



Magistrate Judge Peck's Search Term Wake-Up Call

This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").

Magistrate Judge Andrew Peck, *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903 (S.D.N.Y. Mar. 19, 2009)



The parties in *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903 (S.D.N.Y. Mar. 19, 2009) really ticked off Judge Andrew Peck. It does not take a major legal scholar to sense there will be an unhappy ending for someone whenever you see an opinion where a judge says, "You get the picture" or "This Opinion should serve as a wake-up call..."

William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., is a construction defect and delay case involving the Bronx County Hall of Justice. The parties were in a dispute over search terms involving a non-party's email production to separate project emails from

non-project emails.

One party proposed a few basic search terms to search the non-party's email system. The other party provided several thousand terms. The non-party only wanted to produce emails that related to the Bronx County Hall of Justice project. The Court noted this problem could have been avoided if the non-party had referenced the project name in the "re" line of the email messages. *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 9-10.

Magistrate Judge Andrew Peck was not a happy judge. The Court's frustration could be summed up with this telling quote:

This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails. *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 11.

The Court had to create a key word search methodology, "without adequate information from the parties." *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 10. The Court ordered the parties to use the "narrow" terms, variations of the parties names and the names of the personnel involved in the construction. *Id.*

Judge Peck issued this opinion as a wake up call to lawyers in his district. Judge Peck drove home the point citing both "Bow Tie" Magistrate Judges Paul Grimm and John M. Facciola's search term opinions from *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D.



Md. May 29, 2008); *United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) and *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008).

Judge Grimm's and Judge Facciola's opinions send a clear message that at a minimum determining search terms involves planning, quality assurance and the person performing the search terms can be subject expert qualifications under Federal Rule of Evidence 702. These issues were discussed in my posting [Discovery Production Workflow: Lessons from Magistrate Judges Facciola & Grimm](#)

Judge Peck had to wade into a potential quagmire he did not want to touch. Developing search terms is something judges probably want to avoid like the Black Death. Magistrate Judge Peck's wake-up call to lawyers on search terms speaks for itself and should not be ignored:

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar -- even those lawyers who did not come of age in the computer era -- understand this. *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 22903, 13-14 (S.D.N.Y. Mar. 19, 2009)