

Judge Issues A “Wake Up Call” on the Use of Search in E-Discovery

by Deidre Paknad, President and CEO, PSS Systems

Yet another judge with e-discovery expertise is warning litigants about reliance on search in e-discovery. Magistrate Judge Peck from the Southern District of New York in an opinion dated March 19, 2009, issues what he terms “a wake up call” about “the need for careful thought, quality control, testing and cooperation with opposing counsel in designing search terms or ‘key-words’ to be used to produce emails or other electronically stored information”.

While it is tempting to use search as a routine method for preserving, collecting, and producing data in e-discovery, it is critical to balance efficiency and efficacy. As Judge Peck points out in *William A. Gross Construction Associates v. American Manufacturers Mutual Insurance*, he is not the first judge to warn litigants that search queries are difficult to design and require cooperation – even consent – from opposing counsel. Moreover, the query and its result set must be understandable by those that rely upon it and explained to the Court. The implications for risk-averse litigants are:

Query or term-based search for preservation may not be prudent or viable.

Using or relying on search to identify potentially relevant data is fraught with risk. First, cooperation from opposing counsel is highly unlikely at the opening stages of litigation, which leaves in-house counsel with the burden of determining what vocabulary to include and exclude in any search query or results. This is particularly challenging at early stage before counsel is familiar with the issue in dispute, the body of information available in the company and the adversary’s position.

Second, the risk in a failed preservation query or search is loss of evidence – a far worse consequence than delayed production and one likely to result in more negative judicial response.



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Take-Aways

- 1. Search for preservation is a risky proposition** given the lack of insight counsel has when the hold must be effected and the risk of permanent loss of data from too-narrow queries. As such, it is not the standard of practice.
- 2. Search in collection requires careful query consideration**, agreement from opposing counsel on the queries and terms and a robust, demonstrable legal hold process. Obtaining agreement may cost more than the incremental benefits of filtered collection when the parties’ incentives are not aligned and counsel may be reluctant to open the necessary discussion on collection tools, targets, and methodology to obtain that agreement.
- 3. Cost-based reductions in collection scope can provide far greater discovery cost savings** by eliminating collection, processing and review of custodian data where costs exceed the merits.
- 4. In production, agreement on queries prior is increasingly required** and may be more cost efficient than disputes and rework. In matters with substantial messaging and unstructured data or with complex, colloquial topics and terms, the use of experts and sampling may be the most efficacious and efficient approach.
- 5. If you can’t explain it, it isn’t reliable.** If it isn’t documented, it didn’t happen. Robust, demonstrable preservation is the risk “backstop” and collection by custodian, data source and date range continue to be the standards of practice. The ability to articulate preservation, collection, and production methodology when tested is essential.
- 6. Active, careful query design and upfront communication with the Court are essential**, especially for litigants in New York, Maryland, and DC as well as in those districts where magistrate judges participate in Sedona, Georgetown and other forums where Judges Peck, Facciola, and Grimm are active participants.

Query or term-based search for collection may not be sufficient and the preservation methodology is an important consideration.

While it may seem very efficient, narrowing the scope of data collection by keywords or other queries also presents challenges and risk. Negotiating terms with opposing counsel helps minimize a great deal of these risks – but the negotiation may incur significant legal expense and the motivations of the parties may not be well aligned to quickly reach agreement, essentially negating any efficiencies of search as a solution.

To take Judges Peck, Facciola, and Grimm more literally, the expertise and process needed to even design the query or terms are additional time and expense. Judge Grimm, for one, doesn't have confidence in in-house counsel's ability to design such queries without specific expertise. With corporate acronym "lingo" and as Twitter and text vocabulary pervade business dialogue, his position is easy to see. With a robust hold in place as a foundation, iterative search-based collections combined with clear communications with opposing counsel may be feasible and prudent; corporate counsel and their attorneys will need to decide how much they want to expose in the discussions about their collection methodology and whether the benefits of search in collection outweigh the additional legal fees and exposure that accompany its use.

A more cost-efficient process for collection is to carefully consider the cost of collection, processing and review per custodian, segment and iterate through custodians by priority as negotiated with opposing counsel based on cost, and to consistently negotiate the smallest possible scope of collection and production based on estimated costs. Carefully managing and negotiating the cost/benefits of collection by custodian greatly reduces discovery costs (far more than search) because it eliminates production where the costs exceeded the merits.

Search for production requires expertise and cooperation.

Ironically, the opinions and "wake up calls" from the judges really pivot around the use of search in production of ESI. Unlike preservation and collection where information may be permanently lost or completely overlooked, the worst case scenario for mishandling production is simply late production and higher legal fees. Given the extent to which these magistrate judges have opined on the

hazards and standards for search in production, it's wise to carefully consider the lens they would apply to its use in the earlier stages of e-discovery!

The judges' perspective and the increasingly common standard of practice is to reach agreement with opposing counsel and Courts on the terms and queries to be used prior to starting the work effort to reduce expense, error, and re-work. Negotiating smaller sets of custodians based on cost/merit evaluation is equally important for an efficient process.

About CGOC

CGOC is a community of corporate practitioners in retention, preservation and privacy. Its charter is to create a forum in which legal and compliance executives can get the insight, interaction, and information they need to make good business decisions. Established in 2004, CGOC provides corporate litigation, discovery, and records management leaders and practitioners with educational seminars, benchmarking surveys, group workshops, an annual Summit and retreat, white papers by expert faculty, a professional networking web site, and regional working groups. www.cgoc.com

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Deidre leads PSS Systems and is the innovator behind the company's visionary Atlas legal holds and retention management software. She founded the CGOC in early 2004, is a member of the Sedona legal holds and legacy data teams, and is a recognized subject matter expert on legal holds and enterprise retention management. She is a seasoned software entrepreneur and executive.

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