ACEDS | Detroit Chapter
ASSOCIATION OF CERTIFIED E-DISCOVERY SPECIALISTS

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ACEDS DETROIT

QUARTERLY NEWSLETTER
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ACEDS Detroit Annual Breakfast Returns

By: Megan McKnight

On the morning of May 3, 2022, members and guests of the ACEDS Detroit Chapter gathered at the Westin Hotel in Southfield, Michigan to network, nosh, and nerd-out over emerging eDiscovery issues. John Winkler and Nimisha Patel of FTI Consulting led an insightful discussion on the eDiscovery challenges of emerging data sources. This marked the return of the ACEDS Detroit annual breakfast for the first time since 2019.

Winkler and Patel addressed how some of the newest eDiscovery challenges have arisen from the simultaneous expansion of institutional technology stacks and rapid adoption of new technologies during the pandemic pivot to remote work. eDiscovery and information governance professionals are working to catch-up, as that data is now being called-up upon by legal teams. Winkler and Patel facilitated a discussion among the attendees about working with data in Microsoft Teams and Slack, two platforms that have seen exponential growth in relevance since 2020. The presenters and several attendees shared their experiences managing data in eDiscovery from these now-ubiquitous collaboration tools. Winkler and Patel discussed how the pervasiveness of data within collaboration tools requires modifications to existing eDiscovery frameworks, as well as the adjustment of the expectations of Courts, lawyers, and business agents.

Many members of the ACEDS Detroit Board of Directors attended the Annual Breakfast including: Phil Shane, Tom Issacs, Cindy McBean, Suzanne Alfasten, Richard Ford, Sunny Rehsi, and Megan McKnight. Board members Denise Bach and Suzanne Alfasten were key in organizing the event. ACEDS Detroit is very appreciative of FTI Consulting for sharing their subject-matter expertise and also for generously hosting the breakfast.

UPCOMING EVENTS

FOUR PART SERIES ON MANAGING EMOJIS IN E-DISCOVERY

The Midwest (and additional) Chapters of ACEDs are coming together to present a 4-part series of virtual meetings that will give you insight to how law firms, corporations, and providers are managing emojis in eDiscovery. You will also receive information on how to best incorporate technology from a judge's perspective. Please join us these dates (invites to follow):

September 8, 2022
Emoji CLE

October 13, 2022
Vendor Challenge

November 10, 2022
Judges Panel

December 8, 2022
Networking Challenge
Putting it All Together

FALL BEER, WINE & CHEESE EVENT

Normally, ACEDS Detroit sponsors a summer Beer & Cheese event at Founders Brewery in Grand Rapids and a Wine & Cheese event at Capital Grille in Troy. This year we intend to merge the two events and move the gathering to the middle of the state.

We are finalizing plans to hold this event in September at the MSU Horticulture Gardens in East Lansing. We will have a panel of experts (judge, law firm partner, eDiscovery service provider, and in-house litigation counsel) discussing a wide range of topics.

Details to follow.

Summaries of Recent eDiscovery Cases

By Ken Treece and Jay Yelton

Attorneys Must be Competent and Cooperative in eDiscovery or Partner with Someone with eDiscovery Experience

Waskul v. Washtenaw Cnty. Cmty. Mental Health, 2021 WL 5049154 (E.D. Mich. Oct. 31, 2021)

This case involves claims by four developmentally disabled adults alleging that the county mental health authority's budgeting methodology violates several federal and state statutes. With respect to competing discovery motions, Defendant relied on a "proportionality analysis" that included arguments that it lacked the budget to purchase the "prohibitively expensive" software necessary to comply with Plaintiffs' discovery requests, that the availability of staff was constrained by COVID-19 protocols, that only one employee had access to the email system, and that conducting the test searches would be difficult and time-intensive. Magistrate Judge Elizabeth A. Stafford rejected Defendant's proportionality argument as unsupported by Rule 26(b)(1), reasoning that Defendant had a duty to cooperate in search term testing. The Court also noted that under Rule 26, a party objecting that a request for production of documents is burdensome must submit affidavits or other evidence as substantiation and that "bald generalizations or a conclusory assertion" as to the burden does not sustain an objection.

Although the Court acknowledged that Defendant's claim that it had not budgeted for litigation was credible, "accepting this argument would suggest that public governmental entities are exempt from normal discovery obligations." The Court stated that parties are expected to bear the expense of producing documents from their active email files. Moreover, Defendant explored no avenues for producing discovery other than using a single individual employed by Washtenaw County with other duties. The Court stated that the "failure to pursue better methods to produce the discovery is inexcusable and borne out of a fundamental lack of experience in electronic discovery practices and rules."

The Court agreed with Plaintiffs' counsel that "in 2021, Defendant should not be permitted to evade its obligations to Plaintiffs and the Court by pretending that e-discovery is just too hard." The Court stated that Washtenaw County was one of the largest counties in Michigan and had the state's third-highest median income. While Defendant was a separate legal entity from the county, it used the county's email network system and a county employee to collect the emails at issue. The Court therefore rejected Defendant's argument that it lacked the resources to engage in e-discovery. She acknowledged that e-discovery can be difficult for inexperienced attorneys but stressed that inexperienced attorneys have an "ethical duty to become competent, associate themselves with attorneys who are, or to decline the representation. The Court pointed to a Model Order Relating to the Discovery of Electronically Stored Information, adopted by the Eastern District of Michigan in 2013 providing that in the event of a dispute regarding production of ESI, each party had to designate an e-discovery liaison. This liaison could be an attorney, a third-party consultant, or an employee of the party and must "be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology."

Finally, the Court warned Defendant and its counsel that "any violation of this order or more violations of the rules of discovery may result in sanctions under Rule 37 or the Court's inherent authority and that the sanctions could include the imposition of more

monetary sanctions or a default judgment against it."

PRACTICE TIP: Courts are no longer accepting a party's or an attorney's lack of funding and/or lack of experience to handle eDiscovery tasks. eDiscovery resources and training have been available for parties and attorneys for well over 10 years. See the last few pages of this Newsletter for a listing and description of those resources and training opportunities.

Court Demands That Parties Cooperate and Narrow Scope of Discovery Disputes Before Seeking Court's Involvement

Deal Genius, LLC v. 02 Cool, LLC, No. 21 C 2046 (N.D. Ill. Mar. 24, 2022)

In this patent dispute case involving plastic, battery-operated fans made by both parties, the Court summarized the lack of discovery cooperation between the parties as follows: "Rather than take the opportunity of settling their email dispute at or before the hearing, the parties chose to file briefs on the matter… Plaintiff's counsel spent two-thirds of its brief complaining about defendant's counsel's performance in the parties' Rule 37.2 conference and the pointless exchanges of angry emails, which, unfortunately in all too many cases, have come to typify the otiose exchanges between adversaries…Defendant's counsel spent half its brief complaining about plaintiff's counsel's performance at the same Rule 37.2 conferences and the same exchanges of angry emails…The attorneys even disagreed over what happened between them at certain points in their months-long squabble. It is the attorney version of the children's taunt, 'I know you are but what am I?' Unfortunately, it is all too common – and unnecessary…And seems to be even more common in discovery disputes like this one. As such, a tedious summary of counsels' competing versions of what occurred is unnecessary – and unhelpful."

In addressing the dispute, the Court stated: "It should go without saying that months of arguing over five search terms, and then involving a court in that dispute in any event, would be out of proportion to the needs of many cases. But there can be no dispute that what has gone on thus far in this particular case is out of proportion with the needs of this particular case and the commands of good sense…The attorneys in this case are, essentially, at square one. They have not whittled their dispute down far enough for meaningful court intervention." Noting that selecting search terms that might assist in locating pertinent documents "is counsels' job, not the court's." As a consequence, the Court denied the motion to compel.

The Court also stated in a footnote: "The parties should be aware that, when the numbers of documents to be reviewed by a court in discovery disputes move into the hundreds, courts in this Circuit find it appropriate and far more efficient to engage a special master under Fed.R.Civ.P. 53(a)(1)(C)… given the issues at stake in this case, it is likely more fair to have the parties bear the costs of their discovery dispute, rather than as a tax-payer subsidized matter… Review of thousands or even hundreds of documents would monopolize the court's attentions and be patently unfair to the other litigants waiting in the queue, most of whom have honed their discovery disputes through the meet-and-confer process to far more manageable levels long before discovery closed."

PRACTICE TIP: This is one of many recent cases where a court expresses great frustration with the parties for failing to have cooperated in a good faith manner to narrow the scope of discovery disputes prior to filing a discovery motion. In addition to the possibility of retaining a Special Master to assist in this process, the Michigan Court Rules were recently amended to provide parties the opportunity to retain a Discovery Mediator to assist with discovery disputes prior to or instead of seeking the court's involvement. See MCR 2.411.

Court's Assistance to Finalize Terms of ESI Protocol Helps to Keep Scope of Discovery Reasonable

The Raine Group LLC v. Reign Capital, LLC, 2022 WL 538336 (S.D. NY Feb. 22, 2022)

In this case for trademark infringement and unfair competition based on Defendant's use of the name "Reign Capital", Defendant submitted proposals to the court for addressing two ESI Protocol disputes. The first dispute involved Defendant's disagreement that Plaintiff's search for responsive electronic documents should be limited to six identified custodians. Instead, Defendant wanted Plaintiff to have all 100+ of its employees searched for responsive documents. The Court stated: "As to the custodians, Plaintiff has identified six employees as custodians whose emails and personal files likely contain relevant information. Defendant has not identified additional custodians likely to have relevant emails nor explained why other employees of a bank would have relevant email or personal files." The Court concluded that searching all files of all employees of Plaintiff was "certainly overbroad" and such language should not be included in the ESI protocol. However, the Court did remind Plaintiff that searching "non-custodian sources likely to have relevant information" was also part of their obligation under Rule 26.

The second dispute involved what search terms should the parties use to identify responsive documents. The Court explained that it has "broad discretion" to manage the discovery process, including determinations regarding search terms: "Search terms, while helpful, must be carefully crafted. Poorly crafted terms may return thousands of irrelevant documents and increase, rather than minimize the burden of locating relevant and responsive ESI. They also can miss documents containing a word that has the same meaning or that is misspelled." Although the Court indicated that determining search terms "is often best left to specialists who can interpret 'hit' reports and suggest refinements," the Court provided the parties several rulings with respect to search terms and discovery strategies (including the alternative use of a Rule 30(b)(6) deposition to determine certain facts) for this case.

PRACTICE TIP: Negotiating the scope of an ESI protocol early in your case is an excellent way to develop a reasonable and proportional discovery plan. The parties certainly have a duty to work together transparently and in a good faith to develop that plan. However, most courts are willing to help the parties finalize certain terms of that protocol because they realize that such early efforts will reduce the likelihood of future discovery motions.

Sanctions Awarded for Failing to Preserve Video

Darren Hollis v. CEVA Logistics U.S., Inc., No. 19 cv 50135 (N.D. Ill May 19, 2022)

In this case involving claims of discrimination and wrongful termination of Plaintiff, an incident happened between Plaintiff and a co-worker where two sets of witnesses had differing accounts, with three witnesses (who were white) claiming Plaintiff put his hands on the co-worker, and three other witnesses (who were African American) claiming he didn't. Defendant ultimately chose to believe the three white witnesses and fired Plaintiff.

Three security cameras were aimed at the area of the incident. The day after his termination, Plaintiff verbally requested the general manager to review the video recordings, and about a week later in a document complaining about race discrimination, twice requested a review of the video recordings that he asserted would clear him of wrongdoing. Nevertheless, Defendant presented no evidence that any of its employees ever attempted to view, preserve, or recover the footage before Plaintiff's termination, nor was it preserved to address his EEOC complaint or eventual lawsuit.

In response to Plaintiff's motion for sanctions,

District Court Judge Iain Johnston evaluated Rule 37(e)'s five threshold requirements, as follows:

1.The information must be ESI: the Court rejected Defendant's claim that the burden of proof that the video existed resided with Plaintiff, stating: "Under CEVA's theory, as a practical matter, the spoliation itself prevents a claim of spoliation." He also stated in finding that the first requirement had been met: "the inference that video recordings of the incident between Mr. Hollis and Mr. Bayer existed is bolstered, if not proven, by CEVA's previous use of video recordings in a similar incident in the same warehouse."

2.There is a Duty to Preserve the ESI: the Court rejected Defendant's argument that the duty to preserve didn't begin until months later, when Plaintiff filed an EEOC complaint. Instead, Plaintiff's "formal letter of complaint against CEVA Logistics for workplace race discrimination" sent the day after his determination satisfied this requirement.
3.The ESI was Relevant: Referencing Defendant's claims that, based on the statements of the three white witnesses, the video wouldn't have helped Plaintiff, the Court stated, in finding the third requirement met: "this argument establishes the evidence's relevance. Indeed, even under Fed. R. Evid. 401, the relevance of evidence does not turn on whether it supports its proponent's position, but rather it is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence.'"

4.The ESI was Lost Because the Party Failed to Take Reasonable Steps: in finding this requirement was met the Court stated: "nothing before the Court even hints that CEVA ever intervened to stop its security system from proceeding as designed and discarding any video recordings after thirty to ninety days. Even after Mr. Hollis' December 5, 2018, letter alerted CEVA to the relevance and potential importance of any footage that had been recorded, CEVA did nothing."

5.The Lost ESI is Unable to be Restored or Replaced: the Court stated, in finding the final requirement was met: "nothing in the record establishes that the video recordings can be restored or replaced."

The Court also found Plaintiff was prejudiced by the lost ESI, stating: "despite Mr. Hollis alerting CEVA to the importance of the video recording, CEVA took no steps to view, let alone preserve, the video. As a result, the video is lost and unavailable. Because Mr. Hollis is left unable to obtain the video of the incident he needed for his case, the loss of ESI has prejudiced him as that term is used under Rule 37(e)."

Regarding whether there was intent to deprive, the Court stated: "plenty of evidence exists in the record that could lead a reasonable person to conclude that CEVA acted with intent", referencing how Defendant just months earlier had pulled and reviewed video for an unrelated incident. However, the Court also noted: "a competent counsel who is willing to argue that her client is not inculpatory but is instead incompetent could make a reasonable argument that the failure to pull, preserve, and peruse the video recordings was not intentional. Granted, a jury may not credit this argument, but that should not prevent [Defendant] from attempting to sell that pitch under these facts." As a result, the Court decided to leave the intent to deprive decision to the jury and provided (as an appendix) the factual findings and instruction that will be provided to the jury.

PRACTICE TIP: Organizations must have written data preservation plans in place so when litigation and/or a government investigation becomes reasonably likely to occur, steps will be taken to identify and preserve relevant data sources. This is especially important for data sources such as video recordings which often have auto delete functions that occur within a few days or weeks.

Party May Not Use Email Threading Without Consent of Opponents

In re Actos Antitrust Litigation, 340 F.R.D. 549 (S.D.N.Y. Mar. 30, 2022)

In this antitrust case involving allegations of unlawful monopoly pricing by Defendant Takeda of its drug ACTOS, the parties negotiated an ESI

Protocol governing the production of electronically stored information. The parties agreed to produce ESI in native format with agreed to metadata and coding fields. The parties also agreed to de-duplicate the data to avoid the production of exact duplicate documents. However, the parties did not agree to use email threading technology to allow for the production of only the most inclusive emails in a thread.

Takeda began making rolling productions to plaintiffs in February 2022. Takeda used email threading technology to prepare its document productions. As a result, Takeda only produced to plaintiffs the most inclusive emails along with their associated metadata.

Plaintiffs filed a letter motion with the Court to compel Takeda to produce all lesser-included emails along with associated metadata. Plaintiffs also requested the Court to order Takeda to use categorical privilege logging only when the same parties were present throughout an email thread. Takeda had proposed to log only the most inclusive emails as had been produced. The Court granted in part, and denied in part, plaintiffs' motion.

Addressing the use of email threading, the Court noted that in prior litigation Takeda had negotiated an ESI protocol that provided for the use of that technology. However, in the absence of an agreement, there was nothing in the Federal Rule of Civil Procedure or local Court rules that allowed a party to produce only the most inclusive email in a chain. The Court also noted that the exclusion of lesser-included emails from production excluded their associated email metadata, materially effecting plaintiffs' ability to conduct date range searches. Takeda's production also prevented the plaintiffs from identifying parties blind copied in earlier parts of the email chain. The Court ordered Takeda to produce lesser-included emails to rectify these concerns.

As for the privilege log issue, the Court noted that its local rules permitted the use of categorical privilege logging, but found neither the plaintiffs' or Takeda's proposals suitable. The Court directed the parties to meet and confer over the appropriate privilege log format.

PRACTICE TIP: An ESI Protocol should address whatever ESI technology a party plans to use in making its production. Also, check local Court rules for their potential impact on document production, including allowable formats for privilege logs.

Magistrate's Provisional Award of Costs and Fees under Federal Rule 37 Upheld Where Party's Objections to Discovery Requests Were Not Substantially Justified

Axis Ins.Co. v. American Specialty Ins. & Risk Serv., Inc., 2021 WL 6012709 (N.D. Ind. Dec. 6, 2021)

Plaintiff sued on a single claim for breach of contract for defendant's alleged failure to promote, underwrite, bind, and deliver its insurance policies to customers. During discovery, Plaintiff claimed that defendant's responses to its document requests omitted or included incorrect metadata, including missing "family" data and emails with altered subject lines and message content, and omitted responsive documents. The magistrate judge granted plaintiff's motion to compel and provisionally awarded attorney fees to plaintiff finding that defendant's objections were not substantially justified under Federal Rule 37. Defendant only challenged the cost and fee award to the District Court Judge. The Court upheld the magistrate's provisional award.

Upon consideration of the magistrate's provisional cost and fee award, the Court found no "clear error" justifying reversal. The Court noted that while defendant had objected to many of the plaintiff's document requests for being "contention" requests that invaded work product privilege, defendant agreed to produce all non-privileged documents despite its objection. As to the missing metadata, the Court found that under Federal Rule 34(b)(2)(C) the defendant could not rely on the parties failure to agree to an ESI Protocol to justify its refusal to produce metadata fields requested in the plaintiff's

document requests. Despite the defendant's protestations, Rule 34(b)(2)(C) applies to ESI, and a party must clearly state the basis for its objection and whether requested information is being withheld pursuant to the objection. It is not enough to voluntarily produce some information under Federal Rule 34(b)(2)(D) without making a proper objection under Rule 34(b)(2)(C).

PRACTICE TIP: Be sure to clearly state each basis for your objections under Federal Rule 34(b)(2)(C) AND clearly state whether any responsive materials are being withheld pursuant to your objections. Also, make sure that under Rule 34(b)(2)(D), you clearly state any objection you have to the form of production set forth in the proponent's requests AND be prepared to state your reasonable alternative. Failure to comply with either of these rules may result in waiver or your objections and, possibly, sanctions should have to defend your actions against a motion to compel.

Defendant Must Produce Screen Shots of Sales Data or a Corporate Representative under Federal Rule 30(b)(6) Explaining How the Data Can Be Produced

Famulare v. Gannet Co., No. 2:20-cv-13991 (WJM) (D.N.J. March 17, 2022)

In this diversity-based action alleging age discrimination under the New Jersey Law Against Discrimination, plaintiff moved to compel the production of sales data from the defendant's Sales Force platform. While employed, plaintiff had printed off screen shots of her individual sales information. She requested that defendant produce similar screen shots for other sales employees she identified in her discovery requests. In response, defendant stated that the screen shots only provided "real-time" data and that to produce the historical data sought, it had to produce an Excel spreadsheet, which it did.

After a telephonic conference with the Court, the magistrate judge ordered defendant to produce Sales Force data in the screen shot format requested by plaintiff. If defendant maintained its position that it could not produce the data in a screen shot format, the Court ordered defendant to present a Rule 30(b)(6) representative to testify as to why production could not be made in the requested format and to identify alternative formats for production other than via Excel. The defendant objected to the magistrate's order.

Defendant argued that the magistrate's order impermissibly would require it to produce ESI in two formats in contravention of Federal Rule 34(b)(2)(E)(iii) ("A party need not produce the same electronically stored information in more than one form"). In response, the Court noted that the magistrate's order provided defendant with the alternative of producing a corporate representative for deposition to explain in what format it could produce the Sales Force data, if not in the requested screen shot format. The defendant could not avoid producing a corporate representative as long as it maintained its position that it could not produce screen shots—especially since during the parties' telephone conference defendant stated, it would be "happy to have [Plaintiff] take [the deposition] and speak with our client representatives who can tell them about what's possible and what's not." The Court also dismissed defendant's attempt to rely on information not presented during the telephone conference with the magistrate judge. Unable to find any "clear error," in the magistrate's order, the Court affirmed.

PRACTICE TIP: Ideally, the format(s) for ESI production should be discussed by, and agreed upon, by the parties to avoid the time and expense of motion practice. If an issue regarding format should arise, be prepared to explain on the record why you cannot produce ESI in the format requested by the proponent.

Sanctions Available under Federal Rule 37(c) and 37(e) for Plaintiff's Failure to Produce and Spoliation of ESI

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (2022)

Defendant-employer eliminated plaintiff's position. Plaintiff then sued her employer for both sex and disability discrimination and for retaliation under the Family and Medical Leave Act. Upon close of discovery, defendant moved the Court under Federal Rules 37(c) and 37(e) for sanctions for plaintiff's failure to produce and spoliation of several categories of ESI.

Defendant sought sanctions under Rule 37(e) for plaintiff's deletion of relevant Facebook posts, for an "unsent" Facebook message that prevented its production under subpoena, emails from a deactivated email account that were automatically deleted 90-days after deactivation, data from a stolen iPhone, and deleted Telegram Messenger messages. With respect to each category of data, the Court found that sanctions were warranted for plaintiff's failure to take reasonable steps to preserve the lost ESI. The Court found that plaintiff had an "intent to deprive" with respect to the Facebook posts, the "unsent" Facebook messages, and the deleted Telegram Messenger messages. The Court awarded an adverse inference instruction under Rule 37(e)(2) as to these spoliated data types.

With respect to the data from plaintiff's stolen iPhone and emails from her deactivated email account, the Court did not find sufficient evidence of "intent to deprive" to justify sanctions under Rule 37(e)(2). Under Rule 37(e)(1) the Court awarded attorney fees and costs in amount to be determined.

Of note concerning the stolen iPhone, the Court held that once the duty to preserve attached, Plaintiff should have backed up the data on her iPhone. The Court concluded that plaintiff could foresee the loss of data from her iPhone. By not backing up the phone's data, the Court found that she had failed to take reasonable steps to preserve the ESI.

Defendant moved for sanctions under Rule 37(c) for plaintiff's failure to produce deleted, altered, and fabricated Facebook Messenger messages, audio messages, and email communications with her treating podiatrist. While the Court acknowledged that Rule 37(e) is the exclusive remedy governing lost ESI, defendant's motion as to these categories of data did not allege spoliation because plaintiff did eventually produce most of this ESI, but in an untimely manner. The Court held that sanctions for failure to produce ESI could be awarded under Rule 37(c). As to these categories of ESI, the Court found that plaintiff's failure to produce them during the course of discovery was not "substantially justified or harmless," and warranted monetary sanctions and an order of a forensic examination of plaintiff's electronic devices.

The Court also noted that plaintiff's counsel failed in his obligations during discovery. In footnote 18, the Court states "[h]e had an affirmative obligation to ensure that his client conducted diligent and thorough searches for discoverable material and that discovery responses were complete and correct when made. See Fed. R. Civ. P. 26(g)." Counsel appears fortunate to have avoided sanctions this time, however.

PRACTICE TIP: Counsel should take care to monitor their client's ESI collection efforts. Failure to do so could lead to personal sanctions under Federal Rule 26(g)(3). Also, do not forget sanctions under Federal Rule 37(c) when ESI has not been produced, rather than lost.

Production of Entire Email Box Content Held "Reasonably Proportional" Under Circumstances of the Case

Edwards v. PJ OPS Idaho, No. 1:17-cv-00283-DCN (D. Idaho March 16, 2022)

In this class action against Papa John's franchisees for violation of the minimum wage provisions of the Fair Labor Standards Act, delivery drivers sought discovery to identify their "employer" as defined by the Act. Individual defendants Wylie and Allen had

managerial and/or ownership interests in the franchises under suit. The drivers requested production of Wylie and Allen's entire email box contents. Drivers also requested production of search term hits from twelve other custodians of interest using seven broad search terms. Defendants produced over 4,800 emails from Wylie and Allen's email boxes using their own search terms. Defendants also proposed more narrowly drawn search terms to run over the other twelve custodian's individual email boxes. Plaintiffs moved to compel production under their proposals.

In responding to the motion, defendants did not argue that the discovery sought by plaintiffs was irrelevant, but that the scope was disproportionate to the needs of the case. Defendants explained that production of the entire email box contents for Wylie and Allen would result in the production of an additional 225,000 emails, and entail an enormous amount of time and expense to review. As to the other custodians, defendant proposed using plaintiff's search terms, but in combination other terms that together would more likely lead to finding relevant information. The use of the combined search terms would also result in a reduction from approximately 60,000 emails for review and production to under 10,000. In each instance, the Court rejected defendants' narrower proposal in favor of the plaintiffs' broader proposal.

The Court stressed the "criticality of determining who is an employer," and the important role email would play in making that determination. The Court found that with regard to Wylie and Allen, the drivers could not narrow their requests by using any particular set of search terms "without hampering their ability to demonstrate that Wylie and Allen were in positions of authority over the Drivers." The Court then turned to discovery into the other twelve custodians email boxes. The Court found that "[a]lthough there are a significant amount of document results, it stands to reason that a complex case such as this that spans multiple states and multiple corporate entities will lead to more documents in discovery." The Court concluded, "the search terms are appropriately narrowed, the amount of documents that will be examined here is proportionate to the large and complex nature of the case."

The Court acknowledged its concern "with how much irrelevant material will be brought in" under plaintiff's proposal. "However, no party offered a viable way to limit irrelevant material, either temporally or subjectively, and so the Court has chosen to err on the side of allowing access to more information than less."

PRACTICE TIP: Be prepared to educate the Court on viable alternatives to costly, burdensome discovery requests. In large, complex cases, consider the use of technology-assisted review, phased discovery, keyword searching and other eDiscovery technologies, alone or in combination, to reduce burden and cost. In addition, it pays to remind the Court that no party is entitled to perfection in discovery. Parties are only required to make reasonable efforts to identify potentially relevant information.

Ken is a litigation attorney at Warner, Norcross + Judd with 20+ years of experience conducting and supervising all phases of eDiscovery projects from collection and initial search terms preparation to data review and production. He also regularly writes and speaks to various groups on all things eDiscovery. Ken can be reached at ktreece@wnj.com or at 269.276.8188

After 30+ years as a litigator and manager of eDiscovery teams, Jay now focuses on discovery mediation where he helps clients solve disputes quickly, cost-effectively and confidentially. In addition, he assists parties to design proportional discovery plans and assists parties and courts to efficiently resolve discovery disputes. Jay can be reached at jyelton@wnj.com or at 269.276.8130

Adopted Amendments

2020-06 - Amendments to the case evaluation process

Rules affected:	MCR 2.403, 2.404, and 2.405
Issued:	March 19, 2020
Comment Period:	July 1, 2020
Public Hearing:	September 23, 2020
Effective:	January 1, 2022

These amendments modify the case-evaluation process in numerous ways, including: allowing parties to stipulate to a different ADR process (with judicial approval), removing sanctions provisions, reducing the number of days case evaluation materials must be filed in advance, reducing the number of days for case evaluators to provide parties with an award, and updating the definitions of "verdict" and "actual costs," and defining interest of justice exceptions for attorney fees.

As defined in MCR 2.410, an alternative ADR process includes settlement conferences ordered under MCR 2.401, mediations under MCR 2.411, MCR 3.216, AND MCR 3.970, and other procedures provided by local court rule or ordered on stipulation of the parties.

2017-28 - Protection of personal identifying information submitted to courts

Rules affected:	MCR 1.109 and MCR 8.119
Issued:	December 12, 2018
Comment Period:	April 1, 2019
Public Hearing:	May 22, 2019
Effective:	April 1, 2022

These amendments require certain personal-identifying information ("PII") to be redacted from documents filed with the Court, which includes: date of birth, Social Security Number (or national identification number), Driver's License Number (or state-issued personal identification number), passport number, and financial account numbers. The parties and their attorneys bear the burden of removing this information from documents filed with the court. Although this amendment was adopted in 2019, the effective date has been extended several times.

On March 17, 2022, the Michigan State Court Administrative Office (SCAO) released a list of SCAO-approved forms and on April 19, 2022, the SCAO released updated Frequently Asked Questions about PII in court filings.

The Discovery Proportionality Model

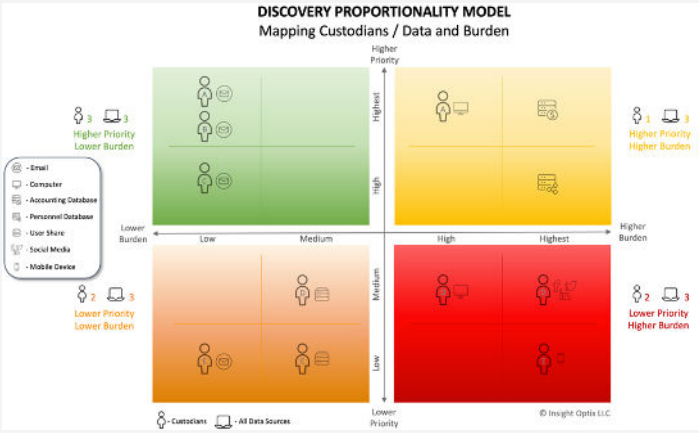
Finally, a solution to wrangle the E-Discovery Beast

By Janice Yates

Back in the heart of the pandemic in 2020, a proactive group of 56 eDiscovery practitioners, attorneys, and judges set out on what many considered an impossible task – to design a step-by-step guide to help attorneys and judges walk through the discovery process with the 2015 FRCP amendments as their guide. The document published in January for public comment is the fruit of their almost two-year labor, the Discovery Proportionality Model - A New Framework.

At the core of this model is a technological framework developed by Evidence Optix® creators, Mandi Ross and Bobbi Basile, two highly experienced, innovative leaders in the eDiscovery industry. Their patented software provided the roots and guidance the drafting teams needed to build an astute and comprehensive discovery scoping workflow.

The New Framework is a groundbreaking tool which provides guidance to a producing party to assess whether discovery is proportional to the needs of the case after taking into account all pertinent Rule 26(b)(1) factors. The New Framework consists of four steps[i] that culminate in a "Heat Map" of custodians and data sources, pinpointing those that are most likely to have knowledge or information relevant to the claims and defenses, and estimating the cost of moving data from collection through review and production. The Heat Map can then be used to present concrete metrics to support discovery scoping, negotiations, and disputes, as the following illustration demonstrates.



Finally, a Discovery Road Map is created for each individual case, "which distills the key data points needed to make reasonable proportionality assessments in a coherent and structured manner." You can see an overview of the New Framework steps here.

The New Framework was introduced to the industry with much fanfare at a Bench Bar Conference hosted by the George Washington University Law School Complex Litigation Center, held in March 2021 to almost 200 participants, which included federal judges, attorneys, and corporate representatives. Since that time, webinars, conferences, and podcasts have been dedicated to review and promotion of the new guidelines. Additionally, a judicial pilot program is currently being deployed that will leverage the methodology in live cases.

As all practitioners know, opinions about what should be collected and produced, what is considered relevant, and what is proportional has been left to motion practice thus far. The permission slip provided by the 2015 FRCP proportionality amendments to rein in runaway eDiscovery costs and burden to balance the needs of the case to the amount in controversy has yet to be fully utilized. This New Framework finally grants the power to use that permission slip and wrangle the unruly eDiscovery beast.

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The State of Emerging Data 2022:
Waking a Sleeping Giant

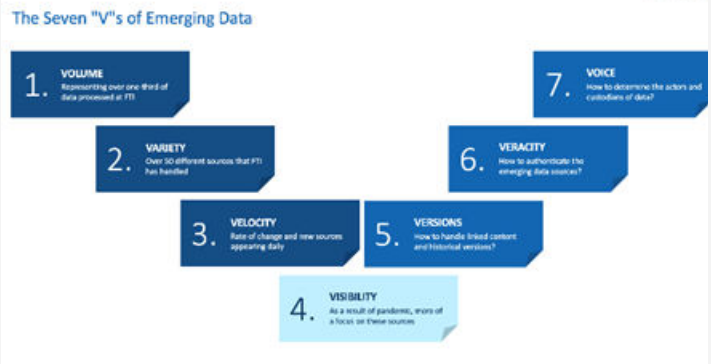
By FTI Consulting

As the creation and divergence of data accelerate, emerging data sources will begin to tip the scales in governance, risk, compliance and discovery

The visibility and use of non-traditional, or emerging, data sources reached an all-time high in 2021, with cloud and collaboration applications experiencing unprecedented enterprise adoption. This has driven tremendous growth in the volume and variety of data within most organizations. Anecdotally over the last few years, the volume of data processed in legal e-discovery and investigations matters remained mostly flat, largely due to the fact that organizations were improving upon information governance and data minimization initiatives. In 2020 however, the volume of data processed jumped 42%, and over the past year, the prevalence of emerging data sources within that increased to account for more than one-third of the total.

What's especially notable about these increases is that when considering the timeframes in scope for current matters, most include data from 2017-2020. Thus, the impact of 2020-2021 emerging data growth has not yet fully materialized in current matters. In reality, the bulk of the data is yet to come. What this means for legal, compliance and IT teams is that the sleeping giant of emerging data will begin to awaken in the coming year, and by 2023, the majority of data within an enterprise (and by extension, in scope for litigation and investigations) will be from cloud-based, emerging data sources.

This paper will discuss the state of emerging data sources at the outset of 2022, and how the current trajectory is positioned to impact governance, risk, compliance and discovery in the years ahead.



Defining Emerging Data: The 7 Vs

When the concept of big data was initially introduced, it was defined by volume, variety and velocity—the "3 Vs." These three categories of data growth are important measurements when considering emerging data sources. As discussed, the volume and variety of these sources are growing exponentially. The global data universe is expected to reach 175 zettabytes of data by 2025 (IDC). To put that into perspective, an IDC analyst explained, "If one were able to store 175ZB onto discs, [it would equate to] a stack of discs that can [reach] the moon 23 times."

The variety of emerging data sources is equally impressive—new sources are emerging all the time, and not only via new platforms, but also in the numerous formats that exist within each platform. Velocity accounts for the rapid, continuous improvement, evolution and cycling of change taking place within the data universe.

Over the last two years, four additional elements have come into play, resulting in the "7 Vs" of emerging data sources. In addition to volume, variety and velocity, these include:

Visibility: Prior to 2020, few attorneys or regulators were thinking about cloud sources and collaboration application data as relevant to regulatory audits, investigations, litigation, etc. Now, emerging data sources have become highly visible and understood as rich stores of relevant and important corporate information.

Versioning: With dynamic documents, legal and compliance teams must now be aware of and address the number of systems that are saving numerous versions of a single document. This is an entirely new concept when considering a request to collect and review a document that was linked in an email. Which version of that document is relevant? Is there an obligation to review and/or produce all versions? Are the changes from version-to-version relevant to a matter, and how can those changes be analyzed in context of the broader dataset at hand?

Veracity: This brings traditional processes for authenticating information into question. When data is connected from numerous, separate repositories into a single chat message, how is the original source determined and verified? How can teams document and defensibly explain the flow of data coming in and out of a record stored in a collaboration application such as Slack? Answering these questions is requiring a reorienting of the entire data ecosystem.

Voice: The concept of "custodian" (e.g., who was doing what, when) is a cornerstone in litigation and investigations. However, with emerging data sources, scoping a matter by custodian is not always effective. The process of appropriately or efficiently targeting individuals and their activities must now also be gauged through the lens of their access, permissions and participation in certain documents or chat channels.

A Reawakening in Best Practices

The "7 Vs" have spurred the need for significant changes in best practices and workflows across governance, risk, compliance and discovery. Current and traditional frameworks were primarily designed for static data and on-premise systems. Many of the sources that are now generating the largest volumes of data within organizations were not even in existence when foundational information governance programs were put into place or when investigations and litigation workflows were developed.

We're at a turning point now where legal, compliance, IT and security teams need to revisit first principles and orient to the new data landscape. This includes taking inventory of what needs to be accomplished, assessing how data is reviewed and analyzed, creating new workflows and implementing new tools and technologies that can accommodate data in this new paradigm. New controls and processes for data retention and minimization will be needed and the processes used to collect data will need to become more sophisticated. Rather than adhering to the linear, step-by-step methodologies that worked for static data sources, teams must be prepared to place greater importance on enriching and visualizing data sets.

Preparing for a Massive Shift in Discovery and Investigations

When we look specifically at how the emerging data climate is transforming and changing e-discovery, there are a number of considerations. It's critical to understand who is using each system, why, how often and the specific business functions for which they are used. Many cloud-based and collaboration platforms have multiple sub-applications within them that are used by different teams for varying purposes. Having a clear view of this landscape is an essential first step before attempting any data collection, processing and review for a legal matter or investigation.

Equally important is to understand that the needs of the matter—and therefore the workflows for dealing with emerging data sources—will vary depending on the type of case it is. The role of emerging data sources in an antitrust inquiry will be quite different from that in a civil litigation or internal investigation. Additional key considerations that should be addressed as workflows are developed and technology is selected include:

1) Not all platforms are created equal. Data interface capabilities for governance and discovery within emerging data sources run the gamut from nonexistent to API-enabled, to robust, built-in functionality. But all have limitations that can significantly impact the ability to extract data in a usable and defensible way. For example, a leading productivity and workspace suite may offer an e-discovery function that enables export of data from its applications, but when that data is exported, the folder path of where users stored their information in the ordinary course of business is omitted. That would be a critical component needed for understanding the data and producing it to an external party.

The level of built-in functionality will also depend upon which version is in use within the organization. If a free/entry-level tier is in use, that will offer a much more limited set of governance and discovery capabilities than the full version of an enterprise-level suite such as Microsoft Office 365.

2) Capabilities within third-party tools. Tools such as Onna, Exterro and Smarsh are examples of platforms designed to provide data archiving, data centralization and/or serve as an interface between emerging data sources and discovery platforms. With these, organizations can bolster their data governance functions over emerging data sources, including implementation of retention, remediation, legal hold and adjunct e-discovery exporting. Tools are also emerging to render content from emerging data platforms, such as Slack messages, in the same format as email or other traditional documents. These can help in some matters, but gaps still remain.

3) The reality of APIs. Many collaboration platforms provide APIs that allow users to develop connectors to access the underlying data and perform certain functions with it. While these APIs can be useful, very few legal teams have the resources necessary to create a custom-built solution for discovery and investigations. Further, the rate of change coming from these emerging data sources is so rapid that custom tools must be frequently updated and retooled to align with software updates. Defensibility is another issue when using APIs, as any process used to ultimately deliver data to a regulatory authority or to opposing counsel must be transparent and documented. In some matters, FTI Technology's team provides custom solution development for client matters using available APIs, but only with the oversight of our dedicated technical team that can ensure defensibility of the workflows and remain continually abreast of software upgrades.

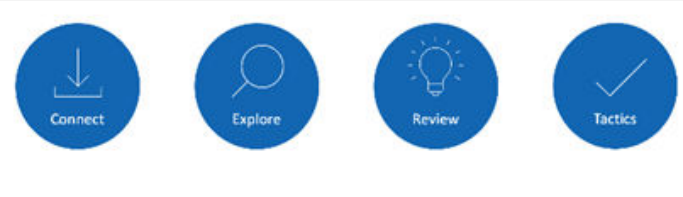
4) Increased volumes require new review methods. Given the volume of data created within platforms like Slack, Teams, Google Workspace and Box, it's very difficult to look at individual messages in context. Doing so requires the use of advanced analytics and a dynamic review methodology. When processed the right way and reviewed using visualizations and other sophisticated analytics, the data from these platforms can actually deliver a great deal of insight, faster than what's been previously available when reviewing email or other static documents.

5) Short form messages introduce unique challenges. A single short-form message in isolation will rarely provide any useful insight, and must be considered a completely different type of artifact than an email. Messages must be grouped in a meaningful way to understand how they came into

existence and the broader context of the conversation. Standards for this are beginning to form—some suggest that messages should be segmented in 24-hour increments—but regardless of how messages are grouped, teams must be mindful of overall context and what the volume of segmented groups will become over time. Rendering these messages into a production environment and reducing the noise within them is another key challenge.

5) A new dynamic for privilege. How is privilege determined in a shared messaging environment like Slack? What if an attorney was present in a channel, but later removed, or was added to a group some duration after it was created? How do these factors impact which content within that channel or group is deemed privileged? And how can a discovery team identify those elements in the source system? These are all new challenges that teams will increasingly face when conducting privilege review in an emerging data source environment. Determining privilege will require an understanding of who is being targeted in the matter and when they and other key people had access to certain data.

6) Handling linked content. As mentioned earlier, productivity and collaboration tools allow users to send documents as hyperlinks in a live message. There's been debate around whether such links are equivalent to attachments. For now, the courts are saying they are not the same. But in the near future, there will likely be some recognition that legal teams must be able to connect an email or chat message and the hyperlinked content within it to each other in some way. Access and versioning will add complexity to this—the type of access someone has, what version they can access and what they do within a linked document are constantly changing dynamics. Our teams have started to see this issue particularly in the antitrust and competition space, which is interesting, because the standard proportionality and reasonableness arguments that counsel can leverage in a legal matter do not apply when dealing with regulators. As this evolves, it's likely that standards developed in the regulatory space will begin to bleed over into the courts.



Adapting To a Connect and Enrich Mindset

Emerging data is forcing e-discovery and investigations teams to consider a new EDRM that is flexible enough to meet the dynamic nature of collaboration, chat and cloud data. To meet those demands, a new framework and workflows should include the following phases:

Connect: Either through built-in, third-party or custom, API-enabled tools, collection will go directly to the data source in a way that isn't possible with on-premise systems.

Explore and Enrich: This is essentially next-level data processing, or deep processing, where teams can capture standard metadata and conduct de-duplication, but also go into the context of messages and extract entities. Knowledge of a particular value or reference area isn't necessary—the data can inform the process. Advanced approaches in this phase include leveraging natural language processing and machine learning on audio and video transcription or other non-traditional content to begin extracting facts earlier on in the process.

Dynamic Review: With visualizations, sentiment analysis, social networks, behavioral patterning and predictive models that can persist across types of cases, the review phase can evolve to provide deep understanding of the tone and intention of messages. This will deliver faster access to critical insights about the entire dataset in context. Again, the concept is all about leveraging the data and letting it speak for itself.

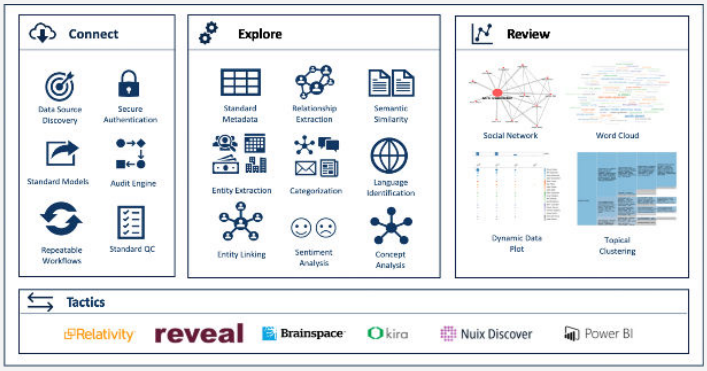
Tactics: The final stages of a matter, across production, disposition, reporting and remediation,

can benefit from the efficiencies and insights gained upstream using a Connect, Explore, Enrich and Dynamic Review—or Exploratory Content Assessment—approach.

Emerging Data = Emerging Insights

There is a sleeping giant of emerging data that will awaken this year. Organizations are going to experience a range of impacts as the volume, variety, velocity, visibility, versioning, veracity and voice of their data continue to expand. Challenges are inevitable, especially from governance, risk, compliance and discovery perspectives.

There are opportunities though, too. Data is a tremendous resource and asset. Aligning current frameworks and workflows to the unique aspects of emerging data sources can provide more direct, more effective and more transparent access to critical information and insights. With deep processing, data enrichment and leveraging the powerful analytics that are available today, data can be allowed to speak for itself. In turn, teams will be more agile to adapt as new use cases, requirements and data sources continue to emerge.



Experts With Impact

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OTHER RESOURCES

The Sedona Conference (thesedonaconference.org): TSC offers free access to hundreds of publications on several topics including eDiscovery, Data Security & Privacy, Complex Litigation and International Discovery. Many of the publications are recommended guidelines and principles developed by working groups composed of judges, attorneys, educators, consultants and other experts. TSC educational institutes and webinars are offered throughout the year for a registration fee.

The Electronic Discovery Reference Model (edrm.net): EDRM creates practical global resources to improve eDiscovery, privacy, security and information governance. EDRM provides articles, webinars, eDiscovery tools and diagrams and the opportunity to propose and participate in eDiscovery research projects. EDRM also offers a Hub which provides you the opportunity to search for jobs, post resumes and post job openings.

Institute of Continuing Legal Education (icle.org): ICLE is cosponsored by the State Bar of Michigan and all of Michigan's law schools and they publish a Michigan Civil Procedure Book which includes a chapter on Discovery of Electronic Evidence. ICLE also provide a broad range of discovery how-to-guides, checklists, forms, publications and webinars. Most of these resources require membership in ICLE or a modest cost to purchase.

State Bar of Michigan (michbar.org/civildiscovery): SBM offers litigation bar journals, seminars, guidelines and other background materials related to discovery in Michigan. In association with our ACEDS Detroit Chapter, ICLE published and offers a Guidebook to the New Civil Discovery Rules.

To become a member or find out more, contact our Membership Director, Suzanne Alfasten, at suzanne.alfasten@trustpoint.one

To get information on previous and future events, recorded links and educational information, contact our Education Director, Denise Bach, at dboccomino@att.net

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