ASSOCIATION OF E-DISCOVERY SPECIALISTS (ACEDS)
ACEDS Midwest 2024 Series: Leaping Forward – Evolving ESI Protocols
Judges Panel
June 6, 2024

<u>CLE OUTLINE</u>

Presenters:

U.S. Magistrate Judge Patricia Barksdale (M.D. Fla.)
U.S. Magistrate Judge Allison Goddard (S.D. Cal)
U.S. Magistrate Judge Joel Richlin (C.D. Cal.)
David Horrigan, Discovery Counsel & Legal Education Director, Relativity, Moderator

I.   **Program Overview**

II.   **The Role of the Judge in ESI Protocols**

    a. **Should every case have an ESI protocol?**

    b. **If not, which types of cases should have ESI protocols?**

    c. **How active should the judge be in the ESI protocol process?**

        i. **The 2015 amendments to Fed. R. Civ. P. 1**

III.   **Specific Issues in ESI Protocols**

    a. **Timing**

    b. **Specificity or Flexibility?**

    c. **Form of Production**

    d. **The Privilege Log**

    e. **Inadvertent Production**

        i. **Fed. R. Evid. 502(d)**

    f. **Multiple Parties**

IV. **Judges, Protocols, and the Use of Artificial Intelligence**

    a. **How active should the judge be in the use of AI?**

    b. **Should the use of AI be included in ESI protocols?**

    c. **Judges and the Use of Generative AI com TAR**

        i. Commentary from Hon. Andrew Peck

        We must be careful not to do to AI for e-discovery what happened with TAR. All studies show TAR is at least as good if not far superior to keywords and manual review. But many lawyers and clients do not use TAR because of the concern that discovery motion practice, and complicated validation measures, will take away the cost savings from use of Tar. So at most they use TAR for prioritization of review behind the firewall, so to speak. Perhaps lawyers and clients who don't want to be early adopters of AI for e-discovery will be late adopters of TAR?

    d. **Are standing orders on AI necessary?**

        i. **Do Fed. R. Civ. P. 11(b) and Fed. R. Civ. P. 26(g) suffice?**

        ii. Commentary by Judge Scott Schlegel, *A Call for Education Over Regulation: An Open Letter*, Nov. 8, 2023.

    e. **Selected Standing Orders on the Use of Artificial Intelligence**

    U.S. District Court for the Northern District of California
        U.S. Magistrate Judge Peter Kang

    U.S. District Court for the Northern District of Illinois
        U.S. Magistrate Judge Gabriel Fuentes

    U.S. District Court for the Eastern District of Pennsylvania
        Senior U.S. District Judge Michael Baylson

    U.S. District Court for the Northern District of Texas
        U.S. District Judge Brantley Starr

    U.S. Court of International Trade
        Judge Stephen Alexander Vaden

Additional Reference Materials

Craig Ball, *The Annotated E-Discovery Protocol: A Primer on ESI Protocols*, 2023.

eDiscovery Assistant, *Key Components to an ESI Protocol.*

Dawson Horn, David Kessler, and Andrew Peck, *ESI Protocols: ESI Tool Turned ESI Problem?, The Mother Court, Fall 2021.*

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 (2021).**

New York State Bar Association, *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence,* April 2024.

United States District Court for the Middle District of Florida, Middle District Discovery: A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida, Feb. 1, 2021.

In re Diisocyanates Antitrust Litig., No. 18-1001, MDL No. 2862 (W.D. Pa. 2023).

In re Valsartan, 337 F.R.D. 610 (D.N.J. 2020).

Nichols v. Noom, Inc., No. 20-cv-3677 (S.D.N.Y. 2021)

Presenter Biographies:

Hon. Patricia D. Barksdale
U.S. Magistrate Judge (M.D. Fla.)

Judge Barksdale has served as U.S. Magistrate Judge for the Middle District of Florida since 2013. During her time on the bench, she has served as Magistrate Judge Observer to the Judicial Conference of the United States and the national Case Modernization Board. Before beginning her judicial service, Judge Barksdale's legal career included experience in both the private and public sectors. After serving as a law clerk at the U.S. Court of Appeals for the Eleventh Circuit, Judge Barksdale was in private practice at a national law firm, and she gained corporate experience as in-house counsel for a Fortune 500 company. Her public service includes her work as Assistant U.S. Attorney for the Middle District of Florida, where she was Senior Litigation Counsel from 2011 to 2013. A magna cum laude, Order of the Coif, graduate

of the University of Florida Frederic G. Levin College of Law, JudgeBarksdale a member of the University of Florida Hall of Fame and is the Past Chair of The Florida Bar's Federal Court Practice Committee.

Hon. Allison Goddard
U.S. Magistrate Judge (S.D. Cal.)

Judge Allison Goddard was sworn in as a U.S. Magistrate Judge for the Southern District of California in August 2019. She graduated from Boston College in 1993 and received her J.D. from the University of San Diego School of Law in 2000. Judge Goddard spent the first half of her legal career representing corporate defendants in litigation at Cooley LLP and her own law firm, Jaczko Goddard LLP. In 2011, she shifted her practice to representing plaintiffs in complex and intellectual property litigation. She has tried several cases, including class actions and patent infringement disputes. Judge Goddard speaks regularly on eDiscovery and other litigation issues. She is a member of the Advisory Board of the San Diego Chapter of the Federal Bar Association and the Louis M. Welsh Inn of Court

Hon. A. Joel Richlin
U.S. Magistrate Judge (C.D. Cal.)

Judge A. Joel Richlin was sworn in as a U.S. Magistrate Judge for the Central District of California in July of 2023. He graduated from Northwestern University in 2003 and received his J.D. from Loyola Law School Los Angeles in 2006. Judge Richlin began his career serving as a law clerk to three judges in the Central District of California for nearly five years, working at both the U.S. Bankruptcy Court and the U.S. District Court. Judge Richlin then worked in the Los Angeles Office of international law firm, Foley & Lardner LLP, where he was a Senior Counsel in the Business Litigation Group. Judge Richlin ultimately left Foley & Lardner LLP to serve as in-house counsel for Prime Healthcare, one of the nation's largest hospital systems. Judge Richlin served as the Chief Litigation Officer and then General Counsel for Prime Healthcare, where he led a national legal department of more than 30 attorneys and 19 support staff and was responsible for all litigation on behalf of the company's hospitals and other business units, which included a real estate development firm and medical school. For the past 16 years, Judge Richlin has also served as an Adjunct Professor of Law at Loyola Law School Los Angeles where he has taught various classes involving appellate brief writing and oral advocacy.

David Horrigan
Discovery Counsel & Legal Education Director, Relativity

David Horrigan is Relativity's discovery counsel and legal education director, where he leads the company's legal education and analyst relations programs. An attorney, award-winning journalist, law school guest lecturer, and former e-discovery industry analyst, David has served as counsel at the ESA, reporter and assistant editor at *The National Law Journal,* and analyst and counsel at 451 Research. David's articles have appeared also in

The American Lawyer, Corporate Counsel, The New York Law Journal, Texas Lawyer, The Washington Examiner, and others, and he has been quoted by *The Wall Street Journal,* American Public Media's *Marketplace*, *TechRepublic,* publications of the law schools of Yale, Northwestern, Emory, and others.   David serves on the Global Advisory Board of the Association of Certified E-Discovery Specialists (ACEDS)*,* the Resource Board of the National Association of Women Judges (NAWJ), the Planning Committee of the University of Florida Law E-Discovery Conference, and the Advisory Board of the *MIT Computational Law Report* at the Massachusetts Institute of Technology. He holds a juris doctor from the University of Florida He is licensed to practice law in Washington, D.C, and he is a Certified Information Privacy Professional (CIPP/US) by the IAPP.