



DorsEdiscovery Forum E-Discovery 2022: The Gift That Keeps On Giving

Magistrate Judge David T. Schultz, Magistrate Judge, U.S. District Court,
District of Minnesota

Thomas L. Nuss, Vice President of Human Resources & General Counsel,
Brakebush Brothers, Inc.

Briana Al Taqatqa, Associate, Dorsey & Whitney LLP

Kathryn Johnson, Partner & Moderator, Dorsey & Whitney LLP

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June 9, 2022

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Housekeeping

Today's program is 60 minutes.

Materials & Attendance Form. Are available for download from the reminder email sent from DorseyU@Dorsey.com. Return completed attendance form to attendance@Dorsey.com.

Q&A. Submit questions using Chat. Time permitting we will try to answer questions during the presentation or at the end.

CLE. A CLE code will be announced for attendees in states that require a Code. CLE expected: AZ, CA, CO, IA, IL, MN, ND, NY, OR, TX, UT, WA, WI.

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E-Discovery 2022

What are our biggest e-discovery challenges in 2022?



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3

E-Discovery 2022: Emerging Technologies

- 2020: prevalence of emerging data sources increased to account for more than one-third of the total volume of data processed by FTI.
- Expected by 2023: majority of data within an enterprise (*and by extension, in scope for litigation and investigations*) will be from cloud-based, emerging data sources.
- The FTI Technology Report: The State of Emerging Data 2022: Awakening a Sleeping Giant is available for download at:
<https://www.ftitechnology.com/resources/white-papers/the-state-of-emerging-data-2022-waking-a-sleeping-giant>



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4

E-Discovery 2022: Emerging Technologies

Nichols, et. al. v. Noom Inc., et. al. No. 20-CV-3677 (LGS) (KHP) (S.D.N.Y. Mar. 11, 2021)

“The issues raised by Plaintiffs raise complex questions about what constitutes reasonable search and collection methods in **2021**—when older forms of communicating via emails and documents with attachments and footnotes or endnotes are replaced by emails and documents containing hyperlinks to other documents, video, audio, or picture files. It also highlights the changing nature of how documents are stored and should be collected. The Court has carefully considered the issues raised and, for the reasons set forth below, denies Plaintiffs' motion for reconsideration and trusts that this Opinion provides clarification.”



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5

E-Discovery 2022: Emerging Technologies

What “emerging technologies” are you seeing and what challenges are they presenting?



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6

E-Discovery 2022: Emerging Technologies

- **Best Practices**

- Take a collaborative approach to addressing e-discovery, including Legal, IT, Compliance, Risk.
 - Consider this when rolling out new platforms.
- Understand who the users are of the various collaborative platforms
- Understand and be able to articulate to outside counsel how the platforms handle attachments and versions.
 - Outside counsel: conduct IT and custodian interviews to scope relevant data sources
- Develop workflows to ensure data can be collected, processed, and reviewed in discovery while minimizing risk to the organization.



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7

E-Discovery 2022: Text Messages

- **Mobile devices**

- Becoming standard data source
- Specialized tool for collecting content
- Imaging allows for recovery of potentially deleted text messages
- Providers do not retain text content
- Volatility of data

- **Chats & text messages**

- Not just standard text messaging
- WeChat very common communication method in China
- What's App
- Other messaging apps: Messenger, Instagram, LinkedIn



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8

E-Discovery 2022: Text Messages

In re Pork Antitrust Litig., 2022 U.S. Dist. LEXIS 60214

- “Hormel alleges that it does not have the requisite “possession, custody, or control” over the text messages sent by and to its employees on their personally-owned cell phones.”
- “...for the reasons discussed below, [the Court] finds that...Plaintiffs have not shown that Hormel has control over text messages on the personally-owned phones of its employees.”
- “The Sedona Conference has taken the position that an employer does not legally control personal text messages despite a BYOD policy when the policy does not assert employer ownership over the texts and the employer cannot legally demand access to the texts.”
- “Accordingly, the Court will enforce the subpoenas...for all custodians (except Chenowith) and orders the custodians (other than Chenowith) to search for and produce relevant text messages within a modified scope and subject to a modified search protocol...”
- “...the Court has found Hormel did not control the text messages on the personally owned cell phones of its custodians. It did communicate litigation holds to reasonably anticipated custodians...”



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...9

E-Discovery 2022: Text Messages

In your experience, do the parties you interact with view text message preservation and collection as a standard aspect of e-discovery?

What challenges or disputes are you encountering with preservation, collection, review and production of text messages?



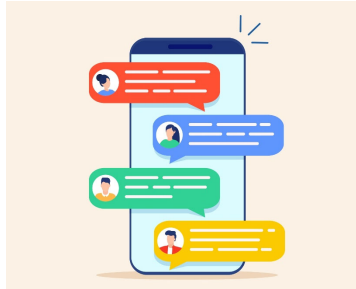
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10

E-Discovery 2022: Text Messages

- **Best Practices**

- Establish company policies for personal device use for business purposes.
 - Educate employees on these policies.
- Interview IT and custodians regarding business-text messaging practices.
- Consider whether pro-active preservation is appropriate for your organization/case.



CLE Code for Attendees in States that Require a Code *(Tip: The CLE code is different than the event code assigned by states)*

E-Discovery 2022: Cooperative Discovery

- **Concept of cooperation embodied in FRCP 26(f) meet and confer process.**
- **Sedona Conference Cooperation Proclamation**
- “It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot “behave responsively” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.” ~ ***Mancia v. Mayflower*, 253 F.R.D. 354 (D. Md. 2008)**



13

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E-Discovery 2022: Cooperative Discovery

ORP Surgical, LLP v. Howmedica Osteonics Corp., 2022 U.S. Dist. LEXIS 84398

“After considering all the evidence and arguments, I find that Stryker failed to meet some of its preservation obligations, and that Stryker’s counsel turned this case sour with nasty litigation tactics. As I stated during the trial, I was “appalled” at Stryker’s lawyers’ “playing fast and loose” with discovery obligations. I agree with the Special Master that Stryker’s failure to preserve text messages in December 2019 was either willful misconduct or gross negligence. That action may have become water under the bridge with the recovery of most text messages. 11 But Stryker’s counsel’s November 1 representation that “***all texts between the Sales Reps and Mr. Jacobs and/or Mr. Bonessi during the alleged spoliation period are being produced 27 today***,” ECF No. 263 at p. 1 (emphasis in original), was simply untrue. Even if Stryker had produced key images and attachments (which it had not), Mason Miller’s text messages were not produced until February 11, 2022. Stryker could have said it was producing “all available text messages” or was working with plaintiffs’ IT people to sort through technical difficulties, but it chose to use unequivocal language on which the Court relied.”

“The Court orders defendant and its counsel to reimburse plaintiff for the full amount of plaintiffs’ share of the Special Master’s fees and costs. Half of this reimbursement should be paid by Stryker for its failure to preserve text messages, and the other half should be paid by the Seyfarth Shaw LLP law firm for the misconduct of counsel during the discovery process. The Court also admonishes counsel. This was a large, important case for both parties. The parties were entitled to zealous advocacy from their outside counsel and from their inside corporate attorneys. However, zealous advocacy does not justify abusive conduct or hiding the ball.”



14

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E-Discovery 2022: Cooperative Discovery

The 2015 FRCP Amendments related to e-discovery were intended to promote cooperation among parties. To what extent do you see zealous advocacy and cooperation as being in tension?

This case also imposes sanctions for failure to properly preserve potentially relevant communications. It seems we continue to see cases where parties are sanctioned for failure to preserve. What steps should parties take to ensure proper preservation?



15

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E-Discovery 2022: Cooperative Discovery

- **Legal Hold**
 - Understand potential trigger events that may require a party to institute a legal hold.
 - Have a process for reviewing potential hold events, implementing legal holds, reviewing and lifting holds and be sure to document litigation hold efforts.
 - Take steps to preserve highly volatile data sources early, even if you may not end up collecting or producing those data sources.
 - Educate employees regarding their obligations when under hold
 - Avoid self-collection
 - Ensure IT and Records departments are involved in the hold process
- **Cooperation**
 - Engage in transparent discovery, alerting the other party to potential issues early in the process.
 - Utilize an ESI protocol and meet and confer, as needed, on issues.
 - Involve the Court when necessary.



16

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E-Discovery 2022: Proportionality

- Embodied in the FRCP since 1983
- 2015 Amendments:
 - Removed “reasonably calculated to lead to the discovery of admissible evidence” language
 - Introduced a set of 6 proportionality factors:
 1. Importance of the issues at stake in the action*
 2. Amount in controversy*
 3. The parties’ relative access to relevant information
 4. The parties’ resources
 5. The importance of the discovery in resolving the issues
 6. Whether the burden or expense of the proposed discovery outweighs its likely benefit



E-Discovery 2022: Proportionality

Edwards v. Pj Ops Idaho, 2022 U.S. Dist. LEXIS 48060

- “Fulfilling this request for production will require a significant investment of money and manpower. However, Defendants’ estimate for the cost of production must be taken with a grain of salt because of how they inflated their estimate of the cost of producing the search terms, as will be discussed in the next section. Additionally, while burdensome, this request is not unduly so. Expensive litigation has unfortunately become a cost of doing business on a large scale.”
- “Although 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 than a simple breach of contract case between two Mom-and-Pop stores. As 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.”



E-Discovery 2022: Proportionality

What methods are successful in helping to achieve proportionality?

What types of information, or data points, are most compelling when assessing proportionality?



19

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E-Discovery 2022: Proportionality

- **Best Practices**
 - Consider how best to limit costs of discovery while still properly identifying potentially relevant data sources.
 - Provide data to the court: reliable cost estimates and transparency as to the burden of requested discovery.
 - Employ technology: search terms, clustering, analytic and predictive tools to focus review
 - Be creative: use of metadata logs, protective orders to reduce review burden while complying with discovery rules and ensuring client confidentiality protections.



20

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21

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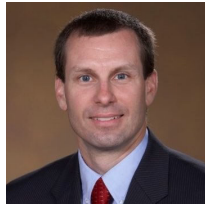
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Questions? If you have questions, you are welcome to follow-up directly with the presenters or call on your trusted Dorsey contact.

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Thomas L. Nuss
Vice President of Human
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Tom is responsible for all human resources, people safety, compensation, employee benefits, payroll, and legal functions for Brakebush Brothers, a family-owned private value-added chicken processor. Brakebush employees approximately 2,500 team members, spread across multiple U.S. production locations, a transportation division, and a nationwide sales team. Prior to joining Brakebush in 2018, Tom served in a variety of legal and human resources roles with Hormel Foods, a Fortune 500 company with over 20,000 employees. Tom started his career in Minneapolis as a trial attorney with the law firm of Dorsey & Whitney.

Tom graduated from Michigan State University with a bachelor's degree in Political Economy, earned his Juris Doctorate from the University of Michigan Law School, and is a Society for Human Resource Management Senior Certified Professional.



Judge David Schultz
Magistrate Judge
U.S. District Court
District of Minnesota

Before becoming a United States Magistrate Judge, David Schultz was a trial lawyer and partner with Maslon, LLC.

He received his Bachelor's degree from Carleton College and his law degree from Stanford. As a lawyer, Judge Schultz tried dozens of cases to verdict in state and federal courts all over the country. He is certified as a Civil Trial Specialist by the National Board of Trial Advocacy.

Judge Schultz also devoted hundreds of hours to pro bono representation, including representing death row inmates, seeking and obtaining exonerations of the wrongfully convicted, and helping to secure justice for the families of murder victims in the United States and abroad. In 2002, Judge Schultz traveled to Kosovo as a delegate of the ABA's Central and Eastern European Law Institute. There he helped create the criminal law bench book for the re-constituted Kosovo judiciary. He was appointed to the bench on February 7, 2017.





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Briana is an associate in Dorsey's Labor & Employment practice group. She works with employers to develop effective workplace strategies and implement efficient policies and procedures to help manage employment risks. She advises companies of all sizes on an array of employment matters including leaves of absence, wage and hour laws, hiring, performance improvement, sensitive terminations, and other employment related policies.

When disputes are unavoidable, Briana draws on her strong litigation experience to defend her clients. She has successfully represented single and multi-plaintiff actions against claims for discrimination, harassment, retaliation, contract matters, and wage and hour suits, and has successfully settled many cases in favor of her clients.

She maintains an active pro bono practice, including representing clients seeking asylum in the United States and participation in a local housing legal clinic. Before coming to Dorsey, Briana worked for an international education-management company, supporting its efforts both in the United States and in Abu Dhabi, United Arab Emirates to provide high quality, free or low-cost education to children in need.



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Kate is commercial litigator and partner in Dorsey's Minneapolis office, focusing primarily on construction litigation. She represents owners, contractors and sub-contractors in cases involving construction defect, delay, and scope claims.

While her primary focus industry is construction, Kate also represents clients in a variety of complex commercial cases. She has represented companies in merger litigation and securities class actions, government investigations, and professional liability, antitrust, and general commercial disputes. She also has extensive experience managing all phases of discovery in cases of all sizes, ranging from third party subpoenas to large, complex cases, including use of emerging analytics techniques to increase efficiency and manage costs.

Kate also maintains a vibrant pro bono practice, and has represented clients in housing court, asylum proceedings, and small business disputes. She currently serves on the pro bono defense team in a federal death penalty defense case.





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Caroline Sweeney is responsible for the delivery of Dorsey's e-discovery services, including LegalMine Managed Review services, litigation technology support, and trial technology support. Caroline is a member of Dorsey's Electronic Discovery Practice Group and the Cybersecurity, Privacy and Social Media Practice Group. She has extensive experience consulting with attorneys and clients with regard to e-discovery, including identification, preservation, collection, processing, review and production of electronically stored information. Her 25+ years of experience in the litigation support industry, include working in the law firm and litigation support vendor environments.

Caroline is actively involved in the e-discovery community. She is ACEDs certified, currently Co-President of the Twin Cities ACEDs chapter, and participated in the development of the litigation support certification test for the Organization of Legal Professionals (OLP). In addition, Caroline is a current member of The Sedona Conference Working Group on Electronic Document Retention and Production and sits on the Information Governance steering committee for the International Legal Technology Association (ILTA), and recently co-chaired the Minnesota E-Discovery Project Working Group 5 on Use of Technology to Facilitate Production of E-Discovery. She has served on a number of e-discovery vendors' client advisory boards and has experience with a wide array of e-discovery processing and review platforms. In addition to various software certifications, Caroline has received additional certifications in the areas of Legal Project Management and records and information management, and is also listed in Strathmore's Who's Who. She has participated as a presenter and faculty member at various conferences on litigation support and E-discovery and is a former instructor of "Computers in the Law" at the Minnesota Legal Assistant Institute. In the early 1990s, she was a co-founder of the Minnesota Association of Litigation Support Managers.



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