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Keyword mediation helps expedite e-discovery

By Daniel B. Garrie and Gail Andler

Selecting and using keywords to search large volumes of electronically stored information is often an unavoidable step in the process of electronic discovery. When parties and courts do so without technical guidance, it can become a contentious and highly technical process. An efficient alternative is to involve a neutral mediator with a thorough understanding of the governing law and the technology systems at issue. This alternative can benefit both parties, as well as the court, because a mediator can expedite an agreement in a technically efficient manner, while the parties maintain control over the keyword selection process. The article addresses some of the challenges of keyword selection and provides guidance on selecting a mediator who can efficiently guide the parties through the process.

Usually, extracting electronically stored information requires counsel or the court to put together a set of search terms and apply these terms to the repositories at issue. Although actual searches have become more sophisticated with predictive coding, disputes over search methodology often result in the court ultimately determining how the search will be conducted, generally following input from the parties' experts. For example, in *William A. Gross Construction Associate, Inc. v. American Manufacturers Mutual Insurance Company*, the plaintiff's proposed keyword search was too narrow and the defendant's proposed keyword search that was too broad. This left the court in the "uncomfortable position" of crafting and imposing its own search methodology for the parties. This result, a court-crafted keyword search, is often undesirable, as courts are rarely knowledgeable in the technology at play, which can lead to inefficiencies in the search process.

The problem confronting counsel is two-fold. First, counsel must understand the technology on which his or her client's information is stored. Absent an understanding of the technology, issuing a list of keywords, no matter how thoughtful, is unlikely to efficiently locate responsive information. The savvy practitioner comes prepared, having already consulted with the client's information technology department to gain the requisite basic understanding of the client's IT systems and where the data at issue sits respective to those systems. Even then, however, most attorneys lack the understanding of the technology necessary to fully grasp the technical boundaries and potential pitfalls of any search on these systems.

Second, e-discovery requires that counsel's understanding of the case and the technology be shared with opposing counsel. Doing so, however, requires a level of cooperation and candor that may seem foreign to most litigators in the context of an adversarial system of justice. However, in the context of keyword selection, cooperation is critical as both sides often stand to lose from failing to work together to move discovery forward. In spite of this, sometimes a party will attempt to use this stage of discovery to stall the litigation, though the court can be called upon to rein in such practices.

In response to these challenges, e-discovery has become a full-fledged part of the adversarial process, complete with motion practice, gamesmanship and "hide the ball" litigation tactics. Many courts, concerned with the disclosure of facts, will lean in the direction of ordering additional or far-reaching discovery, trusting that this is the best method for ferreting out the truth or encouraging the parties to try to settle their dispute. This approach to solving keyword selection problems, however, is costly and often ineffective.

Consequently, rather than arguing to the court and each other about the cost of performing the required searches, both parties can benefit substantially by either agreeing or petitioning the judge to appoint a mediator that knows both the law and the technology. A skilled mediator can ensure appropriate documents are produced at a reasonable price respective to the underlying issue. But courts and parties must be careful in choosing a mediator. Sometimes mediators know the particular business area in dispute but have no more technological aptitude or experience than the parties or the court. For example, if the parties are in an insurance-related dispute, organizations such as ARIAS have a stable of potential mediators and arbitrators with years of impressive, insurance-related experience available for choosing. Few of them, however, would likely know the differences involved in recovering data from an AS400 or an OS390W.

Because most mediators are not technologists, this knowledge deficit works to the detriment of both parties and negates most or all of the value that a mediator or discovery special master can deliver. If a mediator does not understand the technology, the litigants will still have to provide independent, technical, expert reports supporting any objection to the scope of discovery, or have the mediator retain a consulting technical expert of its own. Thus, unless the proper mediator is chosen, the parties once again will find themselves in a situation where the cost of production outweighs the limited value resulting from the execution of a poorly designed discovery search. By agreeing on a mediator that is skilled in both the technology and the law, however, the parties will save time and money, and will likely reach a more equitable result.

This alternative can benefit both parties, as well as the court, because a mediator can expedite an agreement in a technically efficient manner, while the parties maintain control over the keyword selection process.

A mediator with a firm grasp of the technology and the legal substance of the issues in dispute can help construct keyword sets and otherwise oversee discovery in a way that properly balances the costs and benefits of that discovery. The guiding light that a skilled lawyer with IT expertise brings to the keyword selection process benefits everyone, including the parties, their attorneys, the court, and even third parties or nonparties who may be custodians of the electronically stored information.


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