill) a different question, and that has to do with both, again I'm combining a couple of questions, both the data maps that we're getting that you need to know about your client, about either your client or your company, and also how to learn about the information. I mean, how much detail are you seeing in the data maps that a company's counsel is presenting? How far down do they go? Do they really map out every server, every detail, or are they at a more high level, and then really the second question is, is there a shortcut to learning either

your client or your company's technical information if you just end up at a meet and confer, and you don't have that much time to get there?

(Bill Detamore): Sure. I think the, you know, the level of detail included in sort of mapping the network and the other IT infrastructure, I have seen what in my view is fairly high level. That means just functionally what systems do -- does an organization have and generally how do those systems operate, how are they backed up, and what's the size of data, you know, the volumes of data that they contain, and a general description of the scope of what data and information is contained within each one of those systems, and so although for some clients, you know, their data map may be much more complex than that, at a minimum I think that kind of answers from a lawyer's perspective or a judge's perspective kind of what do you have, what does it generally look like, and how does it operate and how it's backed up.

If you find yourself in a meet and confer and you haven't had a lot of time to maybe get prepared with knowing what systems you have and how they operate, one sort of -- one quick and easy way to do this is to get -- find someone in your organization or even outside of your organization, but someone preferably in your organization that understands both what the lawyers need and what their discovery obligations are, and generally knows the terminology of the technologists and the tech speak, I think, as (Bart) called it, and sit down with maybe your key business units that are involved in this litigation and the IT -- the

principal IT staff that supports that business unit and say, “OK, for this particular witness or for this particular business unit, what systems do they have access to? When they turn on their computer, what do they have access to? When they send an e-mail, where does that e-mail go? Where does that e-mail reside? Where is it backed up?” and kind of walk through step by step how do they create information and where is that information stored on the network, and I think that’s a really easy and fundamental step-by-step kind of Q&A with your IT department that can be done pretty quickly, and it can give you a fairly good level of understanding if you find yourself having to, you know, run to a meet and confer without a lot of time to prepare.

(Bart Aronson): (Miriam), can I do a quick follow-up on that?

(Miriam Smolen): Sure.

(Bart Aronson): That’s excellent advice. Let’s take it one step further and do something that will save everybody a ton of money. Once you’ve got that, distribute it. Memorialize it. If your litigation is repeatedly tapping certain systems in the company, your e-mails, your document management, certain financial systems because you’re that kind of company, certain claim systems because that kind of company, once you’ve compiled the information that (Bill) just described, distribute it to all the lawyers. Post it on whatever internal web site the lawyers access. Send it to your outside counsel. Do this only once time rather than

inventing this wheel for each case, and you'll save an enormous amount of time for your internal resources and for your outside lawyers.

(Miriam Smolen): One of the questions that we had here was about how to find sample quick peek or claw-back agreements, and I would include in that often in-house counsel are dealing with very small counsel departments and have small outside budget departments. I'm wondering if the two of you have any advice about where people can go to get some sample forms and in this area, and let me just add that on the ACC web site are info packs. There is going to be another litigation committee info pack being put up on records retention and some of these other issues. I don't know for sure that they'll have these particular motions, but they will have some additional information, so let me just put in a plug for that, but let me turn it back to you two to see if you have any suggestions for people looking for sample motions or forms or pleadings.

(Bill Detamore): Is it improper to do a shameless plug, (Miriam)?

(Miriam Smolen): No, no. People are asking for ((inaudible))

Male: ((inaudible))

(Miriam Smolen): ((inaudible)) go ahead.

(Bill Detamore): We have those for free on our web site at idiscovery.com, but I do believe that (Akka's) web site has some sample claw-back agreement that I have seen at some point. At least they did sometime ago. (Bart), do you have other suggestions as to where they might go?

(Bart Aronson): Not off the top of my head. I wonder if there are such documents appended to any of the (Sedona) documents.

(Miriam Smolen): Yes, that's a very good suggestion to go to the (Sedona) web site, and (Bill), maybe you could just speak one or two words about what (Sedona) is for people that are unfamiliar because that web site will have some useful information.

(Bill Detamore): Sure. The (Sedona) conference is a working group of industry professionals, and they have the most, I guess, successful and most widely-known working group is this working group on complex discovery and its subgroup on (E Discovery), and they have the think tank of academicians and judges and technologists and experts on developing best practices and guidelines for conducting (E discovery). I believe that their web site for more information is thesedonaconference.org, but I could have that wrong.

(Miriam Smolen): OK. I think we are out of time. Before we leave, let me just put in a plug. There are -- the ACC litigation committee is sponsoring three webcasts this

year on the (E discovery) topic. There was one earlier on litigation holds, and that is available. That's been recorded and that's available on the ACC web site, and there is one coming up in July. I believe it's July 24th, but you'll need to check the ACC committee newsletter that comes out and also the web page on kind of a trip through technology and terminology and how to use it to your advantage.

Let me thank both of our speakers, (Bill Detamore) from (IE Discovery) and (Bart Aronson) from the law firm of (Hogan and Hartson), Washington, D.C. again. I've learned a lot. I hope that the listeners on the call have learned a lot. It's a complicated area and we certainly appreciate your sharing your expertise, and to all of our listeners, again, if you wouldn't mind going to the links box and filling out the webcast evaluation. That is very helpful to us in planning future broadcasts, so thank you very much, and enjoy the rest of your afternoon.

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