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FEDERAL E-DISCOVERY

Court Denies Request To Compel Discovery of Slack Messages



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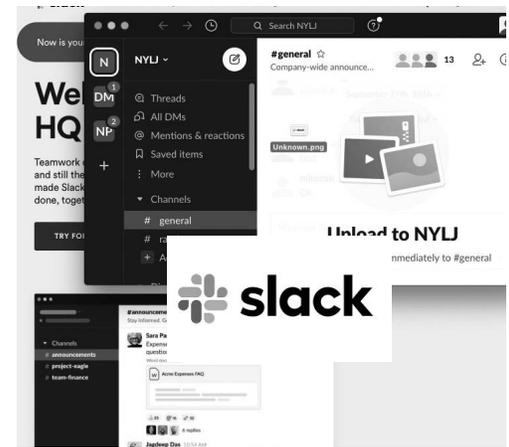
Ask any e-discovery practitioner, technologist, or service provider what has been the leading source of digital evidence over the past 20 years or so and they'll probably say something along the lines of "corporate email." And while likely accurate, what was true in the aughts and teens with respect to how we communicate at work is not necessarily true today. As text and app messaging and online communication platforms such as Slack continue to supplement—and supplant—email communications in the workplace, parties and courts need to consider these technologies' impact on document preservation and production obligations.

A recent decision provides clues on how courts may treat such electronically stored information (ESI) when considered in the context of traditional discovery concepts such as relevance, proportionality, production format, and possession, custody,

and control. Analyzing the requirements of Federal Rule of Civil Procedure 26(b), a court found that information on Slack sought by plaintiffs was relevant but that the nature of the platform created complexities as to the proportionality element such that the discovery was denied. And while the court rejected the plaintiffs' request for production of certain text message threads, it restated a prior determination on the need to produce other text messages in a format that preserves the integrity of conversation threads.

Drones and Slack

In *Laub v. Horbaczewski*, 2020 WL 7978227 (C.D. Cal Nov. 17, 2020), the parties clashed over the rightful ownership of the Drone Racing League (DRL). Among a number of discovery disputes, two notable questions arose: (1) whether the plaintiffs were entitled to certain communications from Slack, and (2) whether defendants should be required to reproduce text messages that were individually irrelevant but were, plaintiffs argued, relevant when considered in the context of a text message thread.



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Slack is an online messaging platform widely used for both personal and business communications. Slack workspaces are based on "channels" that relate to various topics or projects and can contain messages and files as part of ongoing conversations. When an organization uses Slack, the channels in its workspace can be public or private. Public channels are open for all members of the workspace to join; private channels are not, they are invitation-only.

In November 2017, the plaintiffs requested production of all of the defendants' Slack messages that were relevant to the matter, including all messages involving one of the plaintiffs. Objecting, the defendants

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produced messages from their public Slack channels to which they still had access, but not from private channels, which would be accessible only if the defendant DRL were to pay to upgrade its Slack service plan. The court held in August 2018 that “because the ESI housed at Slack.com was not within the possession, custody, and control of DRL, Defendants were not obligated to produce Slack messages in response to Plaintiffs’ RFPs” and “instructed Plaintiffs to pursue the Slack messages through third party subpoenas.” *Id.* at *2 (citation omitted). The plaintiffs issued a third party subpoena to Slack, which objected to any such production without consent of the defendants. *Id.* at *3.

The plaintiffs then filed the motion to compel at issue, seeking production of the messages from the private Slack channels. In support of their motion, the plaintiffs argued that such messages were relevant to their claims since one of the plaintiffs, while working at DRL, had used Slack to communicate with other DRL employees. Additionally, the plaintiffs speculated that DRL had upgraded its Slack plan since the August 2018 decision and was now able to access and retrieve the messages that were responsive to the request for production. And in the alternative, claiming that the defendants had promised “to consent to Slack and cooperate in its production of messages responsive to the subpoena,” the plaintiffs asked the court to compel defendants to provide the promised consent to Slack. *Id.*

The Court’s Analysis

Federal Rule of Civil Procedure 26(b) requires that discovery be both

relevant and proportional. While the court found that the plaintiffs satisfactorily argued the relevancy of the private channel Slack messages, it determined that the plaintiffs floundered on the proportionality prong of the analysis and ultimately denied the request to compel production of these Slack messages.

The court analyzed and rejected each of the plaintiffs’ arguments as to proportionality. First, the court wrote that since the Slack messages were ESI housed at Slack.com, the defendants did not have possession, custody, or control over them. Accordingly, relying on Fed. R. Civ. P.

Analyzing the requirements of Federal Rule of Civil Procedure 26(b), a court found that information on Slack sought by plaintiffs was relevant but that the nature of the platform created complexities as to the proportionality element such that the discovery was denied.

26(b)(2)(B)’s limitation addressing ESI sources that are “not reasonably accessible because of undue burden or cost,” the court held that requiring the defendants to produce the documents would constitute an “undue burden.” *Laub* at *4.

The court then concluded that, despite the plaintiffs’ allegations, there was no evidence that the defendants had received access to the messages by upgrading their Slack plan. While the defendants upgraded from a free Slack account to a paid account on Slack’s “Standard” plan, this plan still did not

permit the defendants to search messages sent by private channels or via direct message. The defendants indicated that Slack’s utility tool for searching private channels and direct messages is only available to accounts on Slack’s “Plus” tier or above. *Id.*

The court next determined that any additional evidence derived from the private Slack messages would be cumulative in light of the other evidence in the record: the plaintiffs’ testimony, other witnesses’ testimony, emails, text messages, and the public Slack channel messages. In the absence of evidence that the private messages contained any novel information, the court found the production to be unwarranted. *Id.* at *5.

Finally, as to the plaintiffs’ contention regarding the defendants’ alleged promise to consent to a subpoena served on Slack, the court not only stated that it was unaware of any authority that would permit it to compel a non-consenting party’s consent to a subpoena served on a non-party, but that it also reviewed the communications between the parties and determined that the plaintiffs misstated the nature of the defendants’ agreement. Rather than the blanket promise to consent alleged by the plaintiffs, the defendants agreed to consent only if the subpoena was reasonable in scope and if they had the opportunity to review the documents before they were produced to plaintiffs. *Id.*

Because the request for the employee’s Slack messages was not proportional to the needs of the case, the court denied the plaintiffs’

request to compel production of those documents.

Text Message Threads

In July 2018, the defendants “inadvertently produced, without review, a spreadsheet containing thousands of text messages ... collected from [defendant] Horbaczewski’s cell phone and involving five individuals believed to be involved in the formation and development of DRL.” *Laub* at *11. Of the 3,970 text messages, 3,741 were of a personal nature and, according to the defendants, not relevant to the matter. In December 2018, the defendants requested that they be allowed to claw back the inadvertent production “on grounds of irrelevance, privacy, and privilege.” *Id.* After vacating a prior order denying this request, the court in April 2019 allowed the defendants to withhold the 3,741 private text messages, finding that they were not relevant or proportional, and that “the seriousness of any prospective invasion of privacy for the individuals involved outweigh[ed] any countervailing interest there might be in discovery.” *Id.* (citation omitted).

With respect to the balance of the messages, which did not suffer from the same issues as the private messages, the court’s April 2019 order directed the defendants to reproduce those exchanges. At that time, the court found that the context and format of the text messages was key, that “case law supported the proposition that messages should be provided in a manner tha[t] provided a ‘complete record,’ as opposed to ‘scattershot texts,’” and “ordered Defendants to ‘produce the text

messages either in the spreadsheet form as originally produced, albeit inadvertently, or, alternatively, in an otherwise mutually agreeable usable format that preserve[d] the integrity of the threads of communication reflected in the text messages.” *Id.* at *11 (citation omitted).

While continuing to withhold the 3,741 messages on grounds of relevance and privacy, the defendants eventually agreed to produce the remaining 229 text messages, along with all relevant embedded images, videos, and files, and a redaction log “showing the date and time (but not content) of the withheld text messages[.]” *Id.* at *12.

Plaintiffs then moved to compel production of certain of these withheld text messages, arguing that individual messages from the threads “may themselves be irrelevant, but are necessary to maintain the integrity and context of each conversation.” *Id.* at *10. The court, refusing to revisit its April 2019 ruling, denied the plaintiffs’ request for the additional text messages. In doing so, it noted that the defendants had complied with the court’s prior order requiring reproduction of the relevant text messages in a format that preserved the integrity of the conversations.

Conclusion

The court in *Laub*, both in the instant and prior decisions, thoughtfully ruled on some thorny issues, including that text messages should be produced in a way that maintains conversational integrity and that privacy interests should be considered as part of a proportionality analysis.

And on Slack, the court addressed novel issues of relevance, accessibility, and burden in reaching a determination on the proportionality of the request for private channel Slack messages. It would be a mistake to read this decision as a license to avoid discovery based on a party’s choice of Slack service plan. Instead, the decision sensibly balances a party’s legitimate ability to select the tools it wishes to deploy in the workplace, such as Slack, against the need for discovery in a particular case. Just as a party should not feel compelled to retain all email, regardless of the cost that a cloud service provider might charge for such a feature, a party deploying Slack should not be compelled to upgrade or adapt a different business model.

The challenges associated with managing tools such as Slack as part of discovery in many ways mirror those we faced many years ago with the advent of email and the rise of e-discovery. And as seen in *Laub*, the added nuance and complexity present novel issues for courts to grapple with against the backdrop of now traditional e-discovery law.