CLEF
Complex Litigation eDiscovery Forum

Discussion Topic No. 4:
What's New in Defendants' ESI Playbook and Strategies?
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Overview

We've all been there—prepared to have a productive Rule 26(f) conference only for opposing counsel to deny basic information about their client's ESI because such information would be considered "discovery-on-discovery". This Panel set out to identify what recent strategies the defense bar has employed to prevent full disclosure and transparency in ESI. Understanding the defense playbook and the recent case law on same will prepare you to overcome these roadblocks.

Topics for Discussion

I. ESI Protocol? What ESI Protocol?

A new tactic by defense counsel in recent years is to question the need for any ESI Protocol at all, as usual justified by Sedona Principle 6. While some of us have seen this as an initial tactic in negotriations, it doesn't appear to be an issue commonly getting briefed to the Court. We would like to have discussion around how often this tactic is coming up, how are plaintiffs pushing back, and what is the best way to overcome this strategy?

II. Search Methodology: Don't worry, we've got it. We'll let you know when we're done.

Defense counsel has consistently resisted the use of transparent technology assisted review ("TAR") in which human reviewers and a computer engage in an interactive process to "train" the computer how to identify responsive documents based on properties and characteristics beyond simple search terms, even though it is widely recognized that "TAR is cheaper, more efficient and superior to keyword searching." *Rio Tinto PLC v. Vale S.A.,* 306 F.R.D. 125, 137 (S.D. N.Y. 2015). *See also In re Mercedes-Benz Emissions Litig.*, 2:16-cv-881, ECF 282 (Jan. 9, 2020) (listing case law noting advantages of TAR over search terms). Courts are hesitant to compel the use of TAR because according to years of case law and Sedona Principle 6, the responding party is best situated to evaluate the procedures, methodologies, and technologies appropriate for producing their own electronically stored information. Thus, defense counsel often indicate they prefer to use the custodian-and-search term approach, which they assert is fair, efficient and well-establisehd. And even when TAR is adopted, defense counsel wish to apply search terms first, diminishing the power of TAR to locate key documents and requiring all the effort of negotiating search terms as well.

Driven largely by Sedona Principle 6, many defense counsel recently have questioned entry of even basic parameters around their search process. Sometimes it is based on the premise they would like to handle the issue informally but will provide some transparency. Other times, it is an effort to push forward with their preferred process and then require plaintiffs to point to a "specific deficiency" to justify any need for further search. Of course, this leaves plaintiffs with little time to remedy problems with the search methodology given case deadlines.

In addition to questioning transparent search term methodologies, defense counsel has resisted implementation of formal meaningful validation processes in ESI protocols. However, conferral on a validation process should be standard and is appropriate. Indeed, "sampling the null set when using key

word searching provides for validation to defend the search and production process, and was commonly used before the movement towards TAR." *City of Rockford v. Mallinckrodt ARD Inc*., No. 17 CV 50107, 2018 WL 3766673, at *4 (N.D. Ill. Aug. 7, 2018) (*citing* Craig Ball, Surefire Steps to Splendid Search, p. 7 (2009), http://www.craigball.com/Surefire_Steps_to_Splendid_Search.pdf) ("Keyword search must be judged both by what it finds and what it misses. That's the 'quality assurance' courts demand. A defensible search protocol includes limited examination of the items not generating hits to assess whether relevant documents are being passed over.") (emphasis in original).

We will discuss recent TAR case law and strategies to avoid unilateral and opaque search methodologies.

III. It's not our cellphone, sorry! – Possession, Cusody or Control non-sense as a means to shield or destroy evidence.

The reality of most of our cases is a fair amount of key evidence is on mobile devices used by key executives. That data is often only available for a short period of time on the device itself, with perhaps another year or two more in associated backups to the device. However, many cases take a year or more to get past motions to dismiss, by which time any data not properly imaged from the devices at the outset of the litigation has been lost. Defendants than hide behind a possession, custody, or control argument or BYOD ("bring your own device" corporate policies) saying they told the custodian to preserve the data, but took no action to make that happen. An example of a fairly successful execution of this strategy is in the included *In re Pork Antitrust Litigation* order. We look forward to a discussion around the various flavors of this strategy and how best to counter it.

IV. Missing Links: Not our problem, that's how it is stored.

It has become more common that companies are using hyperlinks to send documents within the company, instead of attachments to emails. An example of this includes Google links in which the document is "attached" to an email as an embedded link in the email.

Use of hyperlinks in emails needs to be included in your Rule 26(f) checklist, including form of production to ensure that the hyperlinked documents are linked as a family member to corresponding emails. Defendants have argued that there is no technological way to collect hyperlinked documents during document collection and it is important you thoroughly discuss same with your ESI consultant and meet and confer with defendant on the form of production. *See, e.g.*, *Porter v. Equinox Holdings, Inc.*, No. RG19009052, 2022 WL 887242 (Cal. Super. Mar. 17, 2022) (requiring plaintiffs to identify "key" linked documents in the produced communications that defendants had to produce); *Nichols v. Noom*, 20-cv-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), *aff'd*, ECF 324 (S.D.N.Y. Apr. 30, 2021) (finding it disproportionate to the needs of the case for defendant to produce in family relationships every linked document).

We look forward to strategizing ways to deal with hperlink documents such that the documents are made in a reasonably usable form.

V. Relevance Redactions: We'll show you just the parts you "need" to see.

It is well-established that redactions within a document cannot be made for relevance. *See, e.g.*, *United States v. McGraw-Hill Companies, Inc.*, 2014 WL 8662657, at *4 (C.D. Cal. Sept. 25, 2014) (finding "unilateral redactions are inappropriate if they seek not to protect sensitive or protected information, but merely to keep non-responsive information out of an adversary's hands."). Defendants,

however, frequently argue that the EU General Data Protection Regulation ("GDPR") prevents them from producing documents without significant redaction of relevant information. Courts, however, have rejected the notion that the GDPR requires redaction of documents that contain personal identifying information. *See, e.g.*, *AnywhereCommerce, Inc. v. Ingenico, Inc.*, No. 19-cv-11457-IT, 2021 WL 2256273 (D. Mass. June 3, 2021) (ordering defendants to produce "responsive documents in their custody or control without redaction or withholding of personal data pursuant to the GDPR"); *In re Farm-Raised Salmon and Salmon Products Antitrust Litig.*, Case No. 19-21551, ECF 233 (June 3, 2020) (same); *In re Mercedes-Benz Emissions Litig.*, 2:16-cv-881, ECF 251 (Nov. 7, 2019) (same).

What other redactions have you seen employed by defendants? How have you dealt with this? Do you discuss redactions during ESI protocol meet and confers?

VI. Workplace Collaboration Platforms (Slack, Teams, etc.): The Wild West.

Use of workplace collaboration platforms has become widely used, particularly during extended periods of remote work during the pandemic. Discussion of the availability, preservation, and format of production should be discussed at the Rule 26(f) conference and during ESI protocol meet and confers. Failure to do so may result in either the data not being preserved or production in an unusable format. *See Warner Bros. Ent. Inc. v. Random Tuesday, Inc.*, No. CV 20-2416-SB (PLAX), 2021 WL 6882166, at *5 (C.D. Cal. Dec. 8, 2021) (ordering production of Slack communications in "readable format" and to meet and confer to "resolve any difficulties in production"); *Charter Commc'n Operating, LLC v. Optymyze, LLC*, No. 2018-0865-JTL, 2021 WL 1811627 (Del. Chanc. Ct. Jan. 4, 2021) (ordering defendant to produce Teams messages in native format after originally produced as individual messages). We look forward to discussing production of workplace collaboration platforms.