

5 KEY TAKEAWAYS

Mitigating the Costs and Risks of Source Code and Email Discovery

Kilpatrick's [Dean Powell](#) and [Kim Byrd](#) recently presented "**Mitigating the Costs and Risks of Source Code and Email Discovery**" at the firm's annual [2024 Advanced Patent Law Seminar](#). This full-day seminar featured discussions on patent case-law and developments in the areas of ethics in patent law, patent-eligible subject matter, claim construction, inequitable conduct, popular litigation venues, Inter Partes Review, and other patent-related issues.

Key takeaways from the presentation include:

1

Email discovery costs in patent litigation are primarily driven by the amount of data involved, but the amount of data, and those related costs, can be reduced through strategies including phased discovery, agreements with opposing counsel to limit the number of custodians and search terms, and use of e-discovery tools.

Depending on local patent rules, phased discovery of emails may be required, and if there are issues in the case for which email may provide non-cumulative evidence, the court may impose limits on the number of search terms and custodians from whom email discovery can be obtained.

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Use of e-discovery tools such as E-mail threading, which eliminates the need for review of duplicative emails, and technology assisted review, which uses AI and Machine Learning to reduce the necessary time for document review, can significantly reduce the burden of email discovery.

Where production of source code is necessary, strong provisions to protect that source code should be negotiated and included in any applicable confidentiality agreement or protective order.

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When producing source code, consider erring on the side of overproduction and providing internal development documents, a fact witness familiar with how the source code functions and is maintained, and other schematics, flow diagrams, etc. sufficient to enable analysis of that source code.