The Consumer Finance Podcast **– Harnessing the Power of eDiscovery: The Revolution of AI and Technology in Litigation and Investigations**
Host: Chris Willis
Guests: Joseph DeFazio, Alison Grounds, Jason Manning
Date Aired: May 8, 2025

Chris Willis: Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, Co-Leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today, we're going to be talking about eDiscovery trends, in general, and in consumer financial services litigation.

But before we jump into that very timely topic, let me remind you to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com. And don't forget about all of our other podcasts, *FCRA Focus*, *The Crypto Exchange*, *Unauthorized Access*, *Moving the Metal*, and *Payments Pros*. All of those are available on all popular podcast platforms. Speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

Now, as I said, today we're going to be talking about eDiscovery in consumer financial services litigation. And I've got a great set of guests lined up to talk to you about that today. So first, I have my two partners, Joe DeFazio and Jason Manning. They're both partners in our Consumer Financial Services litigation group. And we also have a very special guest, Alison Grounds. Alison is our partner who runs eMerge, which is Troutman Pepper Locke's dedicated eDiscovery unit. So, Alison, Joe, Jason, thanks for joining me today.

Jason Manning: Glad to be here.

Joseph DeFazio: Thanks Chris.

Alison Grounds: Thanks for having me.

Chris Willis: All right. Let's start with, at the risk of asking too basic of a question, but Joe and Jason, let's start off by just setting the table. What is eDiscovery, and why should I care about it? Both me personally and the members of our audience who are out there listening.

Jason Manning: So, in our digital world everything's electronic now and just because it is deleted, doesn't mean it's gone. So, electronic or eDiscovery just has a very broad application to litigation because we need, on the front end, our client to have very clear policies and procedures about what documents they maintain, how they maintain them, what their automatic deletion policy is, and then broader, how do they store documents. What happens when things are deleted? Are they in archive? Are they in backup?

There have been a number of cases where an inordinate amount of time and money is spent on eDiscovery for lack of clear policies. Similarly, once you're in true eDiscovery, there's a lot of things that I wish our clients knew about before we got into the litigation in order to make their life easier during the litigation. And so, that's really what we wanted to talk about today.

Chris Willis: So, what kind of impact does eDiscovery have on the litigation that you and Joe engage in regularly, which of course is consumer financial services litigation?

Jason Manning: A lot of times between business disputes, commercial disputes, whether it's two banks fighting over a portfolio of loans or on the consumer side, a bank defending a class action that's brought on behalf of an individual consumer who's purportedly similarly situated to others. A lot of times there's quite a bit of dispute over what's relevant, the scope of the relevance, and how you get to those relevant documents. As you would imagine, emails and chats and texts are things that are often very contentious issues as to where are they, what's the scope of them. And because it's electronic, in a large company, they have the potential to be very, very voluminous and narrowing them to what is actually appropriate in the case gets into something called proportionality.

What is actually not just relevant broadly defined, but also fair or not overly costly to have to produce. So, in our cases, we routinely have a lot of disputes, I will say, over all of those issues. And we wanted to just share some of the best practices related to that.

Joseph DeFazio: Yes, I would echo what Jason has already mentioned. I would also say there's a couple core things that we want our listeners and clients to really focus on when we talk about eDiscovery. Some of them are, I'll start with efficiency and speed, so as long as you have the right eDiscovery tools, you can streamline identification, collection, review of ESI, which is electronically stored information, so it makes it faster for us to get to the relevant evidence compared to traditional paper discovery methods, which as you can imagine could take quite some time.

There's a cost management, right? So, while eDiscovery itself may be expensive due to technology cost and warehousing the documents and things along that nature, it's an expense that's required in a lot of these cases, but it can also reduce overall litigation costs because it minimizes manual document review. It focuses on relevant data. I think we'll talk about a little bit later some of the tools we have that do that. Alison can certainly speak to TAR and AI and how we're implementing it through eMerge.

I would say the scope and depth of evidence, eDiscovery allows us to access a vast array of digital data. So, Jason talked about emails, but not only that, social media, database. It provides a comprehensive view of facts and potentially uncovering critical evidence that is very important for an overall litigation strategy. You kind of want to know what the documents you're studying and what the case is really going to be about up front. And through the traditional paper method, that could take you a while to get there. With eDiscovery, you can get there a lot faster. So, that goes back to my point about cost and efficiency in managing expenses.

The last thing I'll talk about too on that front is a litigation strategy or legal strategy. So basically, it allows us to efficiently manage and analyze these large volumes of documents. And with certain tools, we can really summarize them faster. It offers a strategic advantage to us, because as I mentioned before, we can recover, uncover, I should say, some critical documents early on and decide what's the best way to litigate the case. Maybe that's an early resolution or maybe that's a prolonged litigation. It just depends on what comes about from the initial eDiscovery reviews.

Chris Willis: Thanks, Joe. And before we get into talking about techniques and technologies for more efficient electronic discovery, let me just sort of echo your comments. You've been talking about what happens in private litigation, but almost all of those same factors are true in regulatory investigations too, the kinds that I do with either state attorneys general or the federal regulators, they routinely ask for electronic discovery, including emails and chats, like Slack or other kinds of more informal communications. Sometimes we will discover that employees have been less than careful in what they say, particularly in those instant messaging platforms, which I wish in hindsight they had been more careful.

So, all of the need and all the sort of important factors that you and Jason identified for eDiscovery are equally true of regulatory investigations. So, with that sort of brief aside, I do want to turn to you, Alison. And Joe made reference to a number of sort of new techniques and technology that are around to help us and our clients do eDiscovery in a more efficient, more cost-effective way. That's your whole world as the one who manages our eMerge function. Can you start by just telling the audience a little bit about what eMerge does and then let's talk about what are some of the things that we can do to have technology help facilitate these electronic document reviews?

Alison Grounds: Absolutely, Chris. I love where this conversation is going. Certainly, the technology is very important, but I also would argue that sometimes I think eDiscovery is viewed merely as a cost or a burden, and it really can be an affirmative benefit, both in an investigation and a litigation. Using these tools and our knowledge of the case and our big lawyer brains to combine and come up with a strategy that helps us really get an advantage over an adversary in a more traditional litigation sense and a little bit more of a jump on the information in an investigation sense.

So, I think sometimes it's overlooked as the benefit that it can actually bestow to our clients because it can be expensive. But the most expensive piece actually of the eDiscovery process is the time that has to be spent by our lawyers in analyzing information. There's just so much information that we're generating through all these different collaboration platforms and messaging applications, certainly in the financial services space, a lot of structured data and database information that we need to analyze. And most of these tools were not designed for

litigation, They're designed for doing business or interacting with customers. So, they're not built to be easy to preserve, collect, slice and dice, and produce in litigation.

A lot of what we do at eMerge is we deploy end-to-end solutions. So, our lawyers, like myself, help consult at the beginning of the case on what do we think is going to be relevant here? How can we preserve that information to reduce risk? How can we do some early case assessment? Collect some information and kind of see where we stand for either the complaint or an answer or to get ourselves in the right position when negotiating with the government. Then we assist with that collection. We help use technology for that as well as any analysis of the document. So, we process it, review it, produce it. We help with fact development, again, extracting the key information from all these different data sets and then present it when necessary to a trial or to a regulator.

We've also found over the years, because this is such a big part of discovery and can be such a high-risk area, Chris, as you mentioned, where employees may be inappropriately using certain platforms to do business, and we saw a big push from the regulators on this off-channel communication issue, especially with broker-dealers and highly-regulated companies, when you really see, it used to be that you could say, "Oh, we're just going to do some basic discovery of key loan files and we're going to maybe get into some emails." Now, you're seeing, especially in the regulatory space, as you know, Chris, they want to know about all the different communication platforms and you have to sort of prove a negative and say, "No, no, our official communication channels are where we should be. We don't need to go to all these other little nooks and crannies."

So, helping with that pre-litigation, response plan, what are you going to do, what do your systems look like? It's an area of our practice, it's really grown in recent years as clients are deploying more solutions internally. So, that was a long answer to your very simple question of kind of what do we do as a team? It's really end-to-end because what we see is the biggest risk for our clients is a failure of process, and discovery is another business process like any other. How are you identifying, preserving, reviewing, and producing information? And when you're a sophisticated client, like a financial services client, courts expect you to have a repeat process.

And they don't understand that there's not a magic button that you can push to automatically output exactly what your adversary may be asking for.

So, we really help architect solutions around, what does this specific case need? And how can we make sure we're finding the information that we need accurately with the least amount of time and investment of our attorneys to give us an advantage in the litigation to know the information faster.

Chris Willis: Thanks, Alison. I think that your answer just underlines why it was so great from my standpoint, when we joined Troutman three years ago, to learn that we had eMerge, an in-house dedicated eDiscovery team that we can mesh seamlessly with and work with as closely as all of our group members do with you and have access to all these tools, right here under our own roof. It really simplifies things for clients and I think allows us to provide clients with a really efficient, effective solution. So, that was a big attraction for me when I joined Troutman three years ago. But I'm sure there have been some significant advances in technology that assist you in doing the functions that you just mentioned for our clients, both in litigation and in regulatory matters. Do you mind telling the audience a little bit about some of those and how they work and what they're used for?

Alison Grounds: Absolutely. This is an area where we're really excited because we have been early adopters in technology at the firm, and I think we've been very fortunate to have the support of the firm in making these investments. We certainly were early adopters in eDiscovery in using AI more generally, so your listeners may have heard of things like technology-assisted review. And that's kind of the old school AI where you could train and you could load documents into the database and say, "Hey, find more like this." It would be very good at finding information and making those kinds of binary decisions. Yes, this relates to their loan policies or no, it doesn't.

What we've now rolled out and deployed is Generative AI solutions, which we're really excited about because we're one of the few law firms that had early access to these solutions, partnering with Relativity, who is the tool, the platform that we use at eMerge. And because we are one of the largest users and consumers of Relativity's products, we always break them and

make them better. We got involved in their early development of their Generative AI solutions. So, we helped them to deploy it and test it and make sure it met our needs and our ethical obligations as a law firm. Because we had a full year to test it before it was available to the general public, we could feel comfortable using it in actual cases.

What Generative AI does compared to the more classic AI is when you're analyzing information, you prompt it, much like you would ChatGPT, except you're in a secure environment where that information is not going external. And when you get that prompt, you can code documents for multiple issues at a time, and instead of just getting a binary yes or no, where you don't really see how the machine is reaching that decision under a more traditional machine learning model, it's very transparent. It generates an explanation for why the document relates to a particular topic, and it also will give it sort of counterthought, like, but here's maybe any hesitancy I have. It will also highlight the specific portion of the document it's relying on for its analysis, and it can be used to do things like create chronologies, do fact development, deposition prep outlines, as well as privilege logs.

So, it's really the next level of technology, and it's infinitely more accurate than I think prior technologies we've seen more transparent in the sense that you can see how that result is being generated and also helps with more downstream use cases. So, not just is it responsive or not, but what does it relate to you? And how do these witnesses connect? Is there a gap in this production? So, we've been able to use Relativity tools and develop some of our own. That's why we like Relativity. We can build our own products and overlay them. One of the tools we recently won an award for is called Flywheel. And it has some sort of pre-done prompting, things we commonly like to do with data sets, and it allows us to do gap analysis.

So, if our adversary isn't producing documents we would expect to see, it can flag that for us pretty quickly and give us a summary of a big data dump and it can say, "Here's what's in this pile," and direct us to what we need to see sooner. So, really exciting technology developments in this space that help us narrow in and focus our efforts on what matters sooner and also help us see if there's any deficiencies in our own productions or in our adversaries.

Chris Willis: That's amazing. You know sort of as an intuitive matter that AI and machine learning should be good at handling and distilling large data sets, but putting that into practice is a significant innovation, and I think that's a very cool thing that you all have done and something that I think our clients are very much advantaged by.

So back to you, Joe and Jason, you see eDiscovery day in and day out in your litigation matters. What kind of trends are you seeing in the litigation context surrounding this topic?

Jason Manning: So, the first one that comes to mind is something that Alison referred to about, sometimes there's client reluctance to engage early on with that discussion. The problem with that is, you get into a you're behind the eight-ball situation and now it's the hurry up and figure it out. We've really been emphasizing on the front end, like we want to talk to your tech folks now, right? And the beauty of having eMerge is their tech folks speak the same language as the client's tech folks, right? They know databases, they know fields, they know data accessibility, and storage. So, they can speak in the same language, how is it stored, how do we access it? And to Alison's point, just because it's there, it doesn't mean it's accessible, or searchable in the manner that your opposition wants it.

So, related to that, there's a front-end discussion. Then once you've processed that first batch of documents, if you will, running those AI tools across them, we actually did this, Joe and I both, had a video conference with an eMerge team member, and they walked us through the Generative AI results. Of this voluminous data set, here's what we're seeing. Here's how it looks. Let's talk through these search results. Do you think there's something different? Is there another question we should be asking?

So, we were able to drill down live, like real-time processing it with the client, seeing the results of essentially a preview of what the discovery would show. The client was thrilled. I mean, they got all kinds of nice like pie arts and responsive hits and things like that. We were able to drill down into a more specific responsiveness set of documents. And then we have to run the redactions, right? And redactions can be very, very expensive if you're doing it manually, right? It's absurd. But they have other tools, and Alison can speak to it where you run, hey, we want you to load these names, let's say it's a list of potential class members, run them and redact

every hit of those names automatically. No human being is doing that work, right? The machine generates it. We do a sample QC, and we produce. It's way more efficient.

Alison, I may have said that wrong, so correct me.

Alison Grounds: No, you're right on. And the redaction tool is a pretty interesting area. We have a couple of custom solutions there too. We have some off-the-shelf tools that will do that, right? It'll automatically redact things that you tell it to look for. And we recently started deploying, and this was from Flywheel helps us to do this to you. I'm not giving this the best justice either, but almost like geographic redactions, right? So, if you know that there's a common document type, like a loan application, where there's sensitive information that's always in the same quadrant of the document, it can automatically redact by location. So, you can do word-based redactions of personal identifying information and things that you know to look for. And you can also, even if you don't know all the names you need to redact, do that more geography-based redaction work to find and redact it. You're right, redaction is one of the most expensive pieces of the eDiscovery process, so having some automation there has been really helpful.

Joseph DeFazio: I think it's important to also make sure your ESI protocol from the beginning is set up well because you can be fighting about that for quite some time with the opposing counsel, especially in these class cases, some of the more sophisticated firms. They know what they're doing and they know what they're looking for and they know the technologies. So, one of the things that Jason and I have done in our class cases, we actually pair with eMerge. We say, "Look at the ESI protocol that they're proposing. What do you think changes need to be tweaked to match our systems and capabilities so that it's all up there and up front?" And you don't have to get bogged down in these fights and go and have a hearing before the judge about what the protective order is going to look like or what the ESI order is going to look like because at the end of the day, judges don't want to get involved with that. They want you to have your ESI protocol. They want you to be transparent about it, and they want you to put it in place and then do the discovery. And you need to be prepared to do that because especially in these bigger class cases, the magistrates or the special master, whoever is running it, they're expecting the same thing. They're expecting you to produce documents that are relevant, and this goes back

to what I think Jason hit on earlier about proportionality. That's another area where you really have to be buttoned up so that you can make your arguments related to proportionality and make sure you're producing what's actually relevant to the litigation because some of our clients, as you can imagine, Chris, and you know because some of them are bigger institutional financial institutions have so much data. What you really want to do is limit the production to what is actually responsive to the requests and to the lawsuit. Because you can get really bogged down with an opposing counsel who, what I'll say, is on a fishing expedition to make you really do a lot more work than is necessary.

Alison Grounds: I would say, Joe, working with you and Jason on cases is great because you do involve us early. And I think it's also that opportunity to be on the offense, right? If we get in an ESI protocol negotiation with an adversary and they can see that we are very technologically savvy and we're going to shut down some things that are fishing expeditions and that we have our information ready to go, it is amazing how that shifts. We had a trademark case a few years back where most clients don't do this, but this client listened to me. I said, "Look, this is a silly case. We know what they need. Let's just actually, in our initial disclosures, produce everything." We were able to go ahead, get out there, get the key documents, and in our very first meet and confer, we said, "Okay, here's the link to the stuff that's relevant to this litigation. Let's go." They were caught so off guard, it was very clear we had our ducks in the row, and we were going to be aggressive on this, but it settled very quickly.

So, sometimes just making sure that you're letting your adversary know we take our responsibilities here seriously, we understand what's relevant, we're not going to let you go through this fishing expedition exercise, and here's how we want to do things, but we're going to be reasonable. And I think it really does set the tone for focusing on the merits of not having a discovery side show, which we all know could be quite expensive and unnecessary.

Chris Willis: Joe, Jason, and Alison, this has been a really interesting discussion. In fact, if our listeners want even more, the eMerge team under Alison actually just recorded their annual eDiscovery case law CLE. It's available on our [website](#). You can check the show notes to find out where you can download it, but it's an hour and a half of content about the latest case law and interesting issues related to eDiscovery as it's playing out in litigation. So, I want to thank all

three of you for being on the podcast today. And of course, thanks to our audience for listening as well.

Don't forget to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com. While you're at it, why not visit us on the web at troutman.com and add yourself to our consumer financial services email list. That way we can send you copies of our alerts and advisories that we send out, as well as invitations to our industry-only webinars that we put on from time to time. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.