

Discussion Topic No. 2: **What's New in Defendants' Playbook and Plaintiffs' Strategies?** *Suzanne Clark, Beena McDonald, & Kelly McNabb*

Overview

This Panel set out to identify what recent strategies the defense bar has employed to prevent full disclosure and transparency in eDiscovery. Understanding the defense playbook and the recent case law on same will prepare you to overcome these roadblocks.

Topics for Discussion

I. Deficient Responses and Objections: strategy to quickly get the responses you're entitled.

We will discuss how to manage the difficulty of unraveling Responses and Objections to Plaintiff's discovery requests. This includes preamble blanket general objections purported to apply to all requests, as well as the typical boilerplate objections that have no substance or factual support, including boilerplate objections generally, but also the standard objections that are themselves *stated without reasonable particularity or specificity*:

- Irrelevance
- Burden
- Claim of Vagueness
- Claim of Overbroad
- Proportionality / Overburdensome
- Qualified Responses
- Objection: But "Nothing Withheld"
- Privilege
- Demand for Confidentiality
- Incomplete Responses to Discovery Requests
- Possession/Control
- Availability from Other Sources

We all know that the rules¹ no longer allow this type of response, but how do we make our opponents play by the rules when they swamp us with such a large volume of legal arguments, that they billed by the hour to draft and serve on our clients? Plaintiff attorney and author, Mark Kosieradzki,² is in the process of developing a plan of attack for dealing with deficient and obstructive responses and objections to discovery requests and some attorneys at Beasley Allen and other firms have been beta testing his process, which includes logging requests and relevance into MS Access, and then logging the objections upon receipt. His process also includes a template brief with case law broken up by each type of objection and why each may be deficient (depending on the circumstances, of course). After the ground work of tracking the requests, relevance, responses and objections is set, the work product that follows includes meet and confer letters (easily put together from the work already completed), meet and

¹ Fed. R. Civ. P. 26(b) and 34.

² <https://www.trialguides.com/blogs/authors/mark-r-kosieradzki>

confer conferences to obtain withdraw of objections, and then motion practice requesting the court overrule the remaining objections, moving to compel, and/or moving for sanctions.

II. Workplace Collaboration Platforms: why is it so hard to produce this data in a reasonably usable form? Or is it?

Rule 34(b)(2)(E) requires documents and ESI to be produced as specified or in native form or “in a reasonably usable form.” The 2006 Advisory Committee notes further state:

But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

See also White v. Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc., 586 F. Supp. 2d 1250 (D. Kan. 2008). Minimally, the disclosing party should provide information for each document including custodian from who obtained, whether hard copy of digital format retained, description of filing system, and assurance that produced how maintained. *Pass & Seymour, Inc. v. Hubbell, Inc.*, 255 F.R.D. 331 (N.D.N.Y. 2008).

We will discuss defendants’ efforts, or lack thereof, to produce workplace collaboration platform data (Teams, Slack, SharePoint, etc.) in a reasonably usable format including: 1) What constitutes a document? Is one ‘document’ the entire chat thread from start to finish or can it be broken into, for example, 24-hour periods (see *In re: Diisoycanates Antitrust Litigation*, 2023 U.S. Dist. LEXIS 15431, *11, n.1 (W.D. Pa. Jan. 26, 2023); *Charter Commc’n Operating, LLC v. Optymyze, LLC*, No. 2018-0865-JTL, 202021 WL 1811627 (Del. Chanc. Ct. Jan. 4, 2021) (ordering defendant to produce Teams messages in native format after originally produced as individual messages); *Warner Bros. Ent. Inc. v. Random Tuesday, Inc.*, 2021 U.S. Dist. LEXIS 250597 (C.D. Cal. Dec. 8, 2021) (ordering production of Slack communications in “readable format” and to meet and confer to “resolve any difficulties in production”); 2) Is the custodian an individual/multiparty user(s) or the administrator of the channel? For example, is providing URLs for SharePoint files sufficient?; and 3) Should contextual data be produced, and if so how much? Is the data able to be threaded?

We look forward to discussing reasonably usable format of production of workplace collaboration platforms.

III. Search Methodology: ongoing use of search terms.

Technology assisted review (“TAR”) is widely recognized as “cheaper, more efficient and superior to keyword searching.” *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 137 (S.D. N.Y. 2015); *see also In re Mercedes-Benz Emissions Litig.*, 2:16-cv-881, ECF 282 (Jan. 9, 2020) (listing case law noting advantages of TAR over search terms). Yet, defendnats continue to insist on use of search terms to cull responsive data, resulting to months long negotiations and delay. Largely thanks Sedona Principle 6, Courts are hesitant to compel the use of TAR reasoning that the responding party is best situated to evaluate the procedures, methodologies, and technologies appropriate for producing their own

electronically stored information. *See* The Sedona Conf. TAR Case Law Primer, Second Ed. (Feb. 2023, Public Comment Version).

We will discuss strategies to avoid unilateral and opaque search methodologies and how a keyword search can be validated.