

## **Electronic Discovery Requires Cooperation between Opposing Counsel**

In a construction defect case between a contractor and owner, the owner agreed to produce electronically stored information (ESI), including e-mails of the construction manager for the project who was not a party to the lawsuit. The parties could not agree to what “keyword” search terms were appropriate for conducting the electronic discovery. The owner proposed just a few keyword terms. The plaintiff, in contrast, proposed thousands of search terms that would have caused the CM to turn over its entire email data base covering all of its projects worldwide instead of limiting the search to the individual project. A magistrate judge for the United States District Court for the Southern District of New York had to step in to prevent unduly burdensome discovery by admonishing counsel in the action to cooperate with each other to “carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of false positives.”

In *William A. Gross Construction Associates v. American Manufacturers Mutual Insurance Company*, 256 F.R.D. 134 ( U.S. S.D. New York , 2009), the case involved a multi-million dollar dispute over alleged defects and delay in the construction of the Bronx County Hall of Justice. The project owner was the Dormitory Authority of the State of New York (DASNY). The owner’s construction manager was Hill International. The owner agreed to produce Hill’s email related to the project and proposed a number of keywords to be used in search the Hill email data base to produce the documents. Opposing counsel, however, according to the court “requested the use of thousands of additional search terms, emphasizing the construction issues they were involved in, such as “sidewalk,” “change order,” “driveway,” “access,” “alarm,” “budget,” “build”, “claim,” “delay,” “elevator,” “electrical,” - you get the picture.”

This use of such extensive keywords, said the court, “would require production of the entire Hill email database, since Hill’s business is construction management, and those terms would be used for any construction project.” The court “found itself in the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information from the parties (and Hill).” With obvious frustration at the situation, the court stated:

“This case is 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.”

While keyword searches are recognized by the court as appropriate and helpful for ESI search and retrieval, “the proper selection and implementation obviously, involves technical, if not scientific knowledge.” Quoting from another U.S. Magistrate decision, the court says the proper selection of keywords “requires careful advance planning by persons qualified to design effective search methodology.”

“The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that is appropriate for the task, and show that it was properly implemented.”

In conclusion, the court ordered the following:

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of “false positives.” It s time that the Bar—even those lawyers who did not come of age in the computer era—understand this.”

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