

FAILURE TO EMPLOY SUFFICIENT SKILLS AND TECHNOLOGY IN SEARCH AND PRODUCTION OF SLACK MESSAGES RESULTS IN CASE TERMINATING SANCTIONS



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In another cautionary tale of the serious consequences that are almost guaranteed to follow having failed to employ sufficiently competent skills in eDiscovery, a court issued terminating sanctions last week in a case in which defendants had delayed producing and failed to produce key documents for years. *See Red Wolf Energy Trading, LLC v. Jylkka, et al.*, Case No. 19019119 (D. Mass. Sept. 8, 2022). After more “meritorious motions to compel and for sanctions against defendants for failure to produce documents than any other case in which this court has presided in more than 37 years,” the final blow included defendants’ failure to produce numerous Slack messages, including what the court found to be “smoking gun” communications.

In this trade secret misappropriation case, defendants failed to produce key documents for over three years, including Slack communications and documents from their Google Vault, despite numerous court orders and sanctions. In a 2021 order, the Court instructed defendants to “take this period and see whether [there are] any responses that you need to supplement because, inadvertently, this wasn’t disclosed before. That should give the plaintiff everything to use at the depositions and avert discovery disputes.”

In a sworn declaration, one defendant had stated that he “reviewed our Slack communications and provided all Slack channel communications . . .” Yet, in April 2022, defendants produced additional Slack messages that they should have produced in 2019. In June 2022, plaintiff filed a Second Motion for Sanctions arguing that defendants continued to withhold responsive Slack communications. Plaintiff sought a default judgment based on defendants’ repeated failure to produce Slack communications despite numerous court orders and representations to the Court that they had complied with Rule 26.

Defendants admitted in their opposition that they had failed to produce all responsive Slack communications, but claimed it was not intentional. Instead, they blamed their “consultant” in Kazakhstan, who had no experience with Slack and whom they had compensated with equity in the company rather than with money. Defendants claimed the consultant created a program from scratch that failed to produce all responsive Slack communications. In addition, Defendants claimed they consulted with somebody else at the company, who also did not have any experience collecting or producing Slack communications. Defendants’ explanation for not hiring an experienced vendor continually evolved – from not being able to find an outside vendor to do the work, to not being aware of available tools, to having a limited budget.

The court ordered defendants to produce their 2019 Slack archive so that plaintiff could search for the Slack communications that defendants should have produced in 2019.

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Plaintiff's vendor discovered that defendants had failed to produce at least 128 responsive Slack communications that hit search terms. Moreover, plaintiff's vendor submitted an affidavit explaining that in 2019 defendants could have used a standard eDiscovery processing tool to search and produce Slack communications at a moderate cost.

The vendor stated that in 2019 Slack had built-in search functionality that would have allowed defendants to search channels and direct messages. The vendor also stated that defendants should have produced Slack messages in 24-hour threads to provide context for search term hits, a practice that it asserted was industry standard in 2019.

The court held that “[a]t a minimum, [defendant’s] decision to utilize an unpaid novice in Kazakhstan to conduct its search for Slack messages, rather than an experienced vendor in the United States at a modest cost, and defendants’ repeated failures to produce all required documents, was in reckless disregard of [their] duties under Rule 26 and to obey court orders.” The court, clearly exasperated by Defendants’ repeated discovery failures, granted plaintiff’s request for default judgment. Such a “drastic sanction” was necessary to “do justice in this case and deter others from engaging in similar extreme conduct.”

This case highlights the serious consequences that may befall litigants who are not prepared with sufficient technology and skills needed to collect, search, and produce Slack communications. Companies continue to embrace Slack and other collaboration platforms to conduct business, but they must consider how they will collect, process, search, and review Slack data in the event of litigation or regulatory inquiry. Counsel should expect that Slack data is discoverable, and courts will expect litigants to be able to produce Slack data and communications.

In addition to complying with the Federal Rules and court orders, counsel have an ethical duty to stay abreast of new technology. The Model Rules of Professional Conduct state that to maintain proper skill and competence, “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Model Rules of Pro. Conduct R. 1.1 cmt. 8 (Am. Bar Ass'n 2020). The vast majority of states have adopted a statement on technology competence.

Redgrave Is Here to Help

Redgrave LLP can help navigate the use of new technologies like Slack. Our team’s unique blend of legal and technical knowledge and experience can assist your organization with information governance and discovery strategies if dealing with Slack or other collaboration tools. We can also advise organizations on implementing proactive initiatives to get ahead of the curve, including the following initiatives and more:

- Reviewing and strengthening record retention, information security, acceptable use, and business communication policies.

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- Building a comprehensive overarching information governance program.
- Scoping and implementing legal holds and ensuring that preservation duties are satisfied while avoiding costly and disruptive over-preservation.
- Selecting and overseeing the work of eDiscovery vendors; determining and implementing the best search and review methodologies and technologies for the case, including the effective use of analytics and technology assisted review; and overseeing and managing document reviews.
- Defending against spoliation and other discovery sanctions disputes, as well as other motions practice and appellate briefing in state and federal courts addressing discovery, privilege, trade secrets, and privacy-related issues.

Please contact **Ben Barnes**, **Eliza Davis**, or **Britney Lewis** to discuss how Redgrave LLP's team of skilled professionals can assist your organization with information governance and eDiscovery strategies.

Redgrave LLP is one of the largest legal practices focused exclusively on addressing the legal challenges that arise at the intersection of the law and technology, including eDiscovery, information governance, and data privacy. We employ some of the most experienced professionals in the field. We provide clients with practical, innovative, and cost-effective solutions and serve Global and Fortune 500 companies across a diverse array of industries. We also work collaboratively with Am Law 100 law firms in roles ranging from co-counsel to consulting and testifying expert witnesses and have appeared in state and federal courts throughout the United States.