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It Is Not 'Either Or': The Big Lesson From Judge Francis in 'Diisocyanates'

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Since e-discovery broke upon the legal landscape some 20-plus years ago, we have been repeatedly told that e-discovery is complex, technical, nuanced and difficult. While there may be truth in these words, the concept that e-discovery is unmanageable often obscures more simple truths. For example, one simple truth is that discovery is a self-executing process, and the producing party carries the obligation to execute discovery in a reasonable manner. Likewise, the law is rarely proscriptive about how this obligation can be met. There is no *one* reasonable way to accomplish a task, and generally there are many, many ways to conduct discovery reasonably. By returning to these foundational truths, Judge Francis, acting as Special Master in *In re Diisocyanates Antitrust Litig*., MDL No. 2862, 2021 WL 4295729 (W.D. Pa. Aug. 23, 2021), refused to fall into one of the most tempting discovery traps: If a producing party's discovery solution has flaws, then I should adopt the solution of the requesting party. While some litigants may argue about Special Master Francis's fact-intensive analysis and conclusions about search terms and TAR, the most important lesson to be learned is to not fall into the false dichotomy of picking between the two parties' preferred approaches but instead to allow producing parties working in good faith to develop reasonable solutions that work best for them. Put another way: Even where the producing party's discovery solution is flawed *and* the requesting party's solution is *reasonable*, the court should not impose that solution on the producing party, but rather, the court should let the producing party find a reasonable solution that works best for it. This is the big lesson of *Diisocyanates*.

Special Master Francis's opinion provides a thorough framework of the dispute with detail on the parties' competing discovery proposals; however, for purposes of this article, providing that framework is not necessary though a summary is helpful for context. In *Diisocyantes*, the plaintiffs moved to compel under Rules 26 and 37 to require the defendants to apply certain search terms and TAR methodologies. In turn, the defendants cross-moved for a protective order to allow themselves to use their own search terms and TAR methodologies. Both parties had agreed that search terms could be used before applying TAR but provided the court with dueling search term proposals. In support of their positions, both parties offered hit rate percentages (of the number of documents hit by each search term) to the court, but Special Master Francis determined that hit rates were not indicative, for purposes of culling prior to

TAR, of whether search terms were reasonable. Instead, Special Master Francis sought information to confirm whether the defendants' proposed search terms were too narrow. Finding that the defendants had not completed such an analysis and that otherwise that defendants had not "shown that their own search terms will capture a reasonable proportion of responsive documents," id. at *12, the defendants' request to use their search terms was denied. The court also found that the defendants' proposed TAR methodologies and validation processes were deficient in certain respects.

However, Special Master Francis did not simply accept the plaintiffs' proposal. Instead, he determined that the plaintiffs had also failed to provide the court with enough information to show that their proposed search terms and TAR processes were reasonable. Moreover, Special Master Francis found that the "plaintiffs' proposals go beyond what the law requires … which requires reasonableness, not perfection." Id. Determining that "there are alternative TAR methodologies that the defendants could utilize and that are reasonable, they should not be compelled to adopt the plaintiffs'." Id. at *13. Instead, the producing party was given an opportunity to attempt to address the identified concerns and meet and confer in light of the Special Master's recommendations.

Putting aside the wisdom Special Master Francis shared as to how parties can best design a reasonable search methodology, the teaching here is that there are numerous ways to act reasonably. Absent extraordinary circumstances, a court should not mechanically adopt a requesting party's solution without giving the producing party a reasonable opportunity to cure any perceived flaw. First, a requesting party's proposed solution may itself be unreasonable and demand more than the law requires. It may impose burdens and costs that are disproportionate in the context of the dispute.

Second, even if the solution proposed by the requesting party is reasonable, absent agreement by the producing party, the proposal should not be imposed on the producing party unless the producing party cannot develop its own reasonable solution. The Rules of Civil Procedure do not provide that the requesting party can instruct the producing party on how to conduct its own discovery, and as the Sedona Conference articulated so well in Principle 6: "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." The producing party should be given every reasonable opportunity to choose a methodology that is most cost-effective for it. The reality is that discovery is not conducted in a vacuum, and it is often impossible for requesting parties or the court to determine what is the best solution given the myriad of technical, system, litigation, political and business interests and costs that may be implicated by various discovery solutions. The producing party is the only interested party that can adequately navigate those factors. Put another way, if there are multiple reasonable ways to conduct discovery, the producing party should be free to pick the one that works best for it.

This does not mean that requesting parties are barred from providing input. Obviously, they can and absolutely should object to any discovery responses or processes that are unreasonable. Moreover, in the spirit of cooperation, producing parties should welcome comments to their discovery process not only to avoid disputes but also because diverse approaches to problems can help arrive at the best solutions. While litigants and judges are starting to recognize some of the problems caused by the overuse of ESI Protocols

(see *ESI protocols: ESI tool turned ESI problem?,* The Mother Court (Federal Bar Association, SDNY Chapter), Fall 2021), they do still have their place. Like in *Diisocyantes*, parties can choose to negotiate and enter protocols governing the search and production of electronically stored information (ESI). These ESI Protocols can provide the framework for parties (and the court) on an agreed-to mechanism by which documents will be searched, information between the parties will be shared, and disputes about search methodologies or other things discovery-related will be resolved. Having an ESI Protocol is not a requirement, but ESI Protocols may help the parties cooperate in good faith to reach agreement on material issues. As Special Master Francis recognized, the concepts of cooperation and transparency do not require that agreement always be reached between parties, but given the guidance in *Diisocyantes*, parties should attempt to be reasonable in negotiations. Absent discovery abuse, obstructionism, or incompetence, a requesting party should not be able to impose its preferred approach on the producing party.

Moreover, courts should be careful not to weaponize these negotiations; instead, courts should properly incentivize cooperation. Understandably, parties want to avoid unnecessarily bothering the court with discovery matters. As such, parties may be willing to reach agreements that globally resolve certain issues that should not be used as fallback positions in motions to compel. As former Magistrate Judge Paul Grewal rightfully commented, "[t]he time to tap flexibility and creativity is during meet and confer, not after." *Boston Scientific v. Lee*, No. 5:14-mc-80188-BLF-PSG, Dkt. No. 24 (N.D. Ca. Aug. 4, 2014). In *Lee*, Judge Grewal rejected the plaintiff's request that the court order "as a fall back" a discovery proposal that the defendant had offered during the parties' meet and confer (but that was rejected by the plaintiff). In an effort not to make a "mockery" of the meet and confer process, the court chose to set aside the "fall back" and instead accepted the non-movant's proposal on forensic imaging. To do otherwise would undermine cooperation because the requesting party would be incentivized to go to court seeking an even more advantageous position, knowing that it could do no worse than what the producing party had offered. Judge Grewal's conclusion in picking the responding party's position does not conflict with Special Master Francis's big lesson, as he found the responding party's forensic solution was reasonable.

Particularly where parties choose to leverage TAR, courts, like Special Master Francis, have encouraged parties to be even more transparent and engage in good faith meet and confers. Although such meet and confers may not always be successful, Special Master Francis has shared his meaningful wisdom both to parties and courts that may shape the future of discovery disputes. It is no longer a matter of "either or." Instead, parties are heeded to offer and accept reasonable (not perfect) approaches, and courts are cautioned to allow producing parties an opportunity to cure any defects in their process and not to default to imposing a requesting party's solution.

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