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E-Discovery Practice Pointer: Consider Retaining an Expert For Help With Keyword Searches

February 15, 2012

Discovery of electronically stored information (ESI) continues to grow more critical, more complicated, and more expensive in commercial litigation. As the volume of ESI that litigants must wade through has expanded, parties have turned more and more to keyword searches to help them control their discovery costs. Rather than paying lawyers, paralegals, or discovery vendors to search every email for potentially responsive documents, keyword searches automate the process of taking a first pass through a party's ESI, providing a much smaller universe of documents for manual review. But in order for keyword searches to effectively limit the ultimate cost of discovery, it is important to consider spending a little more on the front end by retaining an expert to craft the keyword search terms and test their effectiveness. **Courts Have Sanctioned Parties For Faulty Keyword Searches** In Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 997 (D. Az. 2011), the court awarded discovery expenses and attorney's fees as a sanction for a bad keyword search. A condominium buyer sued his title and escrow company and sought ESI from the defendant in discovery. The defendant left to in-house counsel the task of arranging keyword searches to obtain potentially responsive ESI. Unfortunately, in-house counsel chose to use only the plaintiff's full name and escrow number as search terms. Not surprisingly, these searches returned no documents. The court concluded that these narrow search "terms were not calculated to capture communications to or from [defendant's key player] as sought in the document request." After the court ordered a new search with better keywords, the defendant dumped more than 4,000 responsive documents returned by the new keywords on plaintiff three days before the discovery deadline and after key depositions had been completed. "Given that thousands of responsive documents were discovered once a proper search was performed," the court concluded that the discovery violation was willful and awarded sanctions. **Courts Allow Broader Searches Unless Given Strong Evidence Supporting Narrower Terms** Parties often dispute the breadth of the search terms they will be required to use. Custom Hardware Engineering & Consulting, Inc. v. Dowell, Case No. 4:10VC00653ERW, 2012 WL 10496 (E.D. Mo. Jan. 3, 2012), shows that unless litigants can support their position with good evidence that requested search terms are too broad, courts are likely to allow broader and more

expensive searches. The Dowell court recognized the "well-known limitations and risks associated with" keyword searches. Because keyword searches "identify all documents containing a specific term regardless of context" they may "capture many documents irrelevant to the user's query, but at the same time exclude common or inadvertently misspelled instances of the term." Id. at * 3 (internal quotations and citations omitted). The Dowell defendant urged that some of the plaintiff's broad proposed search terms would probably return only irrelevant documents. But because "[d]efendant's objection is a conclusory statement, stated without any argumentation or other support," the court rejected the argument, holding that "whether information is discoverable under Rule 26(b) does not turn on the existence of an exact match in capitalization and phrasing." Id. at *4.

Some Courts Have Suggested That Parties Must Support Their Search Term Arguments With Expert Testimony Given the technical nature of crafting an effective keyword search, some courts have suggested that expert testimony may actually be required if the parties dispute what search terms and methodologies are appropriate. The influential opinion in Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008), for example, faulted the defendant for allowing a party and its attorney to craft search terms and failing to provide the court any information "regarding their qualifications for designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review. Ultimately, the court concluded that the defendant had waived its attorney-client privilege by failing to take reasonable precautions when it attempted to use its faulty keyword search to conduct a privilege review before producing its documents. The court concluded that a prudent search would have involved an expert to design search terms and test their effectiveness through sampling: "Use of search and information retrieval methodology for the purpose of identifying and withholding privileged or work-product protected information from production, requires the utmost care....Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented." Id. at 262. While the Victor Stanley court was careful to note that it did not intend to lay down a bright line rule requiring the use of experts, id. at n. 10, other courts have done just that. In Culler v. Shinseki, Case No. 3:09-0305, 2011 WL 3795009 (M.D. Pa. Aug. 26, 2011), the court denied plaintiff's motion for discovery sanctions because the plaintiff had not supplied expert testimony to show that the defendant's keyword search methodology was faulty. "Challenges to particular search methodologies of ESI requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence. Generally, neither lawyers nor judges are qualified to opine that certain search terms or files are more or less likely to produce information than those keywords or data actually used or reviewed. Since the plaintiff has failed to present any expert testimony by affidavit or otherwise which would allow the court to conclude that the defendant's search was inadequate, the plaintiff's motion will be denied on this basis." Id. at * 8 (internal quotations and citations omitted). **Practice Pointer** While parties must always balance the cost of their discovery

efforts with the benefits of more robust procedures, it is important to keep these recent developments in mind when deciding whether to retain an expert to design and robustly test your keyword search procedures. These types of disputes can often be avoided by reaching agreement with the opposition on the search terms and methodologies to be used. And for some cases, the amount of risk presented by the case itself or the scope of your ESI will not justify the additional cost. But if a dispute is likely and the potential impact of losing that dispute is substantial, retaining an expert is by far the safer way to go.