



Position: The discovery process should account for iterative search strategy.

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Developing an informed search strategy in litigation, whether it involves key terms, technology, data sources, document types or date ranges, is an iterative process. Unfortunately, many judges and attorneys still approach discovery with outdated perceptions of search methodology. Litigants should not be permitted to submit a keyword list of fifty terms for the opposing party to use in their document review and production, and expect that it will define the scope of discovery. Nor should they be allowed to dictate which data sources the other side should search. Members of the legal community need more education on recent advancements in search strategy to appropriately define the scope of relevant information. An informed search strategy leads to more efficient and accurate responses in discovery, but the parties must meet and confer often and in a timely fashion to take advantage of these advancements.

For years, members of the legal profession have called attention to the problems inherent in the use of keyword search terms. Attorneys may draft search terms too narrowly or too broadly. Some terms may yield a large amount of hits unexpectedly, such as a term that is automatically generated in every company email signature. These problems exist because there is significant variance in the way individuals use language, and it is impossible to fully predict that use when first drafting search terms. Similarly, attorneys must focus their keyword searches on the appropriate data sources. Otherwise, they waste time and money on irrelevant information.

To address these issues, parties need to test the search terms' performance repeatedly in an iterative process to determine how they interact with the data set at issue. As data sets increase in size, search term problems are exacerbated, and more time must be spent testing the terms to determine their effectiveness. Cooperation between the parties is essential to make this process as efficient and effective as possible. Attorneys must take the time to become familiar with their client's data, conducting custodian interviews to learn about unique use of language and to determine where relevant data is most likely to reside. Each side should bring this knowledge to the meet and confer. The parties should discuss and agree upon an initial search strategy. Thereafter, the parties should test the chosen methodology and meet often and in a timely fashion to discuss the results. Because of the disparity in understanding of search methodology amongst judges and attorneys, it is often appropriate to include a third party data analytics provider to assist in the process and, if needed, defend its use before the court.

In order to effectively implement an iterative search strategy, the courts and parties must account for the time involved in testing, meeting, and applying the search terms in the document review process. It is widely recognized that standard linear document review is the number one



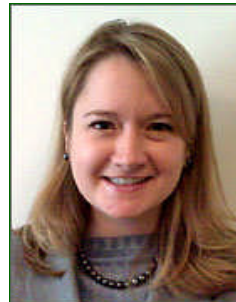
driver of discovery cost and time. While an iterative search strategy takes time upfront, its use should yield a focused and accurate data set for attorney review, which significantly limits the review costs and increases efficiency in responding to discovery requests.

There is prior literature that begins to address this position. In 2008, The Sedona Conference published the “Cooperation Proclamation,” which addresses the increasing burden that pre-trial discovery causes to the American judicial system and champions a paradigm shift in the way the legal community approaches discovery. *See* The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008), <http://www.thesedonaconference.org>. Although still zealously advocating for their clients, attorneys should cooperate as much as possible with the opposing party on discovery issues, particularly those that relate to ESI. This reduces costs for the clients and allows the attorneys to focus on the substantive legal matter(s) at issue, which in turn advances the best interests of the client. Along the same lines, there has recently been a push for proportionality and phased approaches to eDiscovery. The Sedona Conference Commentary on Proportionality in Electronic Discovery says that it may be “appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources.” *See* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery* at 297 (2010), <http://www.thesedonaconference.org>. This work supports the value of an iterative search strategy and for parties to meet and confer often and timely on the issue.

Attorneys must be prepared to educate the judiciary on the importance of a fully developed search strategy. They have to explain that while the iterative search process and subsequent meet and confers take time, the cost savings and increased efficiency in pre-trial discovery are significant and well worth the effort.

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Full biographies and a description of the practice group are available at <http://www.orrick.com/practices/ediscovery>.