

# eMerge Webinar Recap: Annual eDiscovery Updates

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Troutman Pepper attorneys and technologists hosted a webinar, *Annual eDiscovery Updates*, where they analyzed the past year's key decisions and technical innovations impacting discovery and highlighted 2023 trends. Webinar discussions included practical considerations in balancing legal requirements with rapidly changing AI and other technologies; how ESI protocols can act as both a blessing and a curse for litigants; the proliferation of messaging applications and workplace collaboration platforms; and how evolving data protection and privacy laws impact discovery.

Click [here](#) to replay the webinar.

Below find key takeaways and practical pointers to help your company with its eDiscovery needs.

### Preservation

- Do not allow your litigation hold to be a paper tiger.
- Check auto-delete functions and suspend or alter them as appropriate.
- Implement policies and/or notice requirements around device or system replacement.
- Carefully evaluate use of alternative modes of communication (particularly encrypted and ephemeral messaging applications) and understand how to preserve and collect them — the “usual” tactics, including device imaging, may not suffice.

### Workplace Collaboration Platforms

- Add collaboration platforms to your checklist of custodial and noncustodial data sources to consider when developing an eDiscovery plan.
- Preservation, collection, and search methodologies may vary based on platform license tier.
- Ensure your ESI protocols are flexible enough to adapt to usage or functionality changes of your collaboration tools.

## **Possession, Custody, or Control**

- Know your circuit and its presumptive standard:
  - Legal right;
  - Legal right plus notification; and
  - Practical ability.
- No matter your jurisdiction, consider contacting third parties with discoverable data to begin dialogue before serving RFPs or subpoenas.
- Revisit bring your own device (BYOD) and mobile device management (MDM) policies in light of recent case law and DOJ guidance.

## **International Data Protection and Discovery**

- Carefully consider the impact of privacy protections on transfers necessary to conduct discovery.
- When an international data protection law may conflict with U.S. discovery obligations, seek ways to minimize use of foreign data (*e.g.*, via phased production or redactions) and ensure adequate protective orders are in place.
- Consult with practitioners in the foreign jurisdiction and document all decisions.
- Generally, one cannot shield data from disclosure by storing it internationally.
- These considerations are not limited to international discovery. Consider U.S. and state privacy protections (*e.g.*, CCPA and other state rules).

## **Proportionality**

- Research your judges.
  - What were their practice areas before taking the bench?
  - What do their other decisions show about their willingness to get into the weeds of a discovery dispute?
- Have concrete evidence to support your position, such as:

- Dollars;
- Hours;
- Declarations; and
- Details.

### **Search Terms v. Technology Assisted Review (TAR)**

- Generally, avoid defining specific filtering or review procedures in an ESI protocol.
- Still no decisions where a party was ordered to use TAR without any alleged discovery deficiencies.

### **Protecting Privileges**

- Negotiate timelines and scope limitations for privilege logs and then meet your obligations.
- Implement a reasonable document and privilege review process. Failing to do so could result in waiver, subject to terms of FRE 502(d) order.
- Use FRE 502(d) to your advantage but understand its potential limitations.

### **Process Failures**

- Develop a proactive eDiscovery plan.
- Involve appropriate resources, both technical and legal.
- Adapt plan throughout.
- Carefully address deficiencies.
- Have a contingency plan.

### **Rule 34**

- Avoid boilerplate objections to discovery requests. Respond and object with the specificity required by federal or state rules.

- Do not unilaterally degrade the accessibility of ESI when producing it.
- Raise the production format early and reach an agreement, especially with structured data. Alternatively, include the production format in requests and/or raise timely objections to the requested format.
  - Provide basis for objections;
  - State your intended production format; and
  - If possible, reach agreement without involving the court.

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