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Epic Failures in Technology Assisted Review Collaboration: When Discovery Turns Dysfunctional

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U.S. District Court Judge Martin C. Carlson of the Middle District of Pennsylvania recently delivered a scathing, if not somewhat poetic, opinion of the parties' handling of electronically stored information (ESI)-related disputes in *Everlast Roofing, Inc. v. Wilson*.¹ Opening with "Today we write the next chapter in this litigation, a case which threatens to become an epic of dysfunctional discovery," the opinion highlights how strongly courts dislike making discovery-related decisions due to lawyers' failures to compromise.

THE CASE

For the seven months prior to the *Everlast* decision, the parties had consistently failed to reach consensus on a series of contentious discovery disputes stemming from plaintiff's multiple claims of breach of contract, tortious interference with contract, unfair competition and misappropriation of trade secrets. One of the most significant disputes between the parties centered

on how many documents were likely to be responsive and should therefore be subject to review and production. Defendants proposed a universe of approximately 100,000 documents yielding from search terms they designed to satisfy the requests, but plaintiff identified 2,000 documents they claimed would be sufficient to capture all responsive materials. In an effort to encourage the parties to come to an agreement on how to expand the search beyond what plaintiff had identified, Judge Carlson ordered the parties and their respective ESI vendors to develop a "collaborative, data-driven sample testing strategy" to determine which materials yielding in defendants' proposed 100,000 document set might still be relevant and proportionate to the needs of the case.

Not only did the parties fail to reach a true agreement, Judge Carlson noted the parties could not even reach a consensus as to the scope of an agreement reached during the meet and confer. The court did not hesitate to scold both parties for their inability to reach a consensus, stating the "inability to perform even rudimentary tasks should be a source of chagrin for all involved." Judge Carlson further noted that counsel's inability to collaborate had now placed the sampling

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TAR Collaboration

issue “where angels fear to tread,” as it required the court to make a decision on a highly technical aspect of the ESI protocol.

While defendants insisted that plaintiff merely produce a random sample of 10-20% of the document set for defendants to analyze, plaintiff proposed a “targeted and analytical approach” of reviewing a statistical sample of the unreviewed document set, leveraging technology assisted review (TAR) to identify likely responsive documents. The court ordered the parties to develop an ESI protocol wherein the plaintiff would use the coding decisions applied to that sample to then set a review population targeting a 95% accuracy rate. Lamenting that the responsibility of making a decision had been “thrust upon us by the litigants’ intransigence,” Judge Carlson determined that using TAR to establish search parameters would be “the most efficient and effective way in which to proceed.”

CONCLUSION

Although the court in *Everlast* was not inclined to affirmatively require the parties to employ TAR at the

outset of the discovery process, when compelled, the court made a swift decision in favor of using TAR. What stands out in this decision is that while the court mandated the parties continue to confer to finalize the specifics of the ESI protocol, it provided direction on the accuracy rate to achieve.

Everlast reflects the increasing willingness of courts to provide direction favoring TAR when the parties cannot agree on the scope of a proportional document search and review process. For the best outcome, counsel should, at a minimum, be open to negotiating a TAR protocol to demonstrate cooperation and collaboration on cost reduction measures. Including a skilled eDiscovery lawyer on your team can bolster the likelihood of success in achieving that collaboration courts increasingly demand when negotiating and designing a search and review protocol to satisfy your discovery obligations.

Note

1. *Everlast Roofing, Inc. v. Wilson*, No. 1:23-CV-828 (M.D. Pa. July 16, 2025).

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