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# E-DISCOVERY AND COMPLEX LITIGATION

# Muddy Waters: Navigating TAR Protocol

*A recent decision in the District of New Jersey demonstrates the pitfalls of including requirements for the parties to disclose and agree to the use of technology assisted review (TAR) within the protocol. But it likewise demonstrates the importance of agreement on TAR methodology.*

By *Molly Hurley Kellett*

Negotiation of electronically stored information (ESI) protocols is always a complicated endeavor. There are those who prefer to leave holes in the protocol, allowing the parties latitude and thinking it can be sorted out later if there is a challenge to the methodology. Other attorneys prefer to outline every aspect of the ESI preservation, collection, review and production in the protocol to avoid uncertainties in the process. And still others fail to address certain items they do not know must be included—a failure that many courts will no longer excuse.

When it comes to the inclusion of technology assisted review (TAR) methodology in the protocol, the question is often: If it need not be addressed under applicable rules or practices, should it be? A recent decision in the District of New Jersey demonstrates the pitfalls of including requirements for the parties to disclose and agree to the use of TAR within the protocol. But it likewise demonstrates the importance of agreement on TAR methodology. This article summarizes the recent decision and discusses the potential practical implications for federal practitioners in New Jersey.

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In December 2020, Magistrate Joel Schneider entered a decision in In re Valsartan, Losartan, and Irbesartan Products Liability Litigation, resolving a long-standing dispute over an ESI protocol, its requirements, and a party's ESI production. The court reviewed the agreed-upon protocol to assess whether it allowed a party to unilaterally employ its TAR program to avoid a manual responsiveness review. The magistrate was candid in explaining the dispute before the court as illustrating "the unfortunate unavoidable consequences that occur when a party does not meaningfully and timely meet, confer and collaborate regarding complex and costly ESI discovery."

In the protocol, which was negotiated and agreed to by experienced multidistrict litigation (MDL) counsel, the parties stated that they would meet and confer to discuss search methodology, specifically referencing Boolean searches and TAR/predictive coding. The protocol did not include any definitive agreement on the use or application of these methods, but merely expressed an intent to agree at a later, but near, date. The protocol also indicated that they would refer matters to the court for resolution if they were unable to agree.

But the parties never came to a resolution on the use of TAR or predictive coding tools. The parties negotiated search terms and custodians. There were disagreements on these issues that required court intervention. The court approached the prior disagreements, and this one, using the agreed-upon protocol, which it memorialized in a court management order.

Just weeks before the first court-ordered production deadline, one of the defendants, Teva Pharmaceuticals USA, informed plaintiffs—for the first time—that it applied its own TAR tool, a continuous multi-modal learning (CMML) platform to review, assess and code its ESI and cull the records for production. The plaintiffs had not agreed to this. And notice this late in the discovery process created real questions as to whether the defendant was cooperating in good faith to disclose its search methodology as required by the protocol.

Indeed, the parties agreed in the protocol to meet and confer on TAR methodology before applying it to the ESI. Teva had not done that, and did not appear to have made any prior effort to confer on this point. Plaintiffs' objections appeared to be that the defendant sought to leverage the use of both search terms and TAR, together, in its favor to reduce its burden, costs and, ultimately, any production. Plaintiff argued that the search methodology or TAR was appropriate—that they were alternatives to one another. Plaintiffs had never agreed to allow the defendants to "layer" both of them together (i.e., apply TAR to a universe that only contains records with search hits) to reduce an already limited universe.

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After this dispute, the parties began negotiating a protocol on the defendant's use of its CMML tool, which would have allowed the use of TAR under certain parameters. As part of the plaintiffs' proposed validation process to assess the accuracy and viability of the CMML, the defendant would have to disclose a nonresponsive sample set to plaintiffs. The defendant withdrew the request to apply and indicated it would perform a manual review rather than produce any sampling to plaintiffs to support its CMML methodology.

The defendant returned to the court and requested an order approving its TAR methodology, representing it had applied it (without agreement or approval by plaintiffs) and it confirmed the defendant's estimation that the majority of the records (with search term hits) were actually non-responsive. In the application, the defendant requested reimbursement from plaintiffs if they were ordered to perform a manual review of the subject ESI (without the use of TAR).

In the Valsartan decision, the court expressly noted at the outset that the decision therein did not speak to the appropriateness of TAR as a discovery tool. Throughout the decision, the court referenced TAR methodology approvingly. In fact, the court definitively stated that it was an appropriate ESI tool, and that "a party can use TAR so long as its use is transparent and timely disclosed, and the parties collaborate in good faith about its use." At issue for the court in Valsartan was the transparency, the timeliness and the disclosure—as each was glaringly absent from the defendant's TAR approach.

The court likewise noted that producing parties have the right to direct the production of their records and ESI. But that right can be impacted by an ESI protocol, particularly where the protocol is in a court order. In Valsartan, the defendant voluntarily gave up that absolute right of self-determination by executing the protocol that required it to meet and confer on methodologies. The protocol controlled.

The court was unequivocal that the defendant's use of TAR violated the parties' protocol. The court admonished the defendant for its practices throughout the affair and refused its requested relief. The protocol governed and the defendant's application of TAR, without disclosure, without approval and then in spite of an objection, were beyond inappropriate in that they violated the court order memorializing the ESI protocol.

In the decision, the court expressed particular frustration with the Teva defendants' "unilateral" approach employed in its TAR process. To cure this, but still allow TAR, which the court thought would be appropriate, the court ordered the defendant to abide by the TAR protocol previously negotiated, but not finalized. It included sampling and validation processes to allow the plaintiffs to participate in the process and weigh in on the methodology. Notably, even the egregious conduct by the defendant in Valtarsan did not lead to sanctions—or even preclusion of TAR in the discovery process!

The outcome in Valsartan is different from other cases where the protocol does not include an arrangement to agree on TAR or the application of predictive coding in searching or culling the responsive, non-privileged records to be produced. If the protocol is silent on the use of TAR, then the tools can be used. A party would have two options: (1) disclose prior to applying TAR, and obtain consent and agreement on the use and methodology; or (2) do not disclose, apply TAR, and produce the records. Inherent in the latter approach is the risk that the recipient party will learn about the application of TAR, object to the methodology and process, resulting in motion practice and likely additional review and production efforts. The Valtarsan court was also clear that the latter approach is ill-advised.

"[T]he backbone of TAR's use is transparency and collaboration[.]" Attorneys seeking to utilize the technology should be guided accordingly. The critical practical takeaways are to: (1) address TAR early with clients, vendors and adversaries to avoid losing the opportunity to utilize the technology; (2) include the agreement to—or prohibition on—TAR in the protocol; and (3) follow the protocol that you voluntarily enter. ■