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FEDERAL E-DISCOVERY

ESI Protocol Outweighs FRCP Proportionality Protections, Court Says


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A major theme of the discovery-related 2015 amendments to the Federal Rules of Civil Procedure was the reintroduction of proportionality as a core aspect of the permissible scope of discovery. As amended, Federal Rule of Civil Procedure 26(b)(1) sets forth the scope of discovery, providing, "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Since then, many courts have embraced proportionality, often as part of promoting a reasonable, cost-effective discovery process in line with the Federal Rules.

Over the same period, parties—often encouraged by courts—have made it a standard practice to develop and agree to protocols governing the process for discovery of electronically stored information (ESI), with such ESI protocols ranging from short specifications of the technical production format to complex agreements detailing how each party will search, review, and produce information. When later challenged, courts have often ruled that, especially when formalized as court orders, ESI protocols are controlling as to the conduct of discovery for the matter.

What happens, though, when these two notions, proportionality and protocols, collide? If a party looks to proceed with discovery in a manner that departs from the parties' agreement, endorsed by a court order, on the theory that doing otherwise would violate the proportionality standard, may it do so? In a recent decision directly addressing this question, the judge ruled that the parties' court-ordered ESI protocol superseded proportionality protections. The judge even took the remarkable additional step of entering a separate technology-assisted review (TAR) protocol that required the defendants to produce a sample set of nonresponsive documents despite their proportionality-based objections.

> While it is always important to pursue cooperative discovery efforts, parties, especially those on the responding side of an asymmetrical litigation, should be wary of prematurely committing to search and review protocols that would limit their flexibility in deciding how they will later produce their documents.

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Background

In the multidistrict litigation *In re Valsartan, Losartan, and Irbesartan Prods. Liab. Litig.*, 2020 WL 7054284 (D. N.J. Dec. 2, 2020), the plaintiffs alleged medical injuries and economic losses from taking certain high blood pressure medications. The lead group of defendants consisted of manufacturers, including, as pertinent here, the Teva defendants. During discovery, on June 18, 2019, the court entered the parties' Electronic Discovery Protocol, which stated in part, "The parties agree that they will

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cooperate in good faith regarding the disclosure and formulation of appropriate search methodology, search terms and protocols, and any TAR/predictive coding prior to using any such technology to narrow the pool of collected documents to a set to undergo review for possible production. The parties agree to meet and confer as early as possible to discuss, inter alia: … Search methodology(ies) to be utilized (including but not limited to Boolean searches and technology assisted review/predictive coding)." Id. at *2. Afterwards, the plaintiffs and manufacturer defendants, including Teva, spent months negotiating a protocol outlining various search terms and custodian lists, which the court entered on Dec. 23, 2019. See id. During this process, the manufacturer defendants had "refused plaintiffs' requests to conduct sample runs or hit reports to determine if the proposed search terms were overbroad … [yet later] complained that the search terms they agreed to were unduly burdensome and asked for relief." Id. The plaintiffs begrudgingly agreed to narrow the search terms and the court entered the amended protocol on June 24, 2020. See id.

Two weeks later, on July 1, 2020, Teva announced its intent to identify relevant documents by using TAR, specifically a continuous multi-modal learning (CMML) platform that prioritizes documents by responsiveness. The court stated, "If Teva had planned to only use CMML to 'prioritize' documents for production, perhaps plaintiffs would not have objected." Id. at *3. But Teva had other ideas. It wanted to use TAR to potentially exclude certain documents hitting on the modified search terms from review or production. The "apoplectic" plaintiffs stated that had they "known Teva contemplated the use of TAR they would not have agreed to limit the review of the custodians' documents to only those that contained the designated search terms." Id. They argued that Teva's layering of TAR violated the search protocol's requirements because "search terms and technology assisted review are alternatives in this setting[.]" Id.

Nevertheless, the court, the parties, and their consultants worked together to develop a new separate TAR protocol. Despite much negotiation, Teva ultimately walked away because it did not want the protocol entered as an order, which the plaintiffs demanded, and it refused to "permit plaintiffs to review 5000 alleged non-responsive documents to evaluate and validate Teva's CMML platform." Id. at *4. Teva explained, "'the fundamental disagreement is that the Teva Defendants cannot agree to a non-confidential validation protocol which permits Plaintiffs to review non-responsive documents[.]' … Teva also informed the Court that it would not use TAR to eliminate non-responsive documents to be reviewed and that it would review all of its documents manually even though it recognized its manual review would be 'extremely burdensome.'" Id. (citations omitted).

> It is important to read the decision narrowly, with appropriate attention given to the unique facts of the case and the impact of the behavior of the parties.

Even so, Teva proceeded with TAR and unilaterally developed its own quality control and validation measures. Specifically, Teva pulled a random sample set of 15,000 documents from the hundreds of thousands of documents held by high-priority custodians that the CMML system had designated as non-responsive. See id. Teva's manual review of this sample set determined that only 109 of such documents were responsive. And, of those 109, Teva alleged that almost all were either duplicates of previously produced documents or new documents of marginal relevance. See id.

Based on this information, Teva argued that "it would be grossly disproportionate to require it to review the documents designated non-responsive by its TAR [and that] … it '[s]hould not be forced to spend months and millions of dollars reviewing documents that it already knows are likely to be non-responsive based on well-known technology that has become the norm in eDiscovery.'" Id. (citation omitted). Filing the motion at issue, Teva asked the court for relief on Federal Rule of Civil Procedure 26 proportionality grounds from further manual review of the documents identified by the CMML system as non-responsive or, alternatively, to shift such manual review costs and fees to the plaintiffs. Teva argued that the question before the court was one of pure proportionality or, stated otherwise, that it would be disproportionate to the needs of this case to force Teva to review non-responsive documents. Opposing the motion, the plaintiffs argued that the court-ordered protocol controlled and that Teva should have raised the post-search term culling use of TAR during protocol negotiations. See id. at *5.

Protocol or Proportionality?

The court began its analysis by observing there was no longer any need to debate the adequacy of TAR and CMML, stating, "We are past the time when parties and courts view TAR

as an outlier." Id. The court therefore determined that it did "not have to decide if there are instances when a party may layer a document production with search terms and TAR. Ample case law exists to support Teva's position that in appropriate instances layering may be done." Id. And, notably, the court found no need to decide whether the plaintiffs could dictate how Teva must proceed with e-discovery review and production, stating that it "agrees with the line of cases that holds that a producing party has the right in the first instance to decide how it will produce its documents." Id. at *6. Critically, however, the court added that "this general principle is trumped by the requirements in an agreed upon ESI Protocol memorialized in a Court Order." Id.

The court explained that in its "view there is no legitimate question that the court's Order trumps Teva's proportionality argument. If the protocol has been violated the court's task is to decide the relief to be granted, not to do a proportionality analysis under Fed. R. Civ. P. 26(b)(1)." Id. The court elaborated that conducting a proportionality analysis in the first instance would require it to "ignore and discount the troublesome history of the parties' search term discussions" and that if it "ignored the Protocol, it may incentivize parties to skirt the requirements in a Court Order." Id.

As such, the court concluded that Teva did, in fact, violate the search term protocol "by not timely disclosing its use or possible use of its CMML platform to reduce the universe of documents to review and by attempting to foist on plaintiffs a protocol about which plaintiffs had no input." Id. The court noted that "the Protocol requires the parties to meet and confer in good faith to attempt to reach agreement. This does not occur if one side or the other unilaterally adopts a TAR protocol 'late in the game' and argues it should be approved by the Court … . The time to meet and confer in good faith is before a TAR protocol or CMML platform is adopted and used, not after." Id. at *7.

Ordering TAR—and Production Of Non-Responsive Documents

Next, the court addressed what should be done with Teva's not-yet-reviewed document set. Acknowledging the disproportionate nature of a potential manual review by either party, the court stated, "To put it bluntly, the thought that Teva or plaintiffs might have to spend millions of dollars to manually review irrelevant or marginally relevant documents is more than mildly disturbing." Id. at *13.

The court determined that the best way forward was TAR, permitting Teva to proceed with its TAR process, but requiring it to abide by the previously negotiated—and abandoned—TAR protocol, including "the two provisions originally objected to by Teva, neither of which the Court finds controversial or bothersome." Id. Thus, in addition to the TAR protocol being entered as a court order, "plaintiffs shall have the right to review at the end of Teva's production 5000 alleged non-responsive documents plaintiff designate for review. The court does not understand why this provision is so bothersome to Teva … [since] plaintiffs are asking to review a relatively small number of documents as part of their validation review. Teva's insistence that it is unheard of for alleged non-responsive or irrelevant documents to be produced either by court order or by agreement is not correct." Id.

Conclusion

In re Valsartan clearly demonstrates that parties must negotiate ESI protocols with care and that understanding and negotiating such protocols are key to information discovery practice. While it is always important to pursue cooperative discovery efforts, parties, especially those on the responding side of an asymmetrical litigation, should be wary of prematurely committing to search and review protocols that would limit their flexibility in deciding how they will later produce their documents.

Here, Teva did just that, and found itself in an expensive bind when it belatedly appreciated the implications of its agreement. More worrisome, though, is the potential for the opinion to suggest a winnowing of Federal Rules protections in the discovery process. The plain language of Federal Rule of Civil Procedure 26(b)(1), as analyzed and interpreted by many courts and commentators, both provides proportionality protection and limits the scope of discovery to responsive, nonprivileged materials. Thus, especially considering the In re Valsartan court's determination that the defendants should turn over non-responsive documents, it is important to read the decision narrowly, with appropriate attention given to the unique facts of the case and the impact of the behavior of the parties.