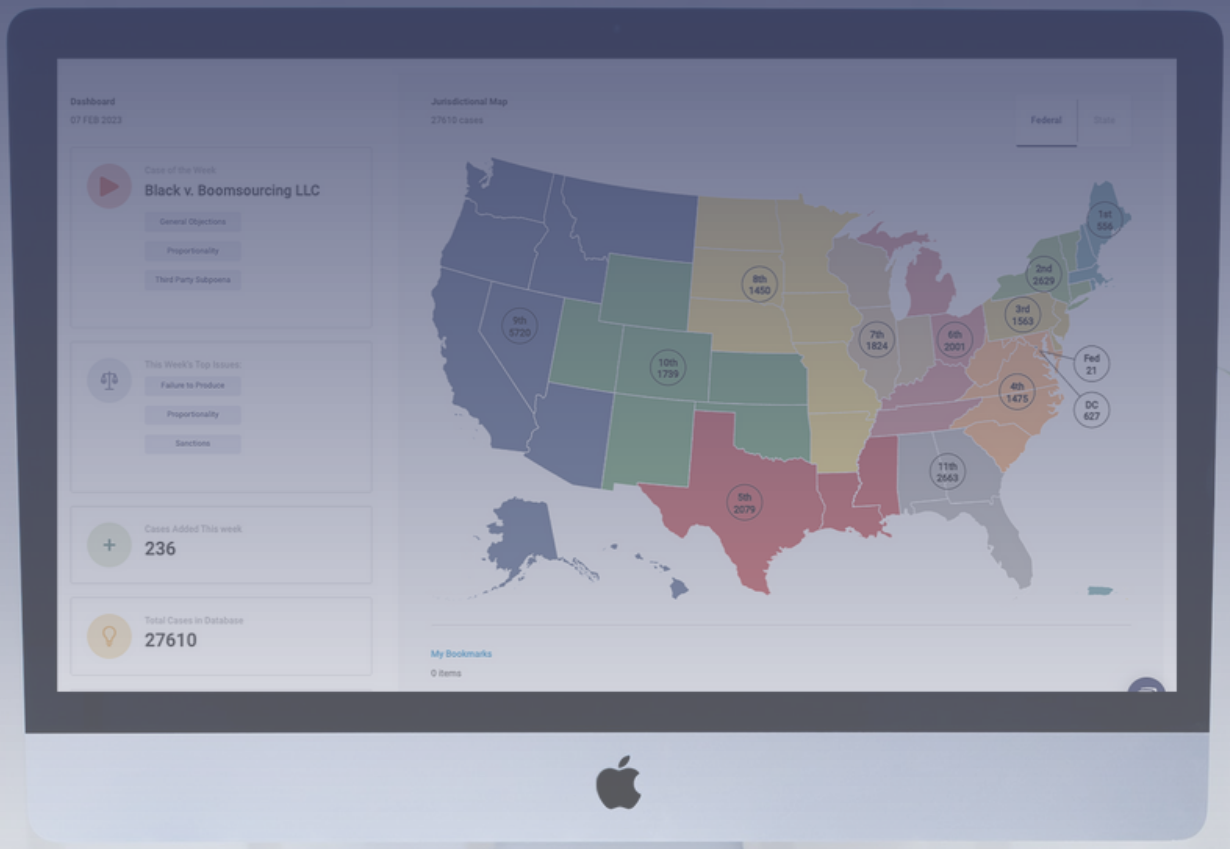
eDiscovery Assistant
eDiscovery Begins Here

eDiscovery Case Law
Year in Review

2022



eDiscovery Assistant

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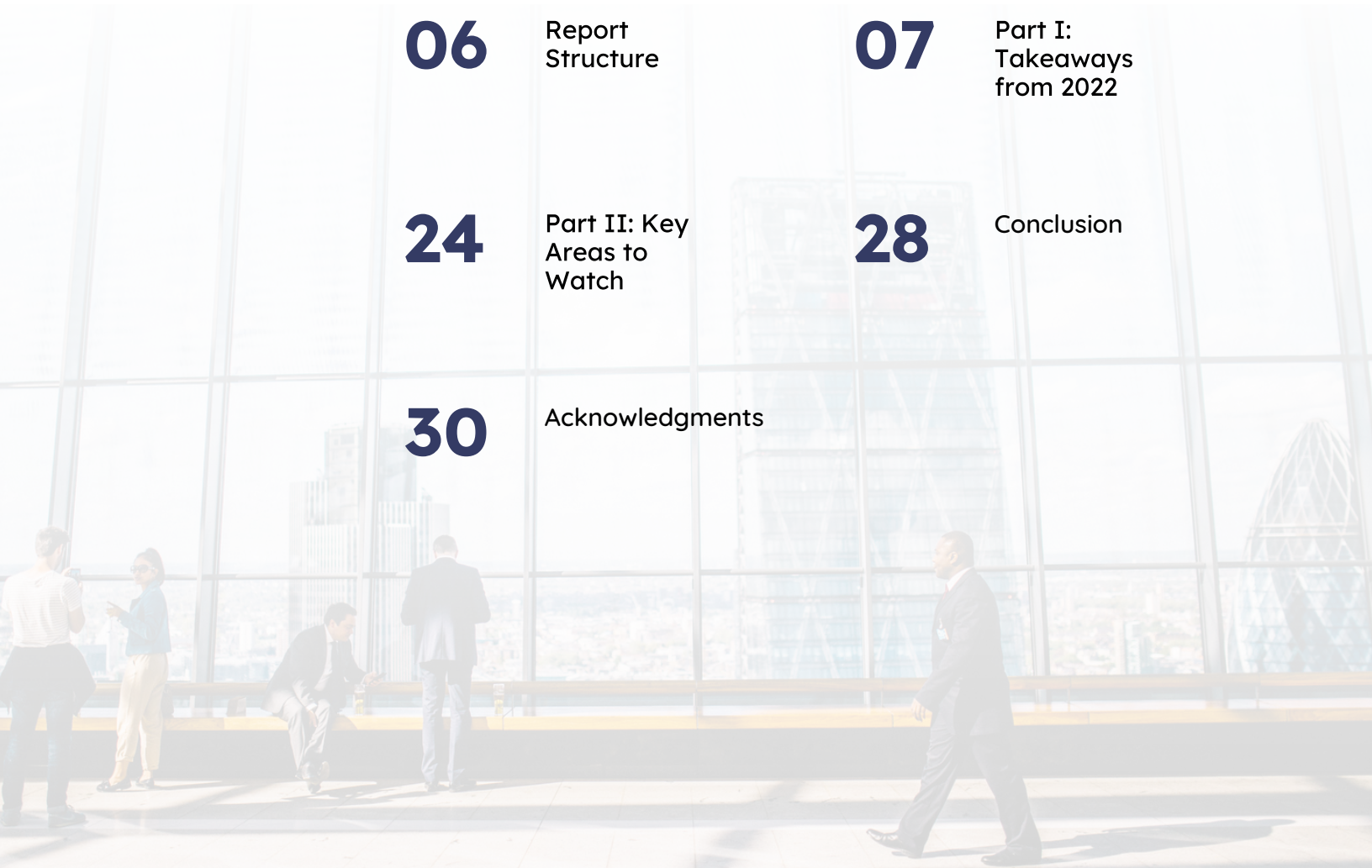


INTRODUCTION

Welcome to our Case Law Report for 2022!

Case law plays a crucial role in educating litigators and other legal professionals on issues related to electronic discovery. The analysis and interpretation of court rulings on ediscovery disputes provide lawyers a deeper understanding of how courts and individual judges interpret the rules governing the handling of ESI.

This knowledge is critical in helping lawyers navigate a complex and rapidly evolving technological landscape and developing effective strategies for identifying, preserving, and producing electronic evidence. Staying informed about the latest case law developments allows lawyers to ensure that their clients' rights are protected, and that the discovery process is conducted in an efficient, cost-effective, and ethical manner.

This past year marked the in-person return to courts, with many courts continuing to hold virtual hearings, particularly on discovery issues, in an effort to capitalize on the efficiencies achieved during the pandemic. And while the volume of cases filed in the U.S. district courts declined 33 percent in 2022, the number of ediscovery decisions dropped by less than a third of the 5119 decisions in 2021 to 4721 in 2022. [1]

1 https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022; the number of decisions listed includes all decisions added to our database from 2022 as of the date of this report.

Chart 1 shows the rise in the number of decisions in ediscovery since 2015 when the Federal Rules of Civil Procedure were amended.

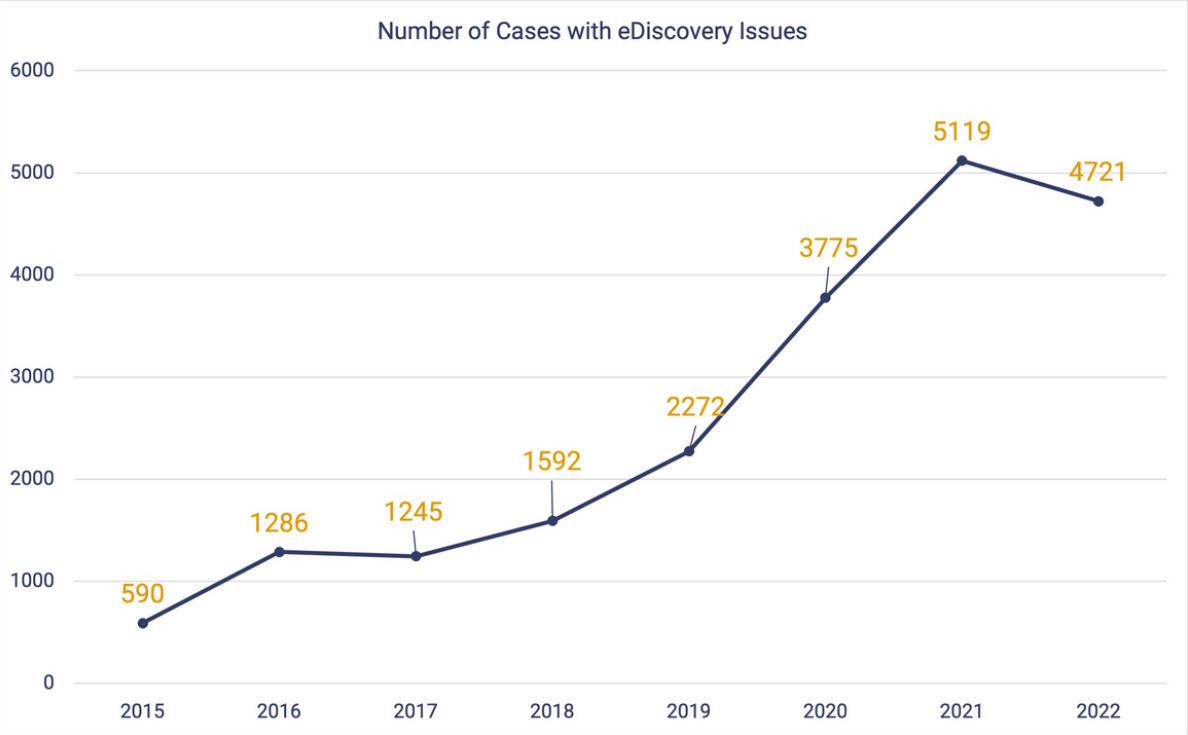
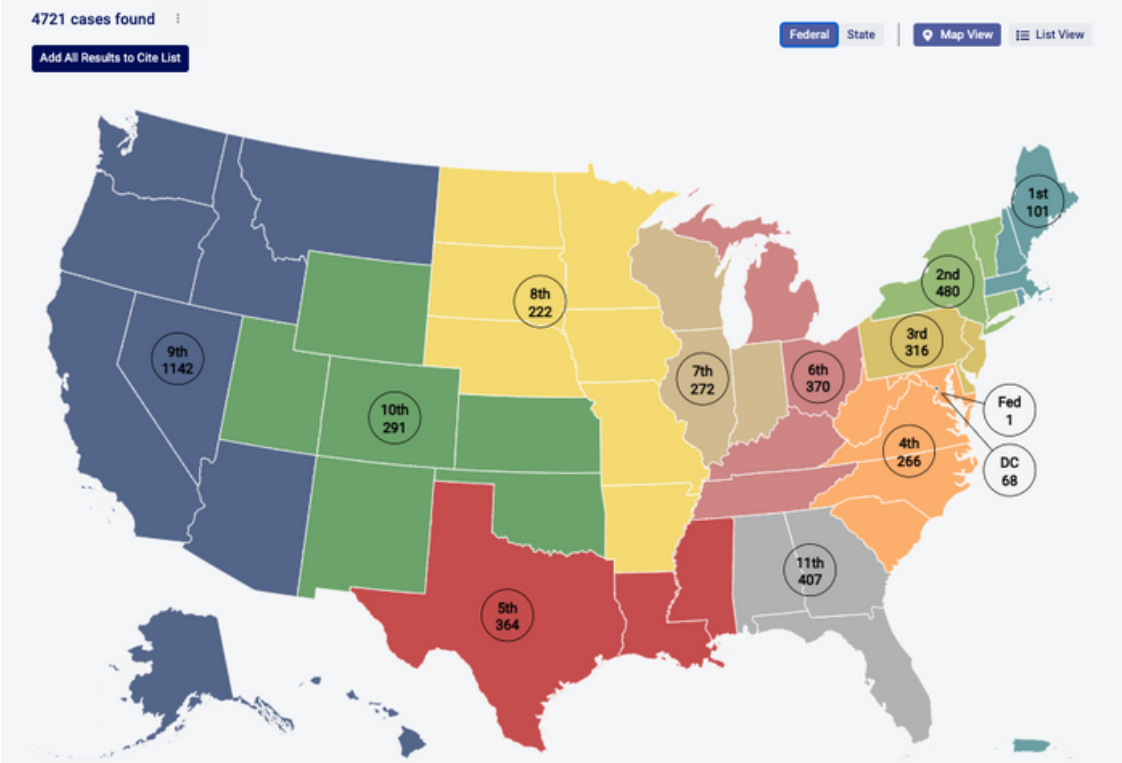
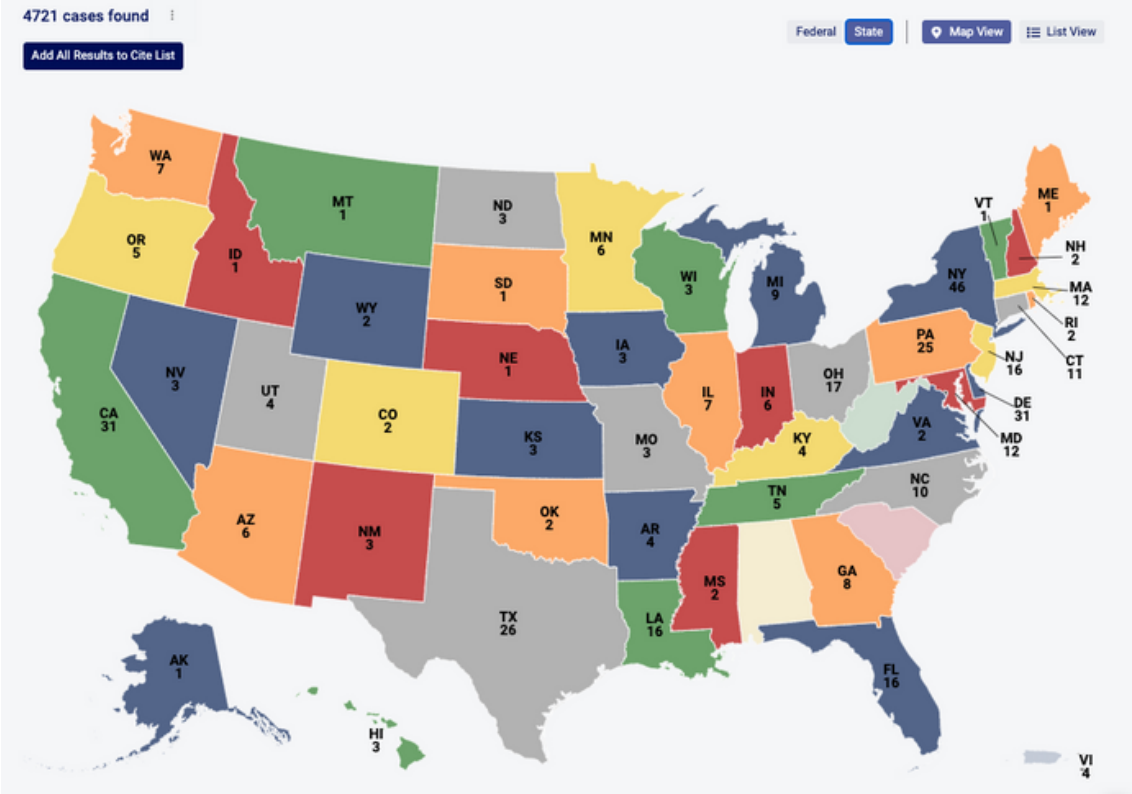


Chart 1: Number of Decisions in eDiscovery Since 2015

Maps 1 and 2 from eDiscovery Assistant show the breakdown of decisions across the federal and state courts in 2022. Users of the platform can click directly into those maps in the application, or drill down to individual district courts using the Jurisdiction filter. Non-users of the platform can view the public links of any decisions included in this Report.



Map 1: Federal Court Decisions in 2022



Map 2: State Court Decisions in 2022

ISSUES IN EDISCOVERY

eDiscovery Assistant reviews each decision from federal, state and administrative courts for inclusion in our database and then tags each decision with issues analyzed in the ruling. The software includes a proprietary tagging structure of more than 80 ediscovery and technology specific issues to allow users to drill into case law without having to discern appropriate search terms. Issues can be combined using boolean parameters to narrow a search, such as using Dismissal with Sanctions to narrow results to decisions including both issues. Chart 2 below sets forth the top issue tags in the eDiscovery Assistant platform for 2022. The individual issue analysis sections of this report use boolean queries of the database to highlight issues.

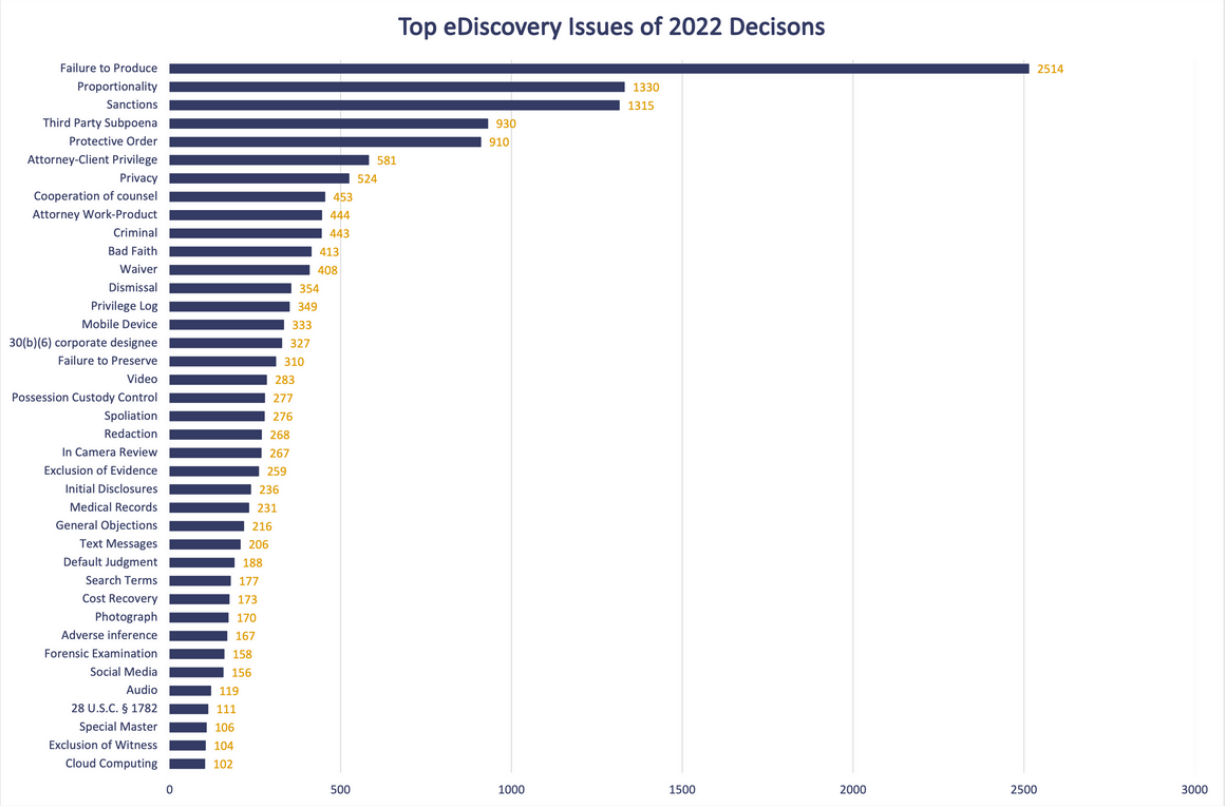


Chart 2: Top Issue Tags of 2022

This year's report shows what we see daily—that ediscovery decisions are evolving as technology evolves, and the expertise of the judges making those decisions is key. Know your judge, and be prepared to educate the bench on the underlying technological issues that are key to the motion before the court. Support your arguments with data and real costs to prevent the court from guessing at the likely burden imposed by discovery. Similarly, be prepared to articulate to the court why discovery being sought is germane and have facts to back up your argument. Mere allegations of what you think you may uncover will not resonate with a court.

"The common law—rulings by our courts—is the front line in our system of legal jurisprudence, and it is from the front lines that lawyers and paralegals develop the chops to competently represent clients. The 2022 Case Law Report from eDiscovery Assistant distills not only significant court decisions from 2022, but also provides insight into the legal and discovery issues that litigants will face in the coming year. The report proves to be both educational and practical in that by understanding the pressing e-discovery issues of the day practitioners who read the report are fulfilling the promise of technical competence and advancing not just the profession, but e-discovery education as well."

— Michael Quartararo
President, ACEDS

REPORT STRUCTURE

Our approach in this year's Case Law Report is different than in previous years. This year our report focuses on an analysis of how specific issues are developing in the courts and is broken up into two parts: Takeaways from 2022 and Key Areas to Watch. If you are familiar with our Case of the Week series hosted by our CEO Kelly Twigger, you know that Takeaways are the practical lessons learned from each decision and how to adjust your strategy based on the court's interpretation or ruling. Key Areas to Watch include those issues we need to be paying attention to as they come before the courts for the impact they will have on ediscovery for parties and non-parties alike.

This year we have also partnered with select software companies and service providers with specialized knowledge of the issues covered to provide insights from the trenches on how rulings affect their everyday work for clients. You'll see quotes from those partners throughout the Report.

PART I: TAKEAWAYS FROM 2022

Proportionality

It's hard to imagine how or when proportionality — the only limiting factor in the Federal Rules on the scope of discovery — will not be one of the most often raised issues in ediscovery case law. In the three years we've completed an annual review of ediscovery case law, proportionality has ranked first or third of the 80+ issues we track.

Proportionality is the principle that the scope and extent of discovery should be reasonable and limited to what is proportional to the needs of the case. This means that the parties involved should only request and produce information that is relevant and proportional to the issues in dispute, and that the burden and expense of discovery should not outweigh the benefits to be gained. The goal is to ensure that the discovery process is fair and efficient, while also avoiding excessive and unnecessary costs and delays.

The Numbers

Over the last five years, more than a quarter of all discovery decisions involved

"Technology now exists to allow parties to utilize metrics to provide the factual basis needed for the court to consider the relevance of the data, and assess the burden and expense of the proposed discovery as required by Rule 26. Counsel should leverage technology to reduce costs and mitigate risk for their clients and ensure the courts have proper metrics to make decisions based on information, not speculation."

— Mandi Ross
CEO, Evidence Optix

an analysis of whether the discovery sought was proportional to the needs of the case. Chart 3 shows the number of decisions tagged with proportionality as an issue, the total number of cases for that year, and the percentage change.

Year	Total Cases with Proportionality Issue	Total Cases for Year	Percentage of Decisions with Proportionality Issue	Percentage Change Since Previous Year
2022	1330	4721	28%	+1%
2021	1439	5291	27%	-2%
2020	1162	3968	29%	+7%
2019	602	2626	22%	-3%
2018	489	1902	25%	N/A

Chart 3: Percentages of Proportionality Decisions since 2018

From the Courts

Courts ruling on proportionality decisions in 2022 continued to seek more fact and data based information from parties arguing that requested discovery was not proportional to the needs of the case, and those unable to provide a basis in facts often lost. In Twitter v. Musk, the breach of contract case in which Twitter sought to enforce Elon Musk's offer to purchase the

social media platform, the court granted Twitter's motion to compel Musk to identify all sources of relevant information and provide discovery related to Musk's potential co-investors, finding Musk's burden arguments "implausible" given that Musk had identified two custodians to Twitters 42 custodians. Maps 3 and 4 show the distribution of federal and state decisions on proportionality in 2022.

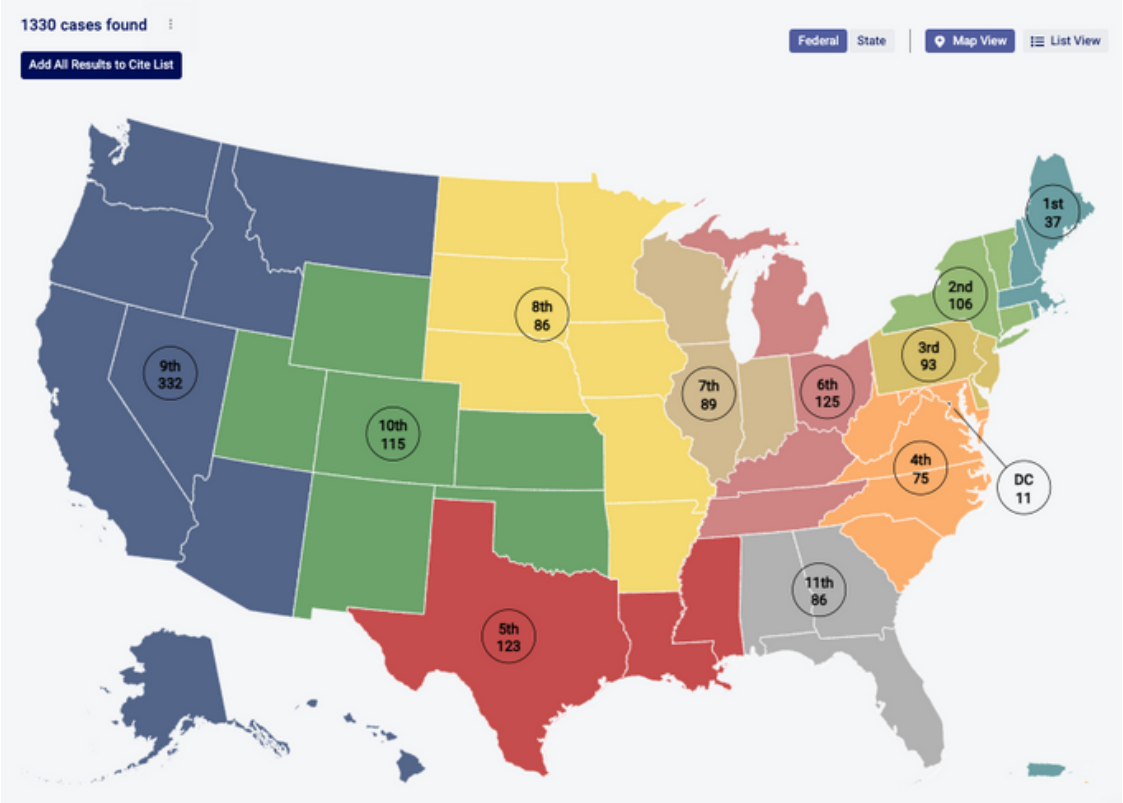
In Deal Genius v. 02 Cool, LLC, the court denied defendant's motion to compel and sent the parties back to negotiations after they spent five months arguing over five search terms and remained at "square one", but sought court guidance without having "whittled their dispute down far enough for meaningful court intervention." Neither party provided any basis — number of documents, cost to review — for the court to determine whether the documents sought were proportional to the needs of the case.

Edwards v. McDermott Int'l, Inc. is perhaps the most comprehensive proportionality analysis of 2022. In that case, United States Magistrate Judge Andrew Edison conducted a review of the six factors of Rule 26(b) in determining whether to require a defendant in a securities class action to review and produce roughly 1.3 million documents following search term negotiations or whether there was a basis that defendants could be permitted to cut the number to 650,000, or roughly half of the proposed set. Judge Edison relied most heavily on factors five and six – the importance of the discovery in resolving the issues, and whether the burden of expense of the proposed discovery outweighed its likely benefit.

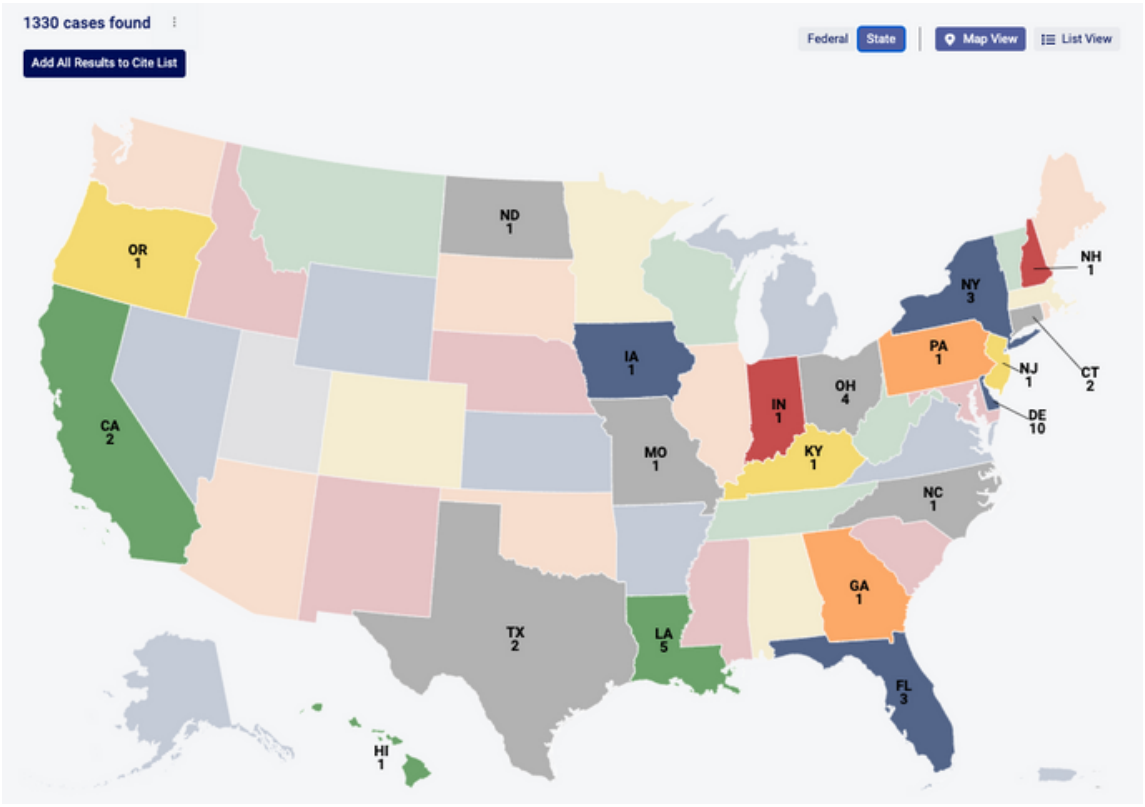
But there are two items of note in Judge Edison's decision. First, defendants did not put forth any information on a sample of the larger collection that could have weighed against production if the sample showed irrelevant or duplicate documents. Since the parties had already agreed on search terms, reviewing a sample of that data to provide a basis for arguing at least some of the additional 650,000 documents were not key to the issues in the case could have tipped the scales for the defendant. As such, there was no evidence for the court to consider: "Nobody, of course, knows what the email searches will reveal until the documents are reviewed . . . and produced." Second, securities cases have a threshold showing under the PLSA that other types of cases do not; that discovery cannot be conducted until the sufficiency of the complaint has been determined, which had already occurred.

Of these cases, most of the arguments made against production focus on two of the six factors articulated in Rule 26(b): the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[2] What we see very little of in the case law is a party putting forth metrics about data to bolster their argument that discovery is not proportional to the needs of the case. But a group of ediscovery professionals working with George Washington University is outlining a proportionality framework leveraging heat map technology that can help parties identify data to substantiate arguments of undue burden or the importance of the discovery. We'll keep our eye on how this develops and whether courts begin to incorporate a new framework into their proportionality analysis.

2 Federal Rule of Civil Procedure 26(b).



Map 3: 2022 Proportionality Decisions in Federal Courts



Map 4: 2022 Proportionality Decisions in State Courts

Is Privacy Part of the Proportionality Analysis?

2022 saw further dispute as to whether the Rule 26(b) factors also include privacy. Prominent ediscovery professionals have weighed in on whether privacy should in fact be considered part of the proportionality factors – a topic that was covered in detail during the Georgetown Advanced eDiscovery Institute in Washington D.C. this past November.[3] The crux of the arguments boil down to this: the Sedona materials argue that courts have recognized privacy considerations as part of the "burden" analysis in proportionality, while Judge Francis takes a textual reading of Rule 26(b) that does not contain any explicit reference to privacy, and he argues that Rule 26(c) has historically been the source of privacy protection, allowing for a more consistent and transparent treatment of privacy considerations.[4]

3 Cf. The Burden of Privacy in Discovery, The Sedona Conference Journal, 2019, Robert Keeling & Ray Mangum; Good Intentions Gone Awry: Privacy as Proportionality under Rule 26(b)(1), Hon. James C. Francis IV (Ret.)

4 *Id.*

Mobile Device Discovery

The Numbers

2022 saw more than 333 decisions addressing data from mobile devices, meaning that roughly 7% of discovery disputes centered on data from cell phones and other personal devices. Of those cases, 22 involved the discovery of instant messages from mobile devices and more than 110 involved discovery of text messages. There can be no question at this point that discovery of data from mobile devices is a consideration in almost all cases.

But discovery of personal mobile devices is fraught with cost and burden issues, proportionality questions and privacy considerations. Decisions in 2022 reiterated that the standard for requesting a forensic examination of an opposing party's device is a high bar to reach, and few do. Courts are recognizing the growing need for cell phone data in discovery across matter types, and the need for parties to get targeted data from smartphones while protecting the interests of custodians.

From the Courts

Courts in 2022 continued to grapple with the privacy issues of custodians whose cell phones may contain relevant information in

"Smart phones have become more prevalent as a key source in discovery over the last 4-5 years. 89% of all Service Provider collections now include a mobile device. Smart phones should now become a default source of evidence to be considered in discovery as remote work and the use of personal mobile devices implicate the accessing and sharing of business related data through apps and cloud based storage. "

— Matthew Rasmussen
Founder & CEO, ModeOne

matters. In fact, 26 decisions in civil cases involving data from mobile devices directly addressed the question of whether a custodian's privacy should be considered in compelling production. Courts acknowledge that the discovery of mobile devices is here to stay, and are also requiring that the request for data from such devices be narrowly tailored and supported by allegations in the complaint. Maps 5 and 6 show the distribution of federal and state decisions across the country on mobile device data in 2022.

The most eyebrow raising decision involving discovery of text messages from personal mobile devices came to us from United States Magistrate Judge Hildy Bowbeer in the class action titled In re Pork Antitrust Litigation. It's factually intense, but key in its holding about a party's custody of data on an employee's personal device.

In a class action stemming from an alleged conspiracy to cut the supply of pork and fix prices, the parties agreed to a Protocol for Preservation of Phone Records that covered the preservation of mobile devices for the 30 named custodians – 17 current employees and 13 former employees. But when plaintiffs requested text messages from those personal devices in discovery from defendant Hormel, Hormel objected that it did not have possession, custody or control over the devices and that it had met its obligations under the Protocol.

Plaintiffs then subpoenaed the custodians directly for data from their cell phones. All of the custodians objected and plaintiff filed a motion to compel production of the text messages from Hormel and from the custodians under the subpoenas.

In finding that Hormel did not, in fact, have the requisite custody or control to require production, Judge Bowbeer examined Hormel's Bring Your Own Device (BYOD) policy that allowed employees to put work related information on their personal mobile devices. Hormel's BYOD policy:

- allows employees to use their personally-owned cell phones to interact remotely with certain Hormel corporate systems
- provides for employees who have a defined business need to be reimbursed for mobile device service for a personally-owned phone, although the employee is responsible for all costs associated with purchasing and maintaining the phone and any accessories, as well as the costs of any application downloads or purchases

Per declaration from Hormel, the company claimed "ownership of all data that is sourced from Hormel systems and synced between the mobile device and its servers. Such data primarily consists of company email, calendars, and contracts . . . but does not include text messages or other information on a personally-owned device." According to Hormel, the policy did not explicitly assert ownership, control or ability to access, inspect, copy, image or limit personal text messages.

Employees that use their personal devices to access Hormel data are required to install an application that prevents an employee from copying or backing up Hormel owned data residing on the phone. But the application does not interfere with or control any access to create, store, or send text messages. The BYOD policy does allow Hormel to remotely remove the application and all company owned data from the device remotely, and to remotely wipe all data from the phone if necessary to wipe the Hormel owned data. A complete wipe of the phone would delete all personal data, including text messages.

Judge Bowbeer agreed that Hormel did not have custody or control of the text messages despite its ability to wipe the phones remotely. Relying on The Sedona Conference Commentary on BYOD, she cited two facts that sealed

her position: first, that the installed application only gives Hormel the right to wipe text messages as part of a factory reset if Hormel concludes the security of its own data on the phone is at risk, and second, that the BYOD policy does not assert ownership over any data not sources from its systems: "the company's ability to wipe personal data from a personally-owned device by resetting the device to a factory floor state in order to purge company data does not give the company control—legal or practical—over that personal data."

The court then turned to the subpoena requests for the devices and ordered the custodians to provide the text messages and to split the cost with plaintiffs for any imaging required.

The long opinion notes several times where counsel has left holes in facts that the court cannot fill – costs for imaging, whether entire phones need to be imaged, whether phones in question are still in use (such that the production burden is nonexistent), or how long each custodian will have to be without their phone. The question in this case has to be—given that Hormel had already imaged 5 of the 30 phones—why fight production of text messages that were ultimately going to be produced in response to a subpoena?

Interestingly, this court addresses privacy concerns raised by the custodians, but not as part of a proportionality analysis. Which raises the question asked about in the proportionality section – if privacy is part of the proportionality factors, how does it get considered when a party is not arguing the data sought is disproportionate to the needs of the case?

In the matter of In re Kuraray Am., Inc., the Texas Supreme Court overturned the trial court's decision to allow discovery of cell phones of five employees in the control room during the time of an ethylene release that caught fire, caused injuries and spurred multiple lawsuits. Nothing in the

complaint alleged that cell phone use by an employee constituted negligence or was a cause of the release.

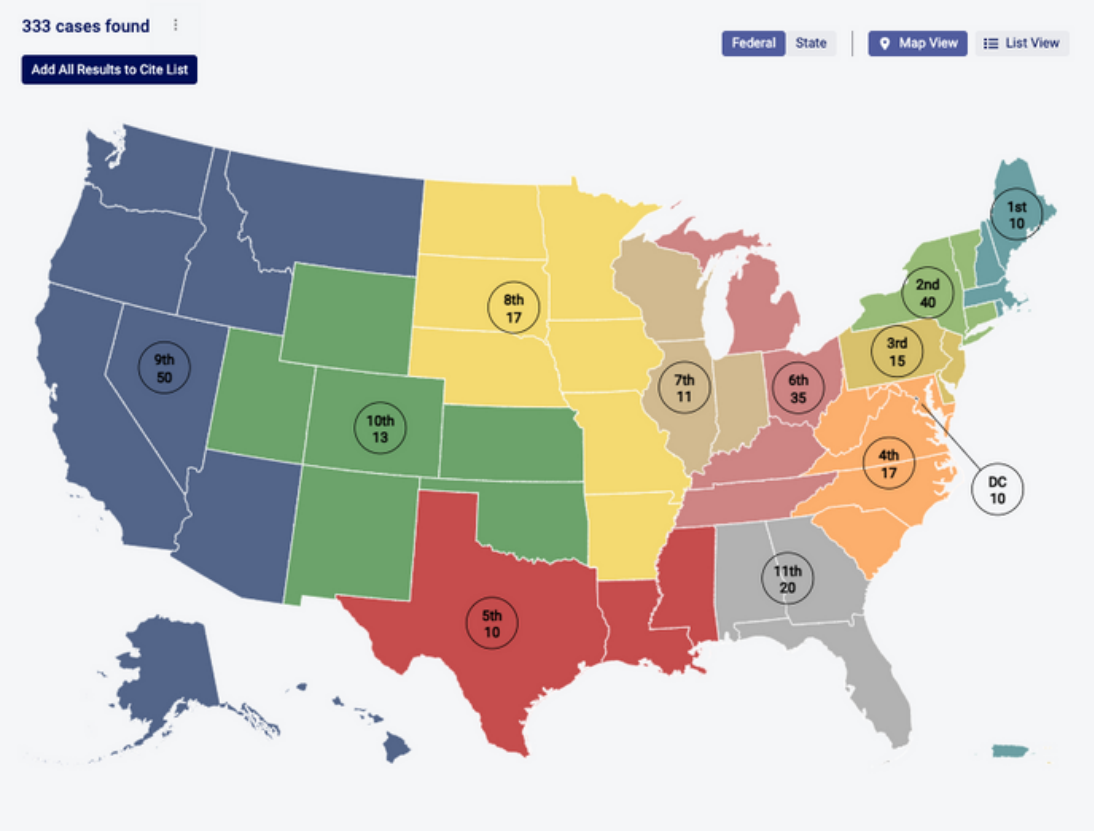
The trial court granted plaintiffs' motion for all data collected from cell phones for a six week or four month period following disclosure of an email complaining of cell phone abuse by board operators that would have been monitoring the plant immediately before the leak.

In analyzing whether the grant by the trial court was appropriate, the Supreme Court noted that "discovery requests for cell phone data have become commonplace" and articulated that "key principles that should guide trial courts' careful management of cell phone data discovery":

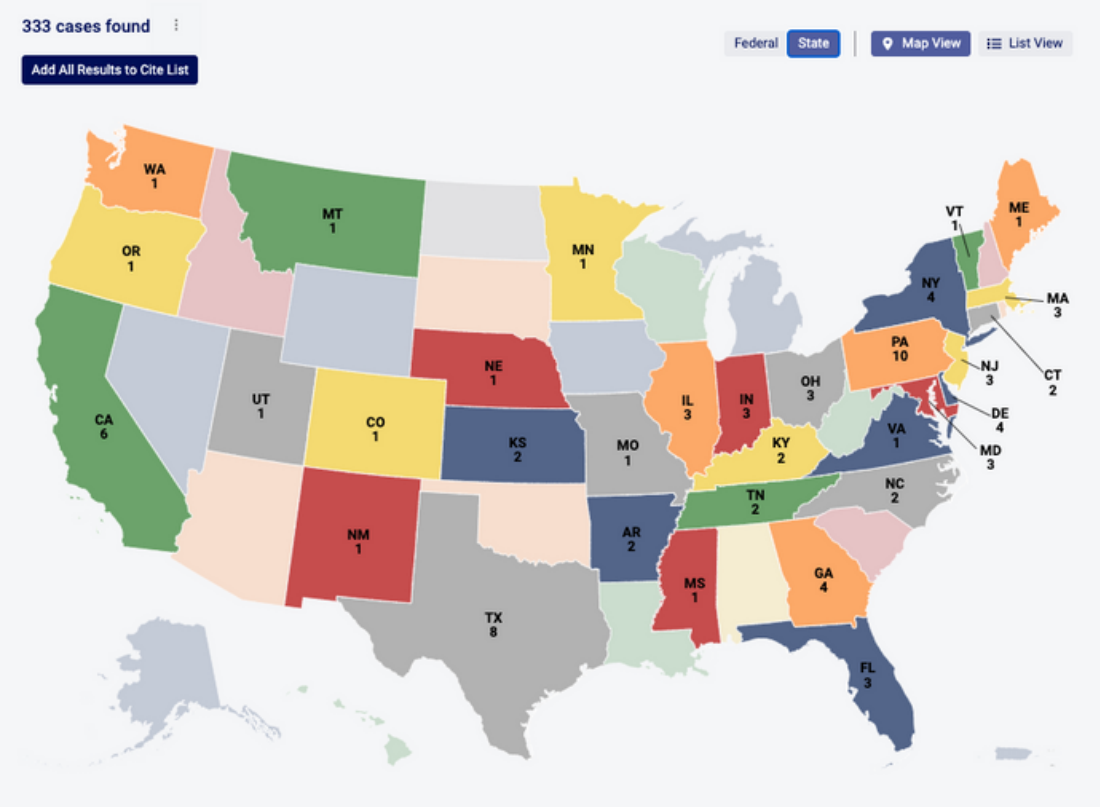
- First, to be entitled to production of cell-phone data, the party seeking it must allege or provide some evidence of cell-phone use by the person whose data is sought at a time when it could have been a contributing cause of the incident on which the claim is based.
- If the party seeking the discovery satisfies this initial burden, the trial court may order production of cell-phone data, provided its temporal scope is tailored to encompass only the period in which cell-phone use could have contributed to the incident.

In other words, a trial court may not order production of a person's cell phone data for a time at which his use of a cell phone could not have been a contributing cause of the incident.

The Court found that the trial court's granting of data for six weeks or four months was an abuse of discretion because it was both outside the scope of what could be relevant, and that the plaintiff had not met its burden to show relevance. As such, the Court granted the writ of mandamus and directed the trial court to vacate its order requiring the defendant to produce cell phone data.



Map 5: 2022 Mobile Device Discovery Decisions in Federal Courts



Map 6: 2022 Mobile Device Discovery Decisions in State Courts

Search Terms and Technology Assisted Review

Over the past few years, a line of cases has begun to develop in which parties are trying to leverage both search terms and technology assisted review together. Most often, that comes into play when a producing party uses search terms (sometimes negotiated, sometimes not) to cull a collected data set to a manageable size for review. TAR is then used to conduct a review of that culled set. But, in looking at various decisions, in particular the two set out below from this year, the facts about process are all over the proverbial map — for example, the parties agree to a process for identifying search terms in a protocol, but squabble for months over the terms to be applied with limited cooperation; the search terms are negotiated, but end up identifying such a high volume of hits that the producing party wants to leverage TAR that has not been previously negotiated; or a party uses search terms agreed to by the parties, the producing party then uses TAR to conduct the review, and the receiving party questions the scope of the responsive documents.

Regardless of the facts in the case, the question always comes down to whether the producing party has the ability to choose how it will identify, collect, review and produce responsive documents. The secondary question then becomes whether a producing party can utilize TAR of its own accord. While the issue is not resolved by case law, two decisions in 2022 bring more light to the murky issue, and we find that, consistent with other case law, where the parties agree to an ESI protocol defining the use of TAR, a court will not then allow them to deviate from that protocol absent a solid basis backed up by data.

From the Courts

In Raymond James & Assocs., Inc. v. 50 N. Front St. TN, LLC, a decision from August 2020, defendant 50 North dumped about 800,000 pages of documents on plaintiff following a series of orders from the Court ordering that it "produce all responsive, non-privileged documents from the above referenced e-mail searches, along with a privilege log, and the above identification of additional employees to counsel for Raymond James." This order came after a series of disputes between the parties on the search terms to be applied. In response, 50 North ran the required email searches, conducted a privilege review, and then simply produced all of the remaining documents with no responsiveness review at all, resulting in what we call a document dump.

Raymond James conducted an analysis of the produced materials and found that of the first 100 documents it reviewed, 49 were not relevant. It then hired a team of contract attorneys to conduct a linear review of the production – document by document and moved for sanctions alleging that 50 North had violated the Court's order and seeking costs associated with the review to the tune of $283,000. 50 North argued that the court's order did not require a responsiveness review, but instead ordered it to produce all documents that hit on the search terms.

The Court disagreed and granted Raymond James motion for sanctions stating that "[a] reasonable party would not have felt substantially justified interpreting that [Order] as permitting them to turn over all of the documents from the email searches without any review for responsiveness." The Court did not have enough information on costs incurred by Raymond James at that time and ordered the parties to provide affidavits about costs incurred.

Fast forward to February 2022 and the Court's ruling on the costs for the grant of sanctions granting Raymond James costs for $242,262, the total cost of the review. As part of its submission on costs, Raymond James stated that it had used search terms to cull the collection, and then conducted a manual, linear review of those documents that hit on the search terms. Nothing in the decision discusses how Raymond James determined the search terms to be applied. In response, 50 North argued that Raymond James should have used technology assisted review (TAR) as a more efficient method than manual review to reduce costs.

The Court disagreed and held that the "fact that more efficient means of sorting through the documents existed is not dispositive" and went on to analyze whether it was reasonable for Raymond James to incur the expenses of manual review, citing to In re Mercedes-Benz Emissions Litigation, which held that "[w]hile the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it, no court has ordered a party to engage in TAR over the objection of that party." The Court found that while 50 North was best equipped to identify and use the best process for finding responsive documents, it neglected to do so and Raymond James' method of employing search terms before review was reasonable. According to the Court, 50 North's argument for the use of TAR is both precluded by existing case law and much "too late."

Several months after that ruling, Special Master Joseph Dickson issued a report and recommendation in In re Allergan Biocell Textured Breast Implant Products Liability Litigation denying defendants the ability to use TAR to complete a review. In that case, the parties had agreed to an ESI protocol that stated that the parties would meet and confer on both the application of TAR and that the parties would cooperate on TAR/search terms.

Defendant had applied the negotiated search terms to the document collection of more than nine terabytes of data and begun a manual review of

the document hits. With 560,000 documents left to be reviewed (out of millions), defendant wanted to employ TAR to conduct the review faster and more efficiently. At that time, its vendor believed it would take an additional 20 weeks to complete the manual review. Defendant argued that "applying TAR after the application of search terms is standard practice and commonly used to promote efficiency and reduce costs" (emphasis added) and that it was in the best position to determine the best review methodology.

The Special Master disagreed, distinguishing In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig., Livingston v. City of Chicago, and Huntsman v. Sw. Airlines Co., — all decisions that permitted the use of TAR after the application of search terms — and holding that:

> There is no such general principle espoused by the courts or the commentators [that applying TAR after the application of search terms is standard practice]. That is not to say that cases do not exist where parties are permitted to apply TAR after culling by the application of search terms. The courts find solutions to the problems confronting them, but do not settle the question of which method is better.

Relying on the fact that the parties had agreed on an ESI protocol that required them to agree on the application of TAR, the Special Master denied the defendant's request to utilize TAR to complete the review:

> We have little doubt that the parties knew at the outset the costs of ESI discovery would be high, and the review process would be extensive. The fact is, without testing on an agreed set of documents, no one can predict whether the application of TAR with or without search terms is the more economic and feasible way to proceed. Implementing TAR, at this stage, after the application of search terms, opens the door for potential disputes that may arise related to the accuracy of the review and will further delay the completion of discovery and drive costs upward. Finally, applying TAR to an already reduced (via search terms) set of documents will reduce further the identified responsive documents and will certainly not reveal documents that the application of search terms has precluded. Because Plaintiffs did not bargain for this at the outset, over a year ago, it is inappropriate to force them to accept it now.

Keeping in mind that the decisions we see in ediscovery are at the trial court level and not persuasive authority, following In re Allergan, parties will need to evaluate up front the best process for identifying and providing responsive documents as well as whether they should agree to protocols that limit their ability to make decisions on the best method for meeting their production obligations. All litigators know that you can never know all the facts up front, and even the most carefully thought out discovery plan can go awry at any point that changes the scope of data to be reviewed and potentially the approach to be applied.

PART II: KEY AREAS TO WATCH

As part of the curation of ediscovery case law, our team plays close attention to newly developing trends, including developments in technology and new sources of ESI that effect how we identify, collect, review and produce ESI in litigation. The areas identified below should be on your radar as issues to consider in planning for discovery in litigation as well as identifying the tools to use to handle new sources of ESI in a manner consistent with a party's obligations under the Federal Rules of Civil Procedure.

"New and complex data sources emphasize the need for discovery counsel and litigation support to work together from the outset of a matter. Early recognition of new and complex sources of ESI is crucial to allow for negotiation of how ESI will be preserved, and to assist in the identification of tools for collection and review that can maintain the integrity of the data."

— Joy Murao
Founder and CEO, Practice Aligned Resources

Sources of ESI — Emojis

Emojis first became common on smartphones in 2010-2011 and have now become a part of mainstream communications in text messaging, email, instant messaging and on social media. Emojis are not images like memes whose text can be imaged — emojis are defined by at least one code point in Unicode, an international computing industry standard that maps from each letter, character or symbol to a numeric value that allows sharing of documents across different platforms and environments. That means

that handling emojis in ediscovery requires functionality in collection tools and review platforms that can interpret and recreate the Unicode to display the same emojis that a user creates. Each year, Unicode approves a new batch of emojis that are then pushed to users and become available for use. But tools also exist to allow users to create their own proprietary emojis and there is no "emoji dictionary" that helps to interpret what those emojis mean.

Starting in 2017-18, we began seeing a sprinkling of decisions involving emojis – mostly in the criminal context. Since that time, and into 2022, we have recorded 37 decisions mentioning emojis in both the civil and criminal context and some have begun to address emojis as evidence. Emojis pose several issues in ediscovery as a unique source of ESI – how to collect them, their importance and interpretation as evidence, whether and how to deal with them in an ESI protocol and proportionality considerations. In November 2022, eDiscovery Assistant, together with our partner ACEDS, hosted a webinar on the legal issues surrounding emojis with United States Magistrate Judges William Matthewman and Xavier Rodriguez. You can watch the webinar in full at the link above or in eDiscovery Academy for subscribers.

Collection of emojis requires tools to correctly interpret the unicode for the emoji and maintain that code as it is loaded into a review platform. That means processing engines must understand and also be able to interpret the code and re-display it so that the original emoji appears for the reviewer.

2022 brought us a key decision that demonstrates why litigators need to both understand the potential issues with emojis, and to be prepared to engage experts to evaluate emoji based evidence when needed. In Rossbach v. Montefiore, the plaintiff sought to introduce evidence of a text message containing the "heart eyes" emoji which she claimed was made using her iPhone 5. Expert testimony revealed that the "heart eyes" emoji in the text was the version displayed on iPhones running OS 13 or later, an operating system that the iPhone 5 was not capable of running. Expert

analysis was able to prove the text was fabricated by showing that the visual characteristics of a text message displayed on an iPhone depend on the iPhone's Operating System, in this case Apple iOS. This version of the "heart eyes" emoji was not could not be displayed on the iPhone 5 that plaintiff alleged was used to create the text, or on her more recently purchased iPhone X, which ran iOS 10.

In our webinar cited above, both Judges noted that emojis present an issue of interpretation. There is no approved "dictionary" to cite regarding the meaning of a specific emoji for a court or a party to attribute. Rather, interpretation is left up to both the party sending the emoji and its recipient. Counsel will need to consider and be prepared for interpretation issues. For example, in a situation when a male employee sends an eggplant emoji to a female colleague in a work setting, is that sexual harassment? What is the context of the message? What is the relationship of the parties involved? So many variables come into play because there is no standard for interpretation of emojis.

The prevalence of smartphones and the rise in text and instant messages each year suggest that emojis will become a source of ESI around which case law will develop. Parties need to be aware of how the unicode of emojis impacts preservation, collection, review and production, and plan for and consider the issues of emojis throughout the discovery process.

Sources of ESI — Hyperlinks as Attachments

In our 2021 case law report, we covered the highly publicized ruling in Nichols v. Noom, in which Magistrate Judge Katharine Parker stated that hyperlinks are not attachments, even where they link to a document that is

not otherwise physically attached to an email. Judge Parker's ruling, in context of the facts presented, was upheld by the District Court and quite frankly, it was right. But her statement that hyperlinks are not attachments in the way that we traditionally think of attachments has potentially significant ramifications in a world where many parties leverage Google Docs, Gmail and Microsoft Teams, all of which use links to documents to share them instead of adding physical attachments of a Word file to an email or other communication.

No decisions in 2022 have raised this issue, so there are no further case law developments to consider here. But the implications for parties where one party is identifying and collecting documents from a system that uses hyperlinks for attachments are huge. Failure to preserve, collect or produce hyperlinked documents as attachments with a standard parent-child relationship could be a basis for sanctions if data is lost before it can be re-collected. Case law has not yet defined a party's obligations on how to manage the relationship of documents where attachments are in the form of hyperlinks. But the spirit of the Federal Rules of Civil Procedure and common sense dictate that documents attached to a document in the form of a hyperlink should be attachments and produced in the same manner as parent-child relationships are handled when documents are physically attached The goal is to allow the receiving party to have the exact same data that the producing party has, and that includes knowing what document lies behind an embedded hyperlink.

We'll keep an eye on this developing issue and others for our next annual report.

CONCLUSION

Case law decisions impacting litigators continue to number in the thousands in 2022, and courts across the country are beginning to develop a body of law to deal with non-traditional data sources including text messages, instant messaging, video, audio and mobile device data. The prolific move to the cloud prompted by Covid has created new issues with old sources of ESI including hyperlinks as attachments in Teams and Google Mail, and remote working has increased the use of communication via systems not managed by corporate IT.

This year's report highlights that entities (government included) have to start considering how people are truly communicating and how to find and leverage that ESI to get to the facts quickly. ESI presents both an opportunity for those prepared to navigate the terrain of the challenges each platform presents, and an uphill battle for organizations forced to deal with the complexity of the ever-evolving list of sources of ESI and how to handle them within the obligations of the Federal Rules of Civil Procedure.

This year's decisions show us that courts know and understand what is happening, and that parties' must rise to meet those obligations in this ever evolving landscape of technology. Litigants must come to the court with facts to back up their arguments, and to do so means getting your hands dirty in the data and telling the court in concrete terms what that data is saying. Anything less will be met with a quick denial of a motion as evidenced in the pages of this report and multiple other decisions this past year.

Finally, decisions this year highlight that litigators need to understand the perils of negotiating an ESI protocol or other document defining the parties' obligations before truly understanding the scope of the issues to be covered. Failure to do so will leave your clients on the hook for additional obligations, or will result in missing out on finding critical evidence for your case.

In civil matters, all cases are won and lost on the documents. Now that documents are ESI, you have to do more than just ask for them, you need to know how to handle the issues inherent in each platform from which you receive data. This year's decisions continue to provide a road map to litigators as long as you are willing to read and follow it.

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