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# Analyzing ESI Protocol, Court Orders Manual Document Review

**By Christopher Boehning and Daniel J. Toal**
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The next time you attend a conference or working group meeting on the topic of e-discovery, ask attendees what they consider the most contentious issue between parties in e-discovery practice today. Even as you are being escorted off the dais for disrupting the proceedings, you may hear a popular answer—"ESI protocols."

Under Federal Rule of Civil Procedure 26(f), as amended as part of the 2006 package of e-discovery amendments to the Federal Rules, parties must develop a "proposed discovery plan," which "must state the parties' views and proposals on…any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."

Agreements between parties with details on management of electronically stored information, or "ESI," are often referred to as "ESI protocols," and they may, in some cases, be entered as an order by a court. Some courts provide model ESI protocols as a starting point for discussion between parties.

We previously have written about ESI protocols, the developing law and practice around them, and their importance in matters. Our guidance notwithstanding, as your impromptu survey might demonstrate, ESI protocols still remain a thorny issue on "both sides of the v."

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A recent decision helps illustrate this, where, in a discovery dispute over what was actually agreed to in an ESI protocol, a court ordered a party to proceed with a manual document-by-document review of search hits.

## 'McCormick v. Ryder'

In *McCormick & Co., Inc. v. Ryder Integrated Logistics, Inc.*, 2023 WL 2433902 (D. Md. Mar. 9, 2023), the parties each sought millions in damages for breach of contract. In discovery, the parties agreed to a "Joint Protocol for Discovery of Electronically Stored Information," their "ESI Protocol."

This Protocol contained a section labeled "No Presumption of Responsiveness," which stated, in part, that "a party's obligation to conduct a reasonable search for documents in response to discovery requests shall be

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deemed to be satisfied by reviewing documents that are captured by utilizing the methodology provided for in this Protocol." *Id.* at *1.

It also stated, "[t]he fact that a document is captured by a search pursuant to this protocol does not mean that such document is responsive to a discovery request or otherwise relevant to this litigation and parties may exclude such nonresponsive documents from production." *Id.*

The plaintiff's counsel then learned that a key custodian's files had been deleted upon her departure despite a litigation hold. After informing the defendant, the plaintiff attempted to remediate the potential loss of ESI by collecting the electronic data of six additional custodians and running the search terms against this collection. This led to a significant increase in the population of potentially responsive search hits, with the hits from the newly-gathered ESI comprising 30% of the total.

Faced with this unexpectedly larger review set, the plaintiff balked at conducting a manual responsiveness review. A discovery dispute ensued about whether the ESI Protocol required the parties "to manually review these documents (i.e., the documents captured by the search terms) for relevance prior to production, or whether they could produce those documents without a document-by-document review." *Id.* at *2.

The plaintiff moved to have the ESI Protocol entered into an order and for a declaration by the Court "that the ESI Protocol did not require that the parties conduct a manual review of documents identified through the use of search terms." *Id.*

The defendant opposed only the portion of the motion requesting the declaration. The magistrate judge agreed to enter the ESI Protocol as an order. However, he denied the request to declare that manual review was not required, "reason[ing] that the ESI Protocol expressly contemplated a manual review of the documents in the 'No Presumption of Responsiveness' provision, and that such reading was consistent with Federal Rule of Civil Procedure 26(b)(1)'s command that only relevant evidence is discoverable." *Id.*

Moreover, the magistrate judge "rejected McCormick's argument that the costs associated with such manual

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review—which McCormick estimated at $240,000 for a disputed amount of no more than $4 million—was not proportional to the case." *Id.* The plaintiff objected to the magistrate judge's discovery order.

The court reviewed the plaintiff's objections, including its argument "that the Discovery Order erroneously disregarded the plain language of the ESI Protocol" that questioned "whether McCormick and Ryder agreed to conduct a page-by-page responsiveness review prior to production." *Id.*

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The court ruled that they did indeed agree to such a review, highlighting that the ESI Protocol expressly provides that "a party's obligation to conduct a reasonable search for documents in response to discovery requests shall be deemed to be satisfied *by reviewing documents that are captured by utilizing the methodology provided for in this Protocol*." *Id.* at *3. The court added that this provision "*explicitly* mandates another level of review." *Id.*

The plaintiff additionally argued "that the Discovery Order contravenes the proportionality standard set forth in Federal Rule of Civil Procedure 26(b)." *Id.* at *4. As before, the court found that "McCormick is mistaken" and "that the costs of the review were proportional to the needs of the case." *Id.*

The court highlighted that "this conclusion is particularly appropriate where, as here, there appears to be a large volume of potentially responsive documents due to an error by McCormick whereby the documents of a key custodian were deleted despite a litigation hold.

Further—and again—the parties *agreed* to this review by the plain language of the ESI Protocol." *Id.* The Court overruled the plaintiff's objections, agreeing with the finding of the magistrate judge that "in this case, given the facts and circumstances, including an ESI Protocol that explicitly provides for it—McCormick and Ryder must conduct such a review." *Id.*

### Parties, Protocols,And Proportionality

*The decision in McCormick* leads to a number of questions and observations. First, ESI protocols should be taken seriously. They form the agreement between parties for how e-discovery will be conducted in a matter. This agreement is enforceable by a court, even more so when entered as an order.

As seen in *McCormick* and many other matters, a court will hold parties accountable to their agreement. Thus, parties should ensure that they pay close attention to what is included—and not included—in ESI protocols and also understand the potential impact of everything they are agreeing to do.

Second, proportionality, even though a critical concept in properly scoping discovery, is not necessarily a way to avoid obligations that a party later deems too burdensome. Here, the Court considered the plaintiff's proportionality arguments, but rejected them after a short burden analysis. Other courts, as we have written about in this space, may not even consider such arguments, under the theory that obligations in ESI protocols are controlling.

Third, parties should carefully consider the extent to which they will lock in search terms and other aspects of a search and retrieval methodology. While agreeing to search terms may be part of a cooperative discovery process, parties should carefully consider whether ESI protocols should contain strict requirements with respect to such terms.

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For example, a closer look at the record in *McCormick* shows that the ESI Protocol required a judge's order or agreement between parties for any changes to the previously agreed-upon search terms. Parties may be better served by a less prescriptive search process that encourages reasonable and proportional iteration and collaboration.

And lastly, there's the issue of what was meant by the term "review." In *McCormick*, there was a focus on the traditional notion of a document-by-document manual review. It is fair to question if there may have been a different result had other forms of review been raised or utilized, such as technology to sample, prioritize, or analyze documents, even in tandem with eyes-on review.

This is especially so considering the current case law that courts will assess a party's discovery efforts through the lenses of reasonableness and proportionality and, generally, that responding parties are best situated to choose and determine their own appropriate search and retrieval methodologies. Even so, the dispute here focused only on conducting a manual review, and the court ruled accordingly.