

# **A View From the Bench and the Trench(es) – In Response to Judge Matthewman’s New Paradigm for E-Discovery: It’s More Complicated**

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A VIEW FROM THE BENCH AND THE TRENCH(ES) IN  
RESPONSE TO JUDGE MATTHEWMAN'S NEW PARADIGM FOR  
EDISCOVERY: IT'S MORE COMPLICATED

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We need more judges like my friend Judge William “Bill” Matthewman, who are willing to reflect on eDiscovery, not as a nuisance to be avoided, but in a thoughtful manner to advance the aims of Rule 1, for a just, speedy, and inexpensive resolution of civil litigation. For twenty-three years I served as a United States Magistrate Judge in the Southern District of New York and frequently spoke at Bar and eDiscovery conferences all over the country (indeed, all over the world). Judge Matthewman and I overlapped at a few of these conferences and generally had similar views on handling eDiscovery matters. I applaud his ten “Core Components of the New E-Discovery Paradigm,”<sup>1</sup> but I bring an additional point of view to the subject. Since retiring from the court in February 2018, I returned to being a litigator, joining the international law firm of DLA Piper as Senior Counsel in their New York City office, which gives me a slightly different perspective on the core components. My conclusion is that the most important core component is very active judicial supervision of discovery. So, I generally agree with Judge Matthewman, but I have some further thoughts on the ten core components.

Core Component 1, Preservation:<sup>2</sup> It is easy to say that the “simple answer” to avoiding spoliation motions is to preserve.<sup>3</sup> The problem is that the technological communication tools available outpace clear legal guidelines. By now, most litigators know that when litigation is reasonably anticipated, they must take steps to preserve paper documents and also emails. But what about text messages and instant messages? By now, many jurisdictions have dealt with the need to preserve text messages. But what about encrypted messages and disappearing messages? There may be good reasons in data governance, cybersecurity, and privacy concerns to use such messaging applications, or it may be an

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1. William Matthewman, *Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective*, 71 FLA. L. REV. 1261, 1265 (2019).

2. *Id.* at 1266.

3. *See id.* at 1267.

effort to hide improper conduct. Are disappearing messages more like an email or more like a telephone call?<sup>4</sup> The courts are starting to see more cases dealing with ephemeral messages, but the law is not yet settled. And then there are collaboration tools like Slack and Teams and other such tools. Must they be preserved in the ordinary course of business? While Judge Matthewman's advice of involving the company's IT professionals is sound,<sup>5</sup> in a large company, for example, there may not be one IT department that knows all. And even there, counsel must decide if there is "shadow IT," that is, unofficial tools that employees have started using because they found the company's sanctioned tools were not sufficient for how they preferred to work. So yes, the "simple answer . . . [to] preserve" is not so simple in the real world.<sup>6</sup> But at a minimum, counsel should make good faith efforts to preserve and should document their decisions so as to avoid the most serious "intent to deprive" sanctions under Federal Rule of Civil Procedure 37(e)(2).

Core Component 2, Rule 26(a)(1) Initial Disclosures:<sup>7</sup> I see two problems with reliance on the initial disclosures for identification of documents and electronically stored information ("ESI"). Rule 26(a)(1) serves its purpose for the names of knowledgeable witnesses (although the practice of naming anyone who might know anything, which results in a haystack of names hiding the needle of really relevant individuals, makes even that difficult). But rarely does a party produce a copy of the documents or ESI; rather, the disclosure is a description by category of relevant ESI, which is often useless in crafting document requests. Perhaps Rule 26(a)(1) should be amended to give parties more time to prepare their initial disclosures but require production of every document or ESI that the party may rely on? That is not something that we can do as judges; it would require another amendment to the Federal Rules of Civil Procedure (and I doubt that will occur). In my view, the current initial disclosure rule does not sufficiently identify documents and ESI to start the discovery process.

Core Component 3, Precise Discovery Requests,<sup>8</sup> and Core Component 4, Non-boilerplate Responses:<sup>9</sup> These two components really go together. For many requests, "documents sufficient to show" makes more sense than "any and all." If the issue is how many widgets were sold in each of the last few years, "documents sufficient to show" gets you that information. The "any and all" request gets you each invoice,

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4. No one suggests companies need to record and preserve all calls, except in the brokerage and related industries

5. Matthewman, *supra* note 1, at 1267.

6. *See id.*

7. *Id.* at 1268.

8. *Id.* at 1269.

9. *Id.* at 1270.

shipping label, packing slip, and who knows what other useless material. This is not a made-up example; it occurred numerous times when I was on the bench. While some definitions or instructions may be useful, most are boilerplate and useless. Is it really necessary to define “document” or “ESI” today? What about defining defendant (or plaintiff), especially in a definition that includes every employee, attorney, and agent? For example, instructions seeking information about documents that once existed but have been destroyed; in the forty-plus years I’ve been a lawyer, I have never seen anyone respond to such an instruction with anything except an objection. The same is true for every other instruction that goes beyond the Federal Rules of Civil Procedure. All these get are boilerplate, general objections. Please eliminate all of this nonsense from your form files.

As to boilerplate responses, Federal Rule of Civil Procedure 34(b)(2) was amended in December 2015 to clearly eliminate boilerplate objections.<sup>10</sup> We all recognize the extreme form of such an objection (and you may not admit to using them yourself, but I will bet everyone has seen this from their adversary):

We object to this request for all the reasons stated in our General Objections. We further object that the request is vague, burdensome, over-broad, assumes facts not in evidence, is not comprehensible in the English language [ignore that we asked the same request to you], is not reasonably likely to lead to discoverable information, and is not proportional to the needs of the case [see, Judge, we actually amended our boilerplate in response to the 2015 Rules amendment]. Without waiver of these objections, we will produce what we darn well feel like when hell freezes over or this Court issues at least 2 orders forcing us to.

Of course, I took some liberties with that example, but unfortunately typical boilerplate objections still exist. I issued a wake-up call to the New York Bar in my decision in *Fischer v. Forrest*<sup>11</sup> where I held that such boilerplate objections were a nullity and waived all objections (except as to privilege).<sup>12</sup> There are numerous other decisions criticizing the continued use of boilerplate objections. Judges should continue to strike such boilerplate objections, which is easier when the requests themselves are not boilerplate. For lawyers who need help drafting meaningful objections, read *The Sedona Conference Federal Rule of*

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10. The Sedona Conference, *The Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447, 452–53 (2018).

11. 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017).

12. *Id.* at \*3.

*Civil Procedure 34(b)(2) Primer*.<sup>13</sup> Finally, as Judge Matthewman put it, if you still are using boilerplate objections, “please stop now.”<sup>14</sup>

Core Component 5, Cooperation:<sup>15</sup> This is an area where corporate clients should be involved and require their counsel to cooperate in discovery matters. It is the client, after all, that is paying the bill (usually by the hour). There is no doubt that if counsel cooperates, the cost of the litigation will be reduced. Each discovery motion that could be avoided by cooperation at the meet-and-confer conference reduces the cost of the litigation. It is in the client’s interest to avoid meaningless discovery disputes. Conversely, in some cases, the clients hate each other and the client will instruct counsel to fight everything. Counsel should not only remind the client of the costs involved, but also that the court likely will make conclusions about the merits of the case based on conduct in discovery. Counsel should remember that the Judge’s opinion about counsel will follow that lawyer in future cases before the court. No matter how important the client may be, a lawyer should never take actions or positions that will lessen his or her credibility with the court. Many disputes can be resolved by staging discovery. If defendant is willing to search for emails from five custodians but plaintiff wants ten, do the five agreed on without prejudice to plaintiff seeking more. It may turn out that the five enable the parties to settle the case. E-Discovery competence will allow the parties to better cooperate. And I agree with Judge Matthewman that law schools need to teach eDiscovery.<sup>16</sup>

Core Component 6, Eliminating Wasteful Discovery:<sup>17</sup> This is the Goldilocks principle. One wants the amount of discovery that is not too much or too little, but, rather, just right. I fear that Judge Matthewman’s admonition that places the burden on counsel will not be effective unless judges show more willingness to be actively involved in supervising discovery (which is Core Component 10).

Core Component 7, IT Professional Involvement:<sup>18</sup> I agree with Judge Matthewman that the involvement of knowledgeable IT personnel is very helpful to counsel and the court.<sup>19</sup> When I was on the bench, I resolved most discovery disputes at informal conferences and suggested, and sometimes ordered, that a knowledgeable IT professional should attend. I affectionately called these conferences “bring your own geek to court day.” Often at these conferences, the IT professionals would make suggestions to each other that resolved the dispute. Even when the IT

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13. The Sedona Conference, *supra* note 10.

14. See Matthewman, *supra* note 1, at 1271.

15. *Id.*

16. *Id.* at 1272.

17. *Id.* at 1273.

18. *Id.* at 1274.

19. See *id.* at 1267.

professional does not come to court, an affidavit is extremely helpful in educating the court on what can and cannot be reasonably achieved and provide a more realistic cost estimate than what counsel provides. Of course, some eDiscovery counsel (whether in-house or outside) are as knowledgeable (and sometimes more so) than the company IT professional. This is why some companies hire one firm as merits counsel and another as eDiscovery counsel. The point is, knowledge is power here.

Core Component 8, Use of eDiscovery Vendors:<sup>20</sup> I agree that if the case is big enough, it makes sense to use an eDiscovery vendor. Many large law firms, however, are able to process and produce ESI using the tools that the firm has. DLA Piper, for example, has Relativity One and can process a certain amount of data without needing an outside vendor. And judges need to remember that these outside vendors add a cost that some clients may not be able to afford.

Core Component 9, Technology Assisted Review (“TAR”):<sup>21</sup> I was the first judge to recognize that it was permissible to use TAR in proper cases,<sup>22</sup> and in 2015, I opined that it is now blackletter law that if the responding party wants to use TAR, the courts will allow it.<sup>23</sup> But use of TAR now, five years later, is still much less frequent than it should be. Part of the reason is misinformation about how TAR works. For example, at the time of *Da Silva Moore v. Publicis Groupe* and *Rio Tinto PLC v. Vale S.A.*, it was necessary to train the TAR tool, which led to issues about how much transparency would exist to let the requesting party see all aspects of the seed set.

In what eDiscovery vendors call TAR 2.0, using continuous active learning, the review of every document continues to train the system, alleviating that concern. The biggest continuing concern is whether disputes with opposing counsel and motion practice about the use of TAR will eat up the cost savings from using TAR. Moreover, TAR should now be an accepted methodology. Accordingly, opposing counsel does not need, and should not receive, input into the responding party’s TAR methodology; further transparency or negotiation of protocols is unnecessary. As Sedona Principle 6 teaches, the responding party is in the best position to determine how it will meet its Rule 26(g) obligation to respond to discovery requests.<sup>24</sup>

Concerns over excessive involvement by the opposing party serves to discourage the use of TAR. Another concern is about TAR being held to a higher standard than human review and keywords. If all search methods

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20. *Id.* at 1275.

21. *Id.* at 1276.

22. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189–90 (S.D.N.Y. 2012).

23. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015).

24. The Sedona Conference, *supra* note 10, at 482–83.

were held to the same standard, I believe more lawyers would use TAR. The standard in discovery is reasonableness, not perfection. Many eDiscovery vendor tools include a TAR component, such that while the parties negotiate over key words, the responding party can use TAR behind the scenes to help get through review of the keyword hits.

Core Component 10, Active Judicial Involvement:<sup>25</sup> Unfortunately, this is the most important of Judge Matthewman's Core Components. I say unfortunately because judicial resources are scarce. But without active judicial case management, lawyers will fall back on the inefficient discovery approaches that they have used in the past. Federal judges at least are able to get eDiscovery training through the Federal Judicial Center (but an increased budget for that would be useful). Recently appointed federal judges are likely to have been involved as lawyers with modern eDiscovery. My generation of federal judges had to learn on the bench, as discovery was paper-based when I left practice for the bench in 1995. Magistrate Judges in most jurisdictions have become experts in eDiscovery issues and case management.<sup>26</sup>

#### CONCLUSION

Here are ten "core" suggestions for effective, active judicial involvement:

1. Require pre-motion conferences (based on short letter requests and responses), as suggested by the 2015 amendment to Rule 16(b).<sup>27</sup> Most discovery issues can be ruled on from the bench at that conference, which saves judicial time and gives the parties prompt decisions.
2. Require regular status conferences to keep the case moving and nip disputes in the bud. For counsel who is not cooperating, the conference can be scheduled for Friday afternoon at 4 p.m. Perhaps counsel will get the message.
3. Consider staging or sequencing discovery. Start with the low hanging fruit. If the parties are fighting over how many custodians should be searched, start with the number they agree on without prejudice, allowing more later. Start with discovery that may allow the parties to settle the case.
4. Require appearance or at least affidavits by IT personnel or eDiscovery attorneys knowledgeable about the discovery

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25. See Matthewman, *supra* note 1, at 1279.

26. It is worth noting that most of the leading eDiscovery decisions were written by Magistrate Judges, and there are only a handful of appellate decisions dealing with eDiscovery.

27. See Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, ABA (Feb. 20, 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/02/07\\_marinelli/](https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli/) [<https://perma.cc/5FHL-5S3Z>].

dispute.

5. Strictly deal with excessive requests or boilerplate responses. Develop such a reputation, and parties will get the message and actually follow the Rules.

6. If counsel seems to be unnecessarily hostile and uncooperative with each other, require in-house counsel or senior client personnel to appear at a conference to see where their money is going.

7. Don't look at a particular discovery dispute in a vacuum. What is the case all about? Don't lose the forest for the trees.

8. Suggest ways counsel can be more efficient. Some counsel will need some eDiscovery training, and it may have to come from the court.

9. Recommend, in all cases, that the parties utilize a Federal Rule of Evidence 502(d) Non-waiver of Privilege Order. While Rule 502 was enacted in 2008,<sup>28</sup> it amazes me how many lawyers are unfamiliar with it or, in any event, don't utilize Rule 502(d), which I have called counsel's get out of jail free card. In my view, it is akin to malpractice for counsel not to at least consider a 502(d) order. Some lawyers need a judicial push to get them there.

10. If the case justifies it, the Court should appoint an eDiscovery special master (and I am available to serve in that role for any judge who needs it).

Judge Matthewman's "New Paradigm for eDiscovery" is a good start to managing the complexity and expenses of eDiscovery. More judges need to focus on ways to better control the eDiscovery experience. The amount of data and costs are out of control, and we must do more to control this.

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28. Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (amending the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine).