

2. In *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223-AMO (RMI), 2024 WL 3638421 (N.D. Cal. July 31, 2024), U.S. Magistrate Judge Robert M. Illman addressed disputes regarding search terms and search term validation.

At the outset of discovery, the parties submitted several disagreements regarding the appropriate validation protocol for ESI review and discovery, including (1) whether a producing party should disclose its search terms before the review process (and whether input from the requesting party should be considered in determining search terms); (2) whether recall or elusion was the appropriate evaluation method for validating the efficacy of a search; and (3) whether Plaintiffs' proposal of 98% +/-2% or Defendants' proposal of 95% +/-5% was the appropriate confidence metric for sampling. *Id.* at *1.

Magistrate Judge Illman first addressed the parties' dispute regarding search terms. Plaintiffs argued that a requesting party should have input into the search terms used by a producing party. Defendants opposed this request, arguing that "search term validation" was not required by the court's model ESI orders and that "courts do not find that in the first instance, the receiving party has a right to examine and evaluate the way the production was made or require collaboration in the review protocol and validation process." *Id.* (citing *The Sedona Conference, TAR Case Law Primer, Second Edition, 24 Sedona Conf. J.1, 39 (2023)*).

Magistrate Judge Illman found that "the disclosure of search terms is appropriate and reasonable" and ordered that a producing party would be required to disclose its terms. *Id.* at *2. However, he agreed with Defendants that a requesting party should not have input in determining search terms because that "raises the specter of too many future delays and disputes over methodology and search term formulation."

As to search methodologies, Magistrate Judge Illman ordered that the parties' ESI protocol would contain a provision requiring the parties to "adopt reasonable and proportionate methodologies to identify, search, collect, cull, review, and produce ESI as required under applicable legal standards." He further ordered that the ESI protocol would recognize that "different data sets may implicate different methodologies to identify, search, collect, cull, review, and produce responsive and nonprivileged ESI" and would require the parties to "meet and confer in good faith regarding any potential disputes over their respective ESI productions."

Finally, Magistrate Judge Illman turned to the Parties' dispute regarding validation. He directed that the parties would be required "to disclose their evaluation method for validating the efficiency of searches as well as their method for identifying the confidence metric for their sampling." Therefore, "in light of the need for efficient and effective discovery (as well as the prevailing legal standards)," Magistrate Judge Illman ordered that the parties' ESI protocol would require each party to "take reasonable steps to validate its review process," including "using quality control measures to determine whether its production is missing relevant ESI or contains substantial amounts of irrelevant ESI" and "make any necessary adjustments or corrections to its process."

In addition, Magistrate Judge Illman ordered that the parties' ESI protocol would permit a requesting party to make reasonable requests for additional information regarding the validation methods used by the producing party and that the producing party would "disclose the level of end-to-end recall" (in other words, the percentage of responsive documents in the collection that

were identified as responsive by the producing party's methodology). Finally, he ordered that the parties' ESI protocol would require the parties to meet and confer to resolve any disputes regarding validation, "including a reasonable discussion regarding the tool employed and the parameters used to obtain or calculate the level of recall."