

1. A ruling from the Eastern District of Michigan awarding Plaintiff sanctions against a Defendant for “refusing to engage in basic ESI discovery,” rejecting the Defendants’ unsubstantiated proportionality arguments, and finding that the Defendant had not met its obligation of competence with respect to discovery of ESI.

In *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 2021 WL 5049154 (E.D. Mich. Oct. 31, 2021), U.S. Magistrate Judge Elizabeth A. Stafford ordered Washtenaw County Community Mental Health (WCCMH) to produce ESI and granted Plaintiffs sanctions under Federal Rule of Civil Procedure 37(a)(5)(C), in the process rejecting the argument that WCCMH was “justified in refusing to engage in basic ESI discovery, or to do so promptly, because they lack enough resources and manpower” and warning “attorneys appearing in federal court either to be competent and cooperative in discovery about electronically stored information (ESI), or to partner with someone with ESI expertise.”

Plaintiffs alleged claims under the Medicaid Act and the Americans with Disabilities Act regarding modifications to WCCMH’s budgeting methodology. *Id.* at *2. During discovery, Plaintiffs served interrogatories and requests for production on WCCMH. After issues emerged regarding these discovery requests, the court ordered the parties to meet and confer and then file joint lists of unresolved issues.

At that time, the court had also provided a number of directions to the parties, including that counsel “must make a reasonable inquiry about what responsive documents exist, how they are stored, and how they can be accessed.” The court also rejected WCCMH’s arguments that Plaintiffs or the court had to determine proportional ESI search terms or that none of the Plaintiffs’ requests were relevant or proportional. The court noted that the burden should be proportional to the needs of the case, but given the importance of some of the issues, the court would “expect there to be some burden.” Finally, the court had noted that general and boilerplate objections served by WCCMH violated Federal Rule of Civil Procedure 34 and interpreting case law. *Id.* at *3.

The parties later submitted the requested joint statement of unresolved issues, and Magistrate Judge Stafford addressed each issue in turn. She began with the scope of ESI searches, in particular with a request for production of documents about budgeting and reimbursement of services. The parties had agreed to five sets of search terms to test on WCCMH’s Barracuda email network, but only one set had produced successful results. While WCCMH agreed to produce documents that resulted from the one successful search, it refused to set a deadline to produce those documents. *Id.* at *4. In addition, Plaintiffs requested WCCMH produce 80 randomly selected emails, 20 from each of the other four test searches, but WCCMH refused.

In support of its refusal to produce the 80 requested documents and to set a deadline for producing the agreed documents, WCCMH relied on a “proportionality analysis” that included arguments that Plaintiffs made up only four of 5,000 recipients, that WCCMH lacked the budget to purchase the “prohibitively expensive” software necessary to comply with the Plaintiffs’ requests, that the availability of staff was constrained by COVID-19 protocols, that only one employee had access to the email system, and that conducting the test searches would be difficult and time-intensive.

However, Magistrate Judge Stafford rejected WCCMH’s proportionality argument as unsupported by Rule 26(b)(1), reasoning that WCCMH had a duty to cooperate in search term testing and that

its refusal to set a deadline for production violated Rule 34. She found that the scope of discovery permitted under Rule 26(b)(1) did not support allowing WCCMH to abort testing what it conceded were relevant search terms. Magistrate Judge Stafford also noted that WCCMH did not dispute that it was capable of fulfilling Plaintiffs' request to produce the 80 emails.

Turning to the proportionality analysis under Rule 26(b)(1), Magistrate Judge Stafford began with the first factor addressing the importance of the issues at stake. She noted that this case involved extremely vulnerable plaintiffs with severe developmental disabilities alleging they had been deprived of medically necessary services and that an action to vindicate a citizen's civil rights is generally considered of high importance. She also noted that Plaintiffs cited evidence that a large majority of recipients like them were not receiving services without which they risked becoming isolated in their homes or institutionalized. She concluded by stating that it was "an understatement to say that the issues in this [case] are important."

Magistrate Judge Stafford next found that other proportionality factors also weighed against WCCMH's attempt to limit its responsibilities. For example, WCCMH had exclusive access to the requested emails, and Plaintiffs had an even more limited budget than WCCMH.

Magistrate Judge Stafford then analyzed the final proportionality factor, which was "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* at *5 (quoting Rule 26(b)(1)). She noted that under Rule 26, a party objecting that a request for production of documents is burdensome must submit affidavits or other evidence as substantiation and that "bald generalizations or a conclusory assertion" as to the burden does not sustain an objection. Magistrate Judge Stafford then stated that while WCCMH's claim that it had not budgeted for litigation was credible, "accepting this argument would suggest that public governmental entities are exempt from normal discovery obligations." Magistrate Judge Stafford stated that parties are expected to bear the expense of producing documents from their active email files. Moreover, despite the availability of HIPAA-compliant e-discovery platforms capable of handling volumes of email quickly and at reasonable cost, WCCMH explored no avenues for producing discovery other than using a single individual employed by Washtenaw County with other duties. Magistrate Judge Stafford stated that the "failure to pursue better methods to produce the discovery is inexcusable and borne out of a fundamental lack of experience in electronic discovery practices and rules."

Magistrate Judge Stafford then agreed with Plaintiffs' counsel that "in 2021, WCCMH should not be permitted to evade its obligations to Plaintiffs and the Court by pretending that e-discovery is just too hard." Magistrate Judge Stafford stated that Washtenaw County was one of the largest counties in Michigan and had the state's third-highest median income. While WCCMH was a separate legal entity from the county, it used the county's email network system and a county employee to collect the emails at issue. Magistrate Judge Stafford therefore rejected WCCMH's argument that it lacked the resources to engage in e-discovery. She acknowledged that e-discovery can be difficult for inexperienced attorneys but stressed that inexperienced attorneys have an "ethical duty to become competent, associate themselves with attorneys who are, or to decline the representation. *Id.* (quoting *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 942 (N.D. Ill. 2021)).

Magistrate Judge Stafford illustrated defense counsel's incompetence in this area by citing an incident in which defense counsel accused Plaintiffs of "erroneously" calling WCCMH's employees "custodians," without realizing that is what individuals with custody of relevant ESI are commonly called. *Id.* at *6. Magistrate Judge Stafford explained that attorneys are obligated to interview relevant custodians at the beginning of the litigation to learn the relevant facts regarding ESI and to identify, preserve, collect, and produce the relevant ESI. Magistrate Judge Stafford further stated that the requirement that attorneys interview custodians regarding ESI was not a new one, referring to a discussion in *DR Distributors* relating to rules from 2004 and 2006. *Id.* (citing *DR Distributors, LLC*, 513 F. Supp. 3d at 926). Magistrate Judge Stafford then pointed to a Model Order Relating to the Discovery of Electronically Stored Information, adopted by the Eastern District of Michigan in 2013 providing that in the event of a dispute regarding production of ESI, each party had to designate an e-discovery liaison. *Id.* at *6. This liaison could be an attorney, a third-party consultant, or an employee of the party and must "be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology." *Id.* (quoting Principle 2.02, Model Order Relating to the Discovery of Electronically Stored Information (ESI), United States District Court for the Eastern District of Michigan (Sept. 20, 2013)).

Magistrate Judge Stafford stated that although Plaintiffs served discovery requests prior to the scheduling conference in March 2021, defense counsel had not considered basic methodologies for producing ESI until August 2021 or sought assistance from a knowledgeable e-discovery liaison. *Id.* at *6. In fact, defense counsel had "balked at cooperating with any electronic discovery processes," saying that WCCMH did not have the time or capabilities to do so. Magistrate Judge Stafford stated that defense counsel also apparently did not know that as the responding party, WCCMH should have taken a commanding role in developing the strategy to produce its responsive emails, because "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." *Id.* at *7 (quoting the Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, Principle 6 (2018)). Magistrate Judge Stafford stated that defense counsel instead left Plaintiffs' counsel to determine methodologies to produce documents and referenced the example of Plaintiffs having supplied search terms for the test searches. Magistrate Judge Stafford stated that "[d]efense counsel cannot disown responsibility for designing proportional searches and search testing" and "should have associated with an electronic discovery specialist who could assist WCCMH in fulfilling its discovery obligations."

Magistrate Judge Stafford continued that defense counsel's refusal to commit to a deadline for producing emails resulting from the search contradicted Rule 34(b)(2)(B)'s requirement to produce requested documents within the period set forth in the request or another reasonable time period specified in response. Again, Magistrate Judge Stafford rejected WCCMH's excuse that it lacked capacity to produce emails promptly, calling it an "uninformed" conclusion.

Magistrate Judge Stafford ordered WCCMH to produce documents resulting from the agreed-on search terms and the 80 emails Plaintiffs requested from the search testing. *Id.* at *10. Magistrate Judge Stafford also warned WCCMH and its counsel that "any violation of this order or more violations of the rules of discovery may result in sanctions under Rule 37 or the Court's inherent

authority and that the sanctions could include the imposition of more monetary sanctions or a default judgment against it.”