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FEDERAL E-DISCOVERY

FRCP Define Obligations, ESI Protocols Set Contours

By H. Christopher Boehning And Daniel J. Toal

In the early days of e-discovery, what is now commonly called an ESI protocol was usually a relatively short document that specified the agreement between the parties on format for production of electronically stored information (ESI). Other than technical specifications for production images and load files, there was little in the way of detail for how parties would approach the various steps in the discovery process. Today, that has changed. Many ESI protocols cover topics that run the gamut of discovery, from custodians to privilege to production. And many purport to set forth the parties' obligations relating to search and retrieval methodologies—topics that are often a subject of disagreements and motion practice.

A recent decision from Magistrate Judge Katharine Parker of the Southern District of New York provides guidance concerning the appropriate interplay between ESI protocols and the Federal Rules of Civil Procedure. Magistrate Judge Parker reminds parties that although ESI protocols may set the contours of discovery, the parties' obligations to conduct reasonable searches during discovery flow from the Rules themselves.

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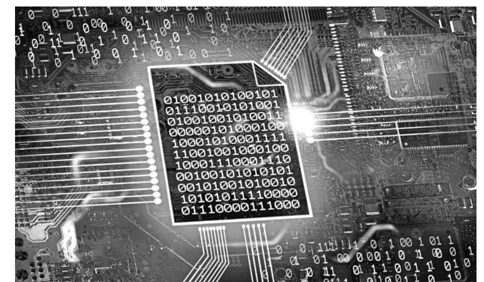
'Raine v. Reign'

In *Raine Grp. v. Reign Capital*, 2022 WL 538336 (S.D.N.Y. Feb. 22, 2022), the plaintiff, "a merchant bank with over 100 employees," sued defendant "Reign Capital LLC, a two-person real estate development and management firm, for trademark infringement and unfair competition based on Defendant's" name. Id. at *2. In negotiating an ESI protocol, the parties reached an impasse on two issues—whether the protocol should include the



defendant's requested language concerning the parties' search obligations and how to formulate certain search terms; the defendant brought these issues to the court to resolve.

The court led its discussion by providing some background on the parties' general requirements under the Federal Rules of Civil Procedure. "Federal Rules of Civil Procedure 26 and 34," according to the court, "require parties to conduct a reasonable search for documents that are relevant to the claims and defenses." See id. at *1. Further illustrating its point, and presumably noting long-standing requirements that pre-date today's standard e-discovery practices, the

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court highlighted that under Rule 26(a), "Parties have an affirmative obligation to search for documents which they may use to support their claims or defenses" and that the Rule "requires a party to provide copies of such documents or identify such documents by category and location 'without awaiting a discovery request.'" Id. The court also pointed to Rule 26(g), stating that it requires counsel to sign responses to document requests, "certifying that the disclosures made are complete and correct as of the time of the disclosure after a reasonable search." Id. Quoting the relevant Advisory Committee Note, the court explained that under Rule 26(g), the "duty to make a 'reasonable inquiry' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances." Id.

Moreover, the court noted that, as part of these efforts, a producing party may choose to deploy search methodologies, specifically mentioning search terms. The court observed that, "in this instance, the producing party must include and utilize search terms it believes are needed to fulfill its obligations under Rule 26 in addition to considering additional search terms requested by the requesting party." Id. The court—in speaking more broadly about cooperative, reasonable, proportional discovery under the Rules—continued: "In other words, the producing party must search custodians and locations it identifies on its own as sources for relevant information as part of its obligations under Rules 26 and 34. It should also cooperate with the requesting party to the extent the requesting party believes that other search terms, custodians or locations may have relevant information when fashioning an ESI protocol, subject to Rule 26(b)'s limitations." Id.

Magistrate Judge Parker reminds parties that although ESI protocols may set the contours of discovery, the parties' obligations to conduct reasonable searches during discovery flow from the Rules themselves.

The ESI Protocol

ESI protocols come into play when parties set forth their agreements on the contours of discovery. As succinctly put by the court, "an ESI protocol and search terms work in tandem with the parties' obligations under the Federal Rules and do not replace a party's independent obligation to produce electronic (or paper) documents that are reasonably accessible, relevant, and responsive within the meaning of Rule 34." Id. at *1.

Here, the defendant had requested that the court include in the ESI protocol language setting forth the defendant's interpretation of the parties' search obligations. For instance, the defendant sought to include such language as "… apart from this ESI protocol, each party has an independent obligation to conduct a reasonable search in all company files and to produce non-privileged and responsive documents to pending document requests" and "Defendant maintains that both parties have an independent obligation to search all files from all employees that could reasonably contain responsive documents to the parties' document requests." Id. at *2. Additionally, the defendant requested that the ESI protocol include language documenting its disagreement with limiting the plaintiff's discovery searches to six identified custodians; rather, the defendant expressly included language that it "wants Plaintiff to have all its employees search for responsive documents and insists that its obligation is to search all its files for potentially relevant information to this litigation, as Defendant agrees to do." Id.

The court determined that the language regarding searching all employees and all files was overbroad as proposed and that the defendant's opinion of the parties' obligations was "unnecessary to

include in the ESI protocol given applicable discovery rules. As noted above, each party must sign its disclosures and certify that it has conducted a reasonable search. This rule is sufficient to address Defendant's concerns about Plaintiff complying with its discovery obligations." Id.

In rejecting the defendant's requested language, the court noted the asymmetry in potential discovery obligations between a 100-person company and a two-person company for a search of "all company files." Highlighting the importance of a well-planned, reasonable, and proportional approach to discovery, the court wrote: "Counsel for both parties must consult with their respective clients to understand which custodians and locations are likely to have relevant information whether or not responsive to its adversary's document requests. The parties can then determine the contours of a reasonable search." Id.

While denying the defendant's request for additional language to the ESI protocol, the court nevertheless advised the plaintiff to search not only the six custodians it identified, but also "other sources of data such as shared drives that are not particular to a specific custodian that should be searched as part of Plaintiffs' obligations under Rule 26. Plaintiff is expected to conduct a reasonable search of such non-custodian sources likely to have relevant information." Id.

Search Terms

The defendant additionally asked the court to resolve the parties' dispute on the formulation of certain search terms. The court, highly experienced in e-discovery, advised that "[s]earch terms, while helpful, must be carefully crafted. Poorly crafted terms may return thousands of irrelevant documents and increase, rather than minimize the burden of locating relevant and responsive ESI. They also can miss documents containing a word that has the same meaning or that is misspelled." Id. at *3. While stating that "what [search] modifiers are appropriate is often best left to specialists who can interpret 'hit' reports and suggest refinements—not to the Court[,]" id., it proceeded to rule on search terms and modifiers to focus on finding relevant documents and that would "possibly narrow the universe of returns[.]" Id. at *4.

Conclusion

Judge Parker is already well-known in the e-discovery world for her insightful, much-discussed decisions in *Nichols v. Noom*, *Pearlstein v. BlackBerry*, and *Winfield v. City of New York*. Here, in *Raine v. Reign,* Judge Parker shows us the forest for the trees, reminding litigants that under the Federal Rules of Civil Procedure, parties have obligations to conduct discovery in a reasonable, proportional manner and that counsel, in turn, are expected to certify the results upon a reasonable inquiry. Working in tandem with these obligations, per Judge Parker, is the ESI protocol, which can provide details for the discovery process, but cannot displace a party's obligations under the Rules.

ESI protocols have been the subject of much recent practice and decisions, including *In re Valsartan*, where a court ruled that agreements in an ESI protocol negated the applicability of Rule 26(b) proportionality in determining the appropriate scope of discovery. Judge Parker, whose thoughts on that matter would be interesting to hear, adds to the developing jurisprudence on ESI protocols and reminds parties and their counsel of the now well-established obligations and standards for reasonable and proportional discovery.

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