ACTIVIST JUDGES?: TECHNOLOGY, RULE 1, AND THE LIMITS OF JUDGE MATTHEWMAN'S NEW PARADIGM FOR E-DISCOVERY

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> As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics.[1]
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> – John G. Roberts, Jr.
> Chief Justice of the United States

The description, "activist judge," often has a pejorative connotation in the culture wars, but what about judicial activism advocating for professionalism, cooperation, and honest good faith in e-discovery? Activism has been defined as "a doctrine or practice that emphasizes direct vigorous action especially in support of or opposition to one side of a controversial issue,"[2] and after the 2015 amendment to Federal Rule of Civil Procedure (FRCP) 1, Chief Justice John Roberts said the eight words of the amendment were "words that judges and practitioners must take to heart."[3] Is it time for the phrase, "activist judge," to have a new, more positive meaning—at least in the world of e-discovery law? In his *Florida Law Review* article, *Towards a New Paradigm for E-Discovery*

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1. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2015), https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx [https://perma.cc/Y8UB-WLFA].
2. *Activism*, MERRIAM-WEBSTER (2020).
3. ROBERTS, JR., *supra* note 1, at 5–6.

in Civil Litigation,[4] U.S. Magistrate Judge William Matthewman (S.D. Fla.) offers 10 insightful and helpful "Core Components" for effective e-discovery. Core Component 5 calls for "professionalism, cooperation, and honest good faith," and Core Component 10 calls for "active participation of judges in the discovery process."[5] To make the Matthewman New Paradigm work, must judges go beyond being active and become judicial activists for cooperative e-discovery? Is it even possible in an adversarial legal system? When the Federal Rules of Civil Procedure became effective in 1938,[6] counsel didn't have to worry about zettabytes of data or how to get Instagram into evidence, but in 2020, technology is often the basis for discovery disputes. To the Chief Justice's point in the opening quote, it's doubtful there are legions of lawyers with a burning desire for discovery mayhem. Thus, should judges even be spending their valuable time on discovery disputes? In his *Florida Law Review Forum* response to Judge Matthewman's article, the Honorable Andrew Jay Peck opined that Core Component 10's call for more active judges is "unfortunately" the most important of the New Paradigm—unfortunate because judicial resources are scarce.[7] This response will take Judge Peck's analysis a step further, examining the effect of technology on society and the law, looking at the limits of FRCP 1 and Core Components 5 and 10, and—considering the jurisprudence on cooperation—examine how much we should expect judges to referee our discovery disputes when courts have had to resort to everything from games of rock-paper-scissors to coin tosses to adjudicate these matters.

I. A THEORY OF TECHNOLOGY

It is obvious, bordering on the trite, to say technology has changed the practice of law and the society the law serves. The profound effect of technology on law and society is nothing new. From the harnessing of fire to the wheel to the printing press to the internal combustion engine to the Apollo spacecraft to the Internet, technology has made radical changes in the way people live and work. Some have bemoaned these changes, yearning for the bygone days of a simpler way of life. However, was simpler better?

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4. William Matthewman, *Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective*, 71 FLA. L. REV. 1261 (2019).

5. *Id.* at 1266.

6. FED. R. CIV. P. Historical Note, at vii, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure [https://perma.cc/B2M2-9RMF] (mentioning that "The original rules [of civil procedure] . . . became effective September 16, 1938").

7. *See* Andrew Jay Peck, *A View from the Bench and the Trench(es) in Response to Judge Matthewman's New Paradigm for EDiscovery: It's More Complicated*, 71 FLA. L. REV. F. 143, 148 (2020).

In his 1985 book, *A Theory of Technology: Continuity and Change in Human Development*,[8] University of Houston economics professor Thomas R. DeGregori conceded that there were "legitimate concerns about technological change that cannot be dismissed as mere technophobia."[9] However, Professor DeGregori argued forcefully that technological change is most often a good thing and that problems caused by technological change can often be solved by even newer technologies.[10]

Lord Darlington, a character of the Irish poet and playwright, Oscar Wilde, said famously, "It is absurd to divide people into good and bad. People are either charming or tedious."[11] Wilde's aversion labeling people as good or bad can be applied to technology. Professor DeGregori is certainly pro-technology, even avoiding the good or bad dichotomy and arguing, "[I]ndustrial technology dwarfs our previous technologies in its power to do good or evil. Those who would have us reject it are, to say the least, confused. The real choice lies in the opportunity to understand the nature of technological change and to use it intelligently to serve human purposes."[12]

II. TECHNOLOGY AND DATA DISCOVERY IN THE LAW

This theory of technology applies to the law as well. Technology has changed every aspect of the law, and data discovery colliding with the Fourth Amendment's prohibition against unreasonable searches and seizures[13] provides an excellent example in the U.S. Supreme Court's 2014 consideration of *Riley v. California*.[14] Notable for being a unanimous 9-0 decision[15] in an era where there is rarely agreement on

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8. *See generally* THOMAS R. DEGREGORI, A THEORY OF TECHNOLOGY: CONTINUITY AND CHANGE IN HUMAN DEVELOPMENT (Iowa State Univ. Press 1985).

9. *Id.* at 68.

10. *Id.* at 68–69.

11. OSCAR WILDE, LADY WINDERMERE'S FAN: A PLAY ABOUT A GOOD WOMAN Act One (1893).

12. DEGREGORI, *supra* note 8, at 52.

13. U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

14. *See* Riley v. California, 573 U.S. 373 (2014).

15. *Riley* was a unanimous 9-0 decision, with Chief Justice Roberts writing for the court, joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito wrote separately, concurring in part and concurring in the judgment. *Id.* at 376, 378.

much of anything, the Supreme Court held that law enforcement must generally secure a warrant before conducting a search of a mobile phone.[16] *Riley* made new law, and it did so because of the advance of technology.

In deciding *Riley*, the Supreme Court declined to extend to mobile phones a 1973 search and seizure precedent, *United States v. Robinson*,[17] which involved a pack of cigarettes and was based on an analysis articulated in a 1969 Supreme Court decision, *Chimel v. California*.[18] Commenting on the technology of the defendants, David Riley and Brima Wurie, in the two cases consolidated in *Riley*, the Court observed:

> These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones . . . . Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.[19]

III. TECHNOLOGY AND THE CHALLENGE FOR E-DISCOVERY

Landmark technology-based U.S. Supreme Court decisions such as *Riley* and 2018's *Carpenter v. United States*[20] set the stage, but when looking at the law, technological change has arguably had its greatest impact in the field of electronic discovery, most notably in complex commercial litigation with e-discovery legal teams attempting to cope with exponential increases in the volume and variety of digital data. Worldwide data volume has skyrocketed during the twenty-first century. Although estimates vary widely, the analyst firm, IDC, has predicted that the volume of data worldwide will increase from thirty-three zettabytes in 2018 to 175 zettabytes by 2025.[21] To put that in perspective, one zettabyte is equal to approximately a thousand exabytes, a billion

16. *See id.* at 386.

17. United States v. Robinson, 414 U.S. 218, 225–26 (1973).

18. Chimel v. California, 395 U.S. 752, 764 (1969), *abrogated by* Davis v. United States, 564 U.S. 229 (2011).

19. *Riley*, 572 U.S. at 385 (citations omitted).

20. Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018).

21. DAVID REINSEL ET AL., THE DIGITIZATION OF THE WORLD: FROM EDGE TO CORE 3 (Nov. 2018), https://www.seagate.com/www-content/our-story/trends/files/idc-seagate-dataage-whitepaper.pdf [https://perma.cc/P6GQ-P6FC].

terabytes, or a trillion gigabytes.[22] Taking this analysis an additional step, Taru Khurana has noted that, if each gigabyte in a zettabyte "were a brick, 258 Great Walls of China (made of 3,873,000,000 bricks) could be built."[23]

In addition, data volume is not the only potential quagmire for the e-discovery law practitioner. As data volume has grown exponentially, data variety has exploded as well. Gone are the days when e-discovery was simply e-mail. If one considers collaboration applications, ephemeral applications, social media applications, and other mobile platforms, the veritable cornucopia of data sources that could appear in an e-discovery document request could include Confide, Excel, Facebook, Instagram, Pinterest, PowerPoint, Reddit, Snapchat, Teams, Threema, Twitter, WhatsApp, Wickr, Zoom, and many more. Bottom Line: the technological challenge for e-discovery legal teams is daunting.

In addition, lawyers in most U.S. jurisdictions have a duty to be competent in technology—with many state bars following the American Bar Association's 2012 amended comment 8 to Model Rule of Professional Conduct 1.1,[24] adding language identical or similar to comment 8's provision that the duty to maintain competence includes "keeping abreast of changes in the benefits and risks associated with relevant technology."[25]

However, in fairness—and in keeping with the theory that technology is neither necessarily good nor bad—we should note that, in many ways, technology has improved the discovery process and other aspects of the practice of law. Law students of today have no need to learn how to research caselaw by going through library stacks in search of pocket parts, and—after they graduate—modern tools have turned formerly laborious tasks into quick and easy feats of marvelous wonder. Hours spent sifting through Bankers Boxes are now quick clicks aided by artificial intelligence, practitioners can file pleadings electronically without traveling to the courthouse, and software as a service (SaaS) has revolutionized e-discovery document review.

Case in point: In his response to Judge Matthewman's article, University of Florida Levin College of Law Professor William F. Hamilton concedes that increasing data volume is a challenge, but he notes that, in some ways, e-discovery is easier than its paper

22. Thomas Barnett, Jr., *The Zettabyte Era Officially Begins (How Much Is That?)*, CISCO BLOG: SP360: SERV. PROVIDER (Sept. 9, 2016), https://blogs.cisco.com/sp/the-zettabyte-era-officially-begins-how-much-is-that [https://perma.cc/8WD7-GMRB].

23. *Id.* (quoting Taru Khurana, Cisco Marketing Manager, Product/Systems).

24. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2015).

25. *See generally* Robert J. Ambrogi, *Tech Competence: 38 States Have Adopted the Duty of Technology Competence*, LAWSITES, https://www.lawsitesblog.com/tech-competence [https://perma.cc/GVR4-9PCV] (noting that thirty-eight states have adopted the duty of technology competence).

predecessor.[26] Professor Hamilton notes that, in the paper world, the "volume of produced documents was typically meager, and the documents themselves often unrevealing," adding that critical paper notes often never made it into discovery.[27] Professor Hamilton contrasted the paper world with the digital world where data helpful to a case can be found in a variety of digital locations.[28]

Professor Hamilton is undoubtedly correct. Technology has improved the practice of law in many ways. However, the challenges for the e-discovery practitioner—and thus, the need for the Matthewman New Paradigm—remain, but how much should we expect our overburdened judges to referee disputes over electronic batch files and the protocols for sifting through evidence?

In fact, in the 2015 e-discovery amendments, rulemakers tried—at least to a certain extent—to take judges out of the discovery process somewhat by limiting their inherent authority to issue sanctions.

The 2015 amendments to FRCP 37(e)[29] represented an attempt to reduce the burdens of over-preservation of data by placing limits on sanctions for spoliation of evidence when that evidence consisted of electronically stored information (ESI).[30] The Advisory Committee Notes to the amendment make clear the rulemakers intent.

Noting that the 2015 amendment replaced the 2006 version of FRCP 37(e), the Advisory Committee wrote that the new rule:

> authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.[31]

U.S. Magistrate Judge James C. "Jay" Francis IV, a respected jurist with extensive e-discovery expertise, was having none of the Advisory Committee's attempt to limit the inherent power of judges. In *Cat3, LLC v. Black Lineage, Inc.*,[32] commenting on the inherent powers possessed by judges and quoting the U.S. Supreme Court in *Chambers v. NASCO, Inc.*,[33] Judge Francis wrote:

> One such inherent power is the authority to impose sanctions

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26. *See* William F. Hamilton, *Magistrate Judge Matthewman's New E-Discovery Paradigm and Solving the E-Discovery Paradox*, 71 FLA. L. REV. F. 150, 152–53 (2020).
27. *Id.* at 153.
28. *Id.*
29. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.
30. *See id.*
31. *Id.*
32. Cat3, LLC v. Black Lineage, Inc. 164 F. Supp. 3d 488, 497–98 (S.D.N.Y 2016).
33. Chambers v. NASCO, Inc., 501 U.S. 32, 49 (1991).

> for the bad faith spoliation of evidence . . . . Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue. In *Chambers*, the Supreme Court rejected the argument by the party opposing the sanctions motion that provisions of the Federal Rules of Civil Procedure foreclosed resort to inherent power. It stated that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."[34]

Associate Justice Tanya R. Kennedy of the Appellate Division, First Judicial Department in New York, has noted that New York's CPLR 3126 gives New York State court judges wide latitude in imposing sanctions.[35]

IV. THE NEW PARADIGM AND THE 2015 E-DISCOVERY AMENDMENTS

Not unlike twelve-step programs helping individuals overcome seemingly insurmountable odds, Judge Matthewman's New Paradigm for E-Discovery offers a ten-step program for e-discovery legal teams to overcome the seemingly insurmountable odds presented by twenty-first century data, and they are intertwined with the 2015 e-discovery amendments to the Federal Rules of Civil Procedure.

Eight of the ten Matthewman Core Components are the responsibility of counsel and their clients, and two of the eight—Core Component 6, Limitation of Discovery and Elimination of Wasteful or Unnecessary Discovery by the Court, and Core Component 10, Active Participation and Prompt Resolution of Disputes by Judges—involve participation by the court.[36]

Each of the ten Core Components involve the three most important concepts driving the 2015 e-discovery amendments to the Federal Rules of Civil Procedure: cooperation, proportionality, and sanctions. The path to these amendments was not an easy one.

The 2015 amendments were the result of a long and laborious process, and they were not without controversy. One need look no further than a November 2013 U.S. Senate hearing on the matter to get insight into the controversy, which was captured in hearing's title: *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and*

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34. *Cat3, LLC*, 164 F. Supp. 3d at 497–98 (citing *Chambers,* 501 U.S. at 42–43).

35. *Relativity Fest 2020 – Judicial Panel*, YOUTUBE (Jan. 6, 2021), at 23:55–24:05, https://www.youtube.com/watch?v=XAQyz_Sm69E&feature=youtu.be [https://perma.cc/P8TH-RBS3] (showcasing Associate Justice Tanya R. Kennedy's, Appellate Division, First Judicial Department, New York State Supreme Court, remarks on CPLR 3126 at the 2020 Relativity Fest Judicial Panel).

36. Matthewman, *supra* note 4, at 1265–66.

Leave Americans Without Access to Justice?[37] In examining the impact of this congressional hearing and the eventual amendments, which went into effect on December 1, 2015, the effect of technology on discovery is evident.

Testifying in support of amending the rules and citing the American College of Trial Lawyers, Andrew Pincus, a partner at Mayer Brown LLP, said:

> Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them. The tremendous growth in the sheer quantity of electronically stored information combined with discovery rules formulated for the typewriter and paper era have produced a huge increase in discovery-related legal costs . . . . In addition, parties incur significant costs just to preserve electronically stored information, beginning when a claim is reasonably anticipated and during the entire course of the litigation. Otherwise, they face onerous sanctions in the event information later found to be subject to discovery is lost, even if that deletion is unintentional.[38]

However, with an opposing view and testifying in opposition to the proposed amendments, Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense Fund, rejected the idea that the discovery process was broken, arguing instead that discovery process—and the federal magistrate judges who oversee it—protect the interests of justice. Ms. Ifill's testimony highlights the importance of Judge Matthewman's Core Component 10 on the active role of judges:

> For those of us who represent civil rights plaintiffs, discovery is the essential stage of any litigation, and that is, of course, because of the nature of our claims. The information that would support a claim of discrimination is often, as the Chairman pointed out, within the possession of the defendant. And the only way we can get that information is through the discovery process . . . . Judges do have the

37. *See generally Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Cts. of the S. Comm. on the Judiciary*, 113th Cong. (2013) (stating the purpose of the meeting is "to examine a series of changes to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Advisory Committee on the Civil Rules").

38. *Id.* at 9 (statement of Andrew Pincus, Partner, Mayer Brown LLP).

> power to manage discovery, and judges do have the power to ensure that discovery is not burdensome. And we have found in the cases that we litigate judges exercise that authority. Magistrate judges are experts in managing discovery in complex cases, and they do so. They play a very active role in setting appropriate timetables and schedules for the parties and ensuring that discovery is managed and maintained in a way that is fair to all sides.[39]

In addition, in *Sekisui American Corp. v. Hart*,[40] the Honorable Shira A. Scheindlin, who, at the time, was a U.S. District Judge in the Southern District of New York, rejected the argument for an undue sanctions burden on producing parties when destruction of evidence was unintentional:

> [I]mposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they can be subject to "remedial curative measures") even if they were negligent, grossly negligent, or reckless in doing so.[41]

How does the Matthewman New Paradigm for E-Discovery address the issue? Core Component 1: Proper and Timely Preservation of Potential Discovery is clear. Judge Matthewman asked rhetorically, "So, what is a company, person, or attorney to do when civil litigation is pending or reasonably foreseeable?"[42] Judge Matthewman answers this question succinctly and decisively: "The answer is simple—preserve."[43]

Judge Matthewman goes on to explain how producing parties can manage this process, and appears to share Judge Scheindlin's disdain for sloppy behavior:

> Companies of all sizes need to have a vigorous, effective, and justifiable preservation policy in place. A valid and effective document retention policy needs to be in place and must be periodically reviewed and updated. Further, that company policy needs to be transparent, followed, and enforced. A company's Information and Technology (IT) professionals are crucial in the preservation process. The company's IT professionals know, for example, the

39. *Id.* at 11–12 (statement of Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense Fund).

40. Sekisui Am. Corp. v. Hart, 945 F. Supp. 2d 494 (S.D.N.Y. 2013).

41. *Id.* at 503 n.51.

42. Matthewman, *supra* note 4, at 1267.

43. *Id.*

> automatic deletion policy or process, and they know how to stop it for preservation purposes. For this reason, they are essential.[44]

Although preservation of data is critical during discovery, it is often an information governance process that should be taking place long before there is a reasonable anticipation of litigation. Once there is a reasonable anticipation of litigation, the e-discovery hijinks often ensue. When the hijinks do ensue or when the sloppy behavior permeates discovery, how much should judges get involved? Authorities are split.

V. FRCP 1, CORE COMPONENT 10, AND ACTIVIST JUDGES?

Cooperation may be the most important concept in Judge Matthewman's New Paradigm. It is the central theme of Core Component 5, but it's actually an important factor in all 10 Core Components—especially when one considers that the 2015 amendment to FRCP 1 includes involvement of the judiciary. Although the 2015 amendment to FRCP 1[45] was less robust linguistically than the amendment on proportionality in FRCP 26(b)(1)[46] and the amendment on sanctions in FRCP 37(e),[47] it may be the most important. The language change is simple:

Prior to the amendment:

Rule 1. Scope and Purpose These rules govern the procedure in all civil actions in the United States district courts, except as stated in Rule 81. They should be construed and administered to ensure the just, speedy, and inexpensive determination of every action and proceeding.[48]

The rule as of December 1, 2015:

Rule 1. Scope and Purpose These rules govern the procedure in all civil actions in the United States district courts, except as stated in Rule 81. They should be construed, ~~*and*~~ administered, *and employed by the court and the parties* to ensure the just, speedy, and inexpensive determination of every action and proceeding.[49]

In his 2015 Year-End Report on the Federal Judiciary, Chief Justice

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44. *Id.* (footnote omitted) (citing Philip Favro, *Defensible Deletion: The Touchstone of Effective E-Discovery,* 7 TECH. FOR LITIGATOR 13 (2013)).

45. *See* FED. R. CIV. P. 1.

46. *See* FED. R. CIV. P. 26(b)(1).

47. *See* FED. R. CIV. P. 37(e).

48. *See* FED. R. CIV. P. 1 (2012) (repealed 2015).

49. *See supra* note 45 (emphasis added).

of the United States John Roberts stressed the importance of the amendment to FRCP 1 when he wrote, "Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart," adding that the "words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation."[50]

This important rule change is not a novel concept. For instance, Dr. Victoria McCloud, Master of the Senior Courts, Queen's Bench Division, in the Courts of England and Wales, noted at the 2020 Relativity Fest Judicial Panel, that the revised FRCP 1 in the United States is very similar to Rule 1.1, the Overriding Objective, in the Civil Procedure Rules in courts in the United Kingdom, and its companion, Rule 1.2, which calls for court involvement.[51]Master McCloud noted:

> What I found very interesting, thinking about the rule changes you had in 2015, is how very similar your reworded Rule 1 is to what we have in our Rule 1 . . . it's the parties' and the court's and the representatives' duties to make sure that cases are advanced in that way so as not to waste court resources and so as to ensure compliance with court orders, and I was really stuck by the similarities.[52]

The concept of cooperation and judicial involvement in e-discovery is addressed in Judge Matthewman's Core Component 10: Active Participation of Judges in the Discovery Process and Prompt Resolution of Any Discovery Disputes by the Court.[53] In Core Component 10, Judge Matthewman not only echoes Chief Justice Roberts' call for cooperation among counsel, but also calls for the involvement of judges in the process, arguing, "Judges must become more like emergency room doctors and rapidly intervene in a discovery dispute to resolve it before it gets out of hand and the case becomes 'infected.' This requires a leadership, hands-on role by the court."[54]

As noted above, in response to Judge Matthewman's article, the Honorable Andrew Jay Peck, the author of multiple landmark decisions

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50. ROBERTS, JR., *supra* note 1, at 5–6.

51. Dr. Victoria McCloud, Master of the Senior Courts, Queen's Bench Division, *Relativity Fest 2020 – Judicial Panel*, YOUTUBE (Jan. 6, 2021), at 29:44–29:51, https://www.youtube.com/watch?v=XAQyz_Sm69E&feature=youtu.be [https://perma.cc/P8TH-RBS3] (Rule 1.1 provides, in part, "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.").

52. *Id.*

53. Matthewman, *supra* note 4, at 1279.

54. *Id.*

on e-discovery law, agrees on both the principles of cooperation and judicial involvement in the discovery process. Judge Peck believes Core Component 10's call for judicial involvement is the most important of the components. However, Judge Peck cautions that this importance is "unfortunate" because judicial resources are scarce.[55]

Although Judge Peck argues in his response, "[W]ithout active judicial case management, lawyers will fall back on the inefficient discovery approaches that they have used in the past,"[56] Judge Peck has been a vocal advocate for counsel using the legal tools at their disposal to reduce discovery burdens on judges.

For instance, Judge Peck has been an advocate—some might say evangelist—for lawyers availing themselves of the orders available under Federal Rule of Evidence (FRE) 502(d).[57] Promulgated in 2008 to address the exponential explosion of electronically stored information and the realization that—in an era where litigants have document productions teeming with terabytes of data, documents subject to the attorney-client privilege and the work product doctrine would be produced inadvertently—FRE 502(d) allows federal courts to issue orders that disclosure will not waive the protection or privilege in the instant matter or other state or federal proceedings.[58]

To an observer in 2020, the idea that parties would want to cooperate during the discovery process with judges taking an active role may seem obvious. However, what constitutes the proper level of "active participation of judges in the discovery process"[59] is a subjective analysis, and cooperation between parties in litigation was once seen as a foreign concept. As retired U.S. Magistrate Judge David J. Waxse, a noted authority on discovery issues, observed in a 2012 law review article, "*Cooperation—What is It, and Why Do It?*"[60] lawyers questioned how they could cooperate in an adversarial legal system that required zealous advocacy.

However, Judge Waxse observed, "Lawyers and judges should consider that the ABA Model Rules of Professional Conduct removed the former ethical obligation for zealous advocacy from the ABA Model Code of Professional Responsibility when the ABA Model Rules of Professional Conduct replaced the Code in 1983,"[61] adding that, under

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55. *See* Peck, *supra* note 7, at 148.

56. *Id.*

57. *See* FED. R. EVID. 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.").

58. *Id.*

59. *See* Matthewman, *supra* note 4, at 1266.

60. David J. Waxse, *Cooperation—What Is It and Why Do It?*, XVIII RICH. J.L. & TECH. 1, 7–8 (2012).

61. *Id.* at 7 (footnote omitted).

the current Model Rules of Professional Conduct, the explicit obligation of zealous advocacy no longer exists and that "[z]ealous advocacy" is mentioned only in the Preamble and in the comment to Rule 1.3.[62]

Yet, just because lawyers amend their rules of conduct doesn't mean clients get the memo, as U.S. District Judge Xavier Rodriguez (W.D. Tex.), another prominent jurist in the field of e-discovery law, noted at the 2014 Relativity Fest Judicial Panel:

> I'm not against cooperation, of course, but I am fully appreciative of the fact that it's hard to be a lawyer right now. And it's hard to keep your clients happy, and there's a whole bunch of pressures right now financially on lawyers and with their clients as well, and—maybe it's because I was in the trenches not too far long ago—I appreciate all that. I understand the burdens that the lawyer is bringing into the courtroom. Is it difficult to cooperate with some clients perhaps looking over your shoulder? Yes, I realize that, so I'm not about to harp on the lawyers too much for this.[63]

In fact, it's not only clients finding cooperation to be somewhat of a foreign concept in discovery. Although the Sedona Conference Cooperation Proclamation[64] may seem noncontroversial by today's standards, Judge Waxse noted that the Sedona Conference said at the time it represented a "paradigm shift for the discovery process."[65] It was a paradigm preview for the New Paradigm, if you will. In applying the concept of cooperation to Judge Matthewman's New Paradigm for E-Discovery, Sedona provides more useful guidance:

> Litigators are, of course, expected and ethically required to be advocates for their clients. They are also expected and ethically required to conduct discovery in a diligent, efficient, and candid manner. The tone of a case is usually set at the beginning, so it is important for all counsel to abide by and advance the principles of cooperative discovery at the outset of the case.[66]

However, Judge Waxse may not embrace fully Judge Matthewman's call under Component 10 for active judicial involvement to achieve just,

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62. *See id.* at 8.

63. *Relativity Fest 2014 – The Judicial Panel*, YOUTUBE (Oct. 13, 2014), at 13:53–14:32, https://www.youtube.com/watch?v=bryRfbvrVW0&list=PLbZQ-EktQEVbIbKp5sYWEkGNaWANfLR6y&index=275 [https://perma.cc/37GN-98P8] (showcasing U.S. District Judge Xavier Rodriguez's (W.D. Tex.) remarks at the 2014 Relativity Fest Judicial Panel).

64. *See generally* The Sedona Conference®, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (Supp. 2009).

65. Waxse, *supra* note 60, at 6 (footnote omitted).

66. *Id.* at 9 (footnote omitted) (quoting THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COOPERATION GUIDANCE FOR LITIGATORS AND IN-HOUSE COUNSEL 2 (2011)).

speedy, and inexpensive resolution of matters. In *Gipson v. Southwestern Bell Telephone Company*,[67] Judge Waxse wrote:

> As of the date of the discovery conference, more than 115 motions and 462 docket entries had been filed in this case, even though the case has been on file for less than a year. Many of the motions filed have addressed matters that the Court would have expected the parties to be able to resolve without judicial involvement. This Court's goal, in accordance with Rule 1 of the Federal Rules of Civil Procedure, is to administer the Federal Rules of Civil Procedure in a "just, speedy and inexpensive" manner. To assist the Court in accomplishing this goal, the parties are encouraged to resolve discovery and other pretrial issues without the Court's involvement.[68]

It's important to note that Judge Waxse issued the order in *Gipson* before the amendment to FRCP 1. However, even after the 2015 amendment, judges have questioned how active they should be in the e-discovery process. In *Olesczuk v. Citizens One Home Loans*,[69] U.S. Magistrate Judge Nancy Koppe cited U.S. Magistrate Judge Peggy Leen for the proposition that a magistrate judge is "not the Maytag repairman of federal judges desperately hoping for something to do,"[70] and—although she cited pre-new FRCP 1 precedent in doing so, wrote in 2016 that a "pillar of federal litigation is that '[d]iscovery is supposed to proceed with minimal involvement of the Court'"[71] and that "discovery disputes should be presented to the Court only as a last resort and only when the underlying dispute implicates truly significant interests."[72]

Judges Koppe and Leen have not been alone in wanting to put limits on judicial involvement in discovery. After Chief Justice Roberts and the 2015 amendment to FRCP 1 called for more judicial involvement in the discovery process, some parties began to seek more judicial involvement in the protocol process for the use of technology assistant review (TAR) in litigation. At the 2017 Relativity Fest Judicial Panel, Judge Rodriguez questioned this trend, telling the audience, "I know people want a pontifical blessing . . . [of TAR protocols], but there's nowhere in the

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67. *See* Waxse, *supra* note 60, at 11 (citing Gipson v. Sw. Bell Tel. Co., No. 08-2017, 2008 U.S. Dist. LEXIS 103822 (D. Kan. Dec. 23, 2008)).

68. *Id.*

69. Olesczuk v. Citizens One Home Loans, No. 16-cv-01008, 2016 U.S. Dist. LEXIS 153342 (D. Nev. Nov. 4, 2016).

70. *Id.* at *2 (citing Mazzeo v. Gibbons, No. 08-cv-01387, 2010 U.S. Dist. LEXIS 147143, at *1 (D. Nev. July 27, 2010)).

71. *Id.* (citing Cardoza v. Bloomin' Brands, Inc., 141 F. Supp. 3d 1137, 1145 (D. Nev. 2015) (quoting F.D.I.C. v. Butcher, 116 F.R.D. 196, 203 (E.D. Tenn. 1986)).

72. *Id.* (quoting *In re* Convergent Techs. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

rules that I find that's my role as a judge."[73]

That is not to say that Judge Rodriguez has a hands-off approach to judicial involvement in discovery disputes. For instance, in *Bellamy v. Wal-Mart Stores, Texas, LLC*,[74] Judge Rodriguez provided a thoughtful analysis of how e-discovery can go awry and what courts and counsel can do to keep the discovery process on track. What was one of counsels' failures in *Bellamy*? The failure to get the aforementioned FRE 502(d) order. The judge wrote, "This Court encourages parties to enter into a FRE 502(d) Order, which states: 'A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.' Despite this Court's encouragement, the Defendant did not request such an Order. This was the first of many mistakes by Defendant's counsel in this case."[75]

Judge Rodriguez is not alone in this analysis on the limits of judicial involvement in discovery. In addition, although technology has exacerbated the challenges of discovery, the discovery process itself—with or without twenty-first century technology—can lead to problems.

For instance, in *Osterman v. General R.V. Center, Inc.*,[76] U.S. District Judge R. Steven Whalen (E.D. Mich.) expressed exasperation at counsel who could not resolve minor discovery disputes on their own. After noting that federal court was a "forum for addressing some of the most compelling issues of the day, including civil rights, voting rights, the First Amendment free speech and religion clauses, federalism, and criminal justice"[77] and important procedural questions, including the "scope of e-discovery,"[78] Judge Whalen went on to describe the discovery matter on which counsel found it necessary to involve a federal judge:

> Today, the Court is asked to resolve a disagreement as to where the deposition of the Defendant's corporate representative will be held: at Plaintiff's counsel's office, which is about 27 miles from the witness' place of business, or at defense counsel's office, which is about 12 miles from his place of business. In other words, the Court must decide whether the deponent will or will not have to drive an additional 15 miles to attend his deposition. To address this

73. *Relativity Fest 2017 – The Judicial Panel*, YOUTUBE (Oct. 23, 2017), at 54:30–54:43, https://www.youtube.com/watch?v=gIzoHneS19M&feature=youtu.be [https://perma.cc/LD6B-A6MR] (showcasing U.S. District Judge Xavier Rodriguez's (W.D. Tex.) remarks at the 2017 Relativity Fest Judicial Panel).

74. Bellamy v. Wal-Mart Stores, Tex., LLC, No. SA-18-CV-60, 2019 WL 3936992, at *4, *6 (W.D. Tex. Aug. 19, 2019).

75. *Id.* at *1(footnotes omitted) (citation omitted).

76. Osterman v. Gen. R.V. Ctr., Inc., No. 19-10698, 2019 WL 4295969 (E.D. Mich. Sept. 11, 2019), *appeal filed*, 2020 WL 6708873 (E.D. Mich. Nov. 16, 2020).

77. *Id.* at *1.

78. *Id.*

> important dispute, the Defendant filed a motion for protective order, with nine pages of exhibits, the Plaintiff filed an 18-page response with 14 pages of exhibits, and the Defendant filed a five-page reply brief. Seriously? This is the kind of issue that should be resolved by the lawyers without judicial intervention. In fact, this [is] the type of disagreement that most third-graders know how to work out.[79]

Judge Whalen discussed two earlier examples of federal judges who were fed-up with counsel expecting the judiciary to resolve minor discovery disputes[80]:

In *Avista Management, Inc. v. Wausau Underwriters Insurance Co.*,[81] U.S. District Judge Gregory Presnell (M.D. Fla.) described the inability of counsel to agree on the location of a FRCP 30(b)(6) deposition as "the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts."[82] To resolve this weighty matter, Judge Presnell made a novel order: "Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time . . . counsel shall engage in one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition."[83]

In *Arizonis v. Suffolk Bus Corp.,*[84] U.S. Magistrate Judge Gary R. Brown (E.D.N.Y.) cited the precedential value of rock-paper-scissors jurisprudence, noting that an exasperated U.S. Magistrate Judge Hugh B. Scott (W.D.N.Y.) cited Judge Presnell's proposed remedy in *Pritchard v. County of Erie.*[85] However, Judge Brown noted shortcomings in using rock-paper-scissors as a means of dispute resolution and opined on a better remedy: "Unfortunately, 'rock-paper-scissors' involves human variables that render it less than ideal as a dispute-resolution device. The instant matter may be better resolved, in this Court's view, through the use of coin flipping, a commonly-used practice that employs an item manufactured to exacting standards by the United States Mint."[86] Thus, Judge Brown issued the following order:

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79. *Id.* (citations omitted).

80. *Id.*

81. Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co., No. 05-CV-1430, 2006 WL 1562246 (M.D. Fla. June 6, 2006).

82. *Id.* at *1.

83. *Id.*

84. Arizonis v. Suffolk Bus Corp., No. CV 13-0964, 2014 WL 1379639, at *1 (E.D.N.Y. Jan. 8, 2014).

85. Pritchard v. Cnty. of Erie, No. 04CV534C, 2006 WL 2927852, at *5 n.3 (W.D.N.Y. Oct. 12, 2006), *mandamus granted sub nom.*, *In re* Cnty. of Erie, 473 F.3d 413 (2d Cir. 2007).

86. *Arizonis*, 2014 WL 1379639, at *1.

> Based on the foregoing, the attorneys are to meet at a time and place of their choosing (but, failing an agreement on this sub-issue, on the steps of the Central Islip Federal Courthouse on January 9, 2014 at 2 o'clock p.m.). Plaintiff's counsel will supply a standard United States quarter to defendants' counsel for inspection, and then proceed, in due course, to toss the coin. Defendants' counsel will "call" heads or tails. The prevailing party will choose which witness will be deposed first; the loser will choose the second deponent. Hopefully, this procedure will demonstrate to counsel that—in lieu of costly motion practice—matters can be resolved with an investment of twenty-five cents. Counsel are also directed to review Local Rule 26.4, requiring cooperation among attorneys in these matters, prior to making any further application.[87]

The more than slightly unreasonable discovery behavior in *Gipson*, *Osterman, Avista, Arizonis,* and *Pritchard* may not happen every day, but it does illustrate some of the pitfalls of over-reliance on judicial involvement in discovery. Of course, it's worth noting that technology could have actually resolved the disputes in *Osterman* and *Avista*. As the COVID pandemic has impacted life and the law, courts and litigants in 2020 are more accepting of virtual proceedings.[88] Even before the pandemic, judges used technology to achieve cooperation between counsel with judicial economy. For example, Judge Waxse described one approach used with counsel who came to court seeking judicial involvement, saying they could not reach agreement:

> What I've developed is a method of increasing cooperation. I tell [the lawyers], "I want you to go back and rediscuss this and see if you can't really cooperate and reach some agreement, and to help you, I want you to videotape the conference, and either send me the agreement or the videotape,"—and I have yet to watch a videotape . . . . I don't know why this works, and I was on a panel with a lawyer who had an undergraduate degree in physics, and she said, "Judge, it's pretty simple why that works: lawyers are like

87. *Id.*

88. *See generally* Victoria Hudgins, *Despite Budget Cuts, Courts Can't Imagine Life Without Zoom*, LEGALTECH NEWS (Oct. 20, 2020), https://www.law.com/legaltechnews/2020/10/20/despite-budget-cuts-courts-cant-imagine-life-without-zoom/ [https://perma.cc/J9TK-7FEC] (noting that the COVID-19 pandemic has caused courts to turn to virtual conferencing technology, and "many forms of remote technology will continue to be used more extensively than before the pandemic").

particles in physics—they change when observed."[89]

However, even the most thoughtful and clever court attempts at getting lawyers to conserve judicial time and resources can go awry, leaving one still perplexed about how active judges should be. As Judge Peck noted: "Some other judges tried this and complained to me. This one judge from New Jersey told me she ended up with an eight-hour videotape."[90]

For the vast majority of counsel whose discovery conduct does not inspire judges to resort to the justice of rock-paper-scissors, coin tosses, or video Romper Rooms,[91] there is the option of a modified approach.

At the 2015 Relativity Fest Judicial Panel, U.S. District Judge Nora Barry Fischer (W.D. Pa.) said the upcoming amendments calling for more judicial involvement in discovery were not a sea change for the court because judges at the U.S. District Court for the Western District of Pennsylvania were already active in the discovery process.[92] However, Judge Fischer noted this active judicial involvement was not absolute:

> In some ways, these new rules are catching up to things that we've already been doing in the Western District. Under our prior chiefs, they have actually embodied in their policies and procedures that, before you engage in motions practice in discovery, you should contact chambers, and so whenever I do a case management conference . . . what I do tell people is: 'If you run into a bump in the road, the first thing you should do after you confer with the other side—and I mean confer, not just send each other emails but in addition to that, call our court' . . . . We try to work things out over the telephone. In a number of my cases, I actually built into the case management order periodic status conferences where we go through discovery issues to keep the case moving. So, at least in our court, I don't see this as a sea change.[93]

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89. U.S. Magistrate Judge David Waxse, Remarks at the 2014 Relativity Fest Judicial Panel (Oct. 13, 2014), at 12:55–13:43, https://resources.relativity.com/session-2014-judicial-panel-on-ediscovery-part-1-watch.html?aliId=eyJpIjoiR2s1S3IrcnNmeTRhOHZlXC8iLCJ0IjoiSzNYMWR2YWdQc3UxZXVnTnJOOTR3dz09In0%253D [https://perma.cc/B9HY-9YNG].

90. *Id.*

91. *See generally* Fred Rasmussen, *1st 'Romper Room' Teacher Nancy Claster Dies at 82*, BALTIMORE SUN (Apr. 26, 1997), https://www.baltimoresun.com/bal-nancyclasterobit-story.html [https://perma.cc/5LSN-2WRE] (A highly successful children's educational television program, *Romper Room* "was, in essence, a televised kindergarten.").

92. *See Relativity Fest 2015 – The Judicial Panel*, YOUTUBE (Oct. 30, 2015), at 3:50–4:00, https://www.youtube.com/watch?v=wPJJQwCKvjY [https://perma.cc/X5LR-8ADT] (showcasing U.S. District Judge Nora Barry Fischer's (W.D. Pa.) remarks at the 2015 Relativity Fest Judicial Panel).

93. *Id.* at 3:50–4:55.

VI. THE MATTHEWMAN NEW PARADIGM IN ACTION: *EEOC V. M1 5100 CORPORATION*

An important new decision from Judge Matthewman, the order in *EEOC v. M1 5100 Corp.,*[94] puts the concepts of the Judge Matthewman New Paradigm into action. In this civil action alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA),[95] an examination of the contentious e-discovery in *M1 5100* provides good guidance for the bar and bench on the role of judges in ensuring the goals of FRCP 1 and Core Component 10 are met.

In *M1 5100*, Judge Matthewman was highly critical of one party's reliance on improperly supervised self-collection of ESI, going so far as to warn that such conduct could be a possible ethical violation. The judge wrote:

> It is clear to the Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to "self-collect" discovery without any attorney advice, supervision, or knowledge of the process utilized.[96]

Despite this admonition, Judge Matthewman did not resort to sanctions immediately, but the messages could not have been clearer:

> Defendant and Defendant's counsel clearly did not employ the proper practices in responding to Plaintiff's discovery requests. And, the Court is not impressed by the repeated delays in production that have occurred in this case by Defendant.[97]

In the order, Judge Matthewman went on to write about considering seriously an EEOC request to inspect how M1 5100 Corporation's ESI was searched, collected, and produced even though realizing such inspections were the exception and not the rule; the judge added that the court usually permits such inspections only "when all other reasonable solutions have been exhausted or when the Court suspects bad faith or other discovery misconduct."[98]

Judge Matthewman showed some understanding for counsel's possible pandemic predicament, but made it clear sanctions were a future

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94. Equal Emp. Opportunity Comm'n v. M1 5100 Corp., No. 19-cv-81320, 2020 WL 3581372 (S.D. Fla. July 2, 2020).

95. Pub. L. No. 90-202, § 4(a), 81 Stat. 602, 603 (1967) (codified as amended at 29 U.S.C. § 623(a)).

96. *M1 5100 Corp.*, 2020 WL 3581372, at *2.

97. *Id.* at *3.

98. *Id.*

possibility:

> The Court notes that it is not finding at this time that Defendant's counsel has acted in bad faith or has committed any discovery misconduct whatsoever; rather, the Court will give Defendant's counsel the benefit of the doubt and suspects that, during these difficult times of the COVID-19 pandemic, counsel's involvement in the discovery process with his client has been unusually difficult. However, the Court does not want to see these problems continue. The Court also directs Defendant's counsel to impress upon Defendant that it must promptly respond to discovery or it will be subject to sanctions. The Court expects to see no more discovery delays.[99]

However, the discovery misadventures continued, and Judge Matthewman had enough. In a September 11, 2020 order,[100] the judge not only awarded attorney fees and costs to the EEOC for what the commission incurred in drafting its Renewed Motion to Compel, but also granted in part M1 5100's motion to compel discovery.[101] In a stern warning from the bench to both sides, Judge Matthewman wrote:

> The Court has had enough of the discovery bickering and delays in this case. All parties and counsel are on notice that further discovery violations or failures to cooperate in good faith shall result in sanctions. The Court will not impose sanctions against Defendant at this time for its failure to fully participate in the filing of the Joint Notice. However, if Defendant fails to comply with any future Court Orders, the Court will not hesitate to impose sanctions against both Defendant and its counsel.[102]

On October 15, 2020, a mere thirty-four days after Judge Matthewman's warning, the parties filed a Joint Motion to Approve Consent Judgment, and a Final Order Approving Consent Decree and Dismissal with Prejudice was entered the following day.[103] Only the lawyers and their clients can say with certainty, but Judge Matthewman's application of Core Component 10 appears to have carried the day,

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99. *Id.* at *4.

100. *See* Order on Plaintiff's and Defendant's Motions to Compel [DE 46, 47] at 5, Equal Emp. Opportunity Comm'n v. M1 5100 Corp. (No. 19-cv-81320) (S.D. Fla. Sept. 11, 2020).

101. *Id.* at 2–4.

102. *Id.* at 5.

103. *See* Joint Motion to Approve Consent Decree at 1, Equal Emp. Opportunity Comm'n v. M1 5100 Corp. (No. 19-cv-81320), 2020 WL 6888066 (S.D. Fla. Oct. 14, 2020); *see also* Final Order Approving Consent Decree and Dismissal with Prejudice, at 1, Equal Emp. Opportunity Comm'n v. M1 5100 Corp. (No. 19-cv-81320), 2020 WL 6889230 (S.D. Fla. Oct. 16, 2020).

helping bring about—at least the relatively—just, speedy, and inexpensive determination of this matter, as envisioned by the drafters of FRCP 1.

CONCLUSION

To answer the question posed by this Response to Judge Matthewman's New Paradigm—should judges become activists to help ensure professionalism, cooperation, and honest good faith in e-discovery to fulfil the mandates of FRCP 1 and Core Components 5 and 10—most certainly not. There are limits to what we should expect from judges. There is a reason the phrase, "activist judge," is a pejorative one. Our nation's judges hold an honored position; they are our second line of defense, behind lawyers and their teams of technical professionals, in ensuring cherished liberties and legal rights are protected. Judges should have a judicial temperament, and they really should not be activists about anything. Besides, they really are not Maytag repair representatives looking for something to do. They are very busy—and, in many ways, overburdened—people. In any event, they can be active advocates for professionalism, cooperation, and honest good faith in e-discovery.

Technology has undoubtedly changed the discovery process in fundamental ways, perhaps making it more difficult, but technological education and cooperation can go a long way. Being a defender of a client's rights is rarely, if ever, achieved by going nuclear in discovery. What can we learn from the experiences of Judge Matthewman and his colleagues, Judge Brown, Judge Fischer, Judge Francis, Justice Kennedy, Judge Koppe, Judge Leen, Master McCloud, Judge Peck, Judge Presnell, Judge Rodriguez, Judge Waxse, and Judge Whalen? Although Chief Justice Roberts is correct—most lawyers are not advocates for antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship—there is still a need for the Matthewman New Paradigm. Perhaps the litigants and counsel in *Arizonis*, *Avista*, *Bellamy*, *Gipson*, *M1 5100*, *Mazzeo v. Gibbons*, *Olesczuk*, *Osterman*, and *Pritchard* saw their actions as necessary components of a zealous protection of legal rights. However, they illustrate the need for Judge Matthewman's New Paradigm because scorched-earth discovery is a disservice to the bar, the bench, and—most importantly—the client. The New Paradigm may have limits, but it could negate the need for judicial adjudication by rock-paper-scissors.