

# The e-Discovery 4-1-1

A monthly publication of LeClairRyan's  
Discovery Solutions Practice



Legal Strategies. Business Solutions.

## Court Rules that Limited Search Capability Supports Undue Burden Argument - But Does Either Party Win?

by Andy Reynolds

In *Helmert, et al. v. Butterball, LLC*, 2010 U.S. Dist. Lexis 60777 (May 27, 2010), an employment law case in the Eastern District of Arkansas, the plaintiffs brought a motion to compel the defendant, Butterball, to conduct a meaningful search of its electronically stored information (ESI). During discovery negotiations, which included multiple meet and confers, the plaintiffs provided the defendant with 70 search terms to identify potentially responsive documents from approximately 40 Butterball employees. The plaintiffs' search terms included proximity searches, which search for terms within the same sentence or within a certain number of words of another term.

Butterball argued that conducting proximity searches was unduly burdensome because it was impossible to run this type of search within its email environment. The court agreed, noting that the plaintiffs did not offer evidence that Butterball was capable of performing proximity searches or alternative methods for conducting the searches.

Though at first glance, the ruling inured to Butterball's benefit, both parties may have lost this argument. Historically, email systems - like many other information systems - were not designed with sophisticated search engines. However, there are many methods for collecting and searching email and other ESI, including early case assessment tools designed specifically for this purpose. A common method for collecting and searching email involves (1) copying an employee's mailbox or specifically identified folders from a company's servers in a legally defensible manner that preserves metadata and (2) importing the emails and document folders into an application capable of running complex searches and filtering by date or other criteria.

Because the plaintiffs failed to challenge Butterball's search methodology or offer alternative search methods, the court denied both parties the benefits of proximity searches. Eliminating proximity

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## Meet DSP

### Shetterly Brings Creativity and Experience to Electronic Discovery Project Management

Daryl Shetterly, a senior associate in LeClairRyan's Discovery Solutions Practice, advises businesses on issues related to the discovery of electronically stored information and compliance with state and federal rules of civil procedure and related case law. He also speaks extensively on the subject of e-discovery, including how law firms can best utilize e-discovery, the use of privilege logs in large-scale document review projects, and the effective use of search terms in e-discovery.

Daryl has managed numerous large-scale electronic discovery projects for Fortune 500 clients in a variety of civil matters, including antitrust, intellectual property, breach of contract

searches will generally increase the number of documents identified. Butterball, therefore, will be required to spend additional time and money reviewing the larger population of documents for responsiveness and privilege. Likewise, the plaintiffs will be required to sift through an even greater amount of documents that contain information related to the broad keyword search but that do not pertain to the litigation at hand.

The fact that neither party recognized the potential downside to a broad keyword search or offered an alternative search methodology appears to demonstrate a lack of knowledge regarding technical issues related to e-discovery. It also reinforces the need for businesses and attorneys unfamiliar with ESI to consult with e-discovery professionals when issues such as proximity searches arise during litigation.

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## What's New at DSP

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### DSP Cross-Trains Litigation Technology and Support Staff

LeClairRyan's Discovery Solutions Practice (DSP) is not a traditional law practice. Just as email, structured data and backup media are not industry specific, the DSP team has provided consulting and managed discovery services in virtually every industry segment. The solutions and services DSP offers reach beyond practice areas and challenge traditional notions of law firm organization. Recent changes involving DSP support staff are in response to the practice's uniqueness.

Historically, DSP support staff comprised two separate groups: paralegals and litigation technology specialists. Each group had its own manager. However, DSP paralegals perform few conventional paralegal tasks, and litigation technology specialists do much more than manage load files and data transfer. Increasingly, the professional skills required of DSP paralegals and litigation technology specialists to deliver discovery solutions to clients have begun to merge.

At the same time, DSP recognizes a need to more quickly and fluidly allocate resources throughout the process as needs arise. Therefore, DSP recently combined both groups under a single manager to form Litigation Technology & Support (LT&S). Members of the combined team will cross-train on the different functions formerly performed by the two separate groups, ensuring that clients receive the highest level of support. Whether working on a field collection of email data and paper records, managing the flow of information through the review center, or performing specialized analyses of data with leading technologies, LT&S professionals have the skills and capacity required to meet the needs of LeClairRyan's clients.

property, breach of contract, employment, class action and multidistrict products liability matters. He has also managed the collection and review of documents responsive to large-scale state and federal investigations. Some of these investigations have involved the U.S. Securities and Exchange Commission, the U.S. Department of Justice, the Federal Bureau of Investigation and the Office of the Attorney General. Daryl brings experience, creativity and a passion for process to an increasingly complex and difficult area of law, while maintaining a focus on two issues most important to his clients - cost and risk.

Prior to practicing law, Daryl helped launch a technology company that provided e-commerce solutions to small- and medium-size organizations.

Outside of work, Daryl serves on the board of directors for the Youth Life Foundation of Richmond, a nonprofit organization providing academic and wellness after-school and summer programs for children living in at-risk communities. The Richmond chapter is an affiliate of the Darrell Green Youth Life Foundation, headquartered in Washington, D.C.

[Learn more about DSP](#)

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**CASE RESULTS DEPEND UPON A VARIETY OF FACTORS  
UNIQUE TO EACH CASE AND DO NOT GUARANTEE OR  
PREDICT A SIMILAR RESULT IN ANY FUTURE CASE**

**Attention to Detail Secures Savings on Client's Records  
Management Vendor Contract**

DSP currently serves as the gatekeeper of all data for the liquidation trust of a Fortune 500 financial services company. As part of its engagement, DSP professionals assessed the company's data environment, identified relevant contract renewal dates for servers, software and records storage facilities, and ensured that document destruction was suspended at those facilities until a more detailed assessment could be performed.

As part of the second assessment, DSP professionals evaluated the company's records management vendor contract. The company had selected the vendor to maintain document volumes, box transfer records and destruction schedules and to manage an online repository of information regarding the locations of paper records. DSP learned that the contract, which cost the company \$40,000 annually, renewed automatically.

This annual contract amount seemed excessive, and DSP believed it could achieve a better result for its client by engaging the services of a preferred vendor. The DSP team introduced the vendor to its client and facilitated meetings to identify the repository features required to provide the company with accurate and searchable record keeping for the purpose of records retention. DSP collaborated with the vendor to build a database that met the client's needs and expectations. The company was extremely pleased, not only with the functionality and speed of the database, but with the cost, which is now less than one-third of the previous annual vendor contract amount.

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