# LITIGATION

**By: Keith Langley**

We grapple every day with all of these newfangled technologies, Slack, instant messaging platforms, TikTok, yet today email is still the primary form of communication within the corporate world and remains one of the most important elements of ESI.

What can you say about eDiscovery? Failing to plan is planning to fail! Planning and understanding are key, and the court is not going to do it for you. It is very valuable to understand the role of proportionality and how cooperation can make you really have a much more cost effective and meaningful plan for eDiscovery.

The Court in Deal Genius, LLC v. 02 Cool, LLC 2022 WL 874690 (N.D. Ill. 2022) wrote:

*Even though it cannot be denied in the world in which we live, that emails of a party's employees may be the most compelling form of evidence, the value of emails and text messages can be particularly significant in litigation due to the fact that the ease of sending or replying to such messages can cause people to say things they might not otherwise say in traditional correspondence. Indeed, emails are often replete with unrehearsed, spontaneous statements that surpass in simplicity and frankness and ease of understanding other far more complicated bits of evidence.*

*The Court cannot and ought not take over the selection of search terms and conjunctive terms that may assist in locating pertinent documents. That is Counsel's job, not the Court's. Indeed, courts are prohibited in all contexts from doing the work of counsel. Requiring the Court to perform what is obviously the work of counsel would be patently unfair. It would require the Court to weigh in on one side to the possible disadvantage of the other and would be inconsistent with the adversary system itself. Indeed, the Supreme Court recently emphasized that, 'In our adversarial system of adjudication, we follow the principle of party representation.*

*The discovery rules are not a ticket to an unlimited, never ending exploration of every conceivable matter that captures an attorney's interest. Parties are entitled to a reasonable opportunity to investigate the facts and no more.*

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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

*Well done is better than well said.*

- Benjamin Franklin


There are practical implications of getting documents late in discovery. It precludes you from having sufficient time to prepare for depositions. It precludes you from being able to follow up on those depositions with additional document requests. It precludes you from understanding the viability of third party discovery. There are numerous reasons why you need to get documents early on in a case, and protracted fights over search terms and how you're going to provide those documents don't do anyone any good.

The Court notes, *"The discovery is almost always costly and difficult, but by its very nature it's burdensome and often intrusive, but that does not make discovery improper, it only becomes so when it is unduly burdensome"*. The Court emphasizes proportionality is a big issue. It calls it a vital limitation on pretrial discovery and says that it requires, *"a common sense and experiential assessment"*. You've got to dive into the data that you have, what are the search terms that you're seeing, and what are you going to propose to the other side that's going to provide responsive data? The Court reiterates that proportionality has been a part of Federal Rules of Civil Procedure since long before the 2015 amendments that brought it into the forefront in Rule 26 (b)(1), and that the move in 2015 to do that and bring it more up front was designed to emphasize the role of proportionality specifically as it relates to ESI.

Item ONE - plan, plan, plan.

Item TWO - know, understand and leverage the proportionality limitations in Rule 26 (and the state equivalent), and use those to keep the discovery scope tailored to the value and other needs of the case. That's essentially what the judge says here. He says two things, one, you guys need to stop arguing and get together and actually figure out a plan, because that's not my job. Second, you need to take into account the value of this case and what it is that you're asking for, and you need to deal with those proportionality considerations.

Item THREE - really know and understand how ESI works and what you need to do to bring a proposed solution or search terms to the other side and how to craft a cost effective and appropriate strategy for discovery given what is proportional. The tone and the tack that you take with opposing counsel in trying to resolve these issues is really key.

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