

**4. An opinion from the U.S. District Court for the District of Kansas finding that a clawback mechanism in the parties' protocol for ESI would not be limited to instances of inadvertent production and the parties would not be required to use a search term review protocol before using TAR.**

In *Edgar v. Teva A Pharmaceutical Industries, Ltd.*, No. 22-cv-2501-DDC-TJJ, 2024 WL 3677614 (D. Kansas Aug. 5, 2024), U.S. Magistrate Judge Teresa J. James resolved two disputes between the parties in connection with their proposed ESI protocol.

Magistrate Judge James first addressed the parties' dispute regarding whether the clawback procedure for the disclosure of privileged information should be limited to "inadvertent or mistaken production" (as proposed by Plaintiffs) or whether it could be invoked for all materials produced "whether inadvertent or otherwise" (as proposed by Defendants).

Plaintiffs argued that Rule 502(b) is expressly titled "Inadvertent Disclosure" and provides a safe harbor only for inadvertent production if reasonable steps were taken to prevent the error and then rectify it. Plaintiffs contended that removing the concept of inadvertence would undermine the waiver consequences of an intentional disclosure and that Defendants could try to use such a provision to allow assertion of privilege over emails that were intentionally produced in another litigation.

Defendants meanwhile argued that their proposed clawback provision for all materials "whether inadvertent or otherwise" was consistent with Rule 502(d) and would avoid fights over whether the production or disclosure of privileged information was in fact "inadvertent." Defendants also argued that the protective order in the case and the Federal Rules provided the parties with "ample protections" to challenge an assertion of privilege if they believed such a challenge was warranted.

Magistrate Judge James agreed with Defendants' proposal permitting the clawback of privileged materials on any basis, "whether inadvertent or otherwise," because that would "avoid disputes over whether the parties' disclosure was inadvertent." She also found that Plaintiffs' concern regarding the potential for clawback of privileged documents that were intentionally disclosed in other cases could be addressed through motion practice challenging the assertion of privilege for the specific documents at issue.

Magistrate Judge James next addressed the parties' dispute regarding the use of TAR during document review. Plaintiffs proposed a TAR provision that would require a party to "disclose the need for implementation of TAR" after the party made a good faith attempt to produce documents using the parties' search term protocol. *Id.* at \*2. Plaintiffs' proposed provision also required the parties to "meet and confer to enter into a cooperative and transparent TAR protocol."

Defendants proposed a simpler TAR provision: "The parties shall meet and confer to enter into a mutually agreeable TAR protocol." Defendants objected to Plaintiffs' proposal that would allow TAR only after a good-faith attempt to use a search term protocol, because this would undermine the "cost and time saving features" of TAR. Defendants also opposed use of the word

“transparent” for a TAR protocol because it was ambiguous and objected to disclosing the need for implementation of TAR on the basis that it might waive attorney-client privilege or work product.

Magistrate Judge James noted that “[b]oth sides make valid arguments” but ultimately sided with Plaintiffs’ proposed TAR provision. In particular, she noted that the case law cited by Plaintiffs supported “the importance of transparency and cooperation among counsel when a party intends to use TAR.” She explained that “TAR requires an unprecedented degree of transparency and cooperation among counsel in the review and production of ESI responsive to discovery requests” and that courts approving the use of TAR typically “required the producing party to provide the requesting party with full disclosure about the TAR technology used, the process, and the methodology, including the documents used to train the computer.” Magistrate Judge James found that Plaintiffs’ proposed TAR provision “better aligns with these principles of transparency and cooperation as it requires the party intending to use TAR to disclose the need for implementation of TAR, as well as requiring a meet and confer to enter into a cooperative and transparent TAR protocol.”

But Magistrate Judge James disagreed with Plaintiffs’ proposal that a party intending to use TAR is required first to make a “good faith attempt to produce from the search term protocol” because this requirement could significantly reduce the cost-saving benefits of TAR. Instead, she ordered that a “reasonableness” standard should apply to the TAR provision requiring a “good faith attempt to produce from the search term protocol.”