
**CASE MANAGEMENT
CONFERENCE MEMORANDUM**

TO: All Counsel
FROM: Hon. _____
Judge of the Superior Court
RE: XYZ v. ABC
_____ Superior Court # 678986543
Case Management Conference Discovery Issues to be addressed by Counsel

DATE: March , 2007

A case management has been scheduled in this case in Department____, _____,California for _____ at ____m. pursuant to CRC Rule 3.721. At least 30 days prior to the date set for the Case Management Conference, the parties are required by CRC Rule 3.724 to meet and confer, in person or by telephone, to consider various matters including discovery issues. One purpose is to identify and resolve discovery (including electronic information) issues by counsel or by the Court in a case management order that will control such issues in this case.

Please note that the matters identified herein may be considered at the case management conference and may be included in the case management order. See CRC Rule 3.722(c). All discovery issues relevant to the specific litigation should be discussed by counsel at their pre-conference meeting. Any agreements or proposals by counsel should be presented to the court in advance of the conference and should be included or attached to the mandatory *Case Management Statement* (form CM-110) which must be filed and served on all parties 15 calendar days before the date set for the case management conference or review. Disputed issues should be identified and alternative proposals submitted for the court's consideration and possible inclusion in the case management order. If appropriate, counsel should provide supporting declarations in advance of the conference and must have persons knowledgeable on e-discovery issues available for consultation or participation at the meeting with counsel and at the conference. Failure of counsel to raise issues in a timely manner and at the CMC may adversely affect future proceedings. Failure to comply fully and in good faith with the case management procedure may be determined to be an abuse of the discovery process requiring an award of appropriate sanctions.

Counsel and the client are responsible for compliance with discovery obligations and must assure knowledge and familiarity with (1) the nature and location of electronic data, (2) relevant computer systems and applications; (2) document retention schedules, policies practices, enforcement, and any need for suspension or modification thereof; and (3) the search, storage and retrieval capabilities of the client and the costs thereof. It is expected that parties will confer in good faith early and throughout the litigation and cooperatively reach agreement or identify e-discovery issues for the court such as the form of production of e-data, the allocation of costs, the protection of privileged, private and confidential information, and other issues relevant to the search, preservation and production of information maintained in electronic form.

Often discovery involves a cost / benefit analysis by the parties and the court and a shifting or sharing of costs may be the most appropriate manner of resolving discovery issues. Counsel should consider such issues at the initial case management conference and continually reconsider them in the context of the case with regard to individual subjects of discovery and discovery as whole. The more detailed addendum attached is intended to facilitate discussions of issues that may be important, not to create issues or consume time unnecessarily.

CRC Rule 3.723 expressly authorizes additional case management conferences at a party's request or by court order. While the court does not wish to encourage unnecessary motions or expenses, it is available to assist and facilitate the discovery process and to rule on issues of significance.

ADDENDUM DETAILED E-DISCOVERY CHECK LIST

E-DATA TERMINOLOGY & glossary to be used by parties & court to assure all participants are using terminology in the same manner.

MAJOR ISSUES IN CASE & discovery parameters and priorities of the litigation

- Relevant subject matter

- Relevant time frame

- Key players, documents, databases, storage media

- Key words to be used in searching and identifying responsive materials

GENERAL DISCOVERY ISSUES

- Any existing or anticipated discovery issues or motions

- Voluntary, mutual disclosure of discoverable information

- Disclosure of background information and identity of policies and procedures, knowledgeable personnel and computer systems used in processing, preserving, destroying, archiving, storing, or backing up electronic information

- Limitations on written discovery or depositions including allotment and coordination

- Discovery schedule & completion date

- Appointment of discovery referee; if so, who, for what purposes, with what powers

- Appointment of neutral expert to facilitate identification and production of e-data

- Appointment of joint document depositories

PRESERVATION DISCUSSIONS

- Preservation and litigation hold policies, practices, and enforcement

- Attempt to agree in writing on terms of preservation whether or not a formal order is requested & submit that agreement or any proposals to the court

- Identify any critical business operations that cannot be interrupted or that cannot be the subject of a litigation hold or preservation order

- Identify data depositories where destruction & creation of information that could be relevant to the case occurs in the normal course of operations

- Identify specific types of data of interest, such as e-mail, instant messaging, blogs, websites, calendar systems, voice mail, logs of computer and other activities, and discuss the location and any issues regarding preservation, production etc including costs and cost shifting or sharing

- Identify potential spoliation issues

- Discuss needs and costs of preserving or producing metadata, track changes, document versions, log records, computer generated information, transitory e-data

- Litigation Hold

- Need, feasibility and costs of suspending any normal procedures or business operations that could result in loss or destruction of data

Identity of persons responsible for compliance with preservation duties
Protocol: when, how, to whom, by whom notice is given;
Form and method of providing notice of the preservation duty to custodians
Protocol to monitor, certify, or audit custodian compliance and suspend or modify any routine business processes or procedures
Protocol to preserve any volatile discoverable material e.g voicemail, instant messaging, changing data in databases,
Anticipated preservation costs;
Whether & how to to reduce or share preservation costs
Protocol to review & modify or terminate preservation as case proceeds
Identify non-parties, witnesses or custodians who may have potential discoverable material and the efforts that will be undertaken or requested to preserve such

DEPOSITORIES OF INFORMATION

Identify where data and information resides or is stored
Identify potential sources of relevant information: e.g. laptops, desktops, CD's, DVD's, thumb drives, backup tapes, GPS, surveillance tapes, i-pods, archives, backup tapes and devices, storage media
Identify custodians or persons knowledgeable re accessing information
Identify redundant or alternative storage locations or sources
Identify private locations where business data might be maintained including, home computers or personal laptops, etc.
Identify issues or obstacles to discovery from each source, including access issues, and evaluate the importance and relationship to the issues of information from such sources considering:
location,
custodian,
risk of loss,
importance,
expense to preserve,
privacy issues,
expenses to restore, search, review and produce,
alternative reliable and less costly sources of equivalent information,
business disruptions from access

Backup "tapes", storage & archives

Disclosure of policies or practices followed regarding preservation, disaster recovery or overwriting of information
Identify any that must be preserved
Identify any that must be restored and searched
Identify any that need not be preserved
Determine if all such sources of relevant information have been identified

Hard Drive: preservation, imaging and examination issues

Have any already been imaged, stored or otherwise preserved?

Is there a reason to image any particular hard drive?
What information is being sought?
Will a computer forensic exam need to be conducted?
Should the parties adopt a protocol for "neutral" examination of the hard drive and recovery or production of files
Who should conduct the examination
Should costs be apportioned? If so, which, how & on what basis?
Does the hard drive contain privileged or confidential information

Database

Identify any databases containing information relevant to the subject matter and custodians, locations, persons knowledgeable of contents, structure, etc.
What reports can be generated that will provide relevant information?
What information needs to be provided to the opposing party to determine what information can be obtained and in what form?
What persons are competent to testify or answer questions as to accessing information on the databases?
Will such persons be present at the CMC?
Will access to the database be provided to the opponent? If so, what limitations or protections might be required? What privacy or privilege issues, protections and procedures should be employed?
Will a database be created for this litigation? If so, who will pay for its creation and maintenance, have access to it, pay for access? Will it be accessible over the Internet?

Non-party depositories & custodians

Agents, contractors, suppliers, employees
Family members
Internet Service Providers
Telephone Companies: landlines, VOIP or cell phone
Credit card companies
Should notice to preserve be given by the party who has a relationship with the non-party? In what form?

SEARCH obligations, limitations and expenses

Acceptable methods: key word, boolean, concept
Hardware & software to be used
What data will/will not be searched
What sources will/not be searched because cost/benefit evaluation
Search capabilities of computer system
Sources that should be searched
Burden & cost of restoring, retrieving and reviewing information
Sampling, as an initial method to determine the value of search and production

PRODUCTION:

Priority re parties and subject matter based on logical progression of discovery

Timing, phased production, etc. in context of overall discovery plan
Use of technology & common depositories with web access

Format:

Form or forms in which particular information or type of document should be produced

Consider the adequacy and use of information as well as whether it can be searched, manipulated, modified, identified, preserved

Consider alternative costs depending on format

Consider whether metadata will be produced and, if so, what metadata

Alternative forms

Paper

Native: format in which created

Image files:PDF, TIFF

Consider the procedure for determination of form of production and for resolving any disputes

ID in request;

Objection to form in response;

Default form of production

If produced in one form, who will pay for additional form

Cost Shifting. Do the provisions of C.C.P. §2031.280(b) apply? Is it necessary for the responding party to use detection devices to translate data compilations into reasonably usable form? If so, what are the reasonable expenses to do so? When will payment be made? When will translation and production occur? What alternatives exist ? See

Toshiba America Electronic Components, Inc. v. Superior Court, 124 Cal.App.4th 762

Cost Shifting Factors Consider and use all applicable concepts and consider the relative importance of each with regard to the specific facts and issues before the Court to reach a just result when C.C.P. §2031.280(b) does not apply. Relevant factors may include the following:

Specificity of request

Degree of relevance to the issues

Importance of information sought in determining the outcome

Alternative sources of comparable information, expenses and adequacy

Likelihood of successful search [possible use of sampling to demonstrate]

Purpose of retention: e.g. legal requirement, business use, storage or disaster recovery

Relative benefits to the parties of obtaining the information.

Total cost of production

Amount in controversy

Resources available to each party

Relative ability and willingness of each party to control production costs and its

incentive to do so
Prior record & conduct of discovery
Public interest and importance of the issues at stake in the litigation

Meta data

Identify what meta data if any should be preserved and the reasons therefore
Identify what meta data if any should be produced
Identify what meta data can be destroyed or ignored

Redactions

Protocol to make, identify, retain, log, and address issues
Special needs that may be required to access, read or use data produced such as proprietary or legacy software, hardware

PRIVILEGED & CONFIDENTIAL INFORMATION

Privilege logs: production when response due, content in compliance with 2031; should additional information establishing the privilege be provided and if so what information
Protocol re procedure for asserting privilege assertion after production
Stipulation re inadvertent production
Stipulation re sharing privileged document with other parties without waiving privilege in this action
Anticipated privilege, privacy or confidentiality issues
Sealing issues