



Presents

Ethics in eDiscovery

March 10, 2022
12:00 pm - 1:00 pm

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ID Ethics in eDiscovery

Presented
to:

Women's Bar Association of the State of New York

Changing Standards
in Competence,
Confidentiality, and
Cooperation



Agenda

- 1 **Technological Competence in Discovery**
- 2 **New and Dynamic Forms of Discoverable ESI**
- 3 **Analytics, Metrics, and Sampling**
- 4 **Safeguarding Confidences and the Privilege**
- 5 **Resources**



Technological
Competence in
Discovery



COMPETENCE UNDER THE NEW YORK RULES OF PROFESSIONAL CONDUCT



“A lawyer shall provide competent representation to a client. *Competent representation requires the legal knowledge, skill, thoroughness and preparation* reasonably necessary for the representation.”

Comment d. “To maintain the requisite knowledge and skill, a lawyer should *keep abreast of changes* in the law and its practice, *including the benefits and risks associated with technology* the lawyer uses to provide services to

New York Rule of Professional Conduct 1.1 (emphasis added)



COMPETENCE IN THE CONTEXT OF DISCOVERY

“[D]iscovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery . . . ***A lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent.***”

California State Bar Formal Opn. No. 2015-193 (emphasis added).



Judicial Expectations for Discovery Competence

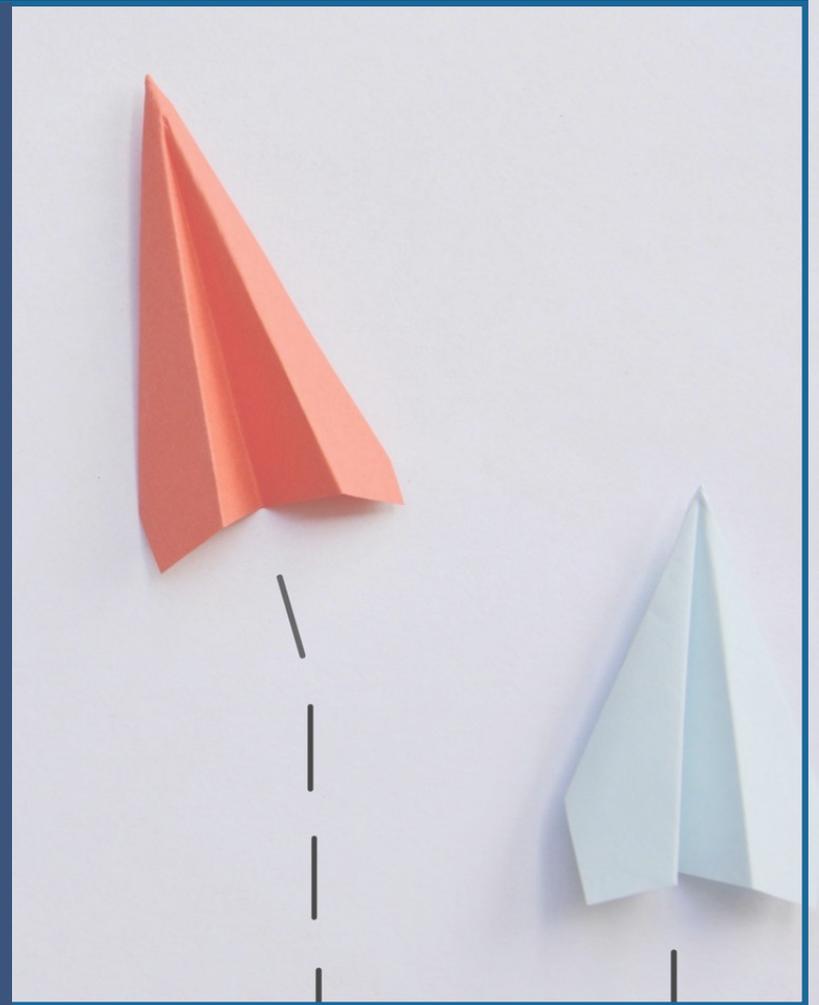
Defendants’ “attorneys did not, and still do not, comprehend that it is their duty to become actively engaged in the discovery process, to be knowledgeable about the source and extent of ESI, and to ensure that all gathered data is accounted for.”

HM Elecs., Inc. v. R.F. Techs., Inc., No. 12-cv-2884
(S.D. Cal. Aug. 7, 2015).



New and Dynamic Forms of Discoverable ESI

Challenges with Preserving
and Producing ESI



SCOPE OF DISCOVERY IN NEW YORK STATE COURT

“There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action”

NEW YORK CPLR § 3101



[Proposed] Preamble to Rule 11. Acknowledging that discovery is one of the most expensive, time-consuming aspects of litigating a commercial case, the Commercial Division aims to provide practitioners with a mechanism for streamlining the discovery process to lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery. It is important that counsel’s discovery requests are both **proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action.**

Proposed amendment to Commercial Division Rule 11 by Commercial Division Advisory Council (September 14, 2021)

SCOPE OF DISCOVERY IN FEDERAL COURT



“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case”

FED. R. CIV. P. 26(B)(1)

WHAT THE CLIENT MUST KNOW ABOUT PRESERVATION

“The lawyer has an obligation to educate himself or herself about what data the client has, who has it, how it is stored, what document retention and destruction policies the client has, who has access to the data, and how it is preserved, or how it may be modified or destroyed.”

Small v. Univ. Med. Ctr. of Southern Nevada, 13-cv-0298, 2018 WL 3795238 (D. Nev. Aug. 9, 2018) (emphasis added).



ETHICAL DUTIES REGARDING PRESERVATION OF EVIDENCE



(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly

New York Rules of Professional Conduct 3.3(a)

WHAT SOURCES OF RELEVANT ESI MUST BE PRESERVED?



MESSAGING APPS WITH ENHANCED SECURITY MEASURES HAVE REPLACED EMAIL FOR COMMUNICATION PURPOSES

“Secure messaging apps like WhatsApp, Signal and Confide are making inroads among lawmakers, corporate executives and other prominent communicators. Spooked by surveillance and wary of being exposed by hackers, ***they are switching from phone calls and emails to apps that allow them to send encrypted and self-destructing texts.***”

As Elites Switch to Texting, Watchdogs Fear Loss of Transparency, NEW YORK TIMES (July 6, 2017) (emphasis added).



THOSE FEATURES INCLUDE END-TO-END ENCRYPTION AND AUTOMATED DESTRUCTION OF MESSAGE CONTENT

The day after learning about the FTC's investigation, *Noland instructed the other members of SBH's leadership team . . . to start using a pair of encrypted communications platforms called Signal and ProtonMail.* After doing so, the Individual Defendants stopped using their previous messaging platforms for work related communications, apparently *turned on Signal's "autodelete" function,* and then proceeded to exchange an untold number of messages related to SBH's business.



F. T. C. v. Noland, No. CV-20-00047-PHX-DWL, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021) (emphasis added).

PRESERVE RELEVANT DATA FROM MESSAGING APPS AND WORKPLACE COLLABORATION TOOLS





Analytics
Metrics,
and
Sampling

Tools Needed for
Litigating in the
Age of eDiscovery



IS HUMAN REVIEW THE DISCOVERY GOLD STANDARD?

“[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible - perhaps even perfect - and constitutes the gold standard by which all searches should be measured.’ . . . ***This myth of human review is exactly that: a myth. Research shows that human review is far from perfect.***”

Dynamo Holdings Limited P’ship v. Comm’r of Internal Revenue, No. 2685-11 (T. C. July 13, 2016) (emphasis added).

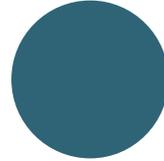
ANALYTICS TOOLS AND SEARCH METHODOLOGI ES



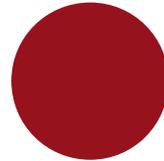
Search Terms



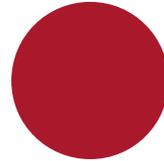
Concept Search



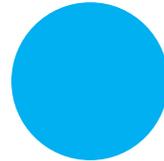
Data Clustering



Technology-Assisted Review



Near Duplicate Identification



Email threading



SEARCH TERMS

- Search terms create a black and white scenario based on whether a document contains a particular word
- Search terms may result in irrelevant documents being identified because the keyword selected may have different meanings or context to what is sought
- Combining keywords with other analytical search methodologies may succeed in identifying additional relevant information, along with the most important documents

City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489 (N.D. Ill. 2018).

CONCEPT SEARCH

- Useful when large volumes have to be examined and the search attempts to match results with the query conceptually
- Methodology is not based on keywords, but on the subject matter of a document, paragraph, sentence, or word
- Concept searching adds information to the very basic keywords as it evaluates both words and the context in which they appear



EDRM, Concept Search,
<http://www.edrm.net/resources/glossaries/glossary/c/concept-search>

EMAIL THREADING

- Many emails contain earlier messages and are constructed in the form of a chain or thread
- Email threading technology identifies the latest message in the chain and eliminates the need to review redundant messages
- Threading organizes emails into conversations, which reveals the context of particular communications



David Harvey and Daniel Garrie,
eDiscovery in New Zealand Under the New Amended Rules,
9 Dig. Evid. and Elec. Signature L. Rev. 7, 15
(2012).

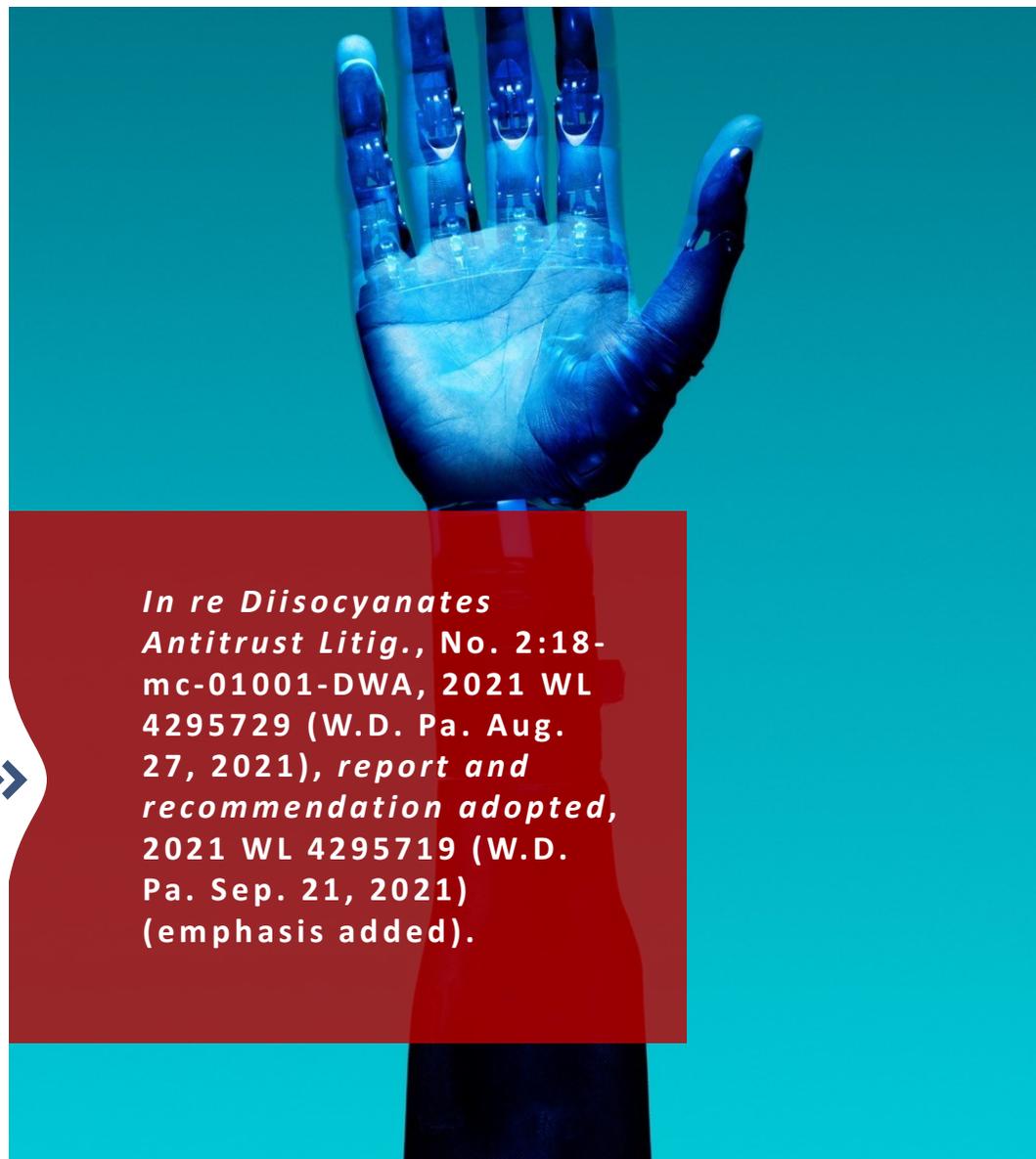


TECHNOLOGY- ASSISTED REVIEW

Technology-assisted review “is a process for ranking . . . a document collection, using computer software that learns to distinguish between responsive and non-responsive documents based on coding decisions made by one or more knowledgeable reviewers on a subset of the document collection. The software then applies what it has learned to the remaining documents in the collection.”



*In re Diisocyanates
Antitrust Litig., No. 2:18-
mc-01001-DWA, 2021 WL
4295729 (W.D. Pa. Aug.
27, 2021), report and
recommendation adopted,
2021 WL 4295719 (W.D.
Pa. Sep. 21, 2021)
(emphasis added).*



THE COOPERATIVE APPROACH TO DISCOVERY

“It is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly.”

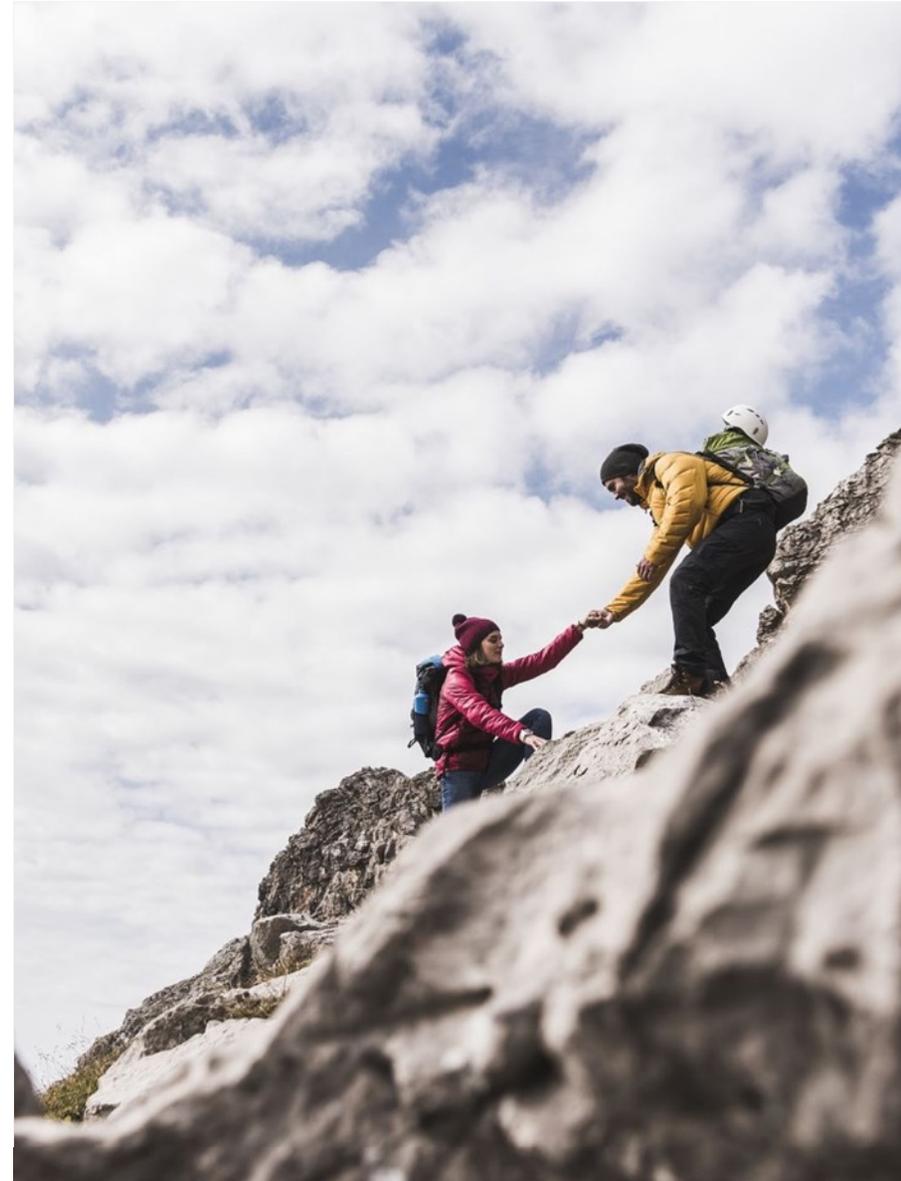


*Mancia v. Mayflower
Mayflower Textile
Servs. Co., 253 F.R.D.
354 (D. Md. 2008);
accord City of Rockford
v. Mallinckrodt ARD
Inc., 326 F.R.D. 489
(N.D. Ill. 2018).*



EXAMPLES OF ADVERSARIAL COOPERATION IN DISCOVERY

- Disclose client information systems during meet and confer process to facilitate exchange of relevant ESI
- Determine during meet and confers whether and when certain custodians can come off legal hold
- Execute a clawback agreement and obtain a non-waiver orders to minimize endless wrangling over inadvertent disclosures of privileged information
- Negotiate a stipulation with opposing counsel that limits or eliminates the scope of a privilege log



SAMPLING

“The appropriate balance between the Plaintiff’s need for the information and the burden of producing it may be struck through statistical sampling . . . ***sampling strikes a fair balance between Plaintiff’s right to relevant information and the burden on UPS in producing a large amount of data.***”



Solo v. United Parcel Service Co.,
No. 14-12719, 2017
WL 85832 (E.D.
Mich. Jan. 10, 2017)
(emphasis added).



METRICS

“Metrics offer counsel ways to assess the ‘performance’ of a particular document production. Metrics can gauge the extent to which a production contains relevant materials, undisclosed privileged information, and even nonresponsive documents. They can also be used to measure the quality and nature of adversaries’ productions.”

A photograph of several red measuring tools, including a ruler, a protractor, and a set square, arranged on a yellow background. The tools are slightly out of focus, creating a sense of depth.

**Philip Favro,
*Analytics, Metrics and
Sampling: Tools
Needed for Litigating
in the Age of
eDiscovery*, 18 DDEE
170, Bloomberg BNA
(Mar. 15, 2018)
(emphasis added).**



Safeguarding
Confidences
and The
Privilege



PRESERVING CLIENT CONFIDENCES AND SECRETS

- (a) "A lawyer shall not knowingly reveal confidential information..."
- (c) "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b)."

New York Rule of Professional Conduct 1.6(a), (c).



Take Care to Prevent Disclosure of Non-Responsive Documents

“The City is directed to provide to Plaintiffs a sample of 300 non-privileged documents in total from the HPD custodians and the Mayor's Office. ***These documents should be randomly pulled from the corpus of non-responsive documents.*** The City shall provide these documents to Plaintiffs' counsel on an attorneys' and experts' eyes-only basis.”

Winfield v. City of New York, 15-CV-05236, 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017) (emphasis added).



BASIC ELEMENTS OF THE LAWYER-CLIENT PRIVILEGE

- “To qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship.”
- “It is a narrow privilege and protects only communications and advice between attorney and client.”

Newman v. Highland School District No. 203, 381 P.3d 1188 (2016).

CLOUD, TEXT MESSAGE, AND SOCIAL MEDIA PROVIDERS MAY LACK CONFIDENTIALITY

“Right now, Slack stores everything you do on its platform by default — your username and password, every message you’ve sent, every lunch you’ve planned and every confidential decision you’ve made. ***That data is not end-to-end encrypted, which means Slack can read it, law enforcement can request it, and hackers — including the nation-state actors highlighted in Slack’s S-1 — can break in and steal it.***”

Gennie Gebhart, *What if All Your Slack Chats Were Leaked?*, New York Times (July 1, 2019) (emphasis added).





Practice Tips

Tips for
Satisfying
Competence
Standards



STEPS TO HELP SATISFY COMPETENCE REQUIREMENTS

- Become proficient in ESI basics and best practices.
- Obtain an understanding of client information and communication systems that may have relevant information.
- Confirm the client has an effective litigation hold process and take steps to remedy any deficiencies.
- Develop an understanding of the search methodologies that can be used to find the key documents.



Philip Favro & Hon. Mitchell Dembin, *Changing the Culture of Discovery*, 37 AMER. J. TR. ADV. 587 (2014).

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Everyone seeking CLE credit for today's webinar, please make note and write down this code down as you will be asked to provide the code after the conclusion of today's program.





Resources



RESOURCES

- Philip Favro, *Court Rejects Sanctions Based on Party's Efforts to Remediate Data Loss*, LEGALTECH NEWS (Jan. 27, 2022).
- Philip Favro, *Lessons Learned for 2022: Spotlighting Five eDiscovery Trends from 2021*, DRIVEN BLOG (Jan. 3, 2022).
- Philip Favro, *Court Sanctions Defendants For Using Signal To Thwart FTC Investigation*, LEGALTECH NEWS (Sept. 16, 2021).
- Philip Favro & Keith Call, *A New Frontier In eDiscovery Ethics: Self-Destructing Messaging Applications*, UTAH BAR JOURNAL (Mar/Apr 2018).
- Philip Favro, *Analytics, Metrics and Sampling: Tools Needed for Litigating in the Age of eDiscovery*, 18 DDEE 170, BLOOMBERG BNA (Mar. 15, 2018).

RESOURCES – THE INNOVATIVE DRIVEN BLOG

**WHAT LITIGANTS
SHOULD KNOW
ABOUT NEW
COURT
DECISIONS ON
CATEGORICAL
PRIVILEGE LOGS**



Questions?



Thank
You



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