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Judge Issues a "Wake-Up Call" to New York Lawyers: When It Comes to Search Terms, Play Nice and Plan Ahead

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A recent opinion by U.S. Magistrate Judge Andrew Peck leaves no question that heightened judicial standards relating to electronic discovery, which have been developing in federal jurisdictions across the country, also apply in the Southern District of New York. In *William A. Gross Construction Associates v. American Manufacturers Mutual Insurance Co.*, Judge Peck issued a "wake-up" call to any lawyers who have continued to rely on discovery practices that pre-date the digital age.[1] Indeed, citing repeatedly to two recent decisions, *Victor Stanley, Inc. v. Creative Pipe, Inc.*[2] and *United States v. O'Keefe*[3] – both of which set a high standard for identifying potentially relevant electronically stored information ("ESI") – Judge Peck made clear that litigators in the 21st century must give "careful thought" to crafting searches for ESI, must engage in cooperative discourse with opposing counsel on that subject, and must take steps to ensure that the results of such searches are accurate.[4] In short, the days of "lawyers designing keyword searches in the dark, by the seat of the pants" appear to be over.[5]

Over the last several years, as pens, typewriters, and paper files have largely given way to computers, courts have increasingly focused on the techniques employed by parties to identify potentially relevant ESI. Lawyers have long relied on "keyword searching" to exclude, from large sets of data, ESI that is likely irrelevant. Search terms, which are often selected by counsel, are applied electronically to a universe of electronic material, leaving only a smaller set of data (the "hits") to review for responsiveness. In turn, only a subset of this reduced data set typically ends up produced. It stands to reason, then, as courts have noted, that flawed search terms can yield incomplete productions.[6] Against this backdrop, Judge Peck has urged counsel engaged in designing and utilizing searches to "carefully craft the appropriate keywords" and to ensure "quality control."[7]

The Facts In Gross

As is true regarding many notable e-discovery opinions, lawyers might not have predicted that the dispute in *Gross*, relating to alleged defects and delay in the construction of the Bronx County Hall of Justice, would lead to a decision highlighting key e-discovery principles and standards. But issues pertaining to electronic discovery have now crept into (and in some instances, dominated) all types of cases. The seminal *Zubulake* opinions by U.S. District Judge Shira A. Scheindlin, for example – which closely considered preservation, data sampling, and cost-shifting matters, among others, and which presaged the amendment of the Federal Rules of Civil Procedure in 2006 – emerged from a "relatively routine employment discrimination dispute."[8]

The documents and ESI of a non-party, Hill International ("Hill"), were at the center of the e-discovery dispute in Gross. The owner of the project, the Dormitory Authority of the State of New York ("DASNY") had agreed to produce the responsive e-mails of Hill, DASNY's construction manager. Judge Peck was faced with determining the proper manner of identifying such e-mails.

DASNY and the other parties disagreed sharply regarding the nature and number of search terms to be applied. DASNY appears to have proposed a limited list, consisting of the names of the parties to the action and a few other terms (such as "Hall of Justice" and "Bronx but not Zoo").

The other parties proposed "thousands" more terms, including "build," "change order" and "electrical," which conceivably could appear in material relating to any number of construction projects.[9] Accordingly, DASNY argued, and the Court agreed, that a search based on those terms could potentially result in the collection of all of Hill's e-mails. Meanwhile, Hill's "only contribution" to the search-term debate consisted of agreeing that DASNY's proposed terms were "probably too narrow," and that "the other parties' terms were overbroad."[10] Even though Hill "was in the best position to explain to the parties and the Court what nomenclature its employees used in emails," Hill remained silent on this issue.[11] As a result, the Court was "left . . . in the uncomfortable position of having to craft the search methodology for the parties itself."[12]

Judge Peck's Analysis

Evidently frustrated with the sub-par search practices of many attorneys who have appeared before him, Judge Peck declared this case to be "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."[13] Judge Peck further observed: "Prior decisions from Magistrate Judges in the Baltimore-Washington Beltway have warned counsel of this problem, but the message has not gotten through to the Bar in this District."[14] From the excerpts of those "prior decisions" that appear in Judge Peck's opinion, three principal guidelines for conducting searches emerge.

First, consider involving, or at least consulting, "persons qualified to design effective search methodology."[15] Whether "search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics."[16] Accordingly, "for lawyers and judges to dare to opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence."[17] Although the *Gross* Court stopped short of requiring expert testimony, it held that the law mandates more than a mere "lawyer's guesses, without client input."[18] In other words, lawyers should, "at a minimum," incorporate "input from the ESI's custodians as to the words and abbreviations they use."[19]

Second, test "the implementation of the methodology selected" for "quality assurance."[20] Counsel are obligated to "assure accuracy in retrieval and elimination of 'false positives.'"[21]

Third, 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."[22] "Vague" descriptions of the "keywords used . . . , how they were developed, how the search was conducted, and what quality controls were employed to assess their reliability and accuracy" may not suffice.[23]

Other Lessons from the Gross Case

Consult Highly Regarded Outside Sources

Both the *Victor Stanley* and *O'Keefe* opinions relied upon by Judge Peck cite to *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery* (available at www.TheSedonaConference.org), which outlines best practices for search methodology. The working group associated with the Sedona Conference, a non-profit research and educational institute, consists of judges, attorneys and subject matter experts who meet, discuss, and publish on issues relating to electronic discovery. Federal judges are now referring with increasing regularity to the e-discovery guidelines set forth in various Sedona Conference publications.[24] Litigators who want to stay ahead of the curve should consult the Sedona Conference publications when designing searches for ESI and planning other phases of the e-discovery process.

Don't Be Adversarial Just For Adversity's Sake

In recent years, in addressing issues relating to search methodology, courts have left no doubt that the adversarial process must sometimes give way to cooperation. Although Judge Peck did not emphasize the need for joint efforts until the conclusion of his opinion, *Gross* suggests that the entire e-discovery process should now be marked by cooperation.[25] This in itself likely amounts to a "wake up" call to the generations of lawyers accustomed to battling their way through discovery requests, in matters big and small, in an effort to gain or preserve some tactical advantage. In a wired world, discovery cannot be conducted this way.[26]

Judge Peck's statement that he "strongly endorses" *The Sedona Conference Cooperation Proclamation* (available at www.TheSedonaConference.org) is fully consistent with this view. The *Cooperation* Proclamation, which has been signed by judges around the country (including the Southern District of New York's own Judges Frank Maas, Shira Scheindlin, Lisa Margaret Smith, Richard J. Sullivan, Judge Peck himself, and Judge Ira B. Warshawsky of the New York State Supreme Court, Commercial Division), calls for civility among counsel engaged in discovery. As increasing numbers of judges sign the *Cooperation Proclamation*, we can expect a corresponding increase in decisions, like *Gross,* that chasten attorneys who persist in playing outmoded forms of hardball.

Note to Old Dogs: Learn New Tricks

Under *Gross*, *all* lawyers practicing in the Southern District must be familiar with the evolving expectations with respect to electronic discovery, "even those . . . who did not come of age in the computer era."[27] If Judge Peck's decision is any indication, judges are losing patience with protestations based on purported computer illiteracy or advancing years. Thus, members of the Bar would be well-advised to stay abreast of developments in the law governing the design and use of search methodology.

At least one major effort is underway to create a protocol for legal search methodology that is grounded in research and science: a project called TREC (Text Retrieval Conference) Legal Track, which began in 2006 and is co-sponsored by the U.S. Department of Commerce's National Institute of Standards and Technology and sub-agencies of the U.S. Office of the Director of National Intelligence. The results of the TREC Legal Track study may provide the very clarity, based on facts and figures, that this still-developing area of the law needs.

Conclusion

Judge Peck has drawn a proverbial line in the sand as to the behavior that is appropriate and expected from counsel when searching for potentially relevant ESI. His decision in *Gross* strongly suggests that New York litigators should begin brushing up on the finer points of proper searching techniques.

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[1] No. 07 Civ. 10639, 2009 BL 56964 (S.D.N.Y. Mar. 19, 2009).
[2] 2008 BL 117051 (D. Md. May 29, 2008) (Grimm, M.J.).
[3] 537 F. Supp. 2d. 14 (D.D.C. 2008) (Facciola, M.J.).

[4] *Gross*, 2009 BL 56964 at 3-4.
[5] *Id.* at 3.
[6] *See, e.g., SEC v. Collins & Aikman Corp*., No. 07 Civ. 2419, 2009 BL 5648 at 17 (S.D.N.Y. Jan. 13, 2009) (observing that a party "could search the document databases using appropriate search terms, but the inaccuracy of such searches is by now relatively well known"); *see also* Jason R. Baron, *et al*., *TREC-2006 Legal Track Overview* (reporting on study demonstrating that Boolean searches, as opposed to other more complex and costly techniques, located only 57% of known relevant documents).
[7] *Gross*, 2009 BL 56964 at 5.
[8] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004).
[9] *Gross*, 2009 BL 56964 at 2.
[10] *Id*.
[11] *Id*. at 2-3.
[12] *Id.* at 3.
[13] *Id.* at 3.
[14] *Id.* at 3.
[15] *Id.* (quoting *Victor Stanley*, 2008 BL 117051 at 26 ("proper selection and implementation obviously involves technical, if not scientific knowledge")).
[16] *Id.* at 4 (quoting *O'Keefe*, 537 F. Supp. 2d at 24).
[17] *Id.* (quoting *O'Keefe*, 537 F. Supp. 2d at 24).
[18] *Id.* at n.3.
[19] *Id.* at 5.
[20] *Id.* at 4 (quoting *Victor Stanley*, 2008 BL 117051 at 26).
[21] *Id.* at 5; *see also Victor Stanley*, 2008 BL 117051 at 11 (noting that party who used keyword searches to identify privileged documents did "not assert that any sampling was done . . . to see if the search results were reliable. Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive . . . .").
[22] *Gross*, 2009 BL 56964 at 4 (quoting *Victor Stanley*, 2008 BL 117051 at 26).
[23] *Victor Stanley*, 2008 BL 117051 at 11. In the end, the Court ruled that, in addition to DASNY's proposed terms, the search should include "the names of the parties' personnel involved in the Bronx Courthouse construction," including "variations on and abbreviations of party names." *Gross*, 2009 BL 56964 at 3. In so doing, the Court "acknowledge[d] . . . that this result" was "less than perfect," and that there was "a risk that as information later comes out at depositions of the Hill employees, another search may have to be done." *Id.* at 5.
[24] *See, e.g., Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec*., 255 F.R.D. 350, 355 (S.D.N.Y. 2008) ("Since 2003, the Conference has published a number of documents concerning ESI, including the *Sedona Principles*. Courts have found the *Sedona Principles* instructive with respect to electronic discovery issues."); *see also Phillip M. Adams & Assocs. v. Dell, Inc*., No. 1:05-CV-64 (D. Utah Mar. 30, 2009) (citing *The Sedona Guidelines: Best Practices Guidelines & Commentary for Managing Information & Records in the Electronic Age*, Nov. 2007 version); *Williams v. Sprint/United Mgmt. Co*., 230 F.R.D. 640, 652 (D. Kan. 2005) (relying on various Sedona Conference publications and praising them as "particularly instructive").
[25] *Gross*, 2009 BL 56964 at 5 ("Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.").
[26] *Id*. ("The best solution in the entire area of electronic discovery is cooperation among counsel.").
[27] *Gross,* 2009 BL 56964 at 5.