

5. An order from the U.S. District Court for the Western District of Washington declining to prohibit Defendants from using technology-assisted review (TAR) as part of its process to respond to Plaintiffs' discovery requests.

In *Garner v. Amazon.com, Inc.*, No. 21-CV-00750-RSL, 2023 WL 3568055 (W.D. Wash. May 19, 2023), U.S. District Judge Robert S. Lasnik addressed a motion to prevent the unilateral use of technology-assisted review.

This litigation concerned the alleged passive data collection and retention by Defendant's digital assistant, which Plaintiffs alleged violated various consumer protection and wiretapping laws. During discovery, Defendants notified Plaintiffs that they intended to use TAR tools to prepare their productions. TAR, Judge Lasnik explained, allows for predictive coding: "Reviewers typically code a set of documents as responsive or unresponsive to 'train' the TAR software, which then uses the coded documents to generate algorithms for reviewing all other documents in the selected universe for responsiveness." *Id.* at *1 n.2. Specifically, Defendants proposed the use of "predictive coding" to cull documents. *Id.* at *3. Defendants maintained that the large number of documents identified with Plaintiffs' terms necessitated further culling, but Plaintiffs categorically refused to discuss the use of TAR and moved to compel discovery consistent with the court's prior discovery orders and without the use of TAR. *Id.* at *1.

Judge Lasnik noted that the presumption in the Western District of Washington is that "technology-assisted review is a reasonable option for locating or filtering" electronically stored information (ESI). He explained that the "producing party" bears the burden of making "an initial, detailed proposal about the technology and methodologies it intends to use." *Id.* at *2. The producing party must do this first because it "is best situated to evaluate the various options for reviewing and producing its own ESI." The "requesting party" then can "intelligently respond and the parties can move toward an agreed protocol for the use of TAR," after consultation with its ESI discovery experts. However, Plaintiffs refused to discuss the use of TAR at all, "improperly short-circuit[ing] this process."

Plaintiffs argued that the court had already ordered production according to specific search terms, and thus it would be improper to cull the results further. But Judge Lasnik stated that this objection was counter to the ESI order entered previously in the case, which provided for "technology-aided methodologies" to be discussed among parties. Furthermore, Judge Lasnik rejected Plaintiffs' argument that agreement on search terms categorically barred the use of TAR: "[T]he use of search terms is not, standing alone, a bar to using technology to further refine the production." He then noted that Plaintiffs' objection to TAR was incoherent because Plaintiffs had not disputed that Defendants could conduct a responsiveness or privilege review of the two million documents — instead, they just objected to the use of "predictive coding" or other technological methods to complete that review. *Id.* at *3. Thus, Judge Lasnik denied Plaintiffs' motion to compel Defendants to proceed with discovery without the use of TAR.