New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 253—NO. 22
TUESDAY, FEBRUARY 3, 2015

FEDERAL E-DISCOVERY

Meta-Discovery Denied: Decision Limits Scrutiny of Methods


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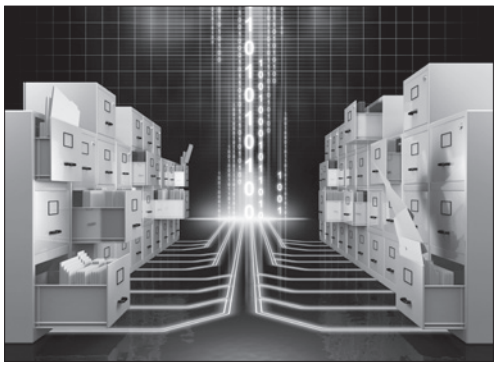
Disputes over e-discovery are ubiquitous in modern complex litigation. Many times, these disputes are rooted in allegations that a party attempted to frustrate production by withholding evidence or inappropriately asserting privileges to prevent disclosure of relevant materials. Less often do these disputes focus on the sufficiency of the processes used by a party to identify relevant documents.[1]

This may be due, in part, to the fact that the Federal Rules of Civil Procedure do not prescribe the processes that a party must use to identify relevant materials.[2] While courts have interpreted Rule 34 of the Federal Rules of Civil Procedure to require parties to "undertake reasonable efforts to identify and produce responsive, non-privileged material in [their] possession, custody, or control,"[3] the Rule does not set forth specific guidelines or requirements for how a party must conduct its searches to produce these materials.[4]

Even so, in some cases, parties have sought to compel production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of "discovery on discovery"—that is, discovery of materials meant to test the sufficiency of the discovery methods used by a responding party. These were the circumstances in *Freedman v. Weatherford International*, a case recently decided by Magistrate Judge James C. Francis in the Southern District of New York.[5]

Background

The plaintiffs in *Freedman* accused Weatherford International of securities fraud. Plaintiffs alleged that, between 2007 and 2010, Weatherford systematically underreported its taxes and issued false financial statements that inflated Weatherford's earning by more than $900 million.[6] The lawsuit followed two internal investigations into practices in the company's tax department. The first, which followed an employee's accusations of improper tax practices, was conducted on Weatherford's behalf by outside counsel. Several months after that investigation concluded, Weatherford announced that it would restate earnings for the third time. This prompted Weatherford's Audit Committee to commission an investigation of its own, which was conducted by its own outside counsel.[7]

In 2012, investors in Weatherford filed a putative securities class action in the Southern District of New York. The plaintiffs in that case claimed that the false accounting statements had led to a significant overvaluation of the company and had caused financial losses to the putative class.

During the discovery phase of the litigation, the plaintiffs sought to compel production of reports that compared documents searched in Weatherford's two internal investigations to documents produced as part of the class action litigation.

The motion came before Francis, a leading jurist in the field of e-discovery.[8] While Francis acknowledged that "such discovery on discovery is sometimes warranted," he initially denied the request because the plaintiffs had failed to provide "an adequate factual basis" for concluding that Weatherford's production was deficient.[9]

The plaintiffs later moved for recon-

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sideration on the grounds that new evidence provided a sufficient factual basis to warrant production of the requested reports. They claimed that this new evidence—18 relevant email messages of "critical [Weatherford] custodians" that had been produced by third-party KPMG, but not by Weatherford itself—showed that Weatherford's production was "significantly deficient."[10] The plaintiffs argued that this deficiency entitled them to examine how discovery was conducted in the class action suit and compare it to the document collection protocol used in the prior investigations.

In examining the plaintiffs' motion for reconsideration, Francis noted that "[i]n certain circumstances where a party makes some showing that a producing party's production has been incomplete, a court may order discovery designed to test the sufficiency of that party's discovery efforts in order to capture additional relevant material."[11] However, he rejected the plaintiffs' assertion that the circumstances in *Freedman* entitled them to this sort of discovery.

In doing so, Francis cited *Orillaneda v. French Culinary Institutes*[12] for the proposition that the right to seek discovery about discovery is limited to circumstances where a party is able to present evidence that the production was insufficient. In *Orillaneda*, Magistrate Judge Henry B. Pitman held that "a plaintiff is not entitled to conduct discovery that is solely relevant to the sufficiency of the adversary's document production without first identifying facts suggesting that the production is deficient."[13]

The plaintiff in *Orillaneda* had similarly sought to conduct discovery to determine whether the defendant's discovery process was adequate, but had made only "broad allegations of harm" and failed to make a specific showing of damage that warranted the court ordering further scrutiny of the defendant's discovery process.[14] Absent such a showing, Pitman found that the plaintiff's request to obtain information related to the defendant's discovery process—specifically information regarding defendant's internal search procedures and information systems—was irrelevant and not appropriate.[15]

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Francis also relied on *Hubbard v. Porter*,[16] to support the notion that mere speculation that a discovery process was insufficient is not enough to warrant scrutiny of the discovery process employed by a responding party. In *Hubbard*, Magistrate Judge M. Facciola—another of the recognized judicial experts in e-discovery—rejected the plaintiffs' argument that the discovery process used by the defendant was faulty because the number of documents produced did not "make sense."[17] Facciola noted that such a "hunch" did not justify requiring the defendant to explain the methods it employed to search for the documents that were ultimately produced.[18]

Facciola further emphasized that Federal Rule of Civil Procedure Rule 26(g) already required the defendant to affirm that the disclosure was "complete and correct as of the time it was made."[19] Absent specific evidence of an error in the gathering of documents, Facciola was unwilling to credit plaintiffs' belief that the defendant had made an "implicitly false certification."[20]

In *Freedman*, Francis similarly found that the circumstances before him did not warrant ordering such further discovery. He was not persuaded that the discovery of 18 relevant unproduced documents, in a case where nearly 4.4 million pages of documents had been produced, rose to the level of seriousness necessary to call into question the integrity and sufficiency of the entire Weatherford production, let alone to warrant the type of further scrutiny the plaintiffs had requested.

Francis further noted that the specific form of "discovery on discovery" that the plaintiffs sought—reports of the documents "hit" by the electronic search terms used in Weatherford's internal investigations—was unlikely to identify additional documents relevant to the litigation. In both the litigation and the internal investigations, only documents that contained certain search terms had been reviewed for responsiveness. Francis concluded that the requested review of electronic hit reports from the internal investigations was of "dubious value" since only one of the unproduced 18 emails would have been captured by the search terms used in the litigation, and only three of the 18 emails would have been identified by the search terms used in connection with the internal investigations.[21]

Notably, Francis' opinion was couched with warnings about the dangers of opening the door too broadly to such "meta-discovery."[22] Acknowledging the already costly and time-consuming nature of e-discovery, Francis emphasized that requests for meta-discovery must be "closely scrutinized."[23] He cautioned that if courts were to question the legal sufficiency of an entire discovery process merely because it later emerged that a handful of relevant documents had not been produced, the discovery phase of litigation would continue "ad infinitum."[24] Although Weatherford's production was not perfect, Weatherford had produced millions of documents in connection with the litigation, making it "unsurprising that some relevant documents

may have fallen through the cracks."[25]

Scope of Meta-Discovery

While Rule 26 of the Federal Rules of Civil Procedure broadly allows for discovery regarding any non-privileged matter that is "reasonably calculated to lead to the discovery of admissible evidence,"[26] the right for a party to obtain discovery is neither absolute nor unbounded. Even assuming that the plaintiffs in *Freedman* were correct that the 18 documents uncovered during third-party discovery were "relevant and should have been produced by Weatherford,"[27] the fact is that the electronic search terms used in the litigation did not lead to the identification of the vast majority of these documents. Although hindsight indicated that the searches used failed to capture some relevant material, that is hardly unusual and, without more, did not support a finding that Weatherford had employed an insufficient discovery process or otherwise made an incomplete production. Nor did it justify pressing the reset button on the Weatherford production.

In this way, *Freedman* appears to limit the extent to which a requesting party can attack the sufficiency of a responding party's discovery methods, and provides some guidance about the type of evidentiary showing that courts will require before permitting discovery into an adversary's discovery methods. It has long been assumed that requests for meta-discovery must be based on something more than speculation and unsubstantiated accusations that a production process was deficient. As a result, the mere suspicion that more documents should have been produced or that something is missing will almost invariably fail to persuade courts to authorize meta-discovery. But Francis set the threshold even higher by rejecting the notion that the identification of some specific evidence of a deficiency—such as the 18 documents that the plaintiffs pointed to here—is necessarily sufficient to permit even limited scrutiny of the methods a responding party used to answer a discovery request.

As Francis recognized, even when there is some evidence that a production was flawed, imposing a standard that mandates perfection would unnecessarily extend and complicate a process that is already lengthy and costly. And, regardless of the methodology employed, a standard of perfection would be particularly unachievable in large volume e-discovery matters that call for the mass production of millions of documents.

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Indeed, permitting unrestricted scrutiny of the discovery process would add an even thicker layer to the discovery phase of litigation, with parties focusing on running a fine-toothed comb through the discovery methods used by one another, thereby delaying the litigation process further, driving up costs, and ultimately forestalling resolutions on the underlying merits of the matter.

Conclusion

Freedman takes a pragmatic view on the standard for testing the sufficiency of discovery methods in the age of modern electronic discovery. E-discovery is not a simple science—it requires designing a process that will identify, collect, and produce relevant documents from an often voluminous universe of electronically stored information, often in a compressed time period. In an attempt to manage costs, meet court deadlines, but still ensure quality and defensibility, a party must make certain decisions, such as how to decrease the size of the universe of potentially responsive documents to identify those that are relevant and non-privileged.

Unfortunately, processes of this nature can neither be entirely automated nor reduced to a mathematical equation: There are countless ways for a responding party to design a methodology to satisfy discovery requests, each carrying with it its own benefits and drawbacks. The opportunity for both human errors and technological malfunctions in the discovery process inevitably leads to less than perfect results no matter what method is employed. A legally sufficient discovery process therefore must be practical—it cannot, and should not, burden parties with the prospect of discovery into discovery whenever, as will almost invariably be the case, the discovery process proves imperfect. Francis' decision in *Freedman* wisely recognized as much.

1. Hon. Craig B. Shaffer, "'Defensible' by What Standard?" 13 Sedona Conf. J. 217, 229 (2012).
2. Id.
3. Id. at 221.
4. Id. at 229.
5. No. 12 CIV. 2121 (LAK)(JCF), 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014).
6. Consolidated Amended Class Action Complaint, *Freedman v. Weatherford International*, 2012 WL 5272343, at ¶ 1 (S.D.N.Y. 2012).
7. Id. at ¶ 3.
8. See *Freedman v. Weatherford International*, No. 12 Civ. 2121, 2014 WL 3767034, at *1 (S.D.N.Y. July 25, 2014).
9. *Freedman*, 2014 WL 4547039, at *1 (citing *Freedman*, 2014 WL 3767034, at *3).
10. Id. at *2.
11. Id.
12. No. 07 Civ. 3206, 2011 WL 4375365 (S.D.N.Y. Sept. 19, 2011).
13. Id. at *8.
14. Id. at *9.
15. Id.
16. 247 F. R. D. 27 (D.D.C. 2008).
17. Id. at 29.
18. Id.
19. Id. at 29-30.
20. Id. at 30.
21. *Freedman*, 2014 WL 4547039, at *3.
22. Id. at *2.
23. Id.
24. Id.
25. Id. at *3.
26. Fed. R. Civ. P. 26(b)(1).
27. *Freedman*, 2014 WL 4547039, at *3.