Over the next several weeks the *E-Discovery Alert* will focus on the strategy and tactics for handling sixteen specific ESI issues throughout pretrial discovery. Whether it is a "meet and confer" or request for production these are the critical issues to focus in requesting or producing ESI. The legal issue excerpts will be derived from the
Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics
(2008-2009). The
Guide
is cross-referenced and hyperlinked with the
Arkfeld on Electronic Discovery and Evidence
(2nd ed.) treatise and part of the CD-ROM.

ISSUE: IS IT IMPORTANT TO FORMULATE A SEARCH METHODOLOGY AND PROTOCOL FOR ESI?

RESPONSE: YES

Resources:

Excerpt from *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics*
(2008-2009),
§ 3.7, *Search Methodology and Protocol:*

A.   Overview
B.   Limitations
C.   Search Method Certification
D.   Suggested Search Protocol
E.   Requesting Party Strategy
F.   Producing Party Strategy
G.   Checklist

A.   Overview

The search and production protocol used by the producing party to identify, preserve, collect and process ESI is important in determining whether the entire relevant data population was disclosed to the requesting party. For the producing party, the production protocol for establishing a proper collection will lessen the spoliation risk inherent in e-discovery cases and provide defensibility for the data population.

The search protocol is one of the most critical steps in the production of ESI. Issues, such as which computer devices and media were searched in acquiring the data, what search terms

were utilized to gather the evidence and what filtering rules were in effect, can have a profound effect on the resulting data population that is disclosed. Also, special attention should be given to the producing party's search software capabilities and limitations since it may unreasonably limit the data population. There are many different types of searches that can be used on a data population including keyword, Boolean, conceptual, clustering and other types that determine what information is retrieved and how it is organized.

How can you be sure that your opponent has made a good-faith effort to search for electronic or paper documents that you requested? This is a difficult question because the opposing counsel may not have an information technology background and will have to rely on certifications from their clients or others. Usually the requesting party will not contest the search results because of the immense volume of information to be searched, different techniques used to search the information, lack of standards by the courts and the likelihood that the courts will not question the producing party's methods. However, the courts have recently taken a more active role in validating the search efforts of the producing party. *See*, § 5.4, *Searching ES*I and § 7.7(I), *Search Type, Protocol and Certification*
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B. Limitations

Some of the most common limitations for keyword searching are discussed below.

First, because of the lack of standardized terms used in conversations and documents, it is doubtful that you will retrieve all relevant documents to your search terms. The formulation of a query or keywords is difficult if the keywords have numerous synonyms, can be described in several different ways or ideas can be expressed in numerous methods.

Second, the search query may locate ambiguous uses of the search words. It may retrieve "hits" of the words that are not relevant to your inquiry.

Third, these limitations have resulted in what is commonly termed "false confidence syndrome."

Fourth, one of the most important things to remember is that the keyword will retrieve only those documents containing the keyword.

The type of search conducted on ESI will have a significant effect as to what ESI is identified and retrieved for review. Special attention should be given to the producing party's search protocol since it may unreasonably limit the data population.

C. Search Method Certification

If there are problems in the production of ESI, the courts generally will require a certification of the data collection and production steps. This certification should set forth what type of identification, collection and production protocol was implemented to gather your requested data. Such certification, preferably from an independent third party, will assist in determining whether you received the requested data, and may also disclose whether the opposing party

preserved the data on a timely basis and used proper data collection techniques.

D.⬜⬜⬜ Suggested Search Protocol

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E.⬜⬜⬜ Requesting Party Strategy

• Retain a computer or linguistic expert to assist in formulating search terms.
• Ensure that all ESI media, devices and locations are searched, including third party ESI storage.
• Meet and confer on a suggested search protocol regarding such items as search terms and software to use to search ESI.
• Do not agree to a set number of search terms.
• Do not agree to only one search. The search protocol is an iterative process and may require several meet and confers regarding the search and ESI storage areas.

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F.⬜⬜⬜ Producing Party Strategy

• Try to negotiate an agreement with the requesting party for a set number of search terms. This will limit subsequent objections, if relevant ESI is missing from the retrieved data population.
• Before conducting searches on your electronic evidence, work with your linguistic specialist, forensic specialist, client and others to create a list of pertinent keyword search strings related to names, dates and terms. As you perform the searches, you will locate e-mail messages, URLs, word processing documents and other data files relevant to your keyword. The results of your searches will show fact patterns that may require additional investigation and discovery.
• In order to actually collect the data you may decide to use your client's staff or law firm personnel. Both come with certain risks, since the search methodology may come under attack by the opposing counsel and your staff may be subject to depositions. Computer forensic experts and e-discovery consultants are available to assist in this area.

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G.⬜⬜⬜ Checklist

Search Protocol

[ ] Contact opposing counsel to negotiate a search protocol.
[ ] Has the search protocol been limited to the "claims or defenses" or the "subject matter" of the case?
[ ] Negotiate terms of protocol including, but not limited to:

   * Search terms (keyword or concept searching, etc.)

* Computer devices and media
* Filtering rules
* Deduplication criteria

* * *

Cross-references

- § 1.2(I), *Searching Electronic Information - Costs*
- § 1.3(C), *Costs*
- § 4.7(E), *Payment of Costs*
- § 5.2(A), *Comparison of Managing ESI in an Electronic vs. Paper Format*
- § 5.2(A)(1), *Time and Cost Savings*
- § 5.6, *ESI Processing Stages - Technology and Cost Issues*
- § 7.3(G)(3), *Cost Allocation - 26(b)(2)(iii)*
- § 7.12, *Taxation of Costs*

* * * denotes content that has been omitted