"Defensible" By What Standard?

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The Sedona Conference®

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There is a growing body of literature suggesting that e-discovery processes that rely upon automated tools to prioritize and select materials for review may be more cost-effective and may result in document production that is superior to traditional manual review.[2] A technology-assisted review process may incorporate keyword, Boolean or conceptual search techniques, as well as "clustering," machine learning, relevance ranking, "predictive coding," or sampling. 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."[3] In the final analysis, a technology-assisted e-discovery process should not be held to a standard of perfection, but it 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.[4]

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[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*, 17 Richmond Journal of Law and Technology 11 (Spring 2011); Anne Kershaw, *Automated Document Review Proves Its Reliability*, 5 Digital Discovery & e-Evidence 11, 10-11 (2005), available at http://www.ediscoveryinstitute.org/pbus/AutoDocumentReviewReliability.pdf.

[3]*United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

[4]*See The Sedona Conference Best Practices for the Selection of Electronic Discovery Vendors* (June 2007 version), p. 3. *Cf. Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at *12 (S.D.N.Y. Feb. 24, 2012) ("[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)(A) proportionality").

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]

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, the goal is to implement a discovery plan that identifies and collects relevant and responsive non-privileged materials and data from a larger universe of electronically stored information using appropriate methodologies that are reasonable to the particular circumstances of the client and litigation and provide a quality result.

Designing and implementing a defensible discovery process is further complicated by the post-hoc nature of most discovery motions. Invariably, the court is asked to evaluate the merits and legal sufficiency of a particular discovery process only after a party has made critical technological decisions, has spent considerable time and money, and progressed through most (if

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

[6] *Id.*

[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 (Fall 2009). *See also The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conference Journal 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.").

not all) of the pretrial process. While developing an effective e-discovery process requires iterative approach from the outset of the litigation, the true measure of a defensible e-discovery process is the ability to withstand challenge after-the-fact by the opposing party. 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.[8] The challenge of developing such a plan is exacerbated by the ever-evolving nature of the technology.

In addressing the legal defensability of a discovery process, the starting point is Rule 26(b)(1) of the Federal Rules of Civil Procedure. Rule 26(b)(1) permits discovery of any nonprivileged matter that is relevant to any party's claim or defense , "including the existence, description, nature, custody, condition and location of any documents or other tangible things." 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."[9] But the right to obtain discovery is not absolute.[10]

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[8]*See The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conference Journal 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).

[9]*See, e.g, Basaldu v. Goodrich Corp.*, No. 4:06-cv-23, 2009 WL 1160915 (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.*, No. 4:04CV3356, 2007 WL 3342423 (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

While a defensible e-discovery plan is not held to a standard of perfection,[11] 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.[12] This "reasonableness" standard is a defining characteristic of the discovery rules. 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."[13] The party invoking the protection of Rule 26(b)(2)(B) bears the burden of persuasion, and cannot hope to sustain that burden with conclusory statements or vague generalities.[14]

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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."); *Johnson v. Kraft Foods North America, Inc.*, 238 F.R.D. 648 (D. Kan. 2006) (a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on a party's claim or defense).

[10]*See, e g., Qwest Communications International, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) ("[i]n every case, the court has the discretion, in the interests of justice, to prevent excessive or burdensome discovery").

[11]*See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010)

[12]*See, e.g., Fendi Adele v. Filene's Basement, Inc.*, No. 6 Civ. 244-RMB-MHD, 2009 WL 855955, at *8 (S.D.N.Y. Mar. 24, 2009) ("litigants have an obligation, when discovery is sought form 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 . . .'").

[13]Fed. R. Civ. P. 26(b)(2)(B). *See also* Fed. R. Civ. P. 45(c) (which protects a non-party from unduly burdensome requests by requiring a party serving a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena").

[14]*See, e.g., Cartel Asset Management v. Ocwen Financial Corp.*, No. 1-cv-01644-REB-CBS, 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.*,

If "reasonableness" is the applicable measure of performance, the Federal Rules also identify factors that the court may consider in weighing a party's efforts at compliance. The court may limit the scope of discovery based upon a finding that "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."[15] The scope of discovery in a particular case, and a party's corresponding discovery obligations, must be proportionate in light of the foregoing factors.[16]

This same aspect of reasonableness finds expression in Rule 26(c), which permits a party or person "from whom discovery is sought" to seek relief from, *inter alia*, "undue burden or expense."[17] Upon a showing of good cause, the court has considerable discretion to provide alternative forms of relief, including "specifying terms, including time and place, 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."[18] A party seeking relief under Rule 26(c) must make a "'particular and specific demonstration of fact' in support of its request."[19] Rule 26(c) requires

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Inc. v. Hurd Windows & Doors, Inc., No. C07-532RL, 2008 WL 1805727, at *1) (W.D. Wash. Apr. 21, 2008) (internal quotation marks omitted).

[15]Fed. R. Civ. P. 26(b)(2)(c).

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

[17]Fed. R. Civ. P. 26(c).

[18]*Id.*

[19]*See, e.g., Aikens v. Deluxe Fin. Services, Inc.*, 217 F.R.D. 533 (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

the court to balance the competing interests of allowing discovery and protecting parties or other persons from undue burdens.[20] Much like the particularized showing required by Rule 26©), a defensible e-discovery process should be based on "articulated reasoning" and the implementing party should be prepared to provide the court with information from which it can reasonably conclude that the proposed plan represents a reasonable response to the nature and magnitude of the requested discovery.[21]

A defensible discovery process must also take into considerable the certification requirement imposed in Fed. R. Civ. P. 26(g). While the Federal Rules do not impose a standard of perfection, a party and its counsel must discharge their discovery obligations in a reasonable manner.[22] 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, . . . not interposed for any improper purpose . . . and neither unreasonable or expensive considering the needs of the

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expense); *Flint Hills Scientific, LLC v. Davidchack*, No. 00-2334-KHV, 2001 WL 1718291 (D. Kan. Dec. 3, 2001) (Rule 269(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).

[20]*Cf. Exum v. United States Olympic Comm.*, 209 F.R.D. 201 (D. Colo. 2002). *See also St. John v. Napolitano*, 274 F.R.D. 12 (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").

[21]*Cf. Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66 (S.D.N.Y. 2010).

[22]*See, e.g., Lewis v. Sch. Dist. #70*, No. 05-776-WDS, 2006 WL 2506465, *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.").

case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[23]

Rule 26(g) imposes on a party and its counsel the obligation "to make a timely, reasonable and diligent search for all documents responsive to the [the opposing party's] discovery requests."[24]

> "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.'"[25]

For example, in the context of a request for information under the Freedom of Information Act, a government agency is expected to undertake a good faith search for the requested documents, using methods that can be reasonably expected to produce the information requested. While the agency's search "need not be perfect, only adequate," the measure of adequacy is defined as "the reasonableness of the effort in light of the [opposing party's] specific request."[26]

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 beyond the knowledge or skills of a layperson, and certainly outside the experience of most

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[23]Fed. R. Civ. P. 26(g)(1)(B).

[24]*Zander v. Craig Hosp.*, No. 09-cv-02121-KHV-BNB, 2011 WL 834190, at *1 (D. Colo. Mar. 4, 2011).

[25]*Robinson v. City of Ark. City, Kan.*, No. 10-1431-JAR-GLR, 2012 WL 603576, at *4 (D. Kan. Feb. 24, 2012)

[26]*Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 69 (D.D.C. 2010). *See, e.g., In re Delta/AirTran Baggage Fee Antitrust Litigation*, __ F. Supp. 2d __, No.1:09-md-2089-TCB, 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).

judges. As one jurist has noted, "the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented."[27] A party invoking the "not reasonably accessible" standard under Rule 26(b)(2)(B) or attempting to satisfy the "particularized need" requirement of Rule 26©) in an ESI context may be dependent upon experts to sustain their burden of proof. The opposing party may then have no choice but to present countervailing expert testimony.[28] In the end, the court is placed in the "uncomfortable position" of having to weigh dueling expert opinions and evaluate the merits of competing e-discovery search protocols.[29]

Acknowledging the inevitable role that experts will play in the development, implementation and defense of a technology-assisted discovery process, however, leaves unresolved the standard the court should apply in weighing the expert's testimony. 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

[27]*Cf. Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008) (noting that "[s]election of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology").

[28]*See, e.g.*, *Culler v. Shinseki*, No. 3:09-0305, 2011 WL 3795009, at *8 (M.D. Pa. Aug. 26, 2011) (denying plaintiff's request for sanctions "since the plaintiff [ ] failed to present any expert testimony by affidavit or otherwise which would allow the court to conclude that the defendant's search was inadequate").

[29]*Cf. William A. Gross Constr. Assocs, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 135 (S.D.N.Y. 2009). *See also Moore*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at *3; Transcript of Record at 11-12, *Kleen Products, LLC v. Packaging Corp. of America*, No. 10-C-5711 (N.D. Ill. Feb. 21, 2012).

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."[30]

> Accordingly, if 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.[31]

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."[32] The seemingly conflicting positions articulated in *O'Keefe* and *Moore* are not irreconcilable. While Judges Facciola and Peck may have conflicting views on the applicability of Rule 702 in an e-discovery pretrial context, the decisions in *O'Keefe* and *Moore* voice the same concern: did the discovery protocol in question produce results that are valid and consistent with the requirements and objectives underlying the Federal Rules of Civil Procedure?

To the extent the answer to that question requires expert testimony, 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.[33] Expert testimony should be permitted to the extent it

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[30]*O'Keefe*, 537 F. Supp. 2d at 24. See also *Equity Analytics LLC*, 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.").

[31]*Id.*

[32]*Moore*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at *7.

[33]*See Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991) ("Rule 702 is one of admissibility rather than exclusion."). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-89 (1993) (acknowledging the Federal Rules of Evidence's "permissive

"will help the trier of fact to understand the evidence or to determine a fact in issue."[34] The judge 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.[35] In that respect, the court's gatekeeper role under Rule 702 is to "protect juries."[36] 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."[37] In applying the Rule 702 factors, the court has considerable discretion.[38]

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backdrop" and their "general approach of relaxing the traditional barriers of 'opinion' testimony").

[34]Fed. R. Evid. 702(a).

[35]*See, e.g., Samuels v. Holland American Line-USA, Inc.*, 656 F.3d 948, 952 (9th Cir. 2011). *Cf. Banister v. Burton*, 636 F.3d 828, 831 (7th Cir. 2011) (as "gatekeeper," it is the district court's role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable") (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).

[36]*Cf. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). *See also United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009) (in functioning as gatekeepers, district courts should permit "only reliable and relevant expert testimony to be presented to the jury"); *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (expressing the need "to protect juries from being bamboozled b technical evidence of dubious merit").

[37]Fed. R. Evid. 702

[38]*Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1243 (10th Cir. 2000) (Rule 702 analysis involves "a flexible and common sense 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. Dev. 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*)*

The trial court's gatekeeper responsibilities are significantly less important in a non-jury context. When the court serves both as gatekeeper and fact finder, for example, during a bench trial, a preliminary determination of whether the Rule 702 standard of reliability is probably superfluous.[39] "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."[40] At a bench trial, 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.[41] 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.[42]

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, those motions in an ESI-intensive case not infrequently may require expert testimony. As already noted, relief under Rule 26(b)(2)(B) or Rule 26c) requires more than generalized assertions of inaccessibility or

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[39]*See In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006).

[40]*United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005). *Cf. Davis v. United States*, No. 08-184-ART, 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))

[41]*Cf. Fowler v. United States*, No. 08-cv-2785, 2011 WL 1004574, at *6 (N.D. Ill. Mar. 18, 2011). *See also New York v. Solvent Chemical Company, Inc.*, No. 83-CV-1401C, 2006 WL 2640647, at *2 (W.D.N.Y. Sept. 4, 2006).

[42]*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").

good cause. Similarly, the reasonableness of a technology-assisted review process ultimately will turn on how and why a particular protocol was selected and then implemented, and whether that protocol appropriately discharges the responding party's discovery obligations. Answering those questions will invariably implicate testimony from individuals with education, training or experience beyond a layperson's common knowledge.

"[I]f the court is to be given scientific or technical information to resolve a contested discovery matter, what standards should govern its evaluation?"[43] While perhaps not directly applicable, Rule 702 can be instructive in guiding the court's evaluation of expert testimony submitted in support of or in opposition to a technology-assisted discovery process. 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."[44] The court should not exclude expert testimony simply because the witness is not the "most qualified"[45] or does not have the specialization considered most appropriate by the opposing party or the court.[46] But in defending a particular e-discovery protocol as reasonable, a party should be prepared to offer testimony from an expert with actual knowledge pertinent to the specific issues raised by the

[43]*Id.* at 261 n.10.

[44]*Markham v. BTM Corp.*, No. 08-4032-SAC, 2011 WL 1231084, at *16 (D. Kan. Mar. 30, 2011) (quoting *LifeWise Master Funding v. Telebank*, 374 F.3d 917 928 (10th Cir. 2004)).

[45]*Raytheon Co. v. United States*, No. 05-448C, 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).

[46]*Squires ex rel. Squires v. Goodwin*, __ F. Supp. 2d __, No. 10-cv-00309-CBS-BND, 2011 WL 5331583, at *4 (D. Colo. Nov. 7, 2011). *But see Solaia Tech. 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)

motion.[47] The qualifications prong of Rule 702 does not require more than that. Similarly, the court's responsibility under Rule 702 is not to determine whether the witness' opinions are correct, but rather whether those opinions are based upon a reliable methodology.[48] The court, in discharging that responsibility, "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."[49] Drawing on the Rule 702 standard for reliability, the proponent of an effective e-discovery process should be able to demonstrate that a "particular tool or method has adequately and accurately collected or captured responsive documents and ESI."[50] When a party's e-discovery process is challenged, that 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 and data and using reliable principles or methodology."[51]

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[47]*See, e.g., Veritas Operating Corp. v. Microsoft Corp.*, No. C06-0703-JCC, 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 require 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 field of computer forensics does not require a background in computer programming or reading and writing code").

[48]*See, e.g., In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-30 (6th Cir. 2008). *See also United States v. Williams*, 235 Fed. Appx. 925, 928 (3rd Cir. 2007) ("The requirement of reliability is lower than the standard of correctness.")

[49]*Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (internal citations omitted) (emphasis in original).

[50]*See The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conference Journal 299, 308 (Fall 2009).

[51]*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. at 261 n. 10.

Although the foregoing discussion has approached "defensability" as an adversarial question to be decided by the court through motion practice, that perspective is antithetical to the true interests of the parties and the court. The court in *Dagger v. Gilles*[52] 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. . . . 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 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.[53]

A defensible e-discovery plan should lead to the accurate identification and production of responsive, non-privileged materials and data using a search methodology that reasonably transparent and justifiable in light of the circumstances of the particular case. A defensible plan e-discovery plan should also expedite the discovery process and minimize, if not eliminate completely, the need for judicial intervention. All of these goals can best be achieved through cooperation and dialogue between the parties from the outset of the litigation.[54]

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[52]755 F. Supp. 2d 909, 929 (N.D. Ill. 2010).

[53]The court in *DeGeeer* 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."

[54]*See, e.g., In re Facebook PPC Advertising Litigation*, No. C09-03043JF (HRL), 2011 WL 1324516, at *1-2 (N.D. Cal. Apr. 6, 2011) ("[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'"); *William A. Gross Construction Associates, Inc.*, 256 F.R.D. at

136 (suggesting that "the best solution in the entire area of electronic discovery is cooperation among counsel"); *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) (finding 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).