

Tip of the Month



The Use of Search Terms

Scenario

A large corporation has been sued on behalf of a putative nationwide class. As discovery begins, in-house counsel is concerned about the cost and time involved in collecting, reviewing and producing the relevant emails, shared documents and other electronically stored information (ESI) throughout departments and across offices. As a way of containing these costs, in-house counsel is considering applying targeted keyword searches to the company's ESI to narrow the scope of the document collection, review and production.

Why Use Search Terms?

Keyword searches apply a set of designed queries against ESI to identify documents that contain the key words or concepts. This enables parties to perform the difficult, and frequently expensive, task of separating potentially relevant materials from irrelevant ones using an automated, time-saving process. Courts have traditionally accepted keyword searches as a means of evaluating large ESI collections. Accordingly, keyword searches are among the most common automated tools for fulfilling the obligation to conduct a diligent search.

Risks and Benefits of Using Search Terms

Keyword Searches May Be Discoverable under Some Circumstances

Parties often work with their in-house or external counsel to formulate keyword searches. As a result, the keywords selected may also incorporate attorney opinion work product and, therefore, be shielded from disclosure by the attorney client privilege and/or the work product doctrine. However, some courts have taken the position that the fact that keywords were used to collect the documents is not, by itself, protected under either the attorney-client privilege or the work product doctrine. There are even courts that have held that the keywords used to conduct an electronic search may be discoverable despite the fact that they may reflect attorneys' opinions about what may be relevant in the case. These courts have concluded that keywords relate to the facts contained in the documents to which they are applied and do not believe that the selection of keywords reflect an attorney's legal advice or mental impressions. Because a keyword search used during pre-trial discovery may be discoverable, parties can reduce the risk of disclosure of attorney mental impressions by selecting keywords, and crafting searches, in a way that does not disclose overarching case theories or other attorney opinion work product.

Cooperation Can Cut Costs

In some circumstances, it may be beneficial to cooperate with the other side and jointly agree early in the discovery process on what keywords to use and how to use them. First, some courts require the parties to cooperate, or at least meet and confer about search methods.

Second, where both parties possess a considerable amount of ESI, both have strong incentives to streamline ESI production through keyword searching. But even where there is an imbalance of ESI, cooperation in choosing keywords may be possible. An agreement on keywords and how they will be used can reduce the producing party's ESI-related discovery costs while giving the requesting party input as to how ESI will be collected without the substantial time and expense of contentious meet-and-confers and motion practice. Even if the parties are unable to reach a full agreement concerning ESI production, partially agreeing on which keyword terms will be used, and how the producing party will use them, may streamline the discovery process.

Third, as one court has framed it, "there is such a thing as discovery karma[.]" *Lee v. Max Int'l LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011). This is particularly true for cooperative efforts toward reaching ESI-agreements early in the litigation, where doing so can improve a party's position in future discovery disputes. Agreements concerning keyword searches can later be used as a defense against claims that relevant evidence was not produced. In some instances, courts have denied motions to compel production of additional ESI where the parties had previously agreed on what keywords to use and how those keywords were to be applied. Further, while courts have the authority to shift some or all of the costs of ESI production from the producing party to the party demanding the material, many courts are reluctant to grant such requests when the party seeking the cost shifting did not first make an effort to control its ESI discovery costs through ESI-related agreements with opposing parties early in the litigation.

Cooperation Offers Control

While courts are becoming more sophisticated in dealing with ESI discovery disputes, no court or requesting party will know the documents better than the party with the ESI. Using agreed upon keyword searches means that the keywords used to collect ESI are devised, at least in part, by those in the best position to appropriately tailor them to fit the documents, rather than by a judge or opposing counsel with little way of knowing that the difference between adding or subtracting even a few terms could lead to tens of thousands of additional documents that need to be reviewed.

Conclusion

The use of appropriate search methodology can be invaluable in managing the costs and time involved in collecting, reviewing and producing the significant volumes of data that come into play with ESI. Courts are beginning to encourage parties to reach early agreement on search terms, date ranges, key players and the like. Thus, the use of search terminology or advanced search technology is an important part of the early discussions relating to ESI. Parties may be able to agree on appropriate search methods, including key terms, key concepts and date limitations, and craft search protocols and procedures that allow for the possibility of refining or expanding those terms as discovery progresses to ensure that they are reasonably tailored to yield responsive information.

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