



2022 Data Discovery Mid-Year Legal Update



Karyn Harty
Partner
McCann FitzGerald



Honorable Andrew Peck
Senior Counsel, DLA Piper;
Retired US Magistrate Judge



David Horrigan
Discovery Counsel and
Legal Education Director
Relativity



Kelly Twigger
Principal, ESI Attorneys;
CEO, eDiscovery Assistant

Disclaimers:

Although this webinar is comprised of attorneys, the speakers are not representing their companies or employers here.

Also, this is an educational program, and no one is giving legal advice. To the extent anything may sound like legal advice, please consider it friendly advice, not legal advice.

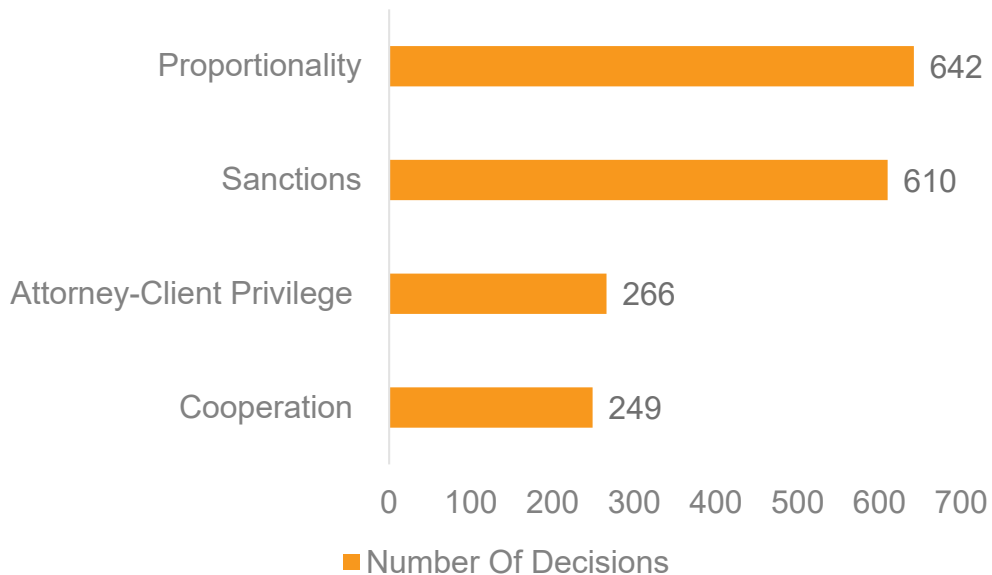
Agenda

- **2022 Mid-Year Overview**
 - Case Law Data from the First Half of 2022
 - Setting the Stage for 2022 in Ireland: *Tobin* on Discovery and *McNulty* on Legal Holds
- **The Growing Impact of Artificial Intelligence on the Law**
 - Europe's Artificial Intelligence Act/Regulation
 - Artificial Intelligence in e-Discovery:
 - Judge Peck's Jurisprudence Setting the Stage for 2022
 - *In re Diisocyanates Antitrust Litig.* (W.D. Pa. Jan. 7, 2022)
- **Preservation of Data, Sanctions, and the Role of the Judge in e-Discovery**
 - *Hollis v. CEVA Logistics, Inc.* (N.D. Ill. May 22, 2022)
- **Proportionality, Cooperation, and Third Parties in Discovery**
 - *Martley v. City of Basehor* (D. Kan. May 2, 2022)
- **Technology, Remote Proceedings, and Access to Justice**
 - *In re R.B.* (Colo. App. Jan. 6, 2022)

2022 Mid-Year Overview



Case Law Data from the First Half of 2022



Source: eDiscovery Assistant

2022 Mid-Year Overview



Setting the Stage for 2022 in Ireland

- **Discovery:** *Tobin v. Minister of Defence* [2019] IESC 57
- **Legal Holds:** *McNulty v The Governor & Company of the Bank of Ireland t/a Bank of Ireland Group* [2021] IECA 182.

Additional Reading:

McCann FitzGerald LLP, *Irish Court of Appeal Outlines Importance of “Litigation Holds” for Discovery*, 30 July 2021.

Artificial Intelligence: Europe



Regulation on Artificial Intelligence (known also as the “Artificial Intelligence Act”)

- European Commission publishes its proposed Regulation on Artificial Intelligence on April 21, 2021.
- Presidency of the Council of the European Union publishes its partial compromise text on November 29, 2021.
- European Parliament committees publish [Draft Report](#) on April 20, 2021.
- **Purpose (amended in proposed draft):** To “improve the functioning of the internal market by laying down a uniform legal framework in particular for the development, the placing on the market, the putting into service, and the use of artificial intelligence in conformity with [European] Union values.”
- A **definition of AI** that includes machine learning (including supervised, unsupervised, and reinforcement learning using a wide variety of methods including deep learning) as well as logic and knowledge-based approaches, statistical approaches, and others.
- **Scope** beyond the European Union
- **Risk-based approach** on violating Fundamental Rights: Unacceptable, High, Low/Minimal
- **Enforcement:** Highlighted for future consideration, but including rules developed by Member States with most severe violations up to €30 million or 6 percent of annual turnover/revenue, whichever is higher.

Additional Reading:

Adam Finlay and Catherine Walsh, McCann FitzGerald, [Counsel Publishes Proposed Amendments to Draft AI Regulation](#), 21 December 2021.

Artificial Intelligence: e-Discovery



The TAR Jurisprudence of Judge Peck

THE LANDMARK CASE: Judge Peck's Opinion and Order in *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279 (S.D.N.Y. Feb. 24, 2012).

"This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases."

BLACK LETTER LAW: Judge Peck's Opinion and Order in *Rio Tinto PLC v. Vale S.A.*, No. 14 Civ. 3042 (S.D.N.Y. March 2, 2015).

"In the three years since *Da Silva Moore*, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it."

SUPPORTING SEDONA PRINCIPAL 6: Judge Peck's Opinion and Order in *Hyles v. City of New York*, No. 10 Civ. 3119 (S.D.N.Y. Aug. 1, 2016).

The Sedona Conference, The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production)

"Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."

Karyn Harty in *Quinn*

THE FIRST JUDICIAL ACCEPTANCE OF TAR OUTSIDE THE UNITED STATES: *Irish Bank Resolution Corp. v. Quinn*, [2015] IECH 175.

Artificial Intelligence: e-Discovery



Judge Francis' Special Master Report and Recommendation in *In re Diisocyanates Antitrust Litig.*, MDL 2862 Master Misc. 18-1001 (W.D. Pa. Jan. 7, 2022).

- Multi-district litigation stemming from an alleged conspiracy to reduce supply and increase price for methylene diphenyl diisocyanate ("MDI") and toluene diisocyanate ("TDI"), precursor ingredients for the manufacture of polyurethane foam and thermoplastic polyurethanes.
- Plaintiffs file motion to compel, asking to court to require Defendant Manufacturers to use certain keywords and TAR method in the production of the Defendant's documents—and Defendant manufacturers respond with motion for protective order allowing them to use their own keywords and TAR method.
- Judge Francis in his capacity as special master finds the Manufacturer Defendants' TAR process had weaknesses—but he refuses to force Plaintiffs' TAR process on them, and denies the Plaintiff's motion. He also denies the Manufacturer Defendants motion as moot, holding that it was "functionally the mirror image of the plaintiffs' motion to compel" and thus, "should be denied as moot insofar as it seeks the same relief that necessarily flows from denial of the plaintiffs' motion.

Preservation of Data, Sanctions, and the Role of the Judge in e-Discovery



Hollis v. CEVA Logistics U.S., Inc., No. 19-CV-50135 (N.D. Ill., May 19, 2022).

- Darren Hollis, an employee of CEVA Logistics, was terminated after a physical altercation with another employee despite Mr. Hollis' claim that the other employee was the aggressor. Security cameras were aimed at the area of the altercation, and Mr. Hollis requested the videotapes the day after his termination.
- Mr. Hollis, who is Black, filed a charge of discrimination with the EEOC, obtained a right to sue letter, filed suit, and requested the videos during discovery. CEVA claimed the videos did not exist, and claimed a vendor operated the system—even though CEVA has used the videos in another matter and the vendor claimed it merely sold the system
- Judge Iain Johnston says there is evidence that CEVA had an intent to deprive, but—referencing “Hanlon’s Razor”—says he will let the jury decide whether it was incompetence or an intent to deprive.
- Judge Johnson orders a jury instruction of providing “factual findings” on the video as a “curative measure.”
- Consider **Judge Johnston’s** sanctions decisions in *Hollis* and in *D.R. Distributors*. What does it take to get a severe sanction for an intent to deprive under **Fed. R. Civ. P. 37(e)**?
- Consider the different approaches to sanctions under **Fed. R. Civ. P. 37(b)** and **Fed. R. Civ. P. 37(e)**.

Role of the Judge—Additional Reading:

Andrew Jay Peck, *A View from the Bench and the Trench(es) in Response to Judge Matthewman’s New Paradigm for E-Discovery: It’s More Complicated*, [71 Fla. L. Rev. F. 143](#) (2020).

“My conclusion is that the most important core component is very active judicial supervision of discovery.”

David Horrigan, *Activist Judges?: Technology, Rule 1, and the Limits of Judge Matthewman’s New Paradigm for E-Discovery*, [71 Fla. L. Rev. F. 258](#) (2001)

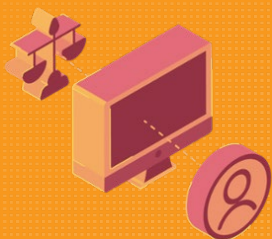
“How much should we expect judges to referee our discovery disputes when courts have had to resort to everything from rock-paper-scissors to coin tosses to adjudicate these matters?”

Proportionality, Cooperation, and Third Parties in e-Discovery



- ***Martley v. City of Basehor, No. 19-02138 (D. Kan. May 2, 2022).***
- Retired male employee sues City, alleging violations of Equal Pay Act because City paid subsequent female allegedly in his role more than they paid him.
- Dissatisfied with the City's discovery production, Retired employee uses Fed. R. Civ. P. 45 to subpoena of data directly from city's former IT service provider; City moves to quash, arguing lack of notice violated Rule 45 and that employee was trying to an end run around Rules 26 and 34 after he failed to request the data before the close of discovery.
- Although court quashed subpoena and did not reopen discovery, it said it was not surprised the retired employee distrusted the City's discovery production and ordered parties to cooperate and share the cost of having a forensic examiner or e-discovery vendor run searches in the subpoena
- **Scope of Discovery:** How wide a net should litigants be able to cast?
- **Data from Non-Parties:** A last resort only—even when discovery is deficient?
- **The Challenge of Emerging Data Sources:** How different is e-discovery with Slack, Fitbit, Slack, Teams, Zoom, etc.?

Technology, Remote Proceedings, and Access to Justice



– *In re R.B.*, No. 21CA0346 (Colo. App. Jan. 6, 2022).

- Retired police chief (who had served also as city administrator) sued the city alleging violations of Equal Pay Act because city paid subsequent female city administrator more than they paid him.
- Family court orders the termination of parental rights despite parent’s counsel moving for continuance because parent was unable to attend virtual hearing due to insufficient Internet access. Court writes:
 - No manifest injustice if continuance were denied
 - No good cause for continuance, writing that parent had sufficient notice and time to prepare for a virtual hearing
 - Not in the best interest in the child to grant continuance.
- Appellate court reverses, holding family court violated parent’s due process rights by refusing to grant the continuance.
- **How significant is an issue is internet access to access to justice?**
- **How much should courts accommodate pro se litigants and others who may lack sufficient Internet access?**

Additional Reading: David Horrigan, *Parental Rights, a Gas Station, and Access to Justice in the Virtual World*, in [The Relativity Blog](#).

Thanks for Joining Us!