

Leaping Forward – Evolving ESI Protocols:

I agreed to **WHAT?!!**





**ACEDS**  
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E-DISCOVERY SPECIALISTS

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A FOUR-PART E-DISCOVERY WEBINAR SERIES  
**LEAPING FORWARD:  
EVOLVING ESI PROTOCOLS**  
BROUGHT TO YOU BY THE MIDWEST CHAPTERS OF ACEDS

**LEAP DAY KICK-OFF SESSION  
FEBRUARY 29TH - NOON CT**



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**PART II: APRIL 18**  
MODERN PITFALLS TO CONSIDER

**PART III: MAY 16**  
JUDGES PANEL

**PART IV: JULY 18**  
A WORKING SESSION: COME READY TO  
WORK! PUTTING TOGETHER A MODERN  
ESI PROTOCOL

# What is an ESI Protocol?

- An ESI Protocol gets the parties on the same page from the outset to promote efficiency and proportionality while avoiding later costly and time-consuming disputes
- FRCP 1, 16, 26, 34 and 37 (and counterpart state rules) lay the groundwork for how electronic discovery should be conducted
- Balance cooperation with advocacy
- Comparison to other discovery orders

# When to Begin Negotiations?

- Ideally begin discussions prior to Rule 16 conference
- Negotiate contemporaneously with a Protective Order and make sure both are compatible and consistent
- Negotiations can take a significant amount of time, particularly when there are multiple corporate parties with expansive (and varying) digital footprints

# “Big Picture” Categories

- Identification of Sources
  - Custodians
  - Non-Custodial
  - 3rd Party

# “Big Picture” Categories

- Preservation and Collection
  - Inaccessible formats
  - M365 content
  - Hyperlinked documents
  - Hard Copy
  - Apps
  - Mobile Devices

# “Big Picture” Categories

- Processing and Filtering
  - DNIST
  - Time Zones
  - Other excluded file types
  - De-duplication
  - Password protected files
  - Chat/IM

# “Big Picture” Categories

- Identifying Review Population
  - Reasonable search methodology
  - TAR – both as an efficiency tool and for culling
  - Validation
- Email Threading



# “Big Picture” Categories

## ○ Production Format

- General principal – no downgrading
- Family relationships (be cautious re hyperlinks)
- Color images
- Native/Images
- Extracted text/OCR
- Metadata
- Structured data
- Other – meet and confer

# “Big Picture” Categories

- Non-Waiver / Modification
- Agreement or Order
- Potential Broader Scope (e.g., Protective Order, Clawback, Privilege Log)
- Customize, Customize, Customize!

# “Modern” Issues to Consider

- Should hyperlinked documents be treated as attachments?
  - *Nichols v. Noom, Inc.*, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021)
  - *In re StubHub Refund Litig.*, 2023 WL 3092972, at \*1 (N.D. Cal. Apr. 25, 2023)
  - *In re Meta Pixel Healthcare Litig.*, 2023 WL 4361131 (N.D. Cal. June 2, 2023) June 2, 2023 decision.
- Use and disclosure of generative AI
- Updated TAR tools and methodologies
- Email duplicate identification

# Practical Solutions

- Leverage available eDiscovery software
- Negotiate scope limitations
- Phased approach
- Don't lose sight of the true goal
- Know when to get help

# Lessons From the Trenches

Case Links  
Provided to  
Attendees  
Courtesy of:



- *In re Fannie Mae Securities Litigation*, 552 F.3d 814 (D.C. Cir. 2009)
- *McCormick & Co. v. Ryder Integrated Logistics, Inc.*, No. JKB-22-0115, 2023 WL 2433902 (D. Md. March 08, 2023)
- *Carl Zeiss Meditec, Inc. v. Topcon Med. Sys., Inc.*, No. 19-cv-04162-SBA(LB), 2022 WL 2394815 (N.D. Cal. July 1, 2022)
- *In the Matter of In Re Skanska USA Civil Southeast Inc.*, No. 3:20-CV-05980-LC/HTC, 2021 WL 2515645 (N.D. Fla. 340 F.R.D. 180 (N.D. Fla. 2021)) and subsequent proceedings at 340 F.R.D. 180 (N.D. Fla. 2021)

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*In re StubHub Refund Litig.*, 2023 WL 3092972, at \*1 (N.D. Cal. Apr. 25, 2023):

“Let’s get back to basics. **Litigants should figure out what they are able to do before they enter into an agreement to do something.** Litigants should live up to their agreements, especially when they are embodied in court orders, as the ESI protocol is here. And if for some reason a party learns that a so ordered discovery agreement has become impossible to comply with, the party should promptly move for relief with a good showing that despite its best efforts, compliance is impossible.”



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**Doug Matthews** is a partner in the Vorys Columbus office and a commercial litigator in the litigation group. His practice focuses on electronic discovery matters, and he is the head of the firm's electronic discovery practice group.

Doug has represented numerous businesses with regard to the management and discovery of electronically stored information. He has represented both corporate and public entities in a variety of litigation matters, including multiple putative class actions and complex antitrust matters.

Doug regularly speaks nationally and locally on electronic discovery issues.

Doug received his J.D. *summa cum laude* from The Ohio State University Moritz College of Law and his B.A. from the University of Virginia. Doug clerked for The Honorable Joseph P. Kinneary, United States District Court for the Southern District of Ohio and for The Honorable Alan Norris, United States Court of Appeals for the Sixth Circuit.

**Angela Shapiro** is shareholder in Butzel Long's Detroit office. A significant portion of Angela's practice is focused on guiding the firm's electronic discovery practice and AI initiatives.

Angela is CEDS certified and has repeatedly been recognized as a metro-Detroit "Top Lawyer" in the areas of Information Management, eDiscovery, and Information Technology Law by DBusiness Magazine.

Crain's Detroit Business named Angela to its inaugural class of Notable Women in Technology in 2018 and she was a 2020 recipient of Michigan Lawyer's Weekly's "Women in the Law" award.

Angela is a member of Butzel's Women's Leadership, Technology, and Pro Bono Committees, and is active with both ACEDS (Detroit chapter) and the EDRM.

Angela is a Spartan through and through, having earned both her undergraduate and law degrees from Michigan State University.