



# DIGITAL DISCOVERY & E-EVIDENCE



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## **DEFENSIBILITY**

Though it can seem to be entirely foreign to discuss openly processes once considered private and strategic with an opponent, it is quickly becoming a requirement rather than an option where e-discovery is concerned. IE Discovery’s Michael Wyatt, Janet Hornsby, and Amy Dove examine four areas key to the processes of searching, culling, and reviewing.

### **The Lawyer’s New Clothes: Transparency and The Use of Automated Review Technologies**

By MICHAEL WYATT,  
JANET HORNSBY, AND AMY DOVE

In the days of huge war rooms and smoke-filled strategy meetings, transparency was considered the worst characteristic of any attorney’s methodology. In today’s electronic discovery world, transparency is expected, if not demanded.

Acting in an open and transparent way enables attorneys to prove that they have indeed produced docu-

ments in a consistent and defensible manner and will avoid negatively affecting the client’s case.

Attorneys are now called upon to produce retention letters, chain of custody documents, client’s network mapping, collection methodology paperwork, automated review terms lists, and any other articles that could prove that collection and review were performed at a consistently high standard.

From meet and confer preparation until the last document has been produced, a methodical, documented approach must be available for review by the court and/or opposing counsel.

**Meet and Confer Preparation.** As instructed in the amended Federal Rules of Civil Procedure, parties are required to meet early in the case and discuss the discovery process but conferences with opposing counsel are still approached with caution; it is next to impossible to remove legal strategy from your mind when discussing the production of gigabytes of e-mail that might contain relevant information.

However, that is exactly how meet and confers to discuss the logistics of discovery need to be approached in

*Michael Wyatt is a Project Manager; Janet Hornsby is a Project Manager and Supervisor of Assistant Project Managers; and Amy Dove is Western Region Manager for IE Discovery, a provider of Comprehensive Discovery Management services, offering a single source for legal, technology, and records management expertise. Questions about this article can be addressed to Amy Dove at [adove@iediscovery.com](mailto:adove@iediscovery.com).*

order to focus on the most efficient and reasonable process for discovery of electronic material.

As Judge Paul W. Grimm noted in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008), when addressing the issue of over burdensome discovery requests because attorneys don't know enough to make them narrower, "this would not be so if lawyers approached discovery responsibly, as the rule mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost—to all parties—is proportional to what is at stake in the litigation." Id.

Although in that particular case, Judge Grimm addressed the broader issue of over-burdensome discovery requests and boilerplate responses, the idea also directly applies to the approach taken by both sides to locate the relevant information contained in huge volumes of electronic data. It is imperative that both parties discuss and agree to the methods taken to locate, review, and produce the responsive material.

In the same ruling, Judge Grimm also promotes *The Sedona Conference Cooperation Proclamation*, which is a "coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'"

The goal of the *Cooperation Proclamation* is to create "a culture of cooperation" in the discovery process in order to streamline the process and reduce costs to all parties.

The end goal of the Proclamation Working Group is to develop and distribute "toolkits" that address specific techniques of discovery cooperation, collaboration, and transparency." One method mentioned in the *Proclamation* is the joint development of automated search and culling technology.

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**Importance of Search and Review.** The search and review process is a key area for developing a mutual understanding between both parties to avoid disputes and excessive costs down the road. Parties are now participating not because they have to, but because they realize the benefits of engaging in collaborative discovery discussions. The cost of processing and reviewing large amounts of electronic data leaves little room for changing your mind, or doing it again if a dispute arises later, or you realize you missed a key term.

The discovery process on a large electronic collection can be likened to an enormous freight ship. Once it is under sail and you are halfway from Los Angeles to Tokyo and you realize you now need to pick up some freight in New York, changing course and back tracking takes considerable time and expense.

There are four main areas to address when discussing the search, culling and review process:

**Technical Proficiency.** Understand the technology, or have someone available to all parties who can ensure mutual understanding. It is imperative to comprehend the mechanics of the search technology, whether it is a key word term search, metadata culling, or other analytical search technology. It is no longer good enough to say you use a "black box" technology that's "really cool"; you must have someone on your team that knows how it works, understands the parameters of the methodology agreements, and can explain it clearly so that everyone is satisfied that the chosen process meets the needs of the case and is working as expected.

**Search Methodology and Workflow.** Give serious thought to the search methodology and settle on the workflow that is appropriate to the case. There is not a "one size fits all" approach that works magic for every project.

**An Example.** One recent large project (in excess of two terabytes of primarily e-mail) is a good example of adjusting the work flow to the needs of the case.

Early in the collection phase, the volume was projected to be exponentially larger than was expected (at least by a factor of 10) and we knew very quickly that the cost to review in the traditional manner—TIFF everything and have the attorney team review every single document—was absolutely not an option due to both cost and time constraints.

We conducted a careful review of the nature of the allegations of the case, the titles and functions of custodians, the types of documents we were seeing in the small amount that had already been collected, and balanced those factors with the potential exposure of the case.

In this instance, the client and counsel determined that 80 percent of the custodians were in positions that would not have had any access to anything privileged, or particularly sensitive. The nature of the case was quite broad and pertained to the company's core business, so almost anything could be considered relevant.

Through discussions, opposing counsel reached agreement on a list of relevant key words, a list of privileged key words, and a claw back agreement. They then agreed to produce anything that contained a relevant key word, but not a privileged key word, without attorney review, and in native electronic format.

Documents containing a privileged key word were entered on a privilege log with the agreement that the other side could challenge privilege on certain documents (up to a certain percentage), which would then be reviewed for privilege by attorneys and produced or withheld as appropriate.

**Measures of Success.** This process was used with great success for the vast majority of the collection. Certain custodians and types of documents were handled separately but, overall, this workflow solution saved millions of dollars compared to the traditional method that was envisioned at the beginning of the case. It allowed the corporation to respond to discovery in a timely fashion and in a way that was acceptable to the other side, even when faced with significantly more data than originally anticipated, without significant unexpected cost.

The plaintiffs received documents faster and, with a good understanding of the key words used to identify them, got a high proportion of relevant documents. Also, receiving the documents in native format gave them the ability to search the production set immediately.

**Why It Worked.** Of course, this approach was only feasible because the risk of producing particularly sensitive or privileged material was fairly low in this dispute, but the same evaluation technique can be adapted to any case. In some cases, only documents containing relevant and/or privileged terms are reviewed in the linear, document-by-document process by attorneys and the non-relevant documents are only given a few cursory ad hoc searches.

**Test the Search Methodology.** Do not underestimate how much time it will take you to create and refine your search protocol. It is better to overestimate and have extra time than to rush the project. Creating and querying the list, printing reports, and reviewing samplings of documents are essential yet time consuming components of a successful process.

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The client and counsel had to feel very comfortable that the search terms were going to identify as much privileged information as possible, as well as turn over all relevant documents. In this case, separate search protocols were developed that were a combination of metadata and key words for each discreet group of custodians based on geographic location and function.

Creating a search term list that actually reduces the collection while finding the desired documents is an art. Knowing the subject matter, the collection in general, and understanding the relevant request for production is vital to the process.

Here are some important tips for developing search parameters:

- Look for variations of a term or acronym in your collection and account for them in your search term list.
- Allow for misspellings, nicknames, aliases, e-mail addresses, along with typographical errors.
- Avoid overly broad terms, especially if your documents were collected in a broad manner. For every term that is too broad, you may be adding thousands of dollars to the cost of your case.

- Understand how your search tool works and the implications of word boundaries, noise words, date and time formats, and how wild cards operate, etc. Engage a search expert if you are not comfortable with search technology.

Reaching agreement with the opposition on the search term list can be difficult but can save money and time in the long run. Regardless of the technology used, an iterative sampling and testing of terms on a portion of the collection must be performed so that you know the terms are behaving as expected.

Documents considered relevant as well as those considered not relevant should be sampled and reviewed using a statistically valid protocol to make sure you aren't missing something vital. Run as many tests and reports as possible to find terms with large amounts of false positives and misdetections.

**Document the Search, Review, and Culling Methodology.** Courts are becoming increasingly savvy about the different methodologies in the marketplace today, so it is important to document those results and retain the documentation in case you are required to defend the process at a later date. The results of all tests should be kept as part of the process documentation. It is essential to demonstrate exactly how it was determined what was produced or withheld.

If automated search term lists have been used, special care should be taken to document any changes to those lists, especially once production has begun. The version of the search term list that was used for a particular production should be at your finger tips.

In this case we used a database to track all the search terms, any changes to the term, who made the change, and when it was made. This information proved invaluable to the attorney and was used several times to explain why a certain document fell in or out of the production.

It was also the only way to manage the multiple lists and minimize consistency or duplication errors. The attorney team used reports of term hits aligned with custodians to get an understanding of what types of documents and content were found in different regions of the organization. Good documentation and tracking of your search protocol can not only help you justify your process, but also provide holistic collection analysis for your legal team.

Parties to litigation should open the dialogue about review methodologies as early in the discovery phase as possible. By the time you get to the first discovery conference or meet and confer, you should have a clear strategy for how you are going to collect and review your data. Courts are requiring litigants to share and agree on that strategy before one document has been reviewed.

Gone are the days when lawyers unilaterally conceive and execute their document reviews, shrouded in secrecy. What and how data is being collected must now be laid bare for all to see.