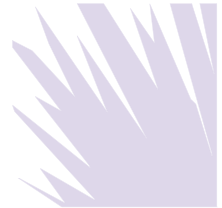


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“DEFENSIBLE” BY WHAT STANDARD?

*Hon. Craig B. Shaffer*¹
United States Magistrate Judge
for the District of Colorado
Denver, CO

OVERVIEW

“E-discovery” can be described as the process of identifying, collecting, reviewing and producing electronically stored information (“ESI”) in connection with pending or reasonably foreseeable litigation. There is a growing body of literature suggesting that e-discovery processes that rely upon automated tools to prioritize and select materials for review and production may be more cost-effective and result in document production that is superior to traditional “linear” or manual review.² A technology-assisted review process may incorporate a variety of approaches, including keywords, Boolean or conceptual search techniques, as well as “clustering,” machine learning, relevance ranking, “predictive coding,” or sampling.³ Each of these procedures, when applied individually or in combination, present the parties and the court with “complicated question[s] involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.”⁴

The process of designing and managing a complex e-discovery project presents obvious challenges, “whether it involves ‘simple’ human review or application of automated tools and more sophisticated techniques.”⁵

Technologically advanced tools, however “cutting edge” they may be, will not yield a successful outcome unless their use is driven by people who understand the circumstances and requirements of the case, as guided by thoughtful and well-defined methods, and unless their results are measured for accuracy. The first step, then, is the development of a well thought-out process in which the applicable review method can be applied.⁶

1 United States Magistrate Judge for the District of Colorado.

2 See, e.g., Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11, 55 (2011) (citing study results that “support the conclusion that technology-assisted review can achieve at least as high recall as manual review, and higher precision, at a fraction of the review effort, and hence, a fraction of the cost”); Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal E-Discovery. Computer Classification vs. Manual Review*, 61 J. Am. So’y For Info. Sci. & Tech. 70, 72-72 (2010) (finding that computer-aided information retrieval techniques were no less accurate in identifying relevant and responsive documents than traditional human review). Technology-assisted review in the preservation context, however, may be limited at this time. See Thomas Y. Allman, Jason R. Baron & Maura R. Grossman, *Preservation, Search Technology & Rulemaking*, Civil Rules Mini-Conference (Dallas) (September 2011), at 4-5 (describing limitations of centralized searches of multiple sources of enterprise ESI subject to preservation), copy at http://www.uscourts.gov/uscourts/RulesandPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman,%20Janson%20Baron,%20and%20Maura%20Grossman.pdf.

3 For definitions or descriptions of many of these terms, see *The Sedona Conference® Glossary: E-Discovery & Digital Information Management (Third Edition)* (September 2010) available at www.thesedonaconference.org.

4 *United States v. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

5 See *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 306 (Fall 2009).

6 *Id.*

Confronted with pending or the reasonably foreseeable prospect of litigation, clients are asked to make e-discovery decisions in a technological realm that provides an array of options, but no single “correct” solution.⁷ At the outset of litigation, and often even before a lawsuit commences, the goal is to implement a discovery plan that identifies, collects and produces relevant and responsive non-privileged materials from a larger universe of ESI using reliable methodologies that provide a quality result at costs that are reasonable and proportionate to the particular circumstances of the client and the litigation. That would be a defensible e-discovery protocol.

Designing and implementing a defensible discovery process, however, is complicated by the *post hoc* nature of most discovery motions challenging the results. Typically, the court is asked to evaluate the results and legal sufficiency of a particular discovery process only after a party has made critical technological decisions, spent considerable time and money, and progressed through most (if not all) of the pretrial process, despite the increased emphasis on early development of a discovery plan.⁸ While implementation of an effective e-discovery process requires an iterative approach from the outset of the litigation, the true measure of a defensible e-discovery process is the ability to withstand an after-the-fact challenge by the opposing party.

Search protocols may produce varying results, and the parties (as well as the court) should expect that methodologies will be refined or adjusted to reflect the evolving discovery needs of a given case. A technology-assisted e-discovery process cannot be held to a standard of perfection, but should produce discovery results that are defensible in terms of the producing party’s discovery obligations and reasonable from the standpoint of cost and efficiency.⁹ Ultimately, a technology-assisted review process must comport with the requirements of the Federal Rules of Civil Procedure, be proportionate to the claims, defenses and circumstances of the particular case, and be reasonably transparent to the court and opposing parties.¹⁰

In 2007, The Sedona Conference[®] noted that litigants and their counsel must be prepared to explain to the opposing party and/or the court how the selected search methodology can be or was used to produce responsive documents.

[A] unilateral choice of search methodology may be challenged due to a lack of scientific showing that the results are accurate, complete and reliable. Since all automated search tools rely on some level of science, the challenging party may argue that the process used by the responding party is essentially an expert technology which has not been validated by

7 See Athena Johns, *Computer Science and the Reference Manual for Scientific Evidence: Defining the Judge’s Role as a Firewall*, 14 Intellectual Property Law Bulletin 23, 28 (2009). See also *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 315 (Fall 2009) (“The question for the producing party is how best to capture and properly produce [non-privileged documents and ESI responsive to non-objectionable discovery requests], and how and what resources need to be allocated to this project.”).

8 As discussed in more detail below, Rule 26(f) and Rule 16(b) contemplate development of a discovery plan marked by cooperation in “front loading” an understanding and discussion of the sources of ESI. See Steven S. Gensler, *Some Thoughts on the Lawyer’s E-Volving Duties in Discovery*, 36 N. Ky. L. Rev. 521, 535-539 (2009). See also *Home Design Services, Inc. v. Trumble*, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) (Shaffer, M.J.).

9 Cf. *Moore v. Publicis Groupe*, 2012 WL 607412, at *12 (S.D.N.Y. Feb. 24, 2012) (Peck, M.J.) (hereinafter “*Moore P*”) (“[c]ounsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to [Fed. R. Civ. P.] 1 and [Fed. R. Civ. P.] 26(b)(2)(C) proportionality”).

10 See *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 307 (Fall 2009) (suggesting that the effective application of technology in the e-discovery process should include “the selection, design, implementation and measurement of a process” that can be “explained in a clear and comprehensive way to the relevant fact-finder, decision-maker, tribunal or regulator, as well as to opposing party as may be appropriate”). Cf. *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008) (requiring defendant’s computer forensic expert to submit an affidavit describing in detail how the search of plaintiff’s computer will be conducted in order to make the best possible judgment as to how to balance the competing interests of the parties).

subjecting it to peer review, and unbiased empirical testing or analysis. . . . A requesting party may demand the responding party to ‘prove up’ the use of such search technology. This could set the stage for a difficult and expensive battle of experts.¹¹

Recent judicial proceedings may portend discovery battles to come as litigants and their vendor surrogates debate the efficacy of competing search methodologies. In *Da Silva Moore*, the plaintiffs brought a putative collective/class action on behalf of “all current, former, and future female PR employees” of Publicis Groupe and its subsidiary, MSL Group.¹² The parties agreed in the abstract to use predictive coding to distill and review “approximately three million electronic documents from the agreed-upon custodians.” After Magistrate Judge Peck accepted a search protocol proposed by Defendant MSL Group, the plaintiffs filed objections challenging whether the protocol adopted by the court would reliably result in the production of ESI that satisfied the defendants’ discovery obligations. More specifically, the plaintiffs argued “that the predictive coding method contemplated in the ESI protocol lacks generally accepted reliability standards, that the use of such method violates Fed. R. Civ. P. 26 and Federal Rules of Evidence 702, that Judge Peck improperly relied on outside documentary evidence . . . , that [Defendant’s] expert is biased because the use of the predicative coding method will reap financial benefits for the company, that Judge Peck failed to hold an evidentiary hearing, and that he adopted [Defendant’s] version of the ESI protocol on an insufficient record.”¹³

In upholding the ESI protocol appended to Magistrate Judge Peck’s February 24, 2012 Opinion and Order,¹⁴ District Judge Carter acknowledged that no review tool “guarantees perfection” and “there are risks inherent in any method of reviewing electronic documents.”¹⁵ After noting that the ESI protocol adopted by Magistrate Judge Peck “contains standards for measuring the reliability of the process,” “builds in levels of participation by Plaintiffs,” and “provides that the search methods will be carefully crafted and tested for quality assurance,” Judge Carter concluded that the plaintiffs’ challenge to the reliability of the selected predictive coding software was premature.¹⁶

Conversely, in *Kleen Products, LLC v. Packaging Corporation of America*,¹⁷ an putative class action brought under section 1 of the Sherman Act, 15 U.S.C. § 1, the plaintiffs challenged the adequacy of the defendants’ search methodology only after the defendants had incurred considerable expense and identified for production more than a million documents using conventional keyword-based search procedures. The *Kleen Products* plaintiffs reportedly contend, in part, that the defendants’ search protocol is flawed because it does not include methods for validating effectiveness, potentially fails to include key custodians, and does not capture variations of key concepts and terms. The plaintiffs in *Kleen Products* would have the defendants re-visit the production of ESI using “content-based advanced analytics.” In an effort to clarify the parties’ competing positions, Magistrate Judge Nolan of the Northern District of Illinois considered expert testimony and legal arguments in a hearing that extended over two days and generated more than 600 pages of transcript.

11 *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 204 (Fall 2007).

12 *Moore I*, 2012 WL 607412, at *1.

13 *Da Silva Moore v. Publicis Groupe SA*, 2012 WL 1446534, at *1 (S.D.N.Y. Apr. 26, 2012) (hereinafter “*Moore II*”).

14 *Moore I*, 2012 WL 607412, at *13-23.

15 *Moore II*, 2012 WL 1446534, at *3.

16 *Id.* at *2 (noting that “Judge Peck has ruled that if the . . . Plaintiffs are not receiving the types of documents that should be produced, the parties are allowed to reconsider their methods and raise their concerns with the Magistrate Judge”).

17 No. 10 C 5771 (N.D. Illinois).

One state court also has weighed into the battle on technology-assisted review. In *Global Aerospace Inc. v. Landow Aviation, LP*, the plaintiffs objected to the defendants’ proposed use of predictive coding to retrieve potentially relevant materials from an estimated 250 gigabytes of reviewable ESI. In moving for a protective order approving the use of predictive coding, the *Global Aerospace* defendants argued that

At average cost and rates of review and effectiveness, linear first-pass review would take 20,000 man hours, cost two million dollars, and locate only sixty percent of the potentially relevant documents. As one alternative, keyword searching might be more cost-effective but likely would retrieve only twenty percent of the potentially relevant documents and would require [defendants] to incur substantial unnecessary costs for document review. Predictive coding, on the other hand, is capable of locating upwards of seventy-five percent of the potentially relevant documents and can be effectively implemented at a fraction of the costs and in a fraction of the time of linear review and keyword searching.¹⁸

In the absence of any “judicial or other legal mandate requiring, or even advocating, the use of one method of document retrieval over another,” the *Global Aerospace* defendants insisted that predictive coding will identify the relevant ESI with “reasonable accuracy” and fully satisfy the “reasonable inquiry” obligation imposed by applicable Virginia Supreme Court Rules.

The plaintiffs’ opposition brief argued there are “no grounds justifying [a] departure” from the traditional approach to document production which the plaintiffs described as

talk[ing] to the client[;] locat[ing] the files that might reasonably contain responsive documents[;] look[ing] at the documents[;] select[ing] the ones that are responsive and non-privileged[;] [and] produc[ing] them.¹⁹

Plaintiffs were quick to concede that computer technologies can make the ESI review process more efficient, and should be used to “supplement” the more traditional linear review process and “ensure a complete response.” However, in the absence of any reported “cases in which a court has compelled a party to accept a document production selected by a ‘predictive coding’ computer program,” the *Global Aerospace* plaintiffs concluded that Virginia law does not “permit such a radical departure from the standard practice of human review of documents as a necessary step in responding to a request for production.”²⁰ This argument would effectively create a presumption in favor of traditional linear review.

On April 23, 2012, in a very short Order and without any substantive discussion, the court in *Global Aerospace* approved the use of predictive coding “for the purposes of the processing and production of electronically stored information.”²¹ The court acknowledged, however, that its Order was entered “without prejudice to a receiving party raising with the Court an issue as to completeness or the contents of the production or the ongoing use of predictive coding.”²²

18 Memorandum in Support of Motion for Protective Order Approving the Use of Predictive Coding, *Global Aerospace Inc. v. Landow Aviation, L.P.*, Consolidated Case No. CL 61040, (Circuit Court for Loudoun County, Virginia, Apr. 9, 2012).

19 Opposition of Plaintiffs to the Landow Defendants’ Motion for Protective Order Regarding Electronic Documents and Predictive Coding, *Global Aerospace Inc. v. Landow Aviation, L.P.*, Consolidated Case No. CL 61040, (Circuit Court for Loudoun County, Virginia, Apr. 16, 2012).

20 *Id.*

21 Order Approving the Use of Predictive Coding for Discovery, *Global Aerospace Inc. v. Landow Aviation, L.P.*, Consolidated Case No. CL 61040, (Circuit Court for Loudoun County, Virginia, Apr. 23, 2012).

22 *Id.*

The discovery disputes in *De Silva Moore*, *Kleen Products* and *Global Aerospace* raise important procedural considerations concerning the identification, collection, review and production of ESI. More specifically, the issue of defensibility will require a court to determine the appropriate legal standard for evaluating a technology-assisted search protocol and the factual showing that should be required to trigger judicial intervention.

THE STANDARD FOR MEASURING DEFENSIBILITY

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides a logical starting point for addressing the legal defensibility of any discovery process. A party may obtain discovery of any nonprivileged matter that is relevant to a claim or defense, “including the existence, description, nature, custody, condition and location of any documents or other tangible things.”²³ The scope of permissible discovery is not defined by the Federal Rules of Evidence, as Rule 26(b)(1) expressly states that “relevant information need not be admissible at the trial if the discovery appears *reasonably calculated* to lead to the discovery of admissible evidence.”²⁴ But the right to obtain discovery is not absolute.²⁵

While a defensible e-discovery plan is not held to a standard of perfection,²⁶ Rule 34 of the Federal Rules of Civil Procedure does require a party to undertake reasonable efforts to identify and produce responsive, non-privileged material in its possession, custody or control.²⁷

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- 23 Fed. R. Civ. P. 26(b)(1). See also *Basaldu v. Goodrich Corp.*, 2009 WL 1160915, at *2 (E.D. Tenn. Apr. 29, 2009) (“The purpose of the modern civil discovery rules is to get all of the proverbial cards on the table in advance of trial.”); *Board of Regents of University of Nebraska v. BASF Corp.*, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) (“The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense and removing contentiousness as much as practicable. . . . If counsel fail in this responsibility – willfully or not – these principles of an open discovery process are undermined, coextensively inhibiting the courts’ ability to objectively resolve their clients’ disputes and the credibility of its resolution.”) (internal citations omitted).
- 24 *Johnson v. Kraft Foods North America, Inc.*, 238 F.R.D. 648, 653 (D. Kan. 2006) (“A request for discovery should be allowed ‘unless it is clear that the information sought can have no possible bearing’ on the claim or defense of a party.”).
- 25 See, e.g., *Quest Communications International, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) (Shaffer, M.J.) (“[i]n every case, the court has the discretion, in the interests of justice, to prevent excessive or burdensome discovery”).
- 26 See *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010). Cf. *Lewis v. Sch. Dist. #70*, 2006 WL 2506465, at *2 (S.D. Ill. Aug. 25, 2006) (“The Court does not doubt that modern technology would lessen the burden of search for relevant e-mails, but the search would undoubtedly not be perfect.”).
- 27 See, e.g., *In re Delta/AirTran Baggage Fee Antitrust Litigation*, __ F. Supp. 2d __, 2012 WL 360509, at *13-14 (N.D. Ga. Feb. 3, 2012) (finding that defendant had failed to conduct a reasonable inquiry to support its implicit representations that all relevant hard drives had been identified and searched, and therefore its discovery responses were not complete or correct); *Fendi Adele v. Filene’s Basement, Inc.*, 2009 WL 855955, at *8 (S.D.N.Y. Mar. 24, 2009) (“litigants have an obligation, when discovery is sought from them, to make reasonable efforts to locate responsive documents, including setting up ‘a reasonable procedure to distribute discovery requests to all employees and agents . . . potentially possessing responsive information, and to account for the collection and subsequent production of the information . . .’)” (internal citations omitted); *Treppel v. Biovail Corporation*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (“Even in a case involving exclusively hard copy documents, there is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files in order to comply with its discovery obligations. Rather, it must conduct a diligent search which involves developing a reasonably comprehensive search strategy. . . . Defined search strategies are even more appropriate in cases involving electronic data, where the number of documents may be exponentially greater.”) (internal citations omitted).

This “reasonableness” standard is a defining characteristic of the discovery rules²⁸ and The Sedona Principles.²⁹

To adequately respond to a request for production, the respondent must “conduct a reasonable search for responsive documents. Parties, along with their employees and attorneys, have a duty to act competently, diligently and ethically” with respect to discharging discovery obligations. . . . Parties “jeopardize the integrity of the discovery process by engaging in halfhearted and ineffective efforts to identify and produce relevant documents.”³⁰

Litigation brought under the Freedom of Information Act (“FOIA”) provides a useful construct for applying the “reasonableness” standard to technology-assisted search methodologies. In response to a FOIA request, a government agency is expected to conduct a good faith search for the requested documents, using methods that can be reasonably expected to produce the information requested. The agency’s search “need not be perfect, only adequate,” and the measure of adequacy is defined as “the reasonableness of the effort in light of the [opposing party’s] specific request.”³¹ As one court has acknowledged, “[r]easonableness does not require defendant to search every record system or to demonstrate that no other potentially responsive documents might exist to demonstrate reasonableness, but it must show ‘that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’”³² By analogy, a party should not be required to show that a search methodology is infallible or that the methodology is certain to find every potentially responsive document.

If “reasonableness” is the applicable measure of performance, the Federal Rules also identify factors that the court should consider in weighing a party’s efforts at compliance. The court is required to limit the frequency or extent of discovery where “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”³³

28 For example, a party is not required to provide electronically stored information from sources that the party identifies “as not reasonably accessible because of undue burden or cost.” See Fed. R. Civ. P. 26(b)(2)(B). But see *Cartel Asset Management v. Ocwen Financial Corp.*, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010) (a party seeking relief under Rule 26(b)(2)(B) “should present details sufficient to allow the requesting party [and the court] to evaluate the costs and benefits of searching and producing the identified sources”) (quoting *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008) (internal quotation marks omitted)). Similarly, a party serving a subpoena is required to “take reasonable steps to avoid imposing undue burden or expense on a party subject to the subpoena.” See Fed. R. Civ. P. 45(c). Cf. *Arthrex, Inc. v. Parcus Medical, LLC*, 2011 WL 6415540, at *8 (S.D. Ind. Dec. 21, 2011) (in determining whether to shift costs under Rule 45(c), the court should consider various factors, including “the breadth of the materials to be produced; whether that breadth looks like a fishing expedition; whether the production necessarily requires expert involvement because of difficult electronic discovery issues, or the need for special and detailed review for privileged information; the relative resources of the party and non-party; whether the non-party is disinterested in the litigation or has a connection to the issuing party’s adversary; whether the non-party could have expected to have been drawn into the litigation or has an interest in the outcome of the case; and the reasonableness of the costs sought”).

29 See *The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (The Sedona Conference Working Group Series, 2007) (“*The Sedona Conference Principles*, Second Edition 2007”), available at www.thosedonaconference.org, and Principles 1 and 5 (the scope of preservation obligations involves “reasonable and good faith efforts” to preserve information that can “reasonably be anticipated to be relevant to litigation); Principle 8 (the primary source of ESI should be active data and resort to sources “not reasonably accessible” should be limited by proportionality concerns); Principle 11 (sources of data “reasonably likely to contain relevant information” can be identified by using “electronic tools and processes”); and Principle 12 (production of metadata extends to “reasonably accessible metadata” under certain conditions)).

30 *Robinson v. City of Arkansas City, Kansas*, 2012 WL 603576, at *4 (D. Kan. Feb. 24, 2012). But see *Benson v. Sanford Health*, 2011 WL 1135379, at *4 (D.S.D. Mar. 25, 2011) (noting that Rule 34 does not “describe the lengths” to which a party must go to search for electronically stored information).

31 See, e.g., *Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 69 (D.D.C. 2010).

32 *Information Network for Responsible Mining v. Department of Energy*, 2008 WL 762248, at *4 (D. Colo. Mar. 18, 2008).

33 Fed. R. Civ. P. 26(b)(2)(C).

The scope of discovery in a particular case, and a party's corresponding discovery obligations, must be proportionate in light of the foregoing factors.³⁴ So, for example, in *Hock Foods, Inc. v. William Blair & Co., LLC*,³⁵ the court denied a motion to compel that sought "an order requiring Defendant to modify its protocol for searching electronically stored information." In opposing this motion, the defendant provided affidavits from its general counsel and a litigation technology project manager, who indicated that it would cost between \$1.3 and \$3.6 million to run the requested search terms. The court declined to require the defendant to undertake the requested search, finding that it would be "unduly burdensome for Defendant to search all of its electronic records for responsive information as originally requested."³⁶ While proportionality typically focuses on the scope of a discovery request or the results of the attendant production, proportionality considerations also are implicated by the *method* of production. Traditional manual review may be reasonable and effective when the requested production involves a very small set of documents or data. That same linear review methodology may be antithetical to the "just, speedy and inexpensive determination of [an] action"³⁷ where the requested production involves several terabytes of data. A defensible discovery process must take into considerable the certification requirement imposed by Fed. R. Civ. P. 26(g). By signing discovery responses or objections, counsel is certifying "to the best of [their] knowledge, information and belief formed after a reasonable inquiry . . . [that the response or objection] is consistent with these rules and warranted by existing law, . . . [is] not interposed for any improper purpose . . . and neither unreasonable or expensive considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."³⁸ Counsel further certifies under Rule 26(g) that his or her client has made "a timely, *reasonable, and diligent* search for all documents responsive to the [the opposing party's] discovery requests."³⁹

Given the foregoing requirements under the Federal Rules of Civil Procedure, a defensible search protocol should satisfy the following criteria. First, the selected process must be *functional* (*i.e.*, the proposed methodology should be commensurate with the quantity of potentially responsive ESI and all pertinent data types, repositories and custodians/users). Here, the focus should be on the "fit" between the technology and the data collection to be searched. It would be a mistake to believe that one search methodology would be optimal for all cases and all data collections.⁴⁰ Second, the selected search methodology should be *reasonable* when measured against the proportionality factors set forth in Rule 26(b)(2)(C) and Rule 26(g). This factor considers the "fit" between the

34 See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 524 (D. Md. 2010).

35 2011 WL 884446 (D. Kan. Mar. 11, 2011).

36 *Id.* at *9.

37 Fed. R. Civ. P. 1.

38 Fed. R. Civ. P. 26(g)(1)(B).

39 *Zander v. Craig Hospital*, 2011 WL 834190, at *1 (D. Colo. Mar. 4, 2011) (emphasis added).

40 See, e.g., *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987) (holding that defendant's discovery omissions were directly attributable to the failure of the defendant and its counsel "to establish a coherent and effective system to faithfully and effectively respond to discovery requests;" that a reasonable inquiry "would have required, at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information and to account for the collection and subsequent production of the information to plaintiffs"). See also *I-Med Pharma Inc. v. Biomatrix, Inc.*, 2011 WL 6140658, at *5 (D.N.J. Dec. 9, 2011) ("In evaluating whether a set of search terms are reasonable, a party should consider a variety of factors, including: (1) the scope of documents searched and whether the search is restricted to specific computers, file systems, or document custodians; (2) any date restrictions imposed on the search; (3) whether the search terms contain proper names, uncommon abbreviations, or other terms unlikely to occur in irrelevant documents; (4) whether operators such as "and," "not" or "near" are used to restrict the universe of possible results; [and] (5) whether the number of results obtained could be practically reviewed given the economics of the case and the amount of money at issue.").

costs associated with the search methodology and the overall value of the litigation.⁴¹ Third, the methodology must be demonstrably *reliable* in terms of recall and precision, or other appropriate metrics.⁴² Admittedly, this criterion may present challenges to counsel and the court in selecting the proper metrics for quantifying accuracy and reliability. The producing party should anticipate future reliability challenges and incorporate quality assurance checks throughout the identification, collection, review and production process.

Finally, the selected methodology must be readily *understandable* to multiple audiences (e.g., the client, opposing counsel and the court).⁴³ Defensibility ultimately depends upon counsel's ability to communicate in a clear and comprehensible way the technical and qualitative aspects of the methodology and the rationale for its selection. While many federal and state judges are becoming more comfortable with e-discovery issues, the reality is that most jurists have a steep learning curve when it comes to search methodologies and the technical challenges associated with electronic records management.⁴⁴ Lawyers remain resistant to technology-assisted search methodologies either because they lack sufficient knowledge about the capabilities of automated search tools or because there is a "perception that there is a lack of scientific validity of search technologies necessary to defend against a court challenge."⁴⁵ The judiciary shares many of these limitations or misconceptions. Thus, counsel should approach defensibility from an educational, rather than adversarial perspective. Counsel should view their role as assisting the court, not in advocating for a zero-sum result. While counsel may erroneously believe that transparency is anathema to traditional notions of zealous advocacy, a defensible search methodology is one that is perceived by the court as reasonable and reliable.⁴⁶ In that respect, candor is counsel's ally.

WHEN AND HOW TO ADDRESS DEFENSIBILITY

From a procedural perspective, the issue of defensibility can arise at several different points in the pretrial process and require counsel to weigh important tactical considerations. Counsel will be making a record throughout the pretrial process that will have significant implications for any defensibility challenge. A producing party may choose a proactive approach from the outset of the litigation and address defensibility at the Rule 26(f) conference or during the Rule 16(b) scheduling conference. In that context, the goal

41 See, e.g. Maura R. Grossman & Gordon V. Cormack, *Some Thoughts On Incentives, Rules and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 Sedona Conf. J. 89, 94 (Fall 2011) ("If the cost of search exceeds the cost of resolving the dispute, the search method is clearly unjustified. To make an informed choice of search method, it is necessary for counsel to have a reliable estimate of the cost and effectiveness of the various alternatives. If the case is strong and can be supported by a few easy-to-find documents, there is little reason for the responding party conduct a more thorough, more expensive search.").

42 "Recall, by definition, is 'an information retrieval performance measure that quantifies the fraction of known relevant documents that were effectively retrieved.' Another way to think about it is: out of the total number of relevant documents in the document collection, how many were retrieved correctly? Precision is defined as 'an information retrieval performance measure that quantifies the fraction of retrieved documents which are known to be relevant.' Put another way, how much of the returned result set is on target." *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 205 (Fall 2007).

43 See, e.g., Anne Kershaw & Joe Howie, *Judges' Guide to Cost-Effective E-Discovery* 14 (Federal Judicial Center 2010) (indicating that a recent survey showed that while, on average predictive coding reduced review costs by 45 percent, "the largest single obstacle to more widespread adoption of predictive coding was the uncertainty over judicial acceptance of this approach"). See also *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 519-20 (S.D. Fla. 2009) (in granting plaintiff's motion to compel, the court noted that defense counsel "forthrightly acknowledged that he was unable to identify the steps taken to identify responsive documents" and "counsel was not able to articulate what Defendants had done in order to search for responsive documents").

44 See, e.g., *United States v. Farlow*, 2009 WL 4728690, at *6 n.3 (D. Me. Dec. 3, 2009) ("[e]ven the most computer literate of judges would struggle to know what protocol is appropriate in any individual case").

45 *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 The Sedona Conf. J. 189, 203 (Fall 2007). See also Sonya L. Sigler, *Permission is One Thing; Adoption Quite Another*, The National Law Journal, May 21, 2012, available at www.law.com/jsp/nlj/PubArticleNLJ.jsp; and Patrick Oot, Anne Kershaw & Herbert L. Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 Denv. U. L. Rev. 533, 544-45 (2010) ("Unfortunately, many attorneys, judges, and other practitioners still maintain the mindset that traditional brute-force page-by-page attorney document review is a best practice when responding to massive discovery requests.").

46 *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 307 (Fall 2009).

is to negotiate a mutually acceptable search protocol with the opposing party and then to have the court incorporate that protocol in the final scheduling order or adopt the protocol in a separate stipulated order.

Alternatively, a producing party may attempt to obtain some certainty at the outset of the discovery process by filing a motion for protective order under Rule 26(c). Adopting a proactive strategy does place the burden of persuasion on the moving party, but may establish some parameters on the identification, collection, review and production of ESI before substantial amounts of time and money are expended. More often, issues of defensibility surface in the context of a motion to compel or for sanctions filed near the end of the discovery process. At that point, the court is asked to resolve an after-the-fact and often irreconcilable conflict between the parties. Rather than seeking permission for a particular search protocol, the producing party may be in the more uncomfortable position of seeking approval (or forgiveness) or having to justify difficult decisions taken unilaterally earlier in the pretrial process. Resolution of defensibility issues in that context may turn on who bears the burden of persuasion and the quantum of proof necessary to sustain that burden.

A. Rule 26(f) and The Advantages of Cooperation

Once again, a defensible e-discovery plan should lead to the reliable and accurate identification and production of responsive, non-privileged materials using a search methodology that is reasonably transparent and justifiable in the context of the circumstances of the particular case. A defensible search protocol also should expedite the discovery process and minimize, if not eliminate completely, the need for judicial intervention. All of these goals can be achieved most efficiently and cost-effectively, from the outset of the litigation, through meaningful cooperation and dialogue between the parties.⁴⁷ The most “defensible” search methodology is one has been jointly adopted by the parties and endorsed by the court.

The court in *DeGeer v. Gillis*⁴⁸ described the lack of communication and unnecessary wrangling that all too frequently occurs in an ESI-intensive case:

Huron was in the best position to take the lead in selecting data custodians and search terms, but it should have been up-front with defense counsel regarding its proposed custodians and search terms and then receptive to defense counsel’s input. . . . On the other hand, Huron asked defense counsel repeatedly to suggest search terms, and Defendants’ counsel did not respond to those requests. Huron’s refusal to disclose the data custodians it identified and its search terms did not excuse Defendants from providing proposed data custodians and search terms in advance of the searches. This is not the kind of collaboration and cooperation needed to manage e-discovery efficiently and with the least expense possible. The proper and most efficient course of action would have been agreement by Huron and Defendants as to search terms

⁴⁷ Cf. *Trusz v. UBS Realty Investors LLC*, 2010 WL 3583064, at *4 (D. Conn. Sept. 7, 2010) (noting that cooperation “regarding the production of electronically stored information . . . allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation merits at the earliest practicable time”); *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009) (acknowledging the “need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’ to be used to produce emails or other electronically stored information”).

⁴⁸ 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010).

and data custodians prior to Huron’s electronic document retrieval. Selecting search terms and data custodians should be a matter of cooperation and transparency among parties and non-parties.⁴⁹

Rule 26(f)(3) requires the parties, in advance of the Rule 16 scheduling conference, to consider “the subjects on which discovery may be needed . . . whether discovery should be conducted in phases or be limited to or focus on particular issues, . . . [and] any issues about disclosure or discovery of electronically stored information.”⁵⁰ Notably, Rule 26(f)(3) is written in mandatory terms. The goal is to expedite the exchange of information and thereby avoid unnecessary discovery disputes.

Rather than dismissing the Rule 26(f) conference as an inconvenient or perfunctory exercise, litigants in an ESI-intensive lawsuit should view this procedure as a strategic opportunity.⁵¹ In a perfect world, the parties will leave the Rule 26(f) conference with agreements on a range of subjects, including the scope of preservation and retention obligations; relevant data and ESI custodians; form of production, and the time required to identify, collect, review and produce ESI.⁵² From the standpoint of defensibility, the parties should discuss what search techniques will be used to identify responsive or privileged ESI and what keyword or other filtering protocols would be appropriate.⁵³ While agreement on all of these issues is ideal, *any* understanding between the parties on e-discovery issues is preferable to gridlock.⁵⁴

For the producing party, particularly in a case involving asymmetrical e-discovery burdens, the advantages of cooperation should be self-evident. However, the party seeking electronically stored information has just as much reason to avoid the “missed opportunity” of negotiating search parameters and methodologies.⁵⁵ The issue of search protocols should be approached as a topic of mutual interest, rather than as a friction point or an opportunity for gamesmanship.⁵⁶ The dispute in *Da Silva Moore* should not discourage

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- 49 The court in *DeGeer* pointedly observed that while counsel “spent a significant amount of time exchanging letters and emails with each other relating to the motion to compel, they did not engage in meaningful discussions with each other.” *Id.*
- 50 Fed. R. Civ. P. 26(f)(3)(B) and (C). Cf. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) (observing that counsel have an obligation at the commencement of the litigation “to take the initiative in meeting and conferring” to develop a plan for the discovery of appropriate electronically stored information).
- 51 See Emery G. Lee, III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 Sedona Conf. J. 201, 207 (Fall 2010) (noting that 61% of of responding magistrate judges reported that Rule 26(f) conferences had reduced the number of e-discovery disputes they had been called upon to resolve).
- 52 See *Equal Employment Opportunity Commission v. McCormick & Schmick’s Seafood Restaurants, Inc.*, 2012 WL 380048, at *4 (D. Md. Feb. 3, 2012) (while noting that the use of search terms is a common practice to reduce the burden of reviewing ESI, “[i]f the producing party generates the search terms on its own, the inevitable result will be complaints that the search terms were inadequate;” the court required “the parties to confer on the development of reasonable search terms to be used to obtain responsive email communications in this case”).
- 53 Cf. *S.E.C. v. Collins & Aikman Corporation*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009) (observing that the “SEC’s blanket refusal to negotiate a workable search protocol responsive to [defendant’s] requests [was] patently unreasonable”). See also *McNulty v. Reddy Ice Holdings, Inc.*, 271 F.R.D. 569, 571 (E.D. Mich. 2011) (the court required counsel for the parties to “meet and confer, in good faith, in order to develop search terms or objective search criteria for use in identifying responsive and non-privileged documents within Home City’s reasonably accessible ESI material,” and further required “[a]s part of this meet-and-confer, [that] Plaintiff will provide for discussion reasonably fashioned search terms and criteria.”); *Board of Regents of University of Nebraska v. BASF Corp.*, 2007 WL 3342423, at *5 (noting that in the discovery process, counsel have an obligation to remove contentiousness “as much as practicable” in order to expedite the pretrial process and minimize burden and expense).
- 54 *In re Facebook PPC Advertising Litigation*, 2011 WL 1324516, at *1 (N.D. Cal. Apr. 6, 2011) (“[T]he argument that an ESI Protocol cannot address every single issue that may arise is not an argument to have no ESI Protocol at all. . . . [T]he clear thrust of the discovery-related rules, case law, and commentary suggests that ‘communication among counsel is crucial to a successful electronic discovery process’”).
- 55 See, e.g., *Ingersoll v. Farmland Foods, Inc.*, 2011 WL 1131129, at *17-19 (W.D. Mo. March 28, 2011). In that case, the court denied the plaintiffs’ motion to compel after noting that the plaintiffs had refused to provide the defendant “with a list of proposed individuals and search terms related to [ESI]” and were now demanding “that Farmland produce ESI regardless of its relevancy and without first allowing Farmland the opportunity to assess the adequacy of its ESI proposal.”
- 56 *Trusz v. US Realty Investors LLC*, 2010 WL 3583064, at *5 (“Among the items about which the court expects counsel to ‘reach practical agreement’ without the court having to micro-manage e-discovery are ‘search terms, date ranges, key players and the like.’”).

parties from considering the benefits of technology-assisted review, but it does highlight the need for counsel to maximize the opportunity for cooperation afforded by the Rule 26(f) process. The “growing pains” associated with technology-assisted review being played out *Da Silva Moore*, while expectable in this ever-evolving field, can be substantially diminished or avoided completely by counsel who are truly committed to controlling the costs and burdens of e-discovery.

It cannot be gainsaid that an adversarial approach to e-discovery only serves to increase the financial burdens of civil litigation and generate unnecessary delay. That realization lies at the heart of The Sedona Conference’s Cooperation Proclamation and its call for a proactive and collaborative approach to e-discovery.

[W]orking cooperatively with opposing counsel to identify a reasonable search protocol, rather than making boilerplate objections to the breadth of a requested protocol or unilaterally selecting the keywords used without disclosure to opposing counsel, may help avoid sanctions or allegations of intentional suppression. Indeed, because knowledge of the producing party’s data is usually asymmetrical, it is possible that refusing to “aid” opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence.⁵⁷

Early agreement on search methodologies should reduce the potential for time-consuming motion practice and expensive supplemental production. More importantly, cooperation in the selection of search methodologies will facilitate the production of relevant information and thereby eliminate surprise, promote the possibility of settlement, and set the stage for a well-tryed case.

Too many litigants and their counsel fail to avail themselves of the benefits of the Rule 26(f) process, based on the misguided belief that intransigence or obfuscation translates into tactical advantage. The Federal Rules belie that notion. Discovery disputes and the resulting motion practice are all too common in an ESI-intensive case, and a party that fails to participate in good-faith in the Rule 26(f) process risks paying a price for that strategy. For example, an attorney or party that does not participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f) can be required to pay the other party’s reasonable fees and costs caused by that failure.⁵⁸ The same sanctions can be imposed on a party or attorney who is substantially unprepared to participate in the Rule 16(b) scheduling conference.⁵⁹

Rule 37(a)(5) provides that in the context of a motion to compel, a prevailing party may recover reasonable fees and costs, unless the court finds, *inter alia*, that “other circumstances make an award of expenses unjust.” In applying that Rule, the court cannot consider the non-prevailing party’s conduct in isolation, but rather should ask whether the “prevailing party also acted unjustifiably.”⁶⁰ Rule 37(a)(1) contemplates that both parties will make reasonable efforts to pursue discovery and resolve pretrial disputes without the need for court intervention. Given the parties’ obligation to participate in good faith in the

57 *The Case for Cooperation*, 10 The Sedona Conf. J. 339, 344 (Fall 2009) (internal citations omitted).

58 Fed. R. Civ. P. 37(f).

59 Fed. R. Civ. P. 16(f).

60 Advisory Committee Notes 10 1970 Amendments to Fed. R. Civ. P. 37(a)(4). *Cf. Burlington Insurance Co. v. Okie Dokie, Inc.*, 368 F. Supp. 2d 83, 91 (D.D.C. 2005) (finding that the “interests of justice [did] not warrant awarding expenses to plaintiff’s counsel” under Rule 37(a)(4) based upon the plaintiff’s own counterbalancing procedural violations).

preparation of a discovery plan, sanctions under Rule 37(a)(5) would seem to be “unjust” where a prevailing requesting party rebuffed the producing party’s good faith efforts to negotiate a mutually acceptable search protocol in the context of the Rule 26(f) process.

Similarly, Rule 26(b)(2)(C)(i) provides that the court must limit the frequency or extent of discovery where, *inter alia*, the discovery sought “can be obtained by some other source that is more convenient, less burdensome or less expensive.” By refusing to negotiate a mutually acceptable search protocol, it could be argued that the requesting party failed to take advantage of an early opportunity to obtain the desired information by a means that was “more convenient, less burdensome or less expensive.” The court’s observation in *Covad Communications Co. v. Revonet, Inc.*⁶¹ is instructive. In that case, plaintiff’s counsel ignored the defendant’s repeated requests for suggested search terms. The court observed that “[g]iven that history it is unfair to allow Covad to fail to participate in the process and then argue that the search terms were inadequate.”⁶² A party should understand that it ignores the potential benefits of Rule 26(f) at its peril.

B. A Motion for Protective Order Under Rule 26(c)

If the parties cannot negotiate a mutually acceptable search protocol at the outset of the litigation, the producing party may still proactively seek relief, as did the defendants in *Global Aerospace*, and obtain early judicial approval for their proposed methodology. Rule 26(c) permits a party or person “from whom discovery is sought” to seek relief from “undue burden or expense.”⁶³ Upon a showing of good cause, the court has considerable discretion to provide alternative forms of relief, including “specifying terms . . . for the disclosure or discovery,” “prescribing a discovery method other than the one selected by the party seeking discovery,” or “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.”⁶⁴ In exercising its discretion under Rule 26(c), the court must balance the competing considerations of allowing discovery and protecting parties or other persons from undue burdens.⁶⁵

A party seeking relief under Rule 26(c) bears the burden of persuasion and must make a “particular and specific demonstration of fact’ in support of its request.”⁶⁶ To support a motion for protective order proposing a particular search protocol, the producing party should provide the court with information from which it can reasonably conclude that the proposed methodology is both reliable and a reasonable response to the nature and magnitude of the ESI at issue in the case. The moving party also should remain mindful of the reasonable discovery needs of the opposing party and be prepared to explain to the court how those needs will be met by the proposed methodology.⁶⁷

61 258 F.R.D. 5, 13 (D.D.C. 2009) (noting that “[i]t is the rare case that a litigant does not allege some deficiency in the production of electronically stored information, particularly e-mail.”).

62 *Id.* at 14.

63 Fed. R. Civ. P. 26(c).

64 *Id.*

65 *Cf. Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 206 (D. Colo. 2002). See also *St. John v. Napolitano*, 274 F.R.D. 12, 16 (D.D.C. 2011) (noting that the court has “broad discretion to tailor discovery narrowly” under Rule 26 and suggesting that “[i]t is appropriate for the court, in exercising its discretion . . . to undertake some substantive balancing of interests”).

66 See, e.g., *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533, 536-37 (D. Kan. 2003) (holding that where a Rule 26(c) motion is based upon claim of undue expense or burden, the moving party must submit affidavits or other detailed explanation as to the nature and extent of the burden or expense); *Flint Hills Scientific, LLC v. Davidchack*, 2001 WL 1718291, at *2 (D. Kan. Dec. 3, 2001) (Rule 26(c) requires a “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981)).

67 *Cf. Duling v. Grisede’s Operating Corp.*, 266 F.R.D. 66, 71 (S.D.N.Y. 2010) (the court, in ruling on a motion for protective order, must balance the litigation needs of the discovering party and the countervailing interests of the producing party).

There are significant tactical advantages to pursuing early relief under Rule 26(c). A successful motion for protective order will provide the producing party with a measure of certainty before incurring considerable time and expense in document collection and review, even if the court declines to adopt the proposed methodology in its entirety.⁶⁸ To be sure, a protective order endorsing the producing party's preferred search methodology will not preclude a subsequent motion challenging the results of the production process. However, a successful Rule 26(c) motion may go a long way toward circumscribing a future motion to compel and neutralizing a request for fees and costs under Rule 37(a)(5).

C. A Motion to Compel Under Rule 37(a)

A producing party loath to exploit the tactical advantages of Rule 26(f) and Rule 26(c) faces the very real possibility of having to defend the reliability and legal sufficiency of its search methodology in the context of a motion to compel filed in the late stages of the discovery process. One need only read the transcripts from the *Kleen Products* hearing to appreciate the implications of such a motion.

In the typical discovery dispute, the requesting party challenges the sufficiency of the responding party's interrogatory responses and/or document production by filing a motion to compel under Rule 37(a)(3).⁶⁹ The motion invariably argues that the producing party has frustrated the objectives underlying the discovery process by withholding relevant, non-privileged information, making spurious objections or improperly asserting privileges. In short, the typical motion to compel is directed to the sufficiency of the responding party's response or final product, not to the *process* from which that product is derived.

Assuming the requested information or material is facially relevant to a claim or defense or likely to lead to the discovery of relevant information, the party resisting discovery assumes the burden of persuasion.⁷⁰ "In most cases, the moving party need only file its motion to compel and draw the court's attention to the relief the party seeks. At that point, the burden is on the nonmoving party to support its objections with specificity and, where appropriate, with reference to affidavits and other evidence."⁷¹ The court is not required to have a hearing and may decide the motion based solely on the written submissions of the parties.⁷²

This conventional approach and the corresponding burden of persuasion is not appropriate where the motion to compel is directed primarily at the producing party's search methodology. Rule 34 does not specify *how* a party must search the documents or ESI in its possession, custody or control, and does not assign that decision to the requesting party. To the contrary, as noted in Principle 6 of The Sedona Principles, the producing party is in the best position to select the most appropriate methods or procedures for reviewing, evaluating and producing its electronically stored information.⁷³ As a technical

68 See, e.g., *Wood v. Capital One Services, LLC*, 2011 WL 2154279, at *8 (N.D.N.Y. Apr. 15, 2011) (in granting defendants' motion for protective order, the court held that defendants had sustained their burden of showing that the effort and expense associated with search for and producing requested information far outweighed any potential relevance; the court noted that the parties had already engaged in substantial discovery and that plaintiff's additional requested searches would generate, after elimination of duplicates, approximately 1,753,537 additional documents at a cost of more than \$5,000,000 to process, review and produce).

69 Fed. R. Civ. P. 37(a)(3)(A) and (B).

70 See, e.g., *Morris v. Lowe's Home Centers, Inc.*, 2012 WL 1073405, at *3 (M.D.N.C. Mar. 29, 2012).

71 *Ice Corp. v. Hamilton Sundstrand Corp.*, 2007 WL 1364984, at *6 (D. Kan. May 9, 2007) (quoting *Williams v. Sprint/United Management Co.*, 2005 WL 731070, at *7, 13 (D. Kan. March 30, 2005)).

72 See, e.g., *Cummings v. General Motors Corp.*, 2002 WL 32713320, at *1 (W.D. Okl. June 18, 2002), *aff'd*, 365 F.3d 944 (10th Cir. 2004).

73 *The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production (The Sedona Conference® Working Group Series, 2007)* ("The Sedona Conference® Principles, Second Edition 2007"), available at www.thosedonaconference.org.

matter, no methodology can produce perfect results. Given that there “are probably more ways of gathering, processing and producing ESI than there are lawyers,”⁷⁴ a producing party should not have to “prove the correctness” of its selected protocol to the exclusion of all other methodologies.⁷⁵ For that reason, applying the usual motion to compel paradigm to disputes concerning search methodologies simply invites a protracted evidentiary hearing that may devolve into a battle between competing vendors advocating for their own software product.⁷⁶

Where the motion to compel challenges the search methodology employed by the producing party, the requesting party should be required, as a threshold matter, to demonstrate the relevance of the desired ESI under Rule 26(b)(1)⁷⁷ and the “reasonableness” of the requested discovery under the proportionality factors set forth in Rule 26(g). The moving party also should be required to show that the opposing party actually failed to produce responsive materials as a result of the methodology employed or that the selected protocol is demonstrably likely to miss responsive documents.

Assuming this threshold showing is made, the burden should shift to the producing party to demonstrate the reasonableness of the selected protocol in light of the particular circumstances of the pending case. The producing party should be prepared to defend its technological decisions “with affidavits or other equivalent information from persons with the requisite qualifications and experience, based on sufficient facts or data and using reliable principles or methodology.”⁷⁸ It remains for the producing party to explain the rationale underlying the selected search methodology, “demonstrate that it is appropriate for the task, and show that it was properly implemented.”⁷⁹

However, the producing party should not be required to prove that the selected methodology is “correct” or infallible, or that the resulting production was perfect. A search methodology should not be subject to challenge simply because experts or opposing parties have their own preferred approach, or have vague, unsubstantiated suspicions that documents or ESI are missing. Again, the court’s focus under Rule 37(a) should be on the result of the search, not the process itself. The court should resist a *post hoc* invitation to

74 Anne Kershaw & Joe Howie, *Judges’ Guide to Cost-Effective E-Discovery*, at iii (Federal Judicial Center 2010).

75 *The Sedona Conference* Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 315-16 (Fall 2009) (“Given the ad hoc nature of the [data collection] process, it is not surprising that objective benchmarks, standards and regulations specific to the governing of this process do not exist.”).

76 To paraphrase the notable military theorist, Carl von Clausewitz, litigation should not be the continuation of marketing by other means.

77 *Cf. Davis v. Young*, 2012 WL 530917, at *3 (E.D. La. Feb. 16, 2012). See also *Jones v. National Council of Young Men’s Christian Associations of the United States*, 2011 WL 7568591, at *2 (N.D. Ill. Oct. 21, 2011) (in denying in part plaintiffs’ motion to compel the production of additional ESI, the court concluded that “Plaintiffs’ untargeted, all-encompassing request fails to focus on key individuals and the likelihood of receiving relevant information;” finding that “the Court needs to step in as Plaintiffs are asking for too much here and the entire burden should not be on Defendants”).

78 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 n. 10 (D. Md. 2008). See also *Seven Seas Cruises S. De R.L. v. V. Ships Leisure SAM*, 2011 WL 772855, at *1 (S.D. Fla. Feb. 19, 2011) (in response to plaintiffs’ motion to compel electronically stored information, the court ordered the defendants to submit an affidavit setting forth the steps undertaken by the defendants to respond to plaintiffs’ ESI requests); *Dorsey v. Equal Employment Opportunity Commission*, 2010 WL 3894590, at *2 (S.D. Cal. Sept. 29, 2010) (holding in a FOIA case that the defendant agency can prove the reasonableness of its search “through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory and submitted in good faith. . . . They must ‘describe what records were searched, by whom, and through what processes’ . . . [and] must demonstrate ‘that the search was reasonably calculated to uncover all relevant documents’”); *White v. Graceland College Center for Professional Development & Lifelong Learning, Inc.*, 586 F. Supp. 2d 1250, 1262 (D. Kan. 2008) (in response to a motion to compel, defendants produced an affidavit from their Director of Information Systems; plaintiff challenged the sufficiency of that affidavit, arguing that the affiant had not “indicated when he conducted his searches, how he conducted the searches, and whether he found any documents as a result of his searches;” the court rejected that challenge, finding that the defendants had sufficiently identified the “computers and networks that were searched for responsive documents and explained why some old computers and loaner” computers were not searched).

79 *Cf. Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. at 260, 262. But see *Chura v. Delmar Gardens of Lenexa, Inc.*, 2012 WL 940270, at *12 (D. Kan. Mar. 20, 2012) (finding that an evidentiary hearing was necessary as the “minimal information” provided limited the court’s “ability to determine whether Defendant met its duty to conduct a reasonable search for ESI responsive to many of Plaintiff’s discovery requests . . . [and] [i]t is unclear what actions Defendant undertook in order to preserve and search for responsive ESI.”).

second-guess or draw qualitative or narrow quantitative distinctions between competing search methodologies. To borrow from the United States Supreme Court, even assuming that alternative search methodologies are available, “it does not follow that the search as conducted was unreasonable.”⁸⁰

The analysis suggested in this article is not unlike the standard set forth in Rule 37(a)(5)(A)(ii), which provides that the court should not impose fees and costs where the non-prevailing party’s position was “substantially justified.”⁸¹ For purposes of Rule 37(a)(5)(A)(ii), a non-prevailing party’s position is substantially justified where that position is “justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person.”⁸² Stated alternatively, “substantial justification” is “justification to a degree that could satisfy a reasonable person that parties could differ” on the point at issue.⁸³

Once the producing party has demonstrated the reasonableness and reliability of its preferred methodology, the ultimate burden of persuasion should fall on the requesting party.⁸⁴ That party should be required to show that the producing party selected its methodology in bad faith (*e.g.*, that the producing party selected search terms or a “seed set” of relevant exemplars fully realizing that the resulting search would omit obviously responsive documents),⁸⁵ or that the chosen protocol is so statistically or scientifically unreliable as to cause actual and substantial prejudice to the requesting party. It should be self-evident that the requesting party could not sustain its burden of persuasion based solely on suspicions or assumptions.⁸⁶

THE APPLICABILITY OF RULE 702 AND *DAUBERT*

Application of the “reasonableness” standard in the context of a technology-assisted e-discovery process invariably will present the court with methodologies or forensic techniques which are beyond the knowledge or skills of a layperson, and certainly outside the experience of most judges. The court inevitably will find itself in the “uncomfortable position” of having to weigh dueling expert opinions and evaluate the merits of competing e-discovery search protocols.⁸⁷

80 *Cf. City of Ontario, California v. Quon*, __ U.S. __, 130 S.Ct. 2619, 2632 (2010) (in the context of a Fourth Amendment search, noting that “judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might be accomplished”).

81 Fed. R. Civ. P. 37(a)(5)(A)(ii).

82 *Romary Associates, Inc. v. Kibbi LLC*, 2011 WL 4005346, at *6 (N.D. Ind. Sept. 8, 2011). See also *Underdog Trucking, LLC v. Verizon Services Corp.*, 273 F.R.D. 372, 377 (S.D.N.Y. 2011); *JSR Micro, Inc. v. QBE Insurance Co.*, 2010 WL 1957465, at *2 (N.D. Cal. May 14, 2010).

83 *Klatch-Maynard v. Sugarloaf Township*, 2011 WL 2006424, at *2 (M.D. Pa. May 23, 2011).

84 *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. at 15 (holding that if a party seeks to conduct additional searches, that party must file a motion “explaining why the results of the search conducted, the history of the controversy between the parties and of this litigation, the controlling law and any other factor, justify the additional search sought.”).

85 See, *e.g.*, *Bailey Industries, Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 671 (N.D. Fla. 2010) (granting the plaintiff’s motion to compel email communications after concluding that the subpoena recipient’s production was demonstrably incomplete and that “the search conducted by CLJP did not include obviously relevant search terms”).

86 *Cf. Orillaneda v. French Culinary Institute*, 2011 WL 4375365, at *7 (S.D.N.Y. Sept. 19, 2011) (in granting in part the defendant’s motion for protective order, the court noted that the “[p]laintiff’s general statements concerning defendant’s production do not identify the ways in which this production was deficient”); *Averill v. Gleaner Life Insurance Soc.*, 626 F. Supp. 2d 756, 766 (N.D. Ohio 2009) (the mere suspicion that the responding party must have additional documents will not suffice to warrant granting a motion to compel); *In re Application for an Order for Judicial Assistance*, 244 F.R.D. 434, 437-38 (N.D. Ill. 2007) (denying a motion to compel that was based the petitioners’ own notions of what is conceivable for McDonald’s to possess; the court concluded that “[t]he evidence and speculation on which Petitioners base their belief is simply insufficient to support their motion to compel”). See also *Lazaridis v. United States Department of Justice*, 766 F. Supp. 2d 134, 141 (D.D.C. 2011) (in the context of FOIA litigation, a party challenging the agency’s production must raise “substantial doubt” about the adequacy of the search; “the [mere] fact that a particular document was not found does not demonstrate the inadequacy of a search”).

87 *Cf. William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. at 135.

Acknowledging the role that experts inevitably will likely play in the development, implementation and defense of a technology-assisted discovery process frames the next question. What standard should the court apply in evaluating expert testimony regarding the producing party’s search methodology? Unfortunately, case law provides little guidance in answering that question. In *O’Keefe*, Magistrate Judge Facciola concluded that the selection and development of e-discovery search terms “is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.”⁸⁸

[I]f defendants are going to contend that the search terms used by the government were insufficient, they will have to specifically so contend in a motion to compel and their contention must be based on evidence that meets the requirements of Rule 702 of the Federal Rules of Evidence.⁸⁹

More recently, Magistrate Judge Peck suggested that “Rule 702 and *Daubert* simply are not applicable to how documents are searched for and found in discovery.”⁹⁰ The seemingly conflicting positions articulated in *O’Keefe* and *Moore I* are not irreconcilable. While Judges Facciola and Peck may have differing views on the applicability of Rule 702 in an e-discovery pretrial context, the decisions in *O’Keefe* and *Moore I* reflect the same underlying concern: will the discovery protocol in question produce results that are reliable and consistent with the requirements and objectives underlying the Federal Rules of Civil Procedure? In the final analysis, a debate over the literal applicability of Rule 702 may be more distracting than helpful.

It is important to remember that Rule 702 establishes a legal framework for the admission of expert opinion and, in that respect, is not a rule of exclusion.⁹¹ Expert testimony should be permitted to the extent it “will help the trier of fact to understand the evidence or to determine a fact in issue.”⁹² The judge typically serves as a “gatekeeper” for the jury, providing a preliminary assessment of the expert’s qualifications and methodology, and the “fit” between the expert’s opinions and the facts at issue.⁹³ Expert opinion testimony is admissible if the expert is appropriately qualified and if “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”⁹⁴ In applying the Rule 702 factors, the court has considerable discretion.⁹⁵

88 *United States v. O’Keefe*, 537 F. Supp. 2d at 24. See also *Equity Analytics LLC v. Lundin*, 248 F.R.D. at 333 (requiring the defendant “to submit an affidavit from its examiner explaining why the limitations proposed by plaintiff are unlikely to capture all the information Equity seeks and the impact, if any, of the loading of the new operating system on Lundin’s computer and the data that was on it before the new operating system was loaded. The expert shall also describe in detail how the search will be conducted. Armed with that information, supplemented if necessary by a hearing at which the expert will be cross examined, [the court] can make the best possible judgment as to how to balance Equity’s need for information against Lundin’s privacy.”).

89 *Id.* See also Fed. R. Evid. 1101 (“These rules apply to the United States district courts . . . and United States magistrate judges, in the actions, cases and proceedings and to the extent hereinafter set forth. . . . These rules apply generally to civil actions and proceedings . . .”).

90 *Moore I*, 2012 WL 607412, at *7.

91 See *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir.), cert. denied., 502 U.S. 913 (1991). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-89 (1993) (acknowledging the Federal Rules of Evidence’s “permissive backdrop” and their “general approach of relaxing the traditional barriers of ‘opinion’ testimony”).

92 Fed. R. Evid. 702(a).

93 See, e.g., *Samuels v. Holland American Line-USA, Inc.*, 656 F.3d 948, 952 (9th Cir. 2011).

94 Fed. R. Evid. 702.

95 *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1243 (10th Cir. 2000) (Rule 702 analysis involves “a flexible and commonsense undertaking in which the trial judge is granted ‘broad latitude’ in deciding both how to determine reliability as well as in the ultimate decision of whether the testimony is reliable”). See also *Murray v. Marina Dist. Development Co.*, 311 Fed. Appx. 521, 523 (3rd Cir. 2008) (holding that the trial court did not abuse its discretion by failing to hold a *Daubert* hearing where the evidentiary record was otherwise sufficient to allow the court to ascertain the expert’s methodology and make a proper reliability determination); *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1252 (11th Cir. 2007) (noting that while *Daubert* hearings are often helpful, hearings are not a prerequisite under Rule 702).

“There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”⁹⁶ At a bench trial, for example, the judge may permit the challenged expert to testify, subject to the rigors of cross-examination, and decide later whether the expert’s opinions are entitled to some consideration or whether they should be excluded as unreliable or irrelevant.⁹⁷ Similarly, there is little need for a Rule 702 “gatekeeper” in the context of a motion to compel or motion for protective order, as there is no trier of fact to “protect.” The court can simply hear the expert testimony and give the opinions whatever weight the court deems appropriate.⁹⁸

While a motion to compel or motion for protective order may not trigger the same “gatekeeper” responsibilities that would apply in a jury trial setting, motions in an ESI-intensive case not infrequently may require expert testimony. The reasonableness of a technology-assisted review process ultimately may turn on why and how a particular protocol was selected and implemented, and whether that protocol appropriately discharges the producing party’s discovery obligations. Answering those questions almost certainly will require affidavits or testimony from individuals with education, training or experience beyond a layperson’s common knowledge, but they should not provide an opportunity for the opposing party to eviscerate the time and cost savings the new technologies were designed to produce.

Even if a party is inclined to argue that the Federal Rules of Evidence do not apply in the context of a motion for protective order or motion to compel, courts confronted with opinion testimony in support of or in opposition to a technology-assisted discovery process likely will look to Rule 702 case law for guidance. Indeed, the Rule 702 standards are well-suited to the constantly evolving technology impacting e-discovery.

An expert is “‘required to possess’ such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation.”⁹⁹ In defending a particular e-discovery protocol as reasonable, a party should be prepared to offer testimony from an individual with actual knowledge pertinent to the specific issues raised by the motion.¹⁰⁰ The qualifications prong of Rule 702 does not require more than that. The court should not exclude appropriate expert testimony simply because the witness is not the “most qualified”¹⁰¹ or does not have the specialization considered most appropriate by the opposing party or the court.¹⁰²

96 *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005), cert. denied, 547 U.S. 1023 (2006). Cf. *Davis v. United States*, 2012 WL 424887, at *5 (E.D. Ky. Feb. 9, 2012) (acknowledging that “[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony” and “[t]hat interest is not implicated . . . where the judge is the decision maker”) (quoting *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 613 (8th Cir. 2011)).

97 Cf. *Fowler v. United States*, 2011 WL 1004574, at *6 (N.D. Ill. Mar. 18, 2011). See also *New York v. Solvent Chemical Company, Inc.*, 2006 WL 2640647, at *2 (W.D.N.Y. Sept. 14, 2006).

98 See Fed. R. Evid. 102 (acknowledging that the Federal Rules of Evidence “should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay . . . to the end of ascertaining the truth and securing a just determination”).

99 *Markham v. BTM Corp.*, 2011 WL 1231084, at *16 (D. Kan. Mar. 30, 2011) (quoting *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928 (10th Cir. 2004)).

100 See, e.g., *Veritas Operating Corp. v. Microsoft Corp.*, 2008 WL 687118, at *3 (W.D. Wash. Mar. 11, 2008) (while acknowledging that the defendant’s expert was qualified to testify as to programming standards within the computer software industry, precluded that expert from offering opinions on issues that required source code analysis as the witness acknowledged during his deposition that he was not an expert with regard to code analysis or software architecture). But see *Galaxy Computer Services, Inc. v. Baker*, 325 B.R. 544, 563 (E.D. Va. 2005) (held that plaintiff’s computer expert was qualified under Rule 702 even though none of his degrees were in computer science, he was not fluent in any computer language, and he did not hold any certificates in computer science; the court concluded that “the field of computer forensics does not require a background in computer programming or reading and writing code”).

101 *Raytheon Co. v. United States*, 2009 WL 1373959, at *1 (Fed. Cl. May 13, 2009) (citing *Holbrook v. Lykes Brothers S.S. Co.*, 80 F.3d 777, 782 (3rd Cir. 1996)).

102 *Squires ex rel. Squires v. Goodwin*, ___ F. Supp. 2d ___, 2011 WL 5331583, at *4 (D. Colo. Nov. 7, 2011) (Shaffer, M.J.). But see *Solaia Technology LLC v. ArvinMeritor, Inc.*, 361 F. Supp. 2d 797, 812-14 (N.D. Ill. 2005) (in an action alleging infringement of plaintiff’s software, held that a computer expert’s qualifications to testify regarding industrial controls generally would not suffice to overcome the witness’ own disclaimer of expertise in the fields of Windows programming or a particular operating system at issue).

Similarly, the court’s responsibility under Rule 702 is not to determine whether the witness’ opinion (or the selected search methodology) is “correct,” but rather whether the opinion is based upon a reliable methodology.¹⁰³ The court, in applying this factor, “not only has broad latitude in determining whether an expert’s testimony is reliable, but also in deciding *how* to determine the testimony’s reliability.”¹⁰⁴ Drawing on the Rule 702 standard for reliability, the proponent of an e-discovery search protocol process should be required to demonstrate that the selected “tool or method has adequately and accurately collected or captured responsive documents and ESI”;¹⁰⁵ in sum, that the process and the outcome are reasonable.

CONCLUSION

Technology-assisted review procedures have the potential to reduce discovery costs and expedite the production of relevant, non-privileged ESI. All of these benefits, however, are lost if counsel and their clients, as well as the courts, become embroiled in unnecessary and distracting motion practice. In the wake of recent court decisions, particularly *Da Silva Moore*, clients and their counsel must consider issues of defensibility in selecting and implementing an ESI search methodology. A defensible e-discovery protocol is one that is reliable, reasonable under the circumstances of the subject litigation, and promotes the “just, speed, and inexpensive determination of [the] action.” Each of these goals, and the ultimate defensibility of any search methodology, is best achieved through cooperative interaction between counsel for the parties.

103 See, e.g., *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-30 (6th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1673 (2009). See also *United States v. Williams*, 235 Fed. Appx. 925, 928 (3rd Cir.) (“The requirement of reliability is lower than the standard of correctness.”), *cert. denied*, 552 U.S. 1082 (2007).

104 *Hangarter v. Provident Life and Accident Insurance, Co.*, 373 F.3d 998, 1017 (9th Cir. 2004)(internal citations omitted) (emphasis in original).

105 See *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299, 308 (Fall 2009).