

E-Discovery Advisory: Courts Seek Sanity in the Development and Implementation of Search Terms

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Practitioners have long recognized that search term culling of electronic document databases consisting of millions of pages is often the only way to make production from these sources cost-effective and time-feasible.¹ Increasingly, courts also recognize the utility of search terms to retrieve responsive electronically stored information. However, with recognition comes scrutiny, and with scrutiny comes frustration.

One recent opinion from the U.S. District Court for the Southern District of New York highlights this budding judicial scrutiny of the use of search term culling as well as a commensurate level of frustration with litigants who allow e-discovery disputes to escalate to motion practice. *See William A. Gross Constr. Assocs., Inc. v. Am. Mfg. Mutual Ins. Co.*, Docket No. 07 Civ. 10639 (LAK)(AJP), 2009 WL 724954 at *1 (S.D.N.Y. March 19, 2009) (Peck, M.J.).

This case involved a dispute over alleged defects and delay in the construction of the Bronx County Hall of Justice. The Dormitory Authority of the State of New York (DASNY) was the “owner” of the project. Non-party Hill International was DASNY’s construction manager, and DASNY agreed to produce Hill’s project-related electronic documents to the other parties.

The issue before Judge Peck was how to separate Hill’s project-related emails from unrelated emails. The parties agreed on using search terms designed to filter out non-responsive emails but could not agree on the scope of these terms. Judge Peck chastised the parties for leaving the court in the “uncomfortable position” of having to craft a keyword search methodology for them without adequate information. According to Judge Peck,

This Opinion should serve as a wake-up call [...] about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms [...]. [...] 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.

While Judge Peck ultimately intervened to resolve this dispute, his desire to keep electronic discovery disputes out of his chambers is implicit here. In Judge Peck’s words, “Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of [electronic documents].”

As judges become more involved in e-discovery-related disputes, it is important that practitioners increase their focus on resolving these disputes before they end up in a judge’s lap.

In addition to minimizing judicial irritation, undertaking the following five steps in association with search term culling will minimize the likelihood of a dispute later in the production process:

1. Carefully craft appropriate search terms based on the subject matter of the case. A keyword search is particularly appropriate where the inquiry focuses on finding particular documents and the use of language is relatively predictable.
2. Seek input from the custodian(s) of the electronic documents as to the words and abbreviations they use.
3. Meet and confer with opposing counsel to discuss in advance the parameters of the search and the set of keywords to be used. Seek total agreement on search terms prior to application of those terms to an electronic document set.
4. Bear in mind that keyword searches do not reflect context. They can also miss documents containing a word that has the same meaning as the term used in the query but is not specified. Misspelled words may be missed in a keyword search.
5. Conduct periodic sampling to determine the validity of keywords and the accuracy of the search.

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About Mintz Levin's Electronic Discovery Practice Group

The litigation reaching court dockets today stems from disputes that have arisen in the age of e-mail and other electronic communications. Congress and the courts are drafting and amending rules and opinions concerning document review, non-disclosure agreements, waivers of privilege, and other questions specific to e-discovery.

Building on our experience as litigators, Mintz Levin's e-discovery team consults with clients who are preparing for specific litigation. We provide these services in cases where Mintz Levin is handling the litigation, or as an independent consultant, advising in-house lawyers or other outside counsel. In both situations, Mintz Levin's attorneys and dedicated IT professionals work with clients to tailor an effective and responsive process which encompasses extracting the appropriate documents, reviewing them for privilege and relevance, managing production, and responding to opposing counsel and the court in the event of a dispute. Our process is carefully tailored to each client's specific needs, addressing and finding appropriate solutions to concerns about costs and resources.

Endnotes

¹ Search term culling means using a set of keywords — simple words or word combinations — with or without Boolean and related operators to identify and extract only documents that contain those words or sets of words. These searches are completed automatically and have the potential

to dramatically reduce the number of documents that must be reviewed for production to an adversary.

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