New York Law Journal
Technology Today
WWW.NYLJ.COM
ALM.
VOLUME 268—NO. 108
TUESDAY, DECEMBER 6, 2022

FEDERAL E-DISCOVERY

# Deletion of Slack Data Justifies Severe Sanction


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If, like us, you frequent e-discovery conferences and CLE programs, you've doubtless heard a lot about how newer communication and collaboration tools are leading to an evolution in e-discovery law and practice. While email is still heavily used, it has been joined by, and in some industries displaced by, other methods of electronic interaction. For example, Slack, a messaging application comprised of topic or project-related workspace "channels" used for conversation and for sharing files and information, has replaced email in many companies, notably in newer, high tech companies.

And just as we're all finally getting comfortable with managing email as the primary source of electronically stored information (ESI) in discovery, courts are now increasingly addressing discovery disputes involving newer technologies like Slack. Here, however, although the technology at issue is new, the nature of the dispute is largely familiar—did a party destroy Slack communications with an intent to avoid production in litigation? In a recent decision, a court was not distracted by the technology at issue as it seamlessly applied traditional e-discovery law in a decision where a high tech company and its founder were accused of spoliation of Slack ESI.

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## 'Drips v. Teledrip'

"Drip marketing" involves sending prospects or customers a set of SMS (short message service) text messages over a period of time as part of marketing or sales strategy. In *Drips Holdings v. Teledrip*, 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022), two competing drip marketing companies were involved. Plaintiff Drips alleged that Defendant Teledrip was infringing on a trademark, "Conversational SMS"—a type of


SMS-based marketing that involves AI supported by humans to maintain engagement with customers in live SMS chats. Id. at *2.

Since 2017, Teledrip "has used Slack as a typical mode of communication for both internal communications as well as customer communications." Id. at *1. During discovery, Drips had "propounded requests for production of documents encompassing the Slack data;" a few months later Drips "sent Defendants a discovery deficiency letter, seeking an explanation for the lack of provided Slack data." Id. at *4.

Drips ultimately learned that Defendant Taylor Murray, founder

of Teledrip, had "downloaded a portion of the Slack data, which did not include Slack channels containing internal communications." Id. at *1. Three days later, he "changed the retention setting of Teledrip's Slack from unlimited to seven days and deleted the previously exported Slack data." Id. The change in retention would cause Slack data to delete after seven days. Teledrip waited about ten months to revert the Slack retention setting back to unlimited, after repeatedly discussing the retention issue with Drips. See id. at *1, *4. Drips alleged that the deletion of the Slack data amounted to spoliation and, in turn, filed a motion for sanctions seeking a mandatory adverse inference instruction under Federal Rule of Civil Procedure 37(e)(2).

### Report and Recommendation Of the Magistrate Judge

In a report and recommendation (R&R) on the motion, the magistrate judge determined that Teledrip was aware that it was potentially infringing on the trademark in August 2019, predating Murray's deletion of the Slack data and modification of the retention setting in October 2019. That court cited as evidence of this awareness both a Teledrip employee's email to a trade show vendor to change panels in its booth since they had "just found out that our competitor has trademarked the phrase 'Conversational SMS'" as well as "a screenshot of a slack message (that has since been deleted)" in which the same employee "warned Murray of a potential trademark issue." Id. at *2.

In their defense, Teledrip and Murray made a novel argument, "that although the deletion of the data was intentional, [Murray] … changed its data retention settings with a good faith belief that it minimized potential liability for the theft or disclosure of its customer's confidential information under the California Consumer Privacy Act of 2018 ('CCPA')," id. at *3, and the International Organization for Standardization (ISO) 27001 standard on information security management. See id. at *3. Moreover, they claimed that the delay in reverting the retention setting was because "'Murray was uncertain how to comply' with the CCPA and the ISO … [and] that they 'unfortunately … did not consult with counsel on how to properly comply with the various obligations under the CCPA/ISO and the litigation hold in this action.'" Id.

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However, the defendants "did not point to any specific [CCPA/ISO] provision upon which they relied upon to destroy the Slack data." Id. at *4. After reviewing both the CCPA and the ISO standards, the magistrate judge "concluded that 'neither the CCPA nor the ISO required the destruction of the Slack data.'" Id. Interestingly, though, that court found that while the defendants' CCPA/ISO excuse was "doubtful," it was "plausible." Id. at *5. Then, in determining the appropriate sanction for spoliation, the magistrate judge recommended the lesser sanction of a permissive adverse inference jury instruction instead of the originally requested more severe mandatory adverse inference. Id. at *4.

### The District Court's Review

The district court reviewed the R&R upon both parties' objections. The defendants argued that the R&R incorrectly found "that they were on notice of anticipated litigation as early as August 2019 and that they knowingly spoliated the Slack data with intent to deprive Drips from discovering its content." Id. at *2. The plaintiff objected, arguing, inter alia, that the harsher sanction of a mandatory adverse inference instruction was more appropriate given then intentional actions of the defendants. See id. at *4.

On the issue of when the defendants were aware of potential litigation, and thus subject to a preservation obligation, the court agreed with the R&R, that "Defendants' duty to preserve the Slack data was triggered no later than August of 2019 as it was reasonably foreseeable

that Defendants faced a trademark dispute with Drips at that time." Id.

As to the state of mind of the defendants when they deleted the Slack data, the defendants urged the court that this should be a question for the jury. The court disagreed, stating that "this issue is before the court on Drips' motions for sanctions for spoliation pursuant to Fed. R. Civ. P. 37(e)(2)—not a cause of action. Accordingly, it is a matter for the court to determine first that 'the party acted with the intent to deprive another party of the information's use in the litigation' and if yes, then fashion a sanction for that conduct." Id. at *3.

Proceeding with this determination, the court considered the timing of the deletion of the Slack data and the change in the retention policy, stating "Defendants were on notice of litigation in August of 2019. It is not disputed that on October 28, 2019, Defendants changed their Slack retention settings from indefinite to a seven-day retention period and deleted all its Slack data up to that point. It is telling of Defendants' state of mind that they admitted to intentionally deleting and changing the retention policy *after* they became aware of litigation." Id. Additionally, "further evidencing their intent to destroy relevant data, Defendants did not change their Slack retention settings for *ten months* after receiving the litigation hold[.]" Id.

The court also considered whether there was a credible explanation for the defendants' failure to preserve the Slack data. Reflecting on the CCPA/ISO excuse, the court stated "simply because the excuse might be plausible does not necessarily mean that it is credible." Id. at *5. Not willing to give the defendants the same "benefit of the doubt" as the magistrate judge, the court found that "this explanation is not credible when coupled with the timing of the destruction and continued refusal to change the retention settings to indefinite despite the litigation." Id. at *4

Turning to Drips' objections, the court agreed with the R&R's conclusion that the defendants "knowingly spoliated the Slack data with the intent to deprive Drips from discovering its content." Id. at *5. However, as to the appropriate sanction, based on its prior determinations of the defendants' behavior and their "not credible" excuse, the court disagreed with the R&R and "will impose the mandatory adverse-inference instruction." Id.

Notably, the court in 'Drips' applies the law governing the failure to preserve ESI to the Slack data at issue, without differentiating it from email or other traditional forms of ESI.

## Conclusion

*Drips* helps illustrate the evolution of how courts are applying existing e-discovery law to more modern communication technologies. Notably, the court in *Drips* applies the law governing the failure to preserve ESI to the Slack data at issue, without differentiating it from email or other traditional forms of ESI. In essence, if you intentionally delete potentially responsive ESI while you are under an obligation to preserve it, you will likely be subject to spoliation sanctions. As such, companies would be well served to look to *Drips* as further evidence of how non-email communications are becoming a standard part of the discovery process.

And while the defendants' excuses relating to privacy and compliance were rejected by the court in *Drips*, it is possible that privacy considerations may come into play when parties are discharging their preservation and discovery obligations. Such companies would be well served to engage counsel or other experts knowledgeable on these subjects as they make risk-based determinations on information management, especially since in U.S. litigations and investigations, such privacy concerns—valid or otherwise—may not carry much weight.

And, finally, *Drips* should also be a reminder to parties that courts can and will still impose harsh sanctions such as the mandatory adverse inference jury instruction for discovery misconduct.