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# THE SEDONA CONFERENCE

*Commentary on Defense of Process:  
Principles and Guidelines for Developing and  
Implementing a Sound E-Discovery Process*

A Project of The Sedona Conference  
Working Group on Electronic Document  
Retention & Production (WG1)

SEPTEMBER 2016

PUBLIC COMMENT VERSION



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Electronic Document Retention and Production (WG1)*

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## *Preface*

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Welcome to the Public Comment Version of The Sedona Conference *Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). The Sedona Conference is a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others, at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks called Working Groups to engage in true dialogue—not debate—in an effort to move the law forward in a reasoned and just way.

This *Commentary* represents the culmination of five years of spirited dialogue within WG1 on a number of sensitive topics that go to the heart of what it means to be a competent advocate and officer of the court in an age of increasing technological complexity. It addresses the tension between the principle of party-controlled discovery, and the need for accountability in the discovery process, by establishing a series of reasonable expectations and by providing practical guidance to meet these competing interests. The overriding goal of the principles and guidelines set forth in this *Commentary* is to reduce the cost and burden typically associated with modern discovery by helping litigants prepare for—or better yet, avoid altogether—challenges to their chosen discovery processes, and by providing guidance to the courts in the (ideally) rare instances in which they are called upon to examine a party’s discovery conduct.

While tremendous effort has been made to reach consensus across WG1’s diverse membership on the principles and guidelines articulated in this *Commentary*, it can still benefit from public review and comment to help achieve an even broader consensus in the legal community. The Sedona Conference hopes that this *Commentary*—as with all of the work product of its Working Groups—will evolve into an authoritative statement of law, both as it is and as it should be. We welcome your input on the *Commentary* through November 15, 2016. Your comments and suggestions may be sent to [comments@sedonaconference.org](mailto:comments@sedonaconference.org).

Achieving consensus through dialogue is always more difficult and time consuming than publishing the views of an individual author or small, homogeneous group; or taking a vote on issues and foreclosing further minority input. But consensus from diverse stakeholders, when it is finally achieved, results in a stronger commentary. We would like to thank the drafting team and WG1 members for their contributions to the dialogue and their dedication to seeing this project through to fruition. Special recognition goes to drafting team co-leaders, Christopher Q. King, Scott Reents, and Brendan M. Schulman, and drafting team members, Sarah Jane Gillett, Matthew Hammond, Matthew Knouff, Dean Kuckelman, Michael Moskovitz, Sandra J. Rampersaud, and Donald Ramsay. Judicial observers, Andrew J. Peck and Craig B. Shaffer, lent their special expertise and experience to the dialogue, which was also enhanced by earlier contributions from WG1 members, Craig Ball, Shoshana Bewlay, Michael Cole, David Cross, P. Sean d’Albertis, Stephanie K. Hines, Will Hoffman, David J.

Kessler, Drew Lewis, Anthony Lowe, Jill Manning, Jessica Neufeld, Danuta Panich, Pete Pepiton, Caroline Reynolds, and Kim Whitehead. Finally, we are indebted to Editor-in-Chief and WG1 Steering Committee Liaison, Maura R. Grossman, without whose determination, hard work, and willingness to devote countless hours to achieving consensus, this publication would not have been possible.

Kenneth J. Withers  
Deputy Executive Director  
The Sedona Conference  
September 2016

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## I. Introduction

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Discovery is a party-driven process essential to the just and efficient resolution of claims and defenses in federal and state courts. It encompasses a series of activities, ranging from preservation through production, and rests on the fundamental principle that “[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”<sup>1</sup>

Under certain circumstances, however, a party may be called upon to defend the efficacy of its discovery efforts, especially when, as is increasingly common, large volumes of electronically stored information (ESI) are involved. This phenomenon is heightening the attention paid to—and the importance of—the defensibility of parties’ e-discovery processes. In *William A. Gross Construction Associates v. American Manufacturers Mutual Insurance Co.*, Magistrate Judge Andrew J. Peck of the Southern District of New York issued a “wake-up call” to the Bar about the “need for careful thought, quality control, testing, and cooperation with opposing counsel” in the design of search techniques.<sup>2</sup> Similarly, in *Victor Stanley v. Creative Pipe*, then Chief Magistrate Judge Paul W. Grimm of the District of Maryland warned that the “[s]election of the appropriate search and information retrieval technique[s] requires careful advance planning by persons qualified to design [an] effective search methodology,” that the “implementation of the methodology selected should be tested for quality assurance; and [that] 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.”<sup>3</sup>

There are several reasons underlying this increased attention to the e-discovery process. First, growing volumes of ESI have made the discovery process more complex. Previously, parties would locate potentially discoverable documents, and review each document individually and sequentially. Today, even identifying the location of potentially discoverable information can require a careful investigation of an organization’s information technology (IT) systems, not to mention the many steps that often follow: accurately collecting and processing potentially discoverable information, searching and culling that information in a reasonable way, coordinating the work of typically large teams of lawyers (or other legal professionals) to review the information, assessing the quality of their work, and, finally, producing the designated information in the proper form or forms. These processes increasingly rely on new and emerging technologies to support them, which only magnifies the degree of complexity. With this added complexity comes the likelihood of disputes over process.

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<sup>1</sup> The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2d ed. 2007), Principle 6, available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>.

<sup>2</sup> 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

<sup>3</sup> 250 F.R.D. 251, 262 (D. Md. 2008); see generally *infra* Comment 10.a. and text accompanying note 114.



Moreover, the methods and metrics used to assess the adequacy of process can be highly technical and, therefore, outside the common knowledge of many practitioners and judges. As former Magistrate Judge John M. Facciola of the District of Columbia stated in *United States v. O'Keefe*, “[F]or lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”<sup>4</sup>

### **Purpose of this Commentary**

The thirteen principles in this Commentary set forth general guidance to help parties and the courts deal with the growing complexity of e-discovery processes. The Commentary seeks to address what should be done to prepare for—or better yet, avoid—challenges to process, and how courts should address those disputes that arise. Importantly, the Commentary makes clear that “defense of process” is not required in every case, and that certain threshold requirements should be met before a party is required to “defend its process” or before “discovery about discovery” should be permitted. It is hoped that this framework, if followed, will invoke scarce judicial resources with less frequency, and only when disputes are ripe for resolution and less formal alternatives have been exhausted.

This Commentary is both broader and narrower than other Sedona Conference commentaries that address best practices for specific aspects of e-discovery, such as preservation,<sup>5</sup> collection,<sup>6</sup> and search.<sup>7</sup> The principles outlined in this Commentary are generally applicable across *all* stages of the e-discovery process—from preservation to production—but its focus is narrower; not on how e-discovery should be conducted, but rather, on how it can be made more defensible, and how, if necessary, disputes about e-discovery should be resolved.

### **Organization of this Commentary**

Section II addresses the question of what it means for a process to be “defensible” and the general elements of a defensible process. Section III applies those general principles to specific issues confronted by the Bar today, including the use of validation processes, search terms and other culling techniques, technology-assisted review (TAR), and the identification of privileged information. Finally, Section IV provides guidance on challenges to the e-discovery process, including the circumstances under which discovery about discovery should be permitted, when challenges to the e-discovery process should be brought, and how they should be resolved.

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<sup>4</sup> 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

<sup>5</sup> See The Sedona Conference, *Commentary on Legal Holds: The Trigger and the Process*, 11 SEDONA CONF. J. 265 (2010).

<sup>6</sup> See The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265 (2014).

<sup>7</sup> See The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014).

## The Sedona Principles for Defense of Process

*Principle 1.* An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances. When evaluating the reasonableness of an e-discovery process, parties and the court should consider issues of proportionality, including the benefits and burdens of a particular process.

*Principle 2.* An e-discovery process should be developed and implemented by a responding party after reasonable due diligence, including consultation with persons with subject-matter expertise, and technical knowledge and competence.

*Principle 3.* Responding parties are best situated to evaluate and select the procedures, methodologies, and technologies for their e-discovery process.

*Principle 4.* Parties may reduce or eliminate the likelihood of formal discovery or expensive and time-consuming motion practice about an e-discovery process by conferring and exchanging non-privileged information about that process.

*Principle 5.* When developing and implementing an e-discovery process, a responding party should consider how it would demonstrate the reasonableness of its process if required to do so. Documentation of significant decisions made during e-discovery may be helpful in demonstrating that the process was reasonable.

*Principle 6.* An e-discovery process should include reasonable validation.

*Principle 7.* A reasonable e-discovery process may use search terms and other culling methods to remove ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.

*Principle 8.* A review process can be reasonable even if it does not include manual review of all potentially responsive ESI.

*Principle 9.* Technology-assisted review should be held to the same standard of reasonableness as any other e-discovery process.

*Principle 10.* A party may use any reasonable process, including a technology-assisted process, to identify and withhold privileged or otherwise protected information. A party should not be required to use any process that does not adequately protect its rights to withhold privileged or otherwise protected information from production.

*Principle 11.* Whenever possible, a dispute about an e-discovery process should be timely resolved through informal mechanisms, such as mediation between the parties and conferences with the court, rather than through formal motion practice and hearings.

*Principle 12.* A party should not be required to provide discovery about its e-discovery process without good cause.

*Principle 13.* The court should not decide a motion regarding the adequacy of an e-discovery process without a sufficient factual record. In many instances, such a motion may not be ripe for determination before there has been substantial or complete production.

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## II. *General Principles*

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**Principle 1. An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances. When evaluating the reasonableness of an e-discovery process, parties and the court should consider issues of proportionality, including the benefits and burdens of a particular process.**

### Comment 1.a. Perfection is Not Required

Reasonableness is the touchstone for evaluating the scope of a variety of discovery obligations under the Federal Rules and its state law equivalents.<sup>8</sup> Rule 26(g) of the Federal Rules requires certification by a responding party that a “reasonable inquiry” has been made, consistent with discovery obligations under the rules.<sup>9</sup> The duty to conduct a reasonable inquiry is satisfied “if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances.”<sup>10</sup>

It follows from this that an e-discovery process used to identify discoverable ESI must be “reasonable.” To be reasonable, an e-discovery process need not be perfect, nor even the best available option, and it does not have to identify all discoverable ESI. All processes will be imperfect and have some margin of error.<sup>11</sup> Risks are inherent in any method of identifying relevant ESI, whether the

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<sup>8</sup> See, e.g., Advisory Committee Note, FED. R. CIV. P. 26(b) (1983); Advisory Committee Note, FED. R. CIV. P. 34(b) (2006); Advisory Committee Note, FED. R. CIV. P. 45 (2006). See also FED. R. CIV. P. 1 (The Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”); Rule 11-c & Appx. A of the New York Uniform Rules of Supreme and County Courts, Commercial Division (22 NYCRR § 202.70(g)) (Sept. 2, 2014) (“A party seeking ESI discovery from a nonparty should reasonably limit its discovery requests, taking into consideration . . . proportionality factors.”).

<sup>9</sup> Pursuant to Rule 26(g)(1), a responding party’s signature on its response to discovery is, in effect, a representation by that party that it has made a “reasonable inquiry” in formulating its response. The signature certifies, among other things, that to the “best of the person’s knowledge, information and belief formed after reasonable inquiry,” the response is “consistent with the rules.” FED. R. CIV. P. 26(g)(1)(B)(i). See also *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008) (noting that the Rule requires that the attorney make a reasonable inquiry into the factual basis of his or her response).

<sup>10</sup> Advisory Committee Note, FED. R. CIV. P. 26(g) (1980).

<sup>11</sup> 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. Jan. 15, 2010) (overruled, in part, on other grounds) (“In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection.”); *Federal Housing Finance Agency v. HSBC North America Holdings Inc.*, Nos. 11-cv-6189, 11-cv-6190, 11-cv-6193, 11-6195, 11-6198, 11-cv-6200, 11-cv-6201, 11-cv-6202, 11-cv-6203, 11-cv-6739, 11-cv-7010, 2014 WL 584300, at \*2 (S.D.N.Y. Feb. 14, 2014) (“Parties in litigation are required to be diligent and to act in good faith in producing documents in discovery. . . . [but] no one could or should expect perfection from this process.”); *Malone v. Kanter Ingredients*, No. 12-cv-3190, 2015 WL 1470334, at \*3 (D. Neb. Mar. 31, 2015) (“The fact that defense counsel may have made mistakes does not warrant imposing sanctions. . . . The discovery standard is, after all, reasonableness, not perfection.”; “It is improper to infer nefarious intent or bad faith from what appear to be ordinary discovery errors.” (citations omitted)). See also

process involves linear manual review of “all” potentially discoverable documents, manual review of documents identified through keyword search, algorithm-based categorization, or something else entirely.<sup>12</sup> Any process involving humans is prone to mistakes, due to the differences in attorneys’ judgment, inconsistent instructions, or simple human error.<sup>13</sup>

Accordingly, an e-discovery process may be reasonable even if it fails to identify all relevant ESI. The process and resulting production may be reasonable, for example, if the burden of identifying additional ESI outweighs the need for such discovery and its importance in resolving the issues in dispute. An e-discovery process is not inadequate simply because an opposing party can demonstrate that a more accurate or complete process exists. For any given case, there may be any number of possible discovery strategies and technological options available that, if implemented appropriately, could each meet the reasonable discovery standard.<sup>14</sup>

### Comment 1.b. Proportionality is Central to Reasonableness

Whether an e-discovery process is reasonable depends on whether what was done—or not done—was proportional under the circumstances of that case.<sup>15</sup> The factors that should be used to assess the reasonableness of e-discovery processes are analogous to those used to assess the reasonableness of the scope of discovery under Rule 26(b)(1): the burden or expense of the process relative to 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.<sup>16</sup>

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Cuban v. S.E.C., 744 F. Supp. 2d 60, 69 (D.D.C. 2010); Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006).

<sup>12</sup> De Silva Moore v. Publicis Groupe SA & MSL Group, 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534, at \*3 (S.D.N.Y. Apr. 26, 2012).

<sup>13</sup> See *id.* See also Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification v. Manual Review*, 61 J. AM. SOC’Y FOR INFO. SCI. & TECH. 70, 79 (2010); Maura R. Grossman & Gordon V. Cormack, *Inconsistent Responsiveness Determination in Document Review: Difference of Opinion or Human Error?*, 32 PACE L. REV. 267 (2012); 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, 48 (2011), available at <http://jolt.richmond.edu/v17i3/article11.pdf>.

<sup>14</sup> See *In re Biomet M2a Magnum Hip Implant Products Liab. Litig.*, No. 12-MD-2391, 2013 WL 1729682, at \*2 (N.D. Ill. Apr. 18, 2013) (rejecting motion to compel producing party to use predictive coding rather than keyword search terms because “[t]he issue before me today isn’t whether predictive coding is a better way of doing things than keyword searching prior to predictive coding [ , but rather] whether Biomet’s procedure satisfies its discovery obligations”).

<sup>15</sup> See *In re Actos (Pioglitazone) Products Liab. Litig.*, MDL No. 11-MD-2299, 2014 WL 2872299, at \*28 (W.D. La. June 23, 2014).

<sup>16</sup> FED. R. CIV. P. 26(b)(1). The 2015 Amendments moved the discussion of proportionality from Rule 26(b)(2)(C) to Rule 26(b)(1). The Advisory Committee Notes explain that the “purpose in returning the proportionality factors to Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.” See also *Larsen v. Coldwell Banker Real*

Parties act reasonably when they choose processes based on an informed assessment of the costs and benefits associated with the various available options. More complex matters involving higher stakes may justify more rigorous processes to identify relevant ESI than do simpler matters with lower stakes. Thus, sophisticated e-discovery practices, such as forensic collection, rigorous search-term testing, and sampling-based quality control and quality assurance, may be appropriate for some matters, but should not be regarded as required in all cases.

**Illustration:** In a contract dispute over \$50,000 in allegedly defective merchandise that was returned by a retailer to its supplier, the retailer has requested all ESI regarding the negotiation and fulfillment of the contract from the supplier. The supplier has identified such ESI by asking the general counsel, who negotiated the contract, and the account representative for the retailer, to search their own email files for emails related to that retailer. Reasonable methods for conducting that search (including but not necessarily limited to the use of search terms) were discussed between outside counsel and the two custodians. Given the modest value of the litigation, the high costs that a more comprehensive search could entail, and the low likelihood that a more comprehensive search would identify unique relevant ESI that would be important to resolving the issues in dispute, a court could find that this process for identifying relevant ESI was reasonable under the circumstances.

There are no bright-line rules about what processes are reasonable and proportionate.<sup>17</sup> Each case requires its own assessment, based on the information reasonably available, a sufficient understanding of available technology and processes, and a good-faith exercise of legal judgment.<sup>18</sup>

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Estate Corp., 2012 WL 359466, at \*8 (C.D. Cal. 2012) (denying motion to compel defendants to re-do its production, which was missing certain metadata, because “the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs”); Hon. Craig B. Shaffer, “*Defensible*” By *What Standard?*, 13 SEDONA CONF. J. 217, 218 (2012) (A defensible discovery process is one that uses “reliable methodologies that provide a quality result at costs that are reasonable and proportionate to the particular circumstances of the client and the litigation.”).

<sup>17</sup> See, e.g., *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *Chin v. Port Authority of New York and New Jersey*, 685 F.3d 135, 162 (2d Cir. 2012); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (citing *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Secs., LLC*, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010)) (other citations omitted). The 2015 Amendments reject a different aspect of *Residential Funding*, specifically the authorization of district courts to give adverse-inference instructions on a finding of negligence or gross negligence. Advisory Committee Note, FED. R. CIV. P. 37(e)(2) (2015).

<sup>18</sup> See, e.g., *Swanson v. ALZA Corp.*, No. 12-cv-04579, 2013 WL 5538908 (N.D. Cal. Oct. 7, 2013) (ordering application of some additional search terms which were likely to yield highly relevant documents, but denying request for other search terms which were likely to be duplicative, or that involved individuals only peripherally involved in dispute); *Little Hocking Water Ass’n v. E.I. du Pont de Nemours & Co.*, 2013 WL 608154, at \*8 (S.D. Ohio Feb. 19, 2013) (denying requesting party’s request to update prior collections for custodians not identified by responding party as likely to have responsive information, given the substantial time and expense of updating the collection, and DuPont’s evidence that updated collections would be “unlikely to yield any new responsive documents”); *id.* at \*6 (finding “it was not unreasonable and was less burdensome for DuPont to rely on its prior searches and documents previously produced in related litigation when responding to discovery requests in this case”).

**Principle 2. An e-discovery process should be developed and implemented by a responding party after reasonable due diligence, including consultation with persons with subject-matter expertise, and technical knowledge and competence.**

### **Comment 2.a. The Requirement for Due Diligence**

As discussed above in Principle 1, a party's e-discovery process needs to be "reasonable." While Rule 26(g) establishes that an e-discovery process need not be perfect, it also requires that counsel conduct appropriate due diligence to ensure that methods used for identifying and producing responsive documents reflect a "reasonable inquiry."<sup>19</sup>

It is counsel's responsibility to ensure that due diligence regarding the e-discovery process is adequate.<sup>20</sup> What is adequate due diligence will involve consideration of proportionality factors such as burden, cost, and the amount in controversy, as well as the importance of the issues at stake in the action.<sup>21</sup> The duty is satisfied if "the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances."<sup>22</sup> Due diligence is typically inadequate where a party's investigation is only "haphazard,"<sup>23</sup> or reflects "sloppiness."<sup>24</sup> When there has been a failure in the process, counsel's failure to properly supervise the investigation may be grounds for sanctions.<sup>25</sup>

Due diligence can also lead to more efficient and effective discovery management. Due diligence can help counsel to avoid unnecessary disputes with opposing counsel. It can also help avoid the types of mistakes that lead to legitimate disputes, and can give opposing counsel (not to mention the court) the confidence that the process a party undertook was reasonable.

In part for this reason, some courts have elaborated on e-discovery due diligence in guidelines and model orders, and have embedded due diligence requirements in lists of topics to be addressed at Rule 26(f) conferences. The District of Kansas, for example, has adopted e-discovery guidelines that

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<sup>19</sup> See text accompanying notes 9–10, *supra*.

<sup>20</sup> See, e.g., *Branhaven, LLC v. BeefTek, Inc.*, 288 F.R.D. 386, 393 (D. Md. 2013) (noting the "chaos" that occurs when counsel exhibit disinterest and inattention).

<sup>21</sup> See The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155 (2013); Seventh Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information*, Principle 1.03 (Aug. 1, 2010) ("The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan.").

<sup>22</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008).

<sup>23</sup> *Carrillo v. Schneider Logistics, Inc.*, No. 11-cv-8557, 2012 WL 479614, at \*5 (C.D. Cal. Oct. 5, 2012).

<sup>24</sup> *Atlas Res. Inc. v. Liberty Mut. Ins. Co.*, 297 F.R.D. 482, 493 (2011).

<sup>25</sup> *Bratka v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 448 (S.D. Ohio 1995); *Painter v. Atwood*, 2014 WL 1089694 (D. Nev. Mar. 18, 2014); *Vagenos v. LDG Financial Servs., LLC*, 2009 U.S. Dist. Lexis 121490, at \*5 (E.D.N.Y. Dec. 31, 2009).

state that “counsel should become knowledgeable about their client’s information management systems and its operation.”<sup>26</sup> The Northern District of California has adopted a checklist for use during the Rule 26(f) meet and confer regarding electronic discovery that includes, among other potential topics, discussion of the systems where relevant ESI may be located, discussion of how the information can be identified, and how the information can be collected.<sup>27</sup> Other courts have approved similar checklists, guidelines, and model standing orders that supplement the minimum requirement of a reasonable inquiry.<sup>28</sup> These checklists reflect varying degrees of diligence, are applicable only in the jurisdictions where they are promulgated, and where applicable may be only advisory rather than mandatory.

### Comment 2.b. Elements of Due Diligence

The topics that due diligence should address will differ from matter to matter and client to client. There is no comprehensive checklist that will cover all contingencies. That said, topics commonly addressed as part of e-discovery due diligence include the following:

- The identity and role of relevant custodians<sup>29</sup>
- The locations of sources of relevant ESI, including those managed by individual custodians (e.g., email messages or files, hard drives, personal network storage, personal devices and external media), as well as those managed at the organizational level (e.g., electronic document management systems, email databases, shared network storage or data stores, databases and other structured data stores)
- Reasonable steps taken, or that should be taken, to preserve relevant information (e.g., reasonable efforts to avoid the automatic deletion of relevant ESI)

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<sup>26</sup> District of Kansas, *Guidelines for Cases Involving Electronically Stored Information (ESI)* (July 18, 2013) at 3, available at <http://www.ksd.uscourts.gov/guidelines-for-esi/>.

<sup>27</sup> Northern District of California, *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information* (revised Dec. 2015), available at <http://www.cand.uscourts.gov/eDiscoveryGuidelines>.

<sup>28</sup> See Delaware Court of Chancery, *Guidelines to Help Lawyers Practicing in the Court of Chancery*, Guideline II(7)(b) (2014), available at <http://courts.delaware.gov/chancery/docs/CompleteGuidelines2014.pdf> (hereinafter Del. Ch. Guidelines); District of Colorado, *Guidelines Addressing the Discovery of Electronically Stored Information* (Sep. 1, 2014), available at [http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery\\_Guidelines.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Guidelines.pdf); cf. Federal Circuit Advisory Council, *An E-Discovery Model Order Regarding E-Discovery in Patent Cases* (2011), available at [http://www.cafc.uscourts.gov/sites/default/files/announcements/Ediscovery\\_Model\\_Order.pdf](http://www.cafc.uscourts.gov/sites/default/files/announcements/Ediscovery_Model_Order.pdf) (model order adopted by Federal Circuit Advisory Council; Court of Appeals for the Federal Circuit has not approved the specific language of the posted Model Order, <http://www.cafc.uscourts.gov/announcements/model-e-discovery-order-adopted-federal-circuit-advisory-counsel-0> (last visited Aug. 31, 2016)).

<sup>29</sup> With respect to organizations, “custodians” generally encompasses individuals who create, receive, and manage ESI likely to be relevant to the claims and defenses in the case (for example, the general counsel and account representative in the illustration under Principle 1), and employees within the organization that have responsibility for maintaining corporate data. With respect to individuals that are parties in litigation, “document custodians” generally encompasses those individuals and third parties that maintain their data.



- The suitability of criteria used to identify relevant ESI (e.g., selection of custodians, or restrictions based on date, file type, and search terms)
- The suitability of tools used to identify relevant ESI (e.g., TAR)
- The qualifications, competence, knowledge, and experience of individuals or entities entrusted to collect, process, search, and review ESI

Satisfying the requirement for reasonable due diligence will often require counsel to interview, consult with, or otherwise obtain information from document custodians, the client's IT and records management personnel, in-house counsel, and third-party e-discovery vendors and experts, and, with respect to individual parties, the party himself or herself and any third parties maintaining information on the individual party's behalf (e.g., Facebook, LinkedIn, Google Docs).<sup>30</sup> Although there are many technical aspects of e-discovery, an understanding of the types and content of ESI that could be relevant to the claims and defenses at issue in the matter, including the documents and information sought by document requests and/or interrogatories, is also essential to evaluating the adequacy and reasonableness of the e-discovery process.<sup>31</sup>

**Illustration:** The client's IT representative advises counsel that she has collected all of the email from the email server where the email of custodians identified by counsel is stored. Before counsel can be satisfied that this email collection is sufficient, counsel might need to understand more about how the client's email system is structured and used. For example, counsel might want to understand whether custodians can and do save email on their local workstations, or on portable media that is not contained on the company email server. This inquiry may also require conferring with the individual document custodians about their own email management practices, particularly in environments where those practices vary from person to person.

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<sup>30</sup> See *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 262 (D. Md. 2008), and text accompanying *supra* note 3; see also Del. Ch. Guidelines, *supra* note 28 (“Among other things, the procedures used to collect and review documents generally should include interviews of custodians who may possess responsive documents . . . and the potential locations of responsive documents, including the files and computers of administrative or other personnel who prepare, send and receive or store documents on behalf of the custodians.”). For an outline of related topics and questions, see Ariana J. Tadler et al, *The Sedona Conference “Jumpstart Outline”: Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production*, THE SEDONA CONFERENCE (2016), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20AE%20%22Jumpstart%20Outline%22>.

<sup>31</sup> See *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (“[W]here counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’”).

### Comment 2.c. The Role of Experts or E-Discovery Liaisons

For some matters, engagement of an expert or use of an e-discovery liaison can facilitate due diligence and promote defensibility. Expert assistance may help counsel understand issues relating to preservation and collection of ESI that are beyond the technical expertise of the party or the party's counsel. Where the circumstances warrant, experts may use forensic tools to evaluate certain data sources, help craft or test search terms, help implement TAR processes, or assist counsel with any number of other e-discovery issues. An e-discovery liaison may be designated to assist with communications with opposing counsel and the court about e-discovery issues. Some courts encourage that such an e-discovery liaison be named.<sup>32</sup> When an e-discovery liaison is designated, the court typically will require that the liaison “be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery.”<sup>33</sup>

While every lawyer should possess a certain baseline level of technical competence, attorneys do not need to be IT experts, and not all attorneys will have the same level of knowledge of IT systems and e-discovery issues.<sup>34</sup> As with other areas of the practice of law, it is important for an attorney to know when he or she does not have the requisite knowledge—to “know what they do not know”—and in those situations, to engage expert(s) with the appropriate technical knowledge, competence, and experience.

**Principle 3. Responding parties are best situated to evaluate and select the procedures, methodologies, and technologies for their e-discovery process.**

### Comment 3.a. Application of Existing Sedona Principles

Under the Federal Rules and similar state court rules, the responding party has the obligation and right to make decisions concerning the processes they will employ to comply with their discovery obligations. Recognizing that responding parties are “best situated” to make a reasonable evaluation and selection of those processes is consistent with those rules, is grounded in common sense, and promotes a more efficient and defensible discovery process. The Sedona Conference adopted this

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<sup>32</sup> See, e.g., Northern District of Illinois, *Standing Order Relating to the Discovery of Electronically Stored Information*, available at [http://www.ilnd.uscourts.gov/\\_assets/\\_documents/\\_forms/\\_judges/brown/ESI%20discovery%20order.pdf](http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/brown/ESI%20discovery%20order.pdf) (last visited Aug. 24, 2016) (“In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in the Principle.”); Northern District of California, *Model Stipulated Order re: Discovery of Electronically Stored Information*, para. 3, available at <http://www.cand.uscourts.gov/eDiscoveryGuidelines> (last visited Aug. 24, 2016).

<sup>33</sup> Eastern District of Michigan, *Model Order Relating to the Discovery of Electronically Stored Information* (Sept. 20, 2013), available at <http://www.mied.uscourts.gov/pdffiles/SteehEsiOrderChecklist.pdf>.

<sup>34</sup> See State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Op. No. 2015-193, available at <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf> (last visited Aug. 24, 2016). See also Aug. 2012 Amendments to ABA Model Rules of Prof'l Conduct, Comment [8] to Rule 1.1, which makes clear a lawyer's duty to stay abreast of changes in the law and practice, including “the benefits and risks associated with relevant technology.”

bedrock concept as Principle 6 in the initial *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Jan. 2004).<sup>35</sup> The Principle was re-stated in the *Second Edition* published in 2007.<sup>36</sup>

The Federal Rules place on the responding party a self-executing responsibility to comply with discovery requirements.<sup>37</sup> A corollary to this responsibility is the presumption that responding parties also bear the cost and burdens associated with e-discovery.<sup>38</sup> As former Magistrate Judge Nan R. Nolan of the Northern District of Illinois stated, “[T]he people who are producing the records, producing the documents are in a better position to know, since they have to do the work, spend the money, spend the time, they know their people, they know their material.”<sup>39</sup> Responding to discovery requests involves decisions by the responding party about how to allocate its financial and other resources to comply with legal requirements. Moreover, the responding party generally has better knowledge of, access to, and control of, the systems, documents, and custodians at issue.<sup>40</sup> Although courts have generally affirmed that the responding party is in the best position to determine how best to comply with e-discovery requirements,<sup>41</sup> some courts have required a degree of disclosure

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<sup>35</sup> The comments to Principle 6 explain that it is the producing party’s responsibility to identify information that is responsive to discovery requests and to produce relevant, non-privileged information; *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010) (finding that third-party respondent was in the “best position to take the lead in selecting data”).

<sup>36</sup> Both the 2004 and 2007 editions are available for download at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>. Many courts have cited Principle 6 with approval. *See, e.g.*, cases cited at *infra* note 41.

<sup>37</sup> *See* FED. R. CIV. P. 26(g); *see* *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, No. 2685-11, 2014 WL 4636526 at \*3 (U.S. Tax Ct. Sept. 17, 2014) (“And although it is a proper role of the Court to supervise the discovery process and intervene when it is abused by the parties, the Court is not normally in the business of dictating to parties the process that they should use when responding to discovery”); *Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist. LEXIS 48551, at \*10–11 (W.D. Mich. June 30, 2006) (noting that the “discovery process is designed to be extrajudicial and relies upon the responding party to search his records to produce the requested data”); *see also* Hon. James C. Francis IV, *Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age*, LAW TECH. NEWS (Feb. 2013) (No Federal Rule “has given judges the authority . . . to dictate to the parties how or where to search for documents.”).

<sup>38</sup> *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . .”).

<sup>39</sup> *Kleen Products LLC v. Packaging Corp. of Am., Inc.*, Civ. No. 10-cv-05711, Docket No. 319-1, at 297–98 (N.D. Ill. May 17, 2012).

<sup>40</sup> There may be some limited circumstances where a requesting party has better information about the location or content of the responding party’s discoverable information. For example, in a suit brought by a former employee, it is possible that the former employee may know a significant amount about the responding party’s relevant records. *See, e.g.*, *Brown v. Tellermate*, No. 11-cv-1122, 2014 WL 2987051, at \*4, 17 (S.D. Ohio July 1, 2014) (awarding sanctions against defendant employer where employer made misrepresentations about its ability to produce documents from Salesforce.com contradicted by former employee plaintiffs’ own experience using the system).

<sup>41</sup> *See, e.g.*, *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427 (D. N.J. 2009) (producing party is in the “best position to determine the method by which they will collect documents” because “[t]he producing party re-

about the process, including what sources of ESI were searched, and the search terms used to conduct the search.<sup>42</sup>

**Illustration:** Defendant has proposed to use search terms to cull the set of email it intends to review. The parties have met and conferred but are unable to agree on the terms to apply. Plaintiff has proposed terms, but defendant believes, based on its understanding of the documents, certain of those terms will retrieve large numbers of irrelevant documents, and that they are therefore unreasonable. The parties are ultimately unable to reach a compromise. Although defendant should give careful consideration to the terms that plaintiff has proposed, ultimately it is the defendant's right to decide how to proceed, understanding that it is under an obligation to conduct a reasonable search pursuant to Rule 26(g) and that its process may later be subject to challenge.

### Comment 3.b. No Safe Harbor

Principle 3 should not be read to suggest that a responding party's e-discovery process is beyond challenge or reproach. To the contrary, when a process is deficient, it may be subject to inquiry and challenge, upon a showing of good cause, as discussed in Principles 12 and 13 below. Nor should Principle 3 be read to encourage a responding party to act unilaterally. To the contrary, as discussed in Principle 4, a responding party should consider, and seek to benefit from, the requesting party's knowledge of the matter in implementing its discovery process, and should seek to cooperate or reach agreement with the requesting party where that is feasible. However, in the absence of agreement or court order, it is ultimately the producing party's prerogative and responsibility to decide the procedures, methodologies, and technologies to use, and to live with the consequences of those decisions.

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sponding to a document request has the best knowledge as to how documents have been preserved and maintained") (citing The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 204 (2007); *Little Hocking Water Assn., Inc. v. E.I. DuPont de Nemours & Co.*, No. 09-cv-1081, 2013 WL 608154, at \*9 (S.D. Ohio Feb. 19, 2013) (producing party "is in the best position to identify . . . potentially responsive information"); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 628 (D. Colo. 2007) ("in the typical case, [r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.")).

<sup>42</sup> See *Formfactor, Inc. v. Micro-Probe, Inc.*, No. C-10-03095, 2012 WL 1575093, at \*6–7 (N.D. Cal. May 3, 2012) (requiring plaintiff to disclose the search terms used for all of its electronic searches, and what storage systems and searches were undertaken to respond to defendants' requests for production, holding that plaintiff's search terms were not privileged); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109–10 (E.D. Pa. 2010) (observing that it was reasonable to require the parties to reach "some agreement on the search terms that Defendants intend to use, the custodians they intend to search, the date ranges for their new searches, and any other essential details about the search methodology they intend to implement for the production of electronically-stored information," and holding that such information was not subject to any work-product protection).

**Principle 4. Parties may reduce or eliminate the likelihood of formal discovery or expensive and time-consuming motion practice about an e-discovery process by conferring and exchanging non-privileged information about that process.**

**Comment 4.a. Benefits of Sharing Information**

Traditionally, “[d]iscovery in federal courts is a ‘self-managed’ process.”<sup>43</sup> To that end, the Federal Rules and their state law equivalents clearly contemplate some exchange of information about the parties’ e-discovery processes. For example, Rule 26(f) requires parties to “attempt in good faith to agree on [a] proposed discovery plan,” which must address “any issues about the disclosure or discovery of electronically stored information.”<sup>44</sup> The 2006 Advisory Committee Note lists subjects that should be considered for discussion pursuant to Rule 26(f), including disclosure on matters that bear on discovery processes.<sup>45</sup> The Advisory Committee Note goes on to comment that such disclosures may limit or eliminate future disputes about electronic discovery processes.<sup>46</sup> Numerous courts have supplemented those rules with additional guidelines for conferring or disclosing details about a

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<sup>43</sup> *Teledyne Instruments, Inc. v. Cairns*, No. 12-cv-0854, 2013 WL 5781274, at \*4 (M.D. Fla. Oct. 25, 2013) (quoting *Inland Am. (LIP) SUB, LLC v. Lauth*, No. 09-cv-00893, 2010 WL 670546, at \*1 (S.D. Ind. Feb. 19, 2010)). The Civil Rules Advisory Committee has expressed its hope that “reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.” Advisory Committee Note, FED. R. CIV. P. 26(b)(1) (2000). It has also stated that “[i]f primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obligated to act responsibly and avoid abuse.” Advisory Committee Note, FED. R. CIV. P. 26(g) (1983). *See, e.g., In re Biomet M2a Magnum Hip Implant Prod. Liab. Litig.*, 2013 WL 6405156, at \*2 (N.D. Ind. Aug. 21, 2013) (While noting defendant was not required to provide information “not made discoverable by the Federal Rules,” the court warned that “[a]n unexplained lack of cooperation in discovery can lead a court to question why the uncooperative party is hiding something, and such questions can affect the exercise of [the court’s] discretion.”).

<sup>44</sup> FED. R. CIV. P. 26(f)(3)(C). *See also* FED. R. CIV. P. 26(a)(1) (requiring disclosures regarding individuals “likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses,” subject to certain exceptions); FED. R. CIV. P. 26(c)(1) (requiring the movant in good faith to confer or attempt to confer with affected parties “in an effort to resolve the dispute without court action”); FED. R. CIV. P. 37(a)(1) (Before moving to compel, a party must in good faith confer or attempt to confer “with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”). *See also* FED. R. CIV. P. 1 (The Federal Rules should be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”). The 2015 Amendments acknowledge that the Civil Rules must be “construed, administered and employed by the court *and the parties* to secure the just, speedy, and inexpensive determination of every action.” The 2015 Amendment Committee Note states that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.” *Cf.* ABA MODEL RULES OF PROF’L CONDUCT R. 3.3 (“Candor toward the Tribunal”), and R. 3.4 (“Fairness To Opposing Party and Counsel”).

<sup>45</sup> *See* Advisory Committee Note, FED. R. CIV. P. 26(f) (2006) (“The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. . . . For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party’s control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information.”).

<sup>46</sup> *See id.* (“When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.”)

party's e-discovery process.<sup>47</sup> For example, the District of Colorado has promulgated guidelines that, among other things, acknowledge “the particular importance of cooperative exchanges of information, including ESI, at all stages of the litigation process.”<sup>48</sup> Individual judges may have practice standards that establish their expectations for disclosure of information concerning e-discovery processes.<sup>49</sup> Anecdotally, even where such practices are not set forth in writing, disclosure is often encouraged—and in some cases even required—by judges informally, during status conferences or pre-motion telephone conferences.

Apart from any rule-based or judicially-mandated disclosure obligations, the voluntary disclosure of information about an e-discovery process may be in the disclosing party's self-interest. The Sedona Conference has advocated that parties “should confer early in discovery regarding the preservation and production of electronically stored information,” and “seek to agree on the scope of each party's rights and responsibilities.”<sup>50</sup> In many cases, exchange of some information can lead to agreement between the parties, eliminating unnecessary motions, hearings, and discovery about discovery—and

<sup>47</sup> See, e.g., Seventh Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information*, Principles 1.02 (Cooperation) and 2.01 (Duty to Meet and Confer) (Aug. 1, 2010), available at [http://www.discovery-pilot.com/sites/default/files/Principles8\\_10.pdf](http://www.discovery-pilot.com/sites/default/files/Principles8_10.pdf); Southern District of New York, *Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York* (Oct. 31, 2011), available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf) (requiring procedures that emphasize cooperation, transparency, and early case assessment); Commercial Division, Nassau (NY) County, *Guidelines for Discovery of Electronically Stored Information (“ESI”)*, Preface, available at [http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing\\_Guidelines.pdf](http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf) (last visited Aug. 24, 2016) (“The purpose of these Guidelines for Discovery of ESI . . . is to . . . encourage meaningful discussions and cooperation between parties prior to the Preliminary Conference. . . .”); *In re* Amendments to Florida Rules of Civil Procedure, 2012 Amendment Committee Notes & Amendments, 95 So. 3d 76 (Fla. 2012) (modifying rules for complex litigation and discovery to include, *inter alia*, provisions permitting counsel cooperation on e-discovery matters); New Hampshire Supreme Court Order, Superior Court PAD Pilot Rules—Proportional Discovery/Automatic Disclosure Pilot Project, PR 5 (Discovery of Electronically Stored Information (ESI)) (2010), available at <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf> (requiring meet and confer specific to e-discovery obligations); Northern District of California, *Guidelines for the Discovery of Electronically Stored Information* (Nov. 27, 2012); District of Kansas, *Guidelines for Cases Involving Electronically Stored Information (ESI)* (Feb. 1, 2008).

<sup>48</sup> District of Colorado, *Guidelines Addressing the Discovery of Electronically Stored Information* (Sep. 1, 2014), at 4, available at [http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery\\_Guidelines.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Guidelines.pdf); see also District of Colorado, *Checklist for Rule 26(f) Meet-and-Confer Regarding Electronically Stored Information* (April 24, 2015), available at [http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery\\_Checklist.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Checklist.pdf).

<sup>49</sup> For example, the Honorable Paul W. Grimm, United States District Judge for the District of Maryland, has a standard Discovery Order mandating that “[p]arties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case” and “[t]he producing party must be able to demonstrate that the search [for electronically-stored information] was effectively designed and efficiently conducted.”

<sup>50</sup> The Sedona Conference, *The Sedona Principles: Best Practices Recommendation & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2d ed. 2007); see also *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Cooperation%20Proclamation>; The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 344–45 (2009 Supp.).

thereby “refocus[ing] litigation toward the substantive resolution of legal disputes.”<sup>51</sup> Candor and cooperation can also help avoid disputes by building trust between the parties and, where disputes arise, give the disclosing party greater credibility with the court.<sup>52</sup> Agreements on e-discovery issues make it more difficult for a requesting party to later complain about alleged deficiencies in the e-discovery process.<sup>53</sup> A requesting party who makes vague or overbroad requests, in addition to violating Rule 26(g),<sup>54</sup> may compromise its ability to challenge the process employed to respond to those requests.<sup>55</sup>

Whether or not a party perceives some advantage or disadvantage from voluntary disclosures at the outset of discovery, litigants and their counsel should consider the possibility that courts may require those disclosures as a way of resolving discovery disputes, moving the case forward, or managing their crowded dockets.<sup>56</sup> As one court has acknowledged, “[t]he costs associated with adversarial

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<sup>51</sup> *The Sedona Conference Cooperation Proclamation*, *supra* note 50. *See also* Steven S. Gensler, *A Bull’s-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 369 (2009 Supp.) (suggesting that a cooperative approach to discovery, coupled with voluntary disclosures, may actually promote a party’s own self-interest).

<sup>52</sup> *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 2014 WL 4636526, at \*5 (U.S. Tax Ct. Sept. 17, 2014) (producing party’s willingness to “retain electronic discovery experts to meet with [requesting party’s] counsel or his experts to conduct a search acceptable to [requesting party]” identified as factor in court’s decision to overrule objection made at commencement of discovery to producing party’s use of predictive coding).

<sup>53</sup> *See, e.g., Saliga v. Chemtura Corp.*, No. 12-cv-0832, 2013 WL 6182227, at \*1 (D. Conn. Nov. 25, 2013) (acknowledging that “the best solution in the entire area of electronic discovery is cooperation among counsel”); *In re Nat’l Ass’n of Music Merchants*, MDL No. 2121, 2011 WL 6372826, at \*3 (S.D. Cal. Dec. 19, 2011) (denying request to expand search terms “[i]n light of the transparent discussion among counsel of the search terminology and subsequent agreement on the search method.”); *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010) (noting that selection of search terms and data custodians should be a matter of transparency and cooperation among parties and non-parties; if the parties had voluntarily disclosed that information, “they might have been able to resolve their differences without court intervention and avoided the substantial time and expense they spent briefing electronic discovery issues”).

<sup>54</sup> *See* FED. R. CIV. P. 26(g)(1) (“By signing [a discovery request], an attorney . . . certifies . . . (B) with respect to a discovery request . . . it is . . . (iii) neither unreasonable nor unduly burdensome 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.”).

<sup>55</sup> *See, e.g., ADT Sec. Servs., Inc. v. Pinnacle Sec. Servs.*, No. 10-cv-7467, 2012 WL 2920985 (N.D. Ill. July 11, 2013) (declining to order responding party to re-do search to include 10 additional custodians because discovery requests had not specifically asked for the correspondence of those custodians, and the discovery requests were vague and overly broad).

<sup>56</sup> *See, e.g., Progressive Cas. Ins. Co. v. Delaney*, No. 11-cv-00678, 2014 WL 3563467, at \*11 (D. Nev. July 18, 2014) (after months of contentious discovery and in the face of plaintiff’s unwillingness to engage in “cooperation and transparency,” the court required plaintiff to produce 565,000 documents with search-term “hits” from a data set of 1.8 million ESI documents); *Am. Home Assurance Co. v. Greater Omaha Packing Co.*, No. 11-cv-0270, 2013 WL 4875997, at \*6 (D. Neb. Sept. 11, 2013) (thirteen months after the start of discovery, the court ordered defendant to disclose the sources of ESI it searched or intended to search and the corresponding search terms used “[t]o provide [plaintiff] an adequate opportunity to contest discovery of ESI”); *Apple Inc. v. Samsung Elec. Co. Ltd.*, No. 12-cv-0630, 2013 WL 1942163, at \*3 (N.D. Cal. May 9, 2013) (requiring a third-party to disclose search terms and custodians as a necessary step to determine the sufficiency of the third-party’s production); *In re Porsche Cars N. Am., Inc.*,



conduct in pre-trial discovery have become a serious burden to the American judicial system.”<sup>57</sup> Any short-term benefits that may be derived from a strategy of non-disclosure will likely pale in comparison to the cost of extended motion practice (both in terms of time and cost), the expense of re-opening the search and production process, and the potentially adverse effects on counsel’s credibility in the eyes of the court. Indeed, a responding party may find that voluntary disclosures at the outset of the discovery process can forestall or favorably cast post-discovery motion practice. As the court noted in *Ruiz-Bueno v. Scott*,<sup>58</sup> voluntary disclosure of a party’s e-discovery process during the Rule 26(f) conference “would [have] change[d] the nature of dispute from one about whether plaintiffs are entitled to find out how defendants went about retrieving information to one about whether those efforts were reasonable.” “In the absence of shared information about the nature of the search,” the “issue cannot be discussed intelligently either between counsel or by the Court.”<sup>59</sup>

#### Comment 4.b. Scope of Information Exchange

While a reasonable exchange of information may be beneficial to litigants and to the efficiency of the e-discovery process, there are both ethical and practical limits. As an initial matter, a party requesting information about an adversary’s e-discovery process must respect the limits imposed by Rule 26(g) that such requests are not “interposed for an improper purpose” nor “unreasonable nor unduly burdensome.”<sup>60</sup> Moreover, a responding party must balance candor and cooperation with the ethical duty to protect client confidentiality and to diligently advance the client’s position.<sup>61</sup> Counsel must also consider the extent to which early exchange of information will facilitate the “just, speedy, and inexpensive determination of the proceeding.”<sup>62</sup> Sharing information should permit the parties to fairly evaluate the overall scope of the search for relevant documents; the purpose is not to facilitate second-guessing of every detail about how each party will conduct its search, nor to create pretexts for adversaries to raise disputes that do not advance the just, speedy, and inexpensive determination of the proceeding.

The level of disclosure and cooperation that will be appropriate and effective in any given matter will depend on the specific circumstances and the adversary involved. In some cases, it may be most effective to exchange only a general description of the process each party intends to use to identify

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No. 11-MD-2233, 2012 WL 4361430, at \*6 (S.D. Ohio Sept. 25, 2012) (in granting plaintiffs’ request for disclosure of defendants’ e-discovery process, the court noted that “[t]ransparency is particularly important” and “[t]here are several outstanding issues that the parties cannot resolve until they reach a level of understanding about the way in which Porsche AG maintains documents and the way in which Porsche AG’s counsel located and produced responsive documents”).

<sup>57</sup> U.S. Bank Nat’l Ass’n v. PHL Variable Ins. Co., No. 12-cv-6811, 2013 WL 1728933, at \*7 (S.D.N.Y. Apr. 22, 2013).

<sup>58</sup> *Ruiz-Bueno v. Scott*, No. 12-cv-0809, 2013 WL 6055402, at \*4 (S.D. Ohio Nov. 15, 2013).

<sup>59</sup> *Id.*

<sup>60</sup> FED. R. CIV. P. 26(g)(1)(B).

<sup>61</sup> See ABA MODEL RULE OF PROF’L CONDUCT R. 1.6.

<sup>62</sup> FED. R. CIV. P. 1



relevant documents for production. In other cases, it may be most effective for each party to exchange more detailed information about the specific data sources collected and omitted, or search queries and protocols.<sup>63</sup> When deciding how much information to exchange, a party should consider a range of factors, which may include:

- the extent to which the information about the process is discoverable, or is otherwise likely to become apparent to the adversary (e.g., at the time of production);
- the extent to which the processes being employed are untested or are at risk of being rejected if challenged;
- the extent to which rejection of the process could result in significant delay or additional expense in resolving the dispute on the merits;
- whether the process being employed could lead to an irreversible loss of discoverable information;
- whether information about the process is protected by the attorney-client privilege or the work-product doctrine; and
- the extent to which disclosure is likely to lead to a more just, speedy, and inexpensive determination of the matter, including by reducing the likelihood or extent of discovery-related discovery, motion practice, or sanctions.

**Illustration:** The responding party has determined that the most efficient way of preserving discoverable emails is to collect the emails that “hit” on a broad set of search terms, rather than to modify the company’s default 30-day retention policy or rely on individual custodians to manually preserve potentially discoverable documents. Since a later determination that the responding party’s search terms were too narrow could come too late to prevent the loss of discoverable information, or cause a significant delay or expense from efforts to restore lost emails from back-up media, it may be prudent for the responding party to notify or seek agreement from the requesting party about the planned preservation approach and the specific search criteria to be applied.

**Illustration:** During the meet and confer regarding a document request, the responding party agrees to share the custodian list, date range, and search terms that it intends to use to limit the ESI that it reviews. The requesting party also demands

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<sup>63</sup> For example, in *Progressive Cas. Ins. Co. v. Delaney*, No. 11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014), the court rejected a party’s switch to the use of TAR after initially agreeing with its opponent to a production based upon search terms. The court stated: “Had the parties worked with their e-discovery consultants and agreed at the onset of this case to a predictive coding-based ESI protocol, the court would not hesitate to approve a transparent, mutually agreed upon ESI protocol. However, this is not what happened.” *Id.* at \*9.

that the responding party disclose technical details about the search and culling methodologies, such as the list of system file types that are not indexed, the “stop words” that are not included in the search index, and the exception reports showing which files were not successfully processed. The responding party could justifiably decide that disclosure of such details is unwarranted because the disclosure risks significantly increasing the time and resources devoted to litigating corollary issues without materially advancing determination of the action or providing a material improvement in the defensibility of the responding party’s e-discovery process.

Topics about which parties may confer include: (i) the identification of data sources that will be subject to preservation and discovery; (ii) the relevant time period; (iii) the identities of particular individuals likely to have relevant ESI; (iv) the form or forms of preservation and production; (v) the types of metadata to be preserved and produced; (vi) the identification of any sources of information that are not reasonably accessible because of undue burden or cost, such as back-up media and legacy data; (vii) use of search terms or other methods of reducing the volume of ESI to be preserved or produced; and (viii) issues related to assertions of privilege and inadvertent production of privileged documents.<sup>64</sup> This is not an exhaustive list, and other topics should be considered, as appropriate, depending on the facts and circumstances.

**Principle 5. When developing and implementing an e-discovery process, a responding party should consider how it would demonstrate the reasonableness of its process if required to do so. Documentation of significant decisions made during e-discovery may be helpful in demonstrating that the process was reasonable.**

While a party is not required proactively to submit evidence of the defensibility of its e-discovery process, as a matter of prudence, it should prepare for the possibility that it might ultimately be required to do so.<sup>65</sup> Documentation of significant decisions may be useful in establishing and proving the reasonableness of a party’s process if there is a subsequent challenge.<sup>66</sup> It can also help to refresh

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<sup>64</sup> The Sedona Conference, *The Sedona Principles: Best Practices Recommendation & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2d ed. June 2007), at 21, available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>.

<sup>65</sup> See *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 260 (D. Md. 2008), and text accompanying *supra* note 3; see also The Sedona Conference, *Commentary on Achieving Quality in the E-discovery Process*, 15 SEDONA CONF. J. 265, 284 (2014) (“At the outset of any e-discovery process, the Team Leader (or his or her delegate) should determine the documentation standards and controls . . . to ensure their ultimate defensibility. [He or she] should act under the assumption that every aspect of the process employed could be challenged and, as appropriate, include quality measures designed to answer those challenges in the overall project plan. This entails creating and updating documentation in real time, as decisions are made, to best assure that declarations and other statements regarding the outcome of the process will be adequately supported if and when the need arises at a later date.”).

<sup>66</sup> See Hon. Craig B. Shaffer, “Defensible” By What Standard?, 13 SEDONA CONF. J. 217 (2012), available at <https://thesedonaconference.org/node/4352> (suggesting that in the same way that a party seeking relief under Fed. R. Civ. P. 26(c) must support its request with a “particular and specific demonstration of fact,” a “defensible e-discovery process should be based on ‘articulated reasoning’ and the implementing party should be prepared to provide the court

recollections, form the basis for expert opinions, or serve as evidence itself in a later motion or hearing. Documentation can also be valuable in its own right, for example, in helping a producing party to formulate and follow a consistent and defensible process and to detect gaps in the process.<sup>67</sup> Documentation can be particularly important where responsibilities and tasks are divided or compartmentalized. To the extent that the client, outside counsel, and an outside vendor are all engaged in different facets of the e-discovery process, a “paper trail” becomes even more valuable as a way to communicate and to reconstruct the decision-making process.

Documenting every decision is, of course, impractical, but a party should try to take reasonable steps to document key decisions, ideally at or near the time such decisions are made. When deciding what to document, and in what detail, a party should balance the burdens of creating such documentation against the value of that documentation, both as a means of improving the e-discovery process, and as evidence of the reasonableness of that process. The amount and detail of the documentation will vary from case-to-case, based upon the application of proportionality principles. A party should consider documentation as early as possible in the e-discovery process, such as when the preservation obligation is triggered.<sup>68</sup> Contemporaneous documentation may also be helpful, and in some cases necessary, to make information admissible as evidence.<sup>69</sup> Such documentation may take various forms, including memoranda to file, standardized forms, checklists, questionnaires, logs, client records, statistical or other quantitative reports, and process documentation from third-party consultants and service providers.

**Illustration:** During its investigation, counsel determines that the custodians stored discoverable ESI in a variety of locations within the company’s systems. Custodians’ document management practices varied widely from custodian to custodian. Some saved relevant materials only to their work stations. Others used personal directories assigned to them on the network. One individual saved his files to flash drives, which he kept locked in a desk drawer. Three working groups set up shared document sites, but each used a different approach. One group used a shared drive in network storage, a second group set up a SharePoint site, and a third group used two

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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”) (internal citations omitted).

<sup>67</sup> The Sedona Conference, *Commentary on Achieving Quality in the E-discovery Process*, 15 SEDONA CONF. J. 265, 279 (2014).

<sup>68</sup> A company can further promote defensibility by implementing a comprehensive e-discovery readiness plan or a unified information governance policy supported by written procedures detailing how e-discovery will be handled. Such documentation can help support later assertions that a process was implemented in a manner designed to find discoverable information consistent with federal or state rules. It is also important to consider the documentary support generated by third-party service providers that may be engaged to support an e-discovery process, and to ensure that such third-parties meet established standards for process documentation. *See generally* The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014).

<sup>69</sup> Admissibility of ESI “is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence.” *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007). Among others, the following two rules may help with regard to admissibility if live testimony is unavailable: Fed. R. Evid. 406 (using process documentation as proof of routine practice) and Fed. R. Evid. 803(6) (using process documentation as a business record).

Outlook public folders. In these circumstances, the collection and search processes counsel selects may vary widely from custodian to custodian. Making a detailed record of the specific processes followed for each custodian (or similarly situated group of custodians) may prove highly beneficial, especially in a large case of long duration.

Some aspects of the e-discovery process where documentation may be useful include:

- the procedures followed for satisfying the party's preservation obligation, including the distribution list and the legal hold notice itself, and any instructions or guidance provided to the person(s) responsible for preserving ESI covered by the legal hold<sup>70</sup>;
- a description of the portions or aspects of a client's IT systems that are likely to have discoverable ESI;
- records of interviews with key custodians to identify potential sources of discoverable information;
- sources of information considered for collection, including those ultimately not collected, and the reasons therefore;
- chain-of-custody records for collected documents;
- data processing specifications for data collected for review (e.g., de-NISTing, de-duplication);
- search and culling methods employed, including keywords, date restrictions, TAR protocols, and other culling parameters and filters;
- procedures, instructions, and other information used for training document reviewers on how to make determinations of relevance, confidentiality, or privilege;
- sampling or other validation methods used to test the efficacy of any search, retrieval, or review methodologies; and
- the substance of any meet-and-confer efforts with opposing counsel, including any agreements reached.

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<sup>70</sup> While a detailed treatment of the legal hold process is generally outside the scope of this Commentary, for guidance on that topic, see The Sedona Conference, *Commentary on Legal Holds: The Trigger and the Process*, 11 SEDONA CONF. J. 265 (2010).

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### III. *Specific Applications of the General Principles*

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#### **Principle 6. An e-discovery process should include reasonable validation.**

As discussed above in Principle 2, Federal Rule 26(g) requires counsel to undertake reasonable due diligence in order to establish that its process for identifying discoverable information reflects a “reasonable inquiry.” Appropriate validation can be an important aspect of that due diligence effort. Even the most carefully and thoughtfully designed process may result in errors and oversights, which only appropriate validation may be able to identify. The e-discovery process may have flaws that are not apparent when one is designing it, or the process may be carried out in a way that introduces unanticipated error.

**Illustration:** The parties agree that documents prior to January 2010 are not relevant to any claims or defenses. The responding party implements this restriction by asking its vendor to run a search that excludes from review all documents created before this date. It may be appropriate for the responding party to validate that the search did not inadvertently exclude documents it should not have, for example, documents that were created before January 2010 but attached to emails sent after January 2010, documents that were created before January 2010 but modified thereafter, or documents that do not have reliable date metadata (e.g., scanned hard-copy documents).

A detailed description of what should be validated and how is beyond the scope of this Commentary, although it has been addressed in a previous Sedona Conference paper.<sup>71</sup> However, it is important to note that, consistent with Principle 1, validation need not be perfect.<sup>72</sup> Instead, validating the results of an e-discovery process entails gaining a reasonable level of confidence that the process has resulted in a reasonably accurate, correct, and complete production, consistent with the responding party’s legal obligations.<sup>73</sup> As with other aspects of the e-discovery process, the effort undertaken to validate the results of a process should be proportionate to the expected benefits of that validation. Excessive validation can introduce unreasonable delay and expense. Insufficient validation increases the likelihood of discovery failures and potential discovery violations. Parties should attempt to strike the appropriate balance between the increase in defensibility that may be afforded by the effort, and the time and cost required to gain that increase.<sup>74</sup>

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<sup>71</sup> See The Sedona Conference, *Commentary on Achieving Quality in the E-discovery Process*, 15 SEDONA CONF. J. 265, 279–82 (2014).

<sup>72</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Secs. LLC*, 685 F. Supp. 2d 456, 456 (2010) (“Courts cannot and do not expect that any party can reach a standard of perfection.”).

<sup>73</sup> See *First Fin. Bank v. Bauknecht*, No. 12-cv-1509, 2013 WL 3833039 (C.D. Ill. July 23, 2013) (shifting cost to requesting party was appropriate because the likelihood of uncovering additional relevant information was outweighed by the cost of conducting a separate, duplicative search).

<sup>74</sup> See Minutes of Telephone Conference, *Indep. Living Center v. City of Los Angeles*, No. 12-cv-00551, Docket No. 375 (C.D. Cal. June 26, 2014) where the court granted the requesting party’s demand that the responding party perform quality assurance in connection with its use of TAR, but ordered it to split the cost. The court stated:

Validation should be tailored to each case—and even to the particular step in the e-discovery process—based on the associated complexities or challenges of specific aspects of the e-discovery process. There may be little or no need for a separate validation step in smaller, less complex matters. For moderately complex matters, appropriate validation might involve “spot checks,” or the use of a quality-assessment checklist. A large, complex matter may call for a more formal and elaborate validation process, such as random sampling and/or other quality assurance processes. In such a matter, quality-control steps would typically be built into the culling, search, and review efforts.

**Principle 7. A reasonable e-discovery process may use search terms and other culling methods to remove ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.**

**Comment 7.a. Eliminating ESI that is Cumulative or Duplicative**

Due to the explosion in the volume of ESI in many organizations, an important part of the e-discovery process, in many cases, is a series of steps to reduce the volume of ESI at each successive stage of the process. Both the responding party and the requesting party benefit from productions that are timely, complete, and not cluttered with a large volume of irrelevant ESI. Thus culling, when done properly, helps further the “just, speedy, and inexpensive determination” contemplated by the Federal Rules,<sup>75</sup> and analogous state court rules.<sup>76</sup> On the other hand, culling may not be “just” if the discovery process fails to produce significant, unique, relevant ESI that exists in the collection. Striking the right balance between these two concerns requires due diligence and analysis, as discussed below.

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The quality assurance step is part of a program that the Court ordered the City to buy for \$50,000 and use in this case. It is a feature that does not exist in traditional production, i.e., reviewing the documents and producing them to the other side. Nor is it a feature in key word searches, the method Plaintiffs were championing when the Court became involved and ordered the City to use predictive coding. It is a feature available in predictive coding which quantifies the level of accuracy in the search. That fact that it exists in the system does not mean that the City has to employ it and pay for it. If Plaintiffs truly believe that quality assurance step is important, they should pay for employing it by splitting the costs with the City.

*Id.* at 3.

<sup>75</sup> FED. R. CIV. P. 1.

<sup>76</sup> *See, e.g.*, FLA. R. CIV. P. 1.010 (“These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.”); N.Y. C.P.L.R. 104 (“The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.”); PA. R. CIV. P. 126 (“The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable.”). *See generally* CAL. R. CT. 1.5(a) (“The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern.”).

The Federal Rules<sup>77</sup> and their state law equivalents<sup>78</sup> provide a sound basis for removing documents that are cumulative or duplicative of other documents. One well-established technique is the identification and elimination of duplicative documents based on their “hash values,” which are “digital fingerprints” that identify documents that are identical to one another.<sup>79</sup> These fingerprints can be used to eliminate duplicates within a single custodian’s collection (i.e., “custodian-level” or “vertical” de-duplication), or to eliminate duplicates across multiple custodians’ collections (i.e., “global” or “horizontal” de-duplication). If done correctly, global de-duplication can eliminate duplicates, while still maintaining information about the identity of each custodian who had a copy of the duplicative document (e.g., through a “duplicate custodian” metadata field). In most cases, global de-duplication is a defensible technique for excluding duplicative documents that are, or should be, beyond the scope of discovery.

While de-duplication is the most common means of eliminating cumulative or duplicative documents, other defensible means exist. For example, many e-discovery tools can identify emails that belong to the same thread and exclude those emails whose content is wholly contained within other emails in the same thread (i.e., retain only the last email in a continuous email chain), although care must be taken to identify emails that branch off from the main thread (e.g., forwards to other parties) or that contain unique attachments. A responding party could use email threading to limit review and production to just the fully inclusive members of email chains.

Similarly, databases often contain data that is cumulative or duplicative, and both parties can often benefit if production from databases can be made in the form of query-based reports generated to capture certain fields, rather than producing the more voluminous (and often less meaningful), underlying data.<sup>80</sup> Relatedly, rather than producing all the reports that are periodically generated in the ordinary course of business, it may be possible to collect and produce one report that contains the combined scope of all historic reports.<sup>81</sup>

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<sup>77</sup> Fed. R. Civ. P. 26(b)(2)(C)(i) provides that “the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the discovery sought is unreasonably cumulative or duplicative.”

<sup>78</sup> See, e.g., CAL. CODE CIV. P. § 2019.030(a)(1) (“The court shall restrict the frequency or extent of use of a discovery method . . . if it determines either of the following: (1) The discovery sought is unreasonably cumulative or duplicative . . . .”); FLA. R. CIV. P. 1.280(d)(2) (“In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative . . . .”); TEX. R. CIV. P. 192.4 (“The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative . . . .”).

<sup>79</sup> See The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, 15 SEDONA CONF. J. 305 (4th ed. 2014) (hereinafter *Sedona Glossary*).

<sup>80</sup> See Seventh Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information*, *supra* note 47, Principle 2.06(b).

<sup>81</sup> See The Sedona Conference, *Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171 (2014), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Database%20Principles>.

### Comment 7.b. Eliminating ESI that is Outside the Scope of Discovery

Reasonable steps may also be taken to remove material that is not “relevant to any party’s claim or defense.”<sup>82</sup> A party need not establish with mathematical certainty that all culled documents are outside the scope of discovery. As with any discovery process, and consistent with Principle 1 above, perfection is not the standard, but rather, the steps taken must be reasonable and the burdens imposed by the discovery proportionate to its benefits.<sup>83</sup> Thus, if a collection of ESI is only marginally relevant and would dramatically increase the costs, or cause delays in production, a party may be justified in foregoing—or at least de-prioritizing—review and production of such ESI. In most cases, a culling process that removes a significant volume of irrelevant or duplicative information is reasonable, even if the process also removes some relevant information. Consistent with Principles 4 and 6, above, agreement with the requesting party and/or reasonable validation steps should generally be undertaken to ensure that such culling is defensible in light of the responding party’s discovery obligations.

### Comment 7.c. The Use of Search Terms to Cull ESI

Perhaps the most common method used to cull data from review and production is the use of search terms. Often crafted using Boolean operators or proximity connectors, keywords attempt to replicate the language expected to be found in relevant documents. As with all means of searching for relevant ESI, search terms are not perfect,<sup>84</sup> and they may be less accurate than lawyers who are using them might expect.<sup>85</sup> That said, search terms are a defensible technique for limiting the number of documents for review and production provided that care is taken in their development and use.

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<sup>82</sup> FED. R. CIV. P. 26(b)(1); *see also* Advisory Committee Note, FED. R. CIV. P. 26(b)(1) (2000) (“The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.”).

<sup>83</sup> *See* FED. R. CIV. P. 26(b)(1) (limiting the scope of discovery to that which is relevant and “proportional to the needs of the case”). *See supra* Comment 1.b. and note 21.

<sup>84</sup> For example, search terms may fail to capture misspellings, abbreviations, slang or acronyms, or they may fail to account for all of the variations in the meaning of a particular word (i.e., polysemy). Search terms are unable to identify potentially relevant ESI that does not contain any machine-readable text (e.g., pictures, drawings, and audio or video files), or that appears in documents that are password-protected or encrypted. Search terms may also be ineffective for hard-copy documents if they contain handwritten notation or the optical character recognition (“OCR”) software applied introduces significant variations in the way words appear. The disconnect between lawyers’ confidence in the search-term method and the demonstrated efficacy of that method has begun to cause courts—and opposing parties—to give increased scrutiny to discovery processes that depend primarily upon search terms.

<sup>85</sup> *See, e.g.*, David C. Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 COMM’NS ACM 289 (March 1985) (showing that experienced paralegal searchers supervised by attorneys believed they had found at least 75 percent of the relevant documents using search terms, when they had actually found, on average, only 20 percent); Douglas W. Oard et al., *Overview of the TREC 2008 Legal Track* (Mar. 17, 2009), available at <http://trec.nist.gov/pubs/trec17/papers/LEGAL.OVERVIEW08.pdf> (showing that Boolean search terms identified only 24 percent of the relevant documents); Stephen Tomlinson et al., *Overview of the TREC 2007 Legal Track* (Apr. 30, 2008), available at <http://trec.nist.gov/pubs/trec16/papers/LEGAL.OVERVIEW16.pdf> (showing that Boolean search terms identified only 22 percent of the relevant documents); *see also* *Da Silva Moore v. Publicis*



The following are measures that should be considered by responding parties to improve the defensibility of their keyword searches. The list is neither intended to be a requirement nor exhaustive, but rather, to highlight several important and potentially useful approaches. No measure should be considered mandatory in all cases, and the concepts of proportionality and reasonableness apply here, just as they do to all other aspects of the e-discovery process. Several courts have emphasized the importance of some of the processes described below in the context of developing search terms.<sup>86</sup>

- *Consultation with Persons Knowledgeable About the Relevant Subject Matter.* A responding party should develop a well-supported, carefully crafted set of search terms. Counsel developing search terms should generally consult with client representatives and custodians who have personal knowledge of the relevant terminology, including nicknames, code words, euphemisms, acronyms, slang, terms of art, abbreviations, and other language likely to be contained in discoverable documents.
- *Consultation with Persons with Appropriate Technical Expertise.* Proximity terms, wildcard characters, truncation, stem words, or technological tools like “fuzzy” logic can be used to make a search more inclusive and/or precise. However, parties must make sure that they understand how these techniques work, and their precise syntax, particularly since they may function differently across different e-discovery tools. Therefore, it may be appropriate to confer with an e-discovery consultant or other professional with the requisite technical knowledge. Similarly, discussions with someone who has knowledge of the client’s IT systems may be necessary in order to develop searches to be run against a client’s internal systems, such as databases, enterprise applications, document management systems, file servers, email systems, and back-up media. In some cases, responding parties may also benefit from assistance of an expert in linguistics, statistical sampling, computer science, information retrieval, or other relevant fields to help craft appropriate and defensible searches.

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Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012) (discussing results of Blair and Maron and TREC Legal Track studies).

<sup>86</sup> See, e.g., *Da Silva Moore*, 287 F.R.D. at 192 (“As with keywords or any other technological solution to ediscovery, counsel must design an appropriate process, including use of available technology, with appropriate quality control testing . . . .”); *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (“[W]here counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’”); *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 260 (D. Md. 2008) (“While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.”); *United States v. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (observing that whether search terms will yield responsive information is a “complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics”). See also Hon. Andrew J. Peck, *Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?*, L. TECH. NEWS, Oct. 11, 2011 (“Despite these (and other) judicial criticisms of the use of keywords without sufficient testing and quality control, many counsel still use the “Go Fish” model of keyword search.”).

- *Use of an Iterative Term-Selection Process.* Using an iterative process to develop search terms will often improve the results of the search-term method. In an iterative process, information in documents returned by the first list of search terms can help attorneys to further refine existing terms or to identify new terms that should be added in subsequent rounds. This process can continue until a reasonable result is achieved. Because it takes time for an iterative process to identify the searches to be used, this approach may require the parties to delay final agreement on search terms, and possibly, to extend document production schedules.
- *Validation of Search Results.* Most search tools can easily provide the number of “hits” returned by each individual term in a set of search terms. This information can be helpful in assessing the burden of a search and in identifying potentially problematic terms based on their return of a surprisingly high or low volume of “hits.” While such “hit reports” are useful, it can often be helpful to undertake further validation of search results, for example, by sampling the “hits” to assess the prevalence of false positives and the “misses” to assess the prevalence of false negatives. Another useful technique is to test the search terms against known collections of responsive documents to confirm that the terms are correctly identifying such documents. *See also* Principle 6 above, concerning validation of process.
- *Documentation of the Search Process.* As discussed above in Principle 5, appropriate documentation can aid defensibility by providing a written record of the reasons for a particular approach so that the process may be better explained, if necessary, at a later date. Reasonable documentation of keyword searches would probably include the precise formulation of the searches, the results of any testing or validation performed on the searches, and the reasons for including or excluding specific terms or phrases from the search.
- *Disclosure to or Cooperation with the Requesting Party.* As discussed above in Principle 4, agreement between the parties on what ESI is outside the scope of discovery can, in many instances, facilitate the “just, speedy, and inexpensive determination” of the matter.<sup>87</sup> Early disclosure of search terms can provide an opportunity for the requesting party to object to the list of terms, suggest additional terms, or seek judicial intervention before the responding party invests substantial resources in applying disputed terms. A requesting party who is involved in the selection of search terms is less likely to challenge the use of those terms, and may indeed be found to have waived such a challenge. In some instances, a requesting party may possess unique knowledge about the terminology that is likely to appear in responsive documents, or may have a good understanding of the facts

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<sup>87</sup> *See* Advisory Committee Note, FED. R. CIV. P. 26(b)(1) (2000) (“In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.”); Advisory Committee Note, FED. R. CIV. P. 26(b)(1) (2015) (parties should discuss discovery scope at Rule 26(f) conference).

surrounding its own claims, such that it is in a position to propose searches that will likely avoid the production of overly inclusive results.

**Illustration:** In a contract dispute, plaintiff was involved in negotiations about the agreement at issue and knows the nicknames the parties used to describe provisions that are relevant to her allegations. Plaintiff's proposed search terms should be considered by the responding party.

While disclosure and cooperation can aid defensibility, they should not permit the requesting party to dictate the search terms to be used, especially where the additional terms would create an undue burden relative to the likelihood of identifying additional responsive ESI. As discussed above in Principle 3, the responding party is ordinarily in the best position to determine whether search terms are reasonably tailored to retrieve the requested ESI without imposing an undue burden, because that party has access to the data and relevant custodians, and can test proposed search terms.

Moreover, a responding party should take care not to disclose privileged or other protected information inadvertently, or without a client's authorization. The sources of information on which the search terms were based, including the identification of particular witnesses an attorney interviewed, or documents the attorney reviewed, could reveal either client confidences (as defined by state ethics rules), or protected attorney work-product. Where a party decides to disclose search terms, it may be prudent to obtain an agreement ensuring that such disclosure of information does not constitute a waiver of applicable privilege or work-product protection.<sup>88</sup>

**Illustration:** In an employment discrimination action, a client confides to his attorney that there was a rumor concerning the possible use of an offensive term to refer to the plaintiff. It is unknown whether the term was actually used or whether it was ever used in email correspondence. Although a basis therefore exists for its inclusion as a search term, the mere disclosure of the proposed term to plaintiff's counsel may tend to reveal the content of an attorney-client communication as well as attorney work-product. In this situation, even if the parties are exchanging search terms, it may be prudent for the attorney to inform the adversary that certain search terms will not be disclosed on the grounds of privilege.

#### **Comment 7.d. Other ESI Culling Techniques**

Technology-assisted review or TAR, discussed in detail in the Commentary to Principles 8 and 9 below, is an ESI culling technique that may be used in lieu of, or in addition to, search terms. Other

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<sup>88</sup> See Sean Grammel, *Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery*, 161 U. PA. L. REV. 2063 (2013) (arguing that search terms deserve protection from compelled disclosure as opinion work product).

techniques to exclude irrelevant ESI include the use of filters based on date ranges<sup>89</sup> and file types.<sup>90</sup> Similarly, emails may reasonably be excluded on the basis of senders, sender domains (e.g., *espn.com* or *cnn.com* news alerts), recipients (e.g., mass distribution lists), subject lines, or other indicia that emails were automatically or system generated or are bulk communications that are not likely to be relevant, unless of course the facts, claims, or defenses make such communications relevant in a particular matter. If a search or review process uncovers large populations of non-relevant ESI, various techniques, including identifying “near duplicates” or conceptually similar documents may help to locate and cull other, similar non-relevant ESI. Again, it may be advisable to get agreement from the requesting party and/or employ reasonable validation techniques before making decisions to exclude documents in bulk from review and production.

**Principle 8. A review process can be reasonable even if it does not include manual review of all potentially responsive ESI.**

As noted in Principle 7 above, it is defensible to use reasonable methods—including the application of keywords—to cull, and therefore to exclude ESI from review, even though some of the excluded ESI may potentially be discoverable.<sup>91</sup> Nevertheless, some have sought to challenge the use of automated e-discovery processes—such as TAR—that similarly may exclude some potentially discoverable ESI from review.<sup>92</sup>

The reluctance by some to agree to the use of TAR may stem, in part, from the mistaken belief that manual review is the “gold standard against which other review techniques are compared.”<sup>93</sup> In fact,

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<sup>89</sup> Care must be taken, however, to apply an appropriate date parameter (i.e., date created, date last modified, or date last accessed), and to account for email attachments that may be older than the emails to which they are attached.

<sup>90</sup> A technique known as de-NISTing identifies system or execution files that are generally unlikely to be relevant to litigation. *Sedona Glossary*, *supra* note 79, at 320. Which file types are appropriate for culling can vary from case to case. For example, system files may be relevant if the litigation involves theft of intellectual property. Similarly, JPEGs, may be irrelevant in one type of case, but extremely significant in another.

<sup>91</sup> Although Principle 8 focuses on alternatives to linear manual review, e-discovery processes that employ automated tools commonly involve some manual review, including eyes-on review of documents designated for potential production, and quality-control checks (e.g., sampling) of documents tagged as non-responsive, and therefore not designated for potential production.

<sup>92</sup> See, e.g., *In re Dulles Jet Center Litig.*, Consolidated Case. No. CL 00061040 (Cir. Ct Va. Apr. 16, 2012), Opposition of Plaintiffs M.I.C. Industries Inc. to the Landow Defendants’ Motion for Protective Order Regarding Electronic Documents and “Predictive Coding,” at 4, available at <http://www.ediscoverylaw.com/files/2013/11/Opp-to-Motion-re-Predictive-Coding.pdf> (“But computerized tools are supplements to the ordinary review process. No computer program is an adequate substitute for having human beings review and sort the documents.”); *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, No. 2685-11, 2014 WL 4636526, at \*5 (U.S. Tax Ct. Sept. 17, 2014) (petitioner’s objection to TAR as an “unproven technology”).

<sup>93</sup> Hon. Andrew J. Peck, *Search Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?*, *supra* note 86, at 25. See also The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217, 230 (2014). (“[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible—perhaps even perfect—and constitutes the gold standard by which all searches should be measured. Even assuming that the profession had the

research suggests that human reviewers disagree to a surprisingly large degree about which documents in a collection are responsive, and also that human reviewers display high rates of error.<sup>94</sup> Indeed, a study comparing two types of TAR to manual review concluded that “the myth that exhaustive manual review is the most effective—and therefore, the most defensible—approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort.”<sup>95</sup>

Courts have come to recognize that TAR, when properly used, can be a defensible method of identifying documents for production.<sup>96</sup> Indeed, in *Da Silva Moore v. Publicis Groupe*,<sup>97</sup> Magistrate Judge Andrew J. Peck of the Southern District of New York reached the following conclusion:

Linear manual review is simply too expensive where, as here, there are over three million emails to review. Moreover, while some lawyers still consider manual review

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time and resources to continue to conduct manual linear review of massive sets of electronic data (which it does not), the relative efficacy of that approach versus utilizing newly developed automated methods of review appears to be increasingly in question.”).

<sup>94</sup> See, e.g., Ellen M. Voorhees, *Variations in Relevance Judgments and the Measurement of Retrieval Effectiveness*, 36 INFO. PROCESSING & MGMT. 697, 700 (2000), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.330.1920&rep=rep1&type=pdf>; Peter Bailey et al., *Relevance Assessment: Are Judges Exchangeable and Does It Matter?*, 31<sup>ST</sup> Annual International ACM SIGIR Conference (2008), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.156.6386&rep=rep1&type=pdf>; Herbert L. Roitblat et al., *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC’Y FOR INFO. SCI. & TECH. 70 (2010), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.372.1347&rep=rep1&type=pdf>; Maura R. Grossman & Gordon V. Cormack, *Inconsistent Responsiveness Determination in Document Review: Difference of Opinion or Human Error?*, 32 PACE L. REV. 267 (2012); 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 (2011), available at <http://jolt.richmond.edu/v17i3/article11.pdf>.

<sup>95</sup> See Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, *supra* note 94, at 48. *But see* William Webber, *Re-examining the Effectiveness of Manual Review*, Workshop Paper Submitted to SIRE ‘11 (July 28, 2011), available at <http://www.umi-acs.umd.edu/~oard/sire11/papers/webber.pdf>; S. Green and M. Yacano, *Computers vs. Humans? Putting the TREC 2009 Study in Perspective*, N.Y. L.J. (Oct. 1, 2012), at S4.

<sup>96</sup> See *Rio Tinto PLC v. Vale S.A.*, No. 14-cv-3042, 2015 WL 872294, at \*1, 2 (S.D.N.Y. Mar. 2, 2015) (“In the three years since *Da Silva Moore*, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.”) (footnote omitted; collecting cases); *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 2014 WL 4636526, at \*5, 7 (U.S. Tax Ct. Sept. 17, 2014) (ordering that respondent could use TAR over petitioner’s objection; “In fact, we understand that the technology industry now considers predictive coding to be widely accepted for limiting e-discovery to relevant documents and effecting discovery of ESI without an undue burden.”) (footnote omitted); *Global Aerospace Inc. v. Landow Aviation*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012); *Fed. Hous. Fin. Agency v. HSBC North Am. Holdings Inc.*, 2014 WL 584300, at \*3 (S.D.N.Y. Feb. 14, 2014) (“The literature the Court reviewed . . . indicated that predictive coding had a better track record in the production of responsive documents than human review.”).

<sup>97</sup> 287 F.R.D. 182, 189 (S.D.N.Y. 2012).

to be the “gold standard,” that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review.<sup>98</sup>

Another empirical study cited in the *Da Silva Moore* decision found that “[o]n every measure, the performance of the two computer systems was at least as accurate (measured against the original review) as that of human re-review.”<sup>99</sup>

Like manual review and search terms, TAR is not perfect. However, as discussed above in Principle 2, “reasonableness,” not “perfection” is the legal standard by which an e-discovery process is measured. Therefore, the question with respect to TAR is *not* whether it is perfect, or even the best technique available, but whether it is a sufficiently reliable method so as to be a “reasonable” way to search for responsive documents.<sup>100</sup> At this point in time, there is both sufficient empirical evidence and sufficient case law to conclude that it is. That is not to say that manual review itself is not defensible, nor that a TAR process is necessarily better than search terms or a manual review process in all circumstances, or that all TAR processes are created equal.<sup>101</sup> Rather, the point is that there should be no presumption that a process that does not include human eyes on every document is necessarily inferior, inadequate, or less defensible than a process that does.<sup>102</sup>

**Principle 9. Technology-assisted review should be held to the same standard of reasonableness as any other e-discovery process.**

**Comment 9.a. The Application by Some Courts of Differing Standards**

The application of search terms to cull ESI, as noted in Principle 7 above, is widely accepted and has generally not been subjected to rigorous oversight or statistical validation. Likewise, manual review has also typically been accepted without much, if any, question. On the other hand, the use of TAR has tended to be subjected to levels of scrutiny and oversight that have not been applied to other search and review methods. One possible explanation for the inclination to apply differing standards is the perception that TAR operates in a “black box.” The algorithms and inner workings of TAR

<sup>98</sup> 287 F.R.D. 182, 189 (S.D.N.Y. 2012). Judge Peck’s observations about cost are supported by a RAND Corporation study. N. Pace & L. Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND CORPORATION, 67–68 (2012), available at <http://www.rand.org/pubs/monographs/MG1208.html>.

<sup>99</sup> *Da Silva Moore*, 287 F.R.D. at 190 (quoting Herbert L. Roitblat et al., *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC’Y FOR INFO. SCI. & TECH. 70, 79 (2010)).

<sup>100</sup> *Da Silva Moore*, 287 F.R.D. at 187 (“[T]he idea is not to make [TAR] perfect, it’s not going to be perfect. The idea is to make it significantly better than the alternatives without nearly as much cost.”).

<sup>101</sup> See, e.g., Gordon V. Cormack & Maura R. Grossman, *Evaluation of Machine-Learning Protocols for Technology-Assisted Review in Electronic Discovery*, in Proceedings of the 37th Int’l ACM SIGIR Conf. on Research & Dev. in Info. Retrieval (SIGIR ‘14), at 153–62 (ACM New York, N.Y. 2014), <http://dx.doi.org/10.1145/2600428.2609601>.

<sup>102</sup> See Advisory Committee Note, FED. R. CIV. P. 26(b)(1) (2015) (“Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information becomes available.”).

tools are not well understood, and may appear to distance the attorney from the review process or to amplify human error. Moreover, misunderstandings about TAR, and assumptions that all TAR is the same (or suffers from the same limitations), appear to have contributed to skepticism and slow adoption.<sup>103</sup> Whatever the cause, the fear of increased scrutiny and unwarranted intrusion can create disincentives to the use of new approaches that may benefit both requesting and responding parties confronting increasing volumes of ESI and growing budgetary constraints.<sup>104</sup>

While the desire to vet a new and unfamiliar process is natural, it does not follow that a familiar process should escape any scrutiny simply by virtue of being “the way it has always been done,” while the new method should be unduly burdened. The imposition of increased oversight and validation requirements on TAR, while exempting more familiar methods from the same obligations, can lead parties to avoid the use of TAR in favor of traditional methods that may not produce better results. As the Court stated in *Rio Tinto PLC v. Vale S.A.*:

One point must be stressed—it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review.<sup>105</sup>

A substantial number of courts (and other authorities) have now recognized that TAR, when used properly, is a reasonable method for the review of ESI.<sup>106</sup> However, because of lingering fear, distrust, and lack of knowledge, it appears that parties that want to use newer, technology-based approaches—such as TAR—for culling, search, or review, may be reluctant to do so because they fear they may open themselves up to increased scrutiny or skepticism about the reliability of their e-dis-

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<sup>103</sup> See generally Maura R. Grossman & Gordon V. Cormack, *Comments on “The Implications of Rule 26(g) on the Use of Technology-Assisted Review,”* 7 FED. CTS. L. REV. 1 (2014).

<sup>104</sup> See *Rio Tinto PLC v. Vale S.A.*, No. 14-cv-3042, 2015 WL 872294, at \*1, 3 (S.D.N.Y. Mar. 2, 2015).

<sup>105</sup> No. 14-cv-3042, 2015 WL 872294, at \*3 (S.D.N.Y. Mar. 2, 2015).

<sup>106</sup> See, e.g., *Malone v. Kantner Ingredients, Inc.*, 2015 WL 1470334, at \*3 n.7 (D. Neb. Mar. 31, 2015) (“Predictive coding is now promoted (and gaining acceptance) as not only a more efficient and cost effective method of ESI review, but a more accurate one.”)(citations omitted); *Rio Tinto*, 2015 WL 872294, at \*2 (collecting cases); *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 2014 WL 4636526, at \*5 (U.S. Tax Ct. Sept. 17, 2014) (“[W]e understand that the technology industry now considers predictive coding to be widely accepted for limiting e-discovery to relevant documents and effecting discovery of ESI without an undue burden.”); *Green v. Am. Modern Home Ins. Co.*, No. 14-cv-04074, 2014 WL 6668422, at \*1 (W.D. Ark., Nov. 24, 2014); *Aurora Coop. Elevator Co. v. Aventine Renewable Energy - Aurora W. LLC*, No. 12-cv-0230, Docket No. 147 (D. Neb. Mar. 10, 2014); *Edwards v. Nat’l Milk Producers Fed’n*, No. 11-cv-4766, Docket No. 154: Joint Stip & Order (N.D. Cal. Apr. 16, 2013); *Bridgestone Am., Inc. v. IBM Corp.*, No. 13-1196, 2014 WL 4923014, at \*1 (M.D. Tenn. July 22, 2014); *Fed. Hous. Fin. Agency v. HSBC N.A. Holdings, Inc.*, 11-cv-6189, 2014 WL 584300 (S.D.N.Y. Feb. 14, 2014); *EORHB, Inc. v. HOA Holdings LLC*, No. Civ. A. 7409, 2013 WL 1960621 (Del. Ch. May 6, 2013); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 11-MD-2299, 2012 WL 7861249, at \*4 (W.D. La. July 27, 2012); *Global Aerospace Inc. v. Landow Aviation*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012); *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012).

covery processes, and to the imposition of more rigorous requirements for transparency and validation, than if they used more traditional approaches. Some requesting parties or courts have demanded greater transparency and collaboration, as well as more extensive validation and proof of efficacy with respect to TAR than would have ever been considered necessary, appropriate, or acceptable with respect to keywords or manual review.<sup>107</sup> This has included demands to see (or participate in the development of) “seed” or “training” documents, demands to see non-responsive documents, and demands for disproportionate and “statistically valid” (i.e., scientific publication-worthy) measures of effectiveness. Such scrutiny and transparency requirements risk imposing additional and unreasonable cost and burden on parties attempting to use TAR, as well as on courts called on to adjudicate disputes over the use of TAR. As with any other e-discovery process, all search and review methods should be reasonable under the circumstances, and their adequacy should be measured against this common standard.

### **Comment 9.b. Common Standards Should Apply to All Review Methods**

In a traditional manual review process, documents that are deemed responsive to the request for production (and not privileged) are produced, while the remaining documents are not. Rarely is that process challenged in the absence of a material defect or gap in the production. Responding parties have not typically been required to perform rigorous statistical sampling, or to disclose, let alone measure, the recall and precision of their productions, or to provide their adversary with the coding manual or instructions provided to reviewers. Rather, manual review has typically been judged, as it should be, according to a reasonableness standard.

Technology-assisted review should be judged by the same reasonableness standard. Technology-based approaches involve a blend of human and automated processes, in which attorneys make informed decisions about what is appropriate to fulfill their discovery obligations, just as they do for manual processes.<sup>108</sup> As Magistrate Judge Andrew J. Peck stated, “if the use of predictive coding is challenged in a case before me, I will want to know what was done and why that produced defensible results. I may be less interested in the science behind the ‘black box’ of the vendor’s software

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<sup>107</sup> *Progressive Cas. Ins. Co. v. Delaney*, No. 11-cv-00678, 2014 WL 3563467, at \*10 (D. Nev. July 18, 2014) (“The cases which have approved technology assisted review of ESI have required an unprecedented degree of transparency and cooperation among counsel in the review and production of ESI responsive to discovery requests.”); *Fed. Hous. Fin. Agency*, 2014 WL 584300, at \*3 (court emphasized importance of transparency and cooperation including giving the requesting party full access to the seed set’s responsive and non-responsive documents, but not to privileged documents); *In re Actos*, 2012 WL 7861249 (parties’ stipulation and protocol called for multiple “experts” from each side to review and code the seed set simultaneously). See *Bridgestone*, 2014 WL 4923014, at \*1 (permitting IBM to change from search terms to TAR and observing that the court expected “full openness in [the] matter”).

<sup>108</sup> *Da Silva Moore*, 287 F.R.D. at 189 (“The court recognizes that computer-assisted review is not a magic, Staples-Easy-Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts needs [sic] to examine.”).



than in whether it produced responsive documents with reasonably high recall and high precision.”<sup>109</sup>

**Illustration:** The responding party has identified hundreds of thousands of potentially responsive documents in need of review for production. The responding party has a choice between an exhaustive manual review of all potentially responsive documents, or a TAR process, to review the documents. The party chooses the TAR process, which is expected to save time and money, while yielding reasonable results. The requesting party subsequently demands a level of validation that would not have been demanded if the responding party had chosen a manual review process. These demands should be rejected because they would hold one review process to a higher standard than the other. If the nature of the case and the issues at stake in litigation warrant a high level of validation and quality assurance, then that same level should apply regardless of the review method that is chosen. For any approach, perfection is not expected, and defensibility will turn on whether the process was reasonable in light of proportionality considerations.<sup>110</sup>

**Principle 10. A party may use any reasonable process, including a technology-assisted process, to identify and withhold privileged or otherwise protected information. A party should not be required to use any process that does not adequately protect its rights to withhold privileged or otherwise protected information from production.**

**Comment 10.a. The Reasonableness of Using Technology to Aid in Privilege Review**

A responding party has legal and ethical obligations to take adequate steps reasonably necessary to prevent the disclosure of privileged or otherwise protected materials.<sup>111</sup> These duties may require a responding party to take steps to identify information that is:

- protected from disclosure because it constitutes an attorney-client communication or attorney work-product;
- prohibited from disclosure by law or regulation (e.g., HIPAA, FOIA, etc.); or
- sensitive and entitled to protection as highly confidential or “attorneys-eyes-only,” pursuant to a confidentiality agreement or protective order (e.g., trade secrets).

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<sup>109</sup> Hon. Andrew J. Peck, *Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?*, *supra* note 86.

<sup>110</sup> *See Fed. Hous. Fin. Agency*, 2014 WL 584300.

<sup>111</sup> *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983); The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2d ed. 2007), Principle 10 (“A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.”).

In cases where a responding party inadvertently produces privileged or protected information, it may be important to establish that the responding party undertook reasonable steps to prevent such inadvertent disclosure in order to avoid waiver or other deleterious consequences. For example, under Federal Rule of Evidence 502(b), an inadvertent disclosure does not constitute waiver as to the disclosed documents as long as the responding party “took reasonable steps to prevent disclosure.”<sup>112</sup> Whenever possible, the parties should avoid potential disputes over the reasonableness of the precautions taken to protect against inadvertent disclosure by securing a court order under Federal Rule of Evidence 502(d).<sup>113</sup>

As stated in Principle 1 above, a responding party’s efforts need not be perfect in order to be reasonable. Time constraints, resource limitations, the volumes of ESI, the inherent complexity of the task, and the inevitability of human error should all inform the assessment of whether the party’s review process was reasonable under the circumstances. Moreover, just as the appropriate use of technology may be reasonable to cull and/or expedite the review of documents for relevance, the use of technology for the identification of privileged or protected materials may also be reasonable. The fact that such a process is not perfect and, indeed, can be expected to carry with it some error rate should not be deemed as either a waiver of applicable protections, or as a failure to undertake appropriate designation measures.

That said, as with any e-discovery process, a privilege review process becomes more defensible when the process has been well planned, subjected to proper due diligence, and appropriately validated. In *Victor Stanley*, then Chief Magistrate Judge Paul W. Grimm found that the responding party’s process for privilege review was not reasonable because the responding party failed to perform any testing to determine whether the documents that were not identified by the “potentially privileged search terms” were actually not privileged.<sup>114</sup> By failing to review a sample of the “non-hits,” the responding party in *Victor Stanley* had failed to test the effectiveness of the selection criteria developed to identify privileged material.

Use of more advanced technologies or processes—such as TAR—may be a perfectly reasonable method for identifying protected materials. As the Advisory Committee Notes to Federal Rule of Evidence 502 state, “[d]epending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure.”<sup>115</sup> That said, the use of TAR for privilege review is relatively new, has not been researched or tested extensively, and may require dif-

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<sup>112</sup> See, e.g., FED. R. EVID. 502(b)(2); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 258 n.5 (D. Md. May 29, 2008).

<sup>113</sup> See generally The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95 (2016).

<sup>114</sup> See *Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251 (2008).

<sup>115</sup> Explanatory Note, FED. R. EVID. 502(b) (revised Nov. 28, 2007).

ferent quality-assessment approaches in the privilege context than when TAR is used for responsiveness determinations.<sup>116</sup> Indeed, use of TAR for identification of privileged materials may present challenges that are not present in the use of TAR for relevance determinations (e.g., determining whether a privilege has been waived). Nevertheless, the defensibility of a privilege review should not turn on whether or which technology was used in conducting the review, but rather, on the reasonableness, under the circumstances, of the process as a whole.

### **Comment 10.b. A Party's Right to Select an Appropriate Process**

Notwithstanding the availability, utility, and potential reasonableness of using technology, such as search terms and TAR, to aid in the identification of privileged materials, a party should be allowed to select the most appropriate search and review process for identifying privileged or otherwise protected information. A party has a legal right to withhold privileged information, and counsel has an ethical obligation to prevent its disclosure.<sup>117</sup> Although a Rule 502(d) clawback order can address the risk of privilege waiver, a producing party may still reasonably decide to review its documents before production because it has other legitimate interests to protect.<sup>118</sup> For example, information that is revealed through a production cannot be “unlearned,” even if it can (in theory) be clawed back. For these reasons, although the use of “quick peek” or other “open files” arrangements may be appropriate when agreed to by the parties, such approaches should rarely, if ever, be imposed by the court in the absence of the consent of the responding party. In *Good v. American Water Works Co., Inc.*, the court correctly rejected plaintiff's argument that defendants should be ordered to produce documents without a manual privilege review.<sup>119</sup> While the court entered an order under Federal Rule of Evidence 502(d), it also permitted defendants to conduct a manual privilege review, “with the expectation that the defendants will marshal the resources necessary to assure that the delay occasioned by manual review of portions of designated categories will uniformly be minimized.”<sup>120</sup> Likewise, the court in *Dynamo Holdings Ltd. Partnership v. Commissioner of Internal Revenue* stated, “[W]e do not consider it appropriate to order petitioners to give all of their ESI to respondent, subject to a right to later claim that some or all of the information that he has reviewed is privileged or confidential information and thus outside the boundaries of discovery.”<sup>121</sup>

For the same reasons, the imposition by a court of an unreasonably short production deadline, or similar time constraints, may indirectly impede the ability of a party to conduct an adequate review

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<sup>116</sup> See, e.g., Manfred Gabriel et al, *The Challenge and Promise of Predictive Coding for Privilege*, Paper Submitted to ICAIL 2013 Workshop on Standards for Using Predictive Coding, Machine Learning and Other Advanced Search and Review Methods in E-Discovery (June 14, 2013), available at <http://www.umiacs.umd.edu/~oard/desi5/research/Gabriel-final2.pdf>.

<sup>117</sup> See, e.g., ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 and R. 4.4(b) (1983).

<sup>118</sup> See generally David J. Kessler et al, *Clawback Orders Do Not Trump Proportionality*, 13 DDEE 268 (May 23, 2013).

<sup>119</sup> 2014 WL 5486827, at \*3 (S.D. W. Va. Oct. 29, 2014).

<sup>120</sup> *Id.*

<sup>121</sup> No. 2685-11, 2014 WL 4636526, at \*3 (U.S. Tax Ct. Sept. 17, 2014).

for privileged or otherwise protected information. A party who is concerned about having sufficient time to complete such a review, in its preferred manner, should be prepared to provide an accurate estimate to the court of the time needed and the reasons therefore, to the extent reasonably possible at the time the schedule is put into effect.

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## *IV. Defending the E-Discovery Process*

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**Principle 11. Whenever possible, a dispute about an e-discovery process should be timely resolved through informal mechanisms, such as mediation between the parties and conferences with the court, rather than through formal motion practice and hearings.**

### **Comment 11.a. Benefits of Informal Dispute Resolution**

Early identification and resolution of potential e-discovery disputes is critical to avoiding costly motion practice, successive production efforts, and the delays that result when such controversies surface only after discovery is almost or completely finished. Although some disputes involving e-discovery processes may be better resolved after an adequate record is developed, that does not mean that these disputes should always be ignored until production is complete. Many discovery disputes may simply be the product of a misunderstanding or miscommunication between counsel. Left to fester, these misunderstandings or miscommunications can become discovery disputes that have no legal or practical significance to the actual claims and defenses in the action, but assume a life of their own. At a minimum, informal mechanisms may serve to avoid the delay and expense associated with motion practice. Moreover, even if such informal efforts are unsuccessful, they may narrow and sharpen the issues for the parties and the court.

In that respect, informal dispute resolution need not exclude the court and, indeed, may benefit from judicial involvement.<sup>122</sup> The court can play an important role in identifying and facilitating the parties' own dispute resolution efforts, by encouraging the parties to confer meaningfully about e-discovery issues, by narrowing the focus of the dispute, and/or by emphasizing the importance of the meet-and-confer process and informal mediation.<sup>123</sup> The court can help the parties involve the

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<sup>122</sup> Indeed, the 2015 Amendment Advisory Committee Report specifically recommended “several changes to Rules 16 and 4 designed to promote earlier and more active judicial case management,” because there was agreement “cases are resolved faster, fairer, and with less expense when judges manage them early and actively.” THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Appendix B, at B11 and B12 (Sept. 2014), *available at* <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conferenceseptember-2014>.

<sup>123</sup> Some courts have even developed their own technological solutions. For example, in *Barnes v. CUS Nashville, LLC*, No. 09-cv-00764, 2010 WL 2265668, at \*1 (M.D. Tenn. June 3, 2010), the court offered to create a Facebook account in order to expedite resolution of a discovery dispute over the appropriate protocol for producing images from the plaintiff's social media site.

right people by ordering the designation of e-discovery liaisons.<sup>124</sup> When appropriate, the court also can suggest or even order e-mediation or appoint a special master.<sup>125</sup>

## Comment 11.b. Mechanisms for Dispute Resolution

### 1. Meet and Confer

The conferences required by Rule 26(f) (for discovery planning), Rule 26(c) (prior to filing a motion for protective order), and Rule 37(a)(1) (prior to filing a motion to compel) can, if pursued cooperatively and in good-faith, promote the informal resolution of disputes about process. The Rule 26(f) conference provides the best opportunity for the parties to exchange views and proposals on “any issues about disclosure or discovery of [ESI]” and discuss possibilities for reducing the time and cost of discovery, while at the same time producing the information needed.<sup>126</sup> The Rule 26(f) conference also affords an opportunity for each party to provide pertinent information about its e-discovery process, to get input from its adversary about possible modifications to that process, and to consider and gain an understanding of any aspects of the process that may become the subject of a later dispute.<sup>127</sup> A purposeful failure to address e-discovery processes at the Rule 26(f) conference may carry unintended but adverse consequences.<sup>128</sup> The Rule 26(c) and 37(a)(1) meet and confers give the parties the opportunity to articulate their respective positions before any motions or briefs are filed, and

<sup>124</sup> See, e.g., Northern District of California, *Guidelines for the Discovery of Electronically Stored Information*, Guideline 2.05 (Nov. 27, 2012); Seventh Circuit, *Electronic Discovery Pilot Program*, Principle 2.02 (2010). See also *Krentz v. Carew Trucking, Inc.*, No. 13-cv-1373, 2014 WL 2110022, at \*5–6 (E.D. Wis. May 20, 2014) (citing with favor Principle 2.02 of the Seventh Circuit Pilot Program which states that “[i]n most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s)”).

<sup>125</sup> See, e.g., *Rio Tinto PLC v. Vale S.A.*, No. 14-cv-3042, 2015 WL 4367250 (S.D.N.Y. July 15, 2015) (Opinion and Order appointing “a special master in this case to assist with issues concerning Technology Assisted Review (TAR), also known as predictive coding”).

<sup>126</sup> The 2015 Amendment Committee Note to Fed. R. Civ. P. 1 states: “Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”

<sup>127</sup> As the court noted in *Ruiz-Bueno v. Scott*, No. 12-cv-0809, 2013 WL 6055402, at \*3 (S.D. Ohio Nov. 15, 2013), “In an ideal world . . . disputes [about the storage and retrieval of ESI] would never be presented to the Court because counsel would have recognized, early in the case, the potential for disagreements about proper search protocols, and would have actively sought to avoid such disagreements through collaboration. . . . That discussion can and should include cooperative planning, rather than unilateral decision-making, about matters such as ‘the sources of information to be preserved or searched; number and identities of custodians whose data will be preserved or collected . . . ; topics for discovery; [and] search terms and methodologies to be employed to identify responsive data. . . .’” See also *Progressive Casualty Ins. Co. v. Delaney*, No. 11-cv-00678, 2014 WL 3563467, at \*9 (D. Nev. July 18, 2014) (“Had the parties worked with their e-discovery consultants and agreed at the onset of [the] case to a predictive coding-based ESI protocol, the court would not hesitate to approve a transparent, mutually agreed upon ESI protocol.”).

<sup>128</sup> See, e.g., *Assaf v. OSF Healthcare System*, No. 11-4108, 2014 WL 321860, at \*2 (C.D. Ill. Jan. 29, 2014) (after noting that plaintiff had refused to respond to defendant’s e-discovery proposals or participate in any meaningful discussion regarding the scope of defendant’s search efforts, the court warned that “[t]here must be agreement . . . and [plaintiff] must either participate in determining the parameters for a reasonable initial search or forfeit any right to do so”).

to consider the strength of their respective arguments.<sup>129</sup> To be successful, however, any conference must be taken seriously; the “drive-by” meet and confer does nothing to advance the e-discovery process and may simply plant the seeds of future disputes.<sup>130</sup>

## 2. Pre-Motion Conferences

Some jurisdictions require the parties to participate in a pre-motion conference with the court before filing certain motions, including discovery motions.<sup>131</sup> During a pre-motion conference, the court may be able to resolve the matter informally, narrow the issues that need to be litigated, or identify disputes that are not ripe for determination because the necessary record is not sufficiently developed.<sup>132</sup>

## 3. Mediation

So-called “e-mediation” provides another option, applying traditional dispute resolution techniques to e-discovery disagreements. Parties may select their own mediator from the local mediation bar

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<sup>129</sup> Parties should anticipate that the court may, as a matter of self-interest, require greater disclosures and cooperation as a way to end protracted discovery disputes. *See, e.g.*, *Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 12-cv-0630, 2013 WL 1942163, at \*2–3 (N.D. Cal. May 9, 2013) (after noting that “transparency and collaboration is essential to meaningful, cost-effective discovery,” the court rejected the suggestion that “transparency in the discovery process is a burden or that the methods of discovery are somehow sacrosanct, and that revealing those methods opens the floodgates to more requests for discovery”; the court required a non-party subpoena recipient to disclose its search terms and custodians); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109–10 (2010) (“[T]he Court deems it reasonable to compel the parties to confer and come to some agreement on the search terms that Defendants intend to use, the custodians they intend to search, the date ranges for their new searches, and any other essential details about the search methodology they intend to implement for the production of electronically stored information[.]”).

<sup>130</sup> In *City of Colton v. American Promotional Events, Inc.*, No. 09-cv-01864 (C.D. Cal. Mar. 5, 2010), the court imposed a detailed “meet and confer” mandate as a pre-condition to discovery motions. The meet and confer had to be in person, recorded, and transcribed. The transcript had to reflect “a statement of the precise issue in dispute” and proposals from both parties to resolve the dispute. Through this vehicle, the court caused the parties to engage in real consultation and efforts to resolve disputes. *See also In re Facebook PPC Advertising Litig.*, No. C09-03043 JF (HRL), 2011 WL 1324516, at \*1 n.1 (N.D. Cal. Apr. 6, 2011) (noting that “counsel are generally directed to meet and confer to work in a cooperative, rather than an adversarial manner, to resolve discovery issues”) (citing *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 344–45 (2009 Supp.)); *Cartel Asset Mgmt. v. Owen Fin. Corp.*, No. 01-cv-01644, 2010 WL 1502721, at \*13 (D. Colo. Feb. 8, 2010) (“Civil litigation, particularly with the advent of expansive e-discovery, has simply become too expensive and too protracted to permit superficial compliance with the ‘meet and confer’ requirement. . .”).

<sup>131</sup> *See, e.g.*, Southern District of New York, Standing Order M10-468, attaching Pilot Project Regarding Case Management Techniques for Complex Civil Cases (Oct. 31, 2011), at p. 8, available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf).

<sup>132</sup> The 2015 Amendments to Fed. R. Civ. P. 16(b)(3)(B)(v) permit the parties to request (and the court to direct) that “before moving for an order relating to discovery, the movant must request a conference with the court.” While the amended Rule leaves the decision whether to require such conferences to the discretion of the judge, the Advisory Committee notes that “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.” Advisory Committee Note, FED. R. CIV. P. 16(b) (2015).

and define their own mediation process. The Seventh Circuit Electronic Discovery Pilot Program has established a formal program for using mediation to resolve disputes about process in smaller cases where the parties lack the resources and expertise to resolve the issue on their own. Trained volunteer mediators are made available to the parties at no cost. The process is informal and confidential.<sup>133</sup> The Western District of Pennsylvania has also established a formal mediation program for e-discovery disputes.<sup>134</sup>

#### 4. Special Masters

Special Masters offer an additional option for informal resolution of e-discovery disputes and have been used for some time.<sup>135</sup> The United States District Court for the Western District of Pennsylvania has been an innovator in the use of Special Masters in this regard. It has created a panel of Electronic Discovery Special Masters (“EDSM”) “to assist in addressing ESI issues that may arise during the litigation.”<sup>136</sup> EDSM panel members are appointed by a committee of judges from the district and are selected based upon “active bar admission; demonstrated litigation experience, particularly with electronic discovery; demonstrated training and experience with computers and technology; and mediation training and experience.”<sup>137</sup> Once a determination is made that an EDSM should be involved and the parties have selected an EDSM panel member, the court will specify the scope of the Special Master’s duties, “which may include, by way of example, developing protocols for the preservation, retrieval or search of potentially relevant ESI; developing protective orders to address concerns regarding the protection of privileged or confidential information; monitoring discovery compliance; [and] resolving discovery disputes.”<sup>138</sup> The court continues its active involvement:

In the event that an appointed EDSM is unsuccessful in achieving a mediated resolution, that EDSM will usually be expected to make findings of fact and/or conclu-

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<sup>133</sup> Formal briefs are not required and pre-mediation submissions are at the mediator’s discretion. All aspects of the mediation are conducted confidentially and the only information disclosed to the court is what the parties mutually agree to disclose. See <http://www.discoverypilot.com/content/e-mediation-program>.

<sup>134</sup> See Western District of Pennsylvania, *ED–Mediation*, <http://www.pawd.uscourts.gov/ed-mediation> (last visited Aug. 26, 2016).

<sup>135</sup> For example, in *Anthropologie, Inc. v. Forever 21, Inc.*, No. 07-cv-7873, 2009 WL 690239, at \*5 (S.D.N.Y. Mar. 13, 2009), the court initially tried to resolve the discovery issues via telephone conference. The court then directed the parties to further meet and confer. Only after these efforts were exhausted would a motion be permitted. Ultimately, the court authorized the parties to “submit the declaration of a forensic specialist proffering a specific proposal” if the issues remained unresolved. See also, e.g., *Maggette v. BL Dev. Corp.*, No. 07-cv-0181, 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009); *Wixon v. Wyndham Resort Dev. Corp.*, No. C07-02361, 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009); *Cannata v. Wyndham Worldwide Corp.*, No. 10-cv-0068, 2012 WL 528224 (D. Nev. Feb. 17, 2012); *PIC Group, Inc. v. Landcoast Insulation, Inc.*, No. 09-cv-0662, 2011 WL 1342951 (S.D. Miss. Mar. 4, 2011).

<sup>136</sup> Western District of Pennsylvania, *ED–Information*, <http://www.pawd.uscourts.gov/ed-information> (last visited Aug. 26, 2016).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*



sions of law to be presented to the Court in the form of a report and recommendation. The parties will then have the opportunity to file objections thereto, prior to a de novo review by the Court.<sup>139</sup>

**Principle 12. A party should not be required to provide discovery about its e-discovery process without good cause.**

A party's ability to obtain discovery of information pertaining to the "existence, description, nature, custody, condition, and location of any documents or other tangible things" is "deeply entrenched" in discovery practice, as the drafters of the Federal Rules have observed.<sup>140</sup> Before the advent of electronic discovery, this practice may not have stirred much controversy. Deponents frequently were asked what kinds of relevant documents they had created or received, what they had retained, where they kept those materials, and whether they had turned those documents over to outside counsel.<sup>141</sup> And responding parties frequently "made documents available for inspection" by the requesting party.

More recently, the massive volumes of ESI present in many cases, and the complexities of the processes used to deal with that information, have caused courts to begin imposing limits on the extent to which formal discovery tools can be used to obtain discovery about e-discovery processes.<sup>142</sup> In-

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<sup>139</sup> *Id.*

<sup>140</sup> The 2015 Amendments to Fed. R. Civ. P. 26(b)(1) deleted from the "scope of discovery" the specific phrase referring to the existence and location of documents. In the notes to the revised rule, the Advisory Committee states that "[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." Advisory Committee Note, FED. R. CIV. P. 26 (2015).

<sup>141</sup> *See, e.g., Doe v. District of Columbia*, 230 F.R.D. 47, 55–56 (D.D.C. 2005) (Although the defendant objected to a proposed deposition topic that sought testimony regarding "[t]he District's document retention policies and procedures, and the process used to collect the documents that have been produced or will be produced . . . in response to plaintiff's requests for production," the magistrate judge concluded that plaintiff's request for information concerning defendant's policies and procedures for document retention and production was encompassed by Rule 26(b)(1).); *Schrom v. Guardian Life Ins. Co. of America*, No. 11-cv-1680, 2012 WL 28138, at \*6 (S.D.N.Y. Jan. 5, 2012) ("Where massive numbers of documents are involved, it may be necessary for the producing party to provide a complete explanation of its information management structure if it wishes to produce . . . documents in the manner that they are ordinarily stored."); *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58, 62–63 (S.D.N.Y. 1959) (suggesting that where a party does not have sufficient information to designate or identify the documents he or she wishes to inspect, that party may acquire the necessary information by use of interrogatories and depositions).

<sup>142</sup> *See, e.g., In re Ford Motor Co.*, 345 F.3d 1315, 1371 (11th Cir. 2003) (vacating order allowing discovery of certain databases where there was no factual finding of "some non-compliance with discovery rules by Ford"); *Miller v. York Risk Servs. Grp.*, No. 13-cv-1419, 2014 WL 1456349 (D. Ariz. Apr. 15, 2014) (denying deposition pursuant to Rule 30(b)(6) concerning manner and methods to store ESI and commenting that the parties should first pursue the merits); *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, No. 11-cv-03684, 2014 WL 1494517, at \*4 (D.N.J. Apr. 16, 2014) (granting motion for protective order against deposition of IT witness where the moving party failed to show a "material deficiency" in the responding party's e-discovery process); *Little Hocking Water Ass'n, Inc. v. E.I. Du Pont Nemours & Co.*, No. 09-cv-1081, 2013 WL 608154, at \*54–55 (S.D. Ohio Feb. 19, 2013) (denying plaintiff's

deed, one district court has explicitly stated in the e-discovery “guidelines” to its local rules that discovery about discovery should only be permitted upon a showing of good cause, considering the specific need for the discovery, including its relevance and the suitability of alternative means of obtaining the information.<sup>143</sup> That district court’s treatment of “discovery about discovery” is consistent with the views expressed by the Advisory Committee and the proportionality principles incorporated in Rules 26(b)(1) and 26(g).

Principle 12 should not be read to prevent reasonable (and proportional) discovery, such as an interrogatory that seeks the identity of document custodians or a series of questions posed to a deponent about the party’s IT systems or data sources.<sup>144</sup> However, before a court permits more burdensome or wide-ranging discovery about discovery, such as Rule 30(b)(6) depositions of a party’s IT staff or e-discovery vendor, or extensive interrogatories concerning a party’s preservation and production efforts, or the processes devised by outside counsel to search for and retrieve relevant, responsive,

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motion for an order compelling defendant to produce a Rule 30(b)(6) deponent to testify to defendant’s search of electronic databases; the court found this request was “not well-taken” given that the court had required defendant to supplement its interrogatory responses and to specify whether production was complete); *Orillaneda v. French Culinary Inst.*, 2011 U.S. Dist. LEXIS 105793, at \*27 (S.D.N.Y. Sept. 19, 2011) (finding plaintiff was not entitled to conduct discovery about defendant’s document production without first showing acts that would suggest the production was deficient); *In re Exxon Corp.*, 208 S.W.3d 70, 76–77 (Tex. App. 2006) (granting writ of mandamus overturning trial court’s order to compel testimony on document search efforts because plaintiffs failed to establish any evidence of document withholding, “discovery abuse,” or “necessity for the inquiry.”); *Hubbard v. Potter*, 247 F.R.D. 27, 31 (D.D.C. 2008) (denying further depositions because of only a “theoretical possibility” that additional electronic documents may exist); *Am. Home Assurance Co. v. Greater Omaha Packing Co.*, 2013 WL 4875997 (D. Neb. Sept. 11, 2013) (requiring disclosure of sources searched and terms used, but withholding additional relief because plaintiff did not provide specific information that had been withheld or sources not searched); *Hanan v. Corso*, 1998 U.S. Dist. LEXIS 11877, at \*24 (D.D.C. Apr. 24, 1998) (declaring that it would be “foolhardy” to order discovery about discovery without any clear showing that the additional discovery would lead to relevant evidence); *Larsen v. Coldwell Banker Real Estate Corp.*, 2012 WL 359466 (C.D. Cal. Feb. 2, 2012) (denying a request for a witness to answer questions under oath regarding its ESI preservation, collection, and processing because plaintiff had not shown any bad faith in defendant’s production); *Memory Corp. v. Kentucky Oil Technology*, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007) (denying motion to compel defendant to produce its computers and storage media for forensic inspection by a third-party consultant based upon a showing of just “two missing emails out of thousands of documents produced in this discovery-intensive case.”); *Freedman v. Weatherford Int’l*, 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014) (plaintiff’s request for “discovery on discovery” denied for failure to provide adequate factual basis for finding original production had been deficient); *In re Honeywell Int’l, Inc. Sec. Litig.*, 230 F.R.D. 293 (S.D.N.Y. 2003) (denying motion to compel seeking information concerning document retention, preservation, search, and collection procedures); *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, 2011 U.S. Dist. LEXIS 43145 (W.D.N.Y. 2011) (denying request for discovery of party’s document preservation actions).

<sup>143</sup> See District of Kansas, *Guidelines for Cases Involving Electronically Stored Information (ESI)* (July 18, 2013) at 9, available at <http://www.ksd.uscourts.gov/guidelines-for-esi/>.

<sup>144</sup> While the 2015 Amendments strike from Rule 26(b)(1) the phrase “existence, description, nature, custody, condition and location of any documents or other tangible things,” the 2015 Amendment Committee Note to Rule 26 recognizes that discovery of an opposing party’s information systems “should still be permitted . . . when relevant and proportional to the needs of the case” and that “[f]raming intelligent requests for electronically stored information, for example, may require detailed information about another party’s information systems and other information resources.” Advisory Committee Note, FED. R. CIV. P. 26 (2015).

and/or non-privileged documents in a case, the party seeking the discovery should be required to make a particularized showing that good cause exists to justify such discovery.

One circumstance in which courts have found good cause to exist is where there is specific evidence (as opposed to mere speculation) of a failure to preserve or produce discoverable ESI. For example, in *Vieste LLC v. Hill Redwood Development*, the court ordered the responding party to provide detailed declarations regarding its efforts to preserve documents after deposition testimony “raised serious questions about the integrity” of “preservation and collection efforts.”<sup>145</sup> Similarly, in *Bray & Gillespie Management LLC v. Lexington Insurance Co.*, the court ordered the deposition of a corporate representative to testify about the architecture of a computer system and location of stored documents based on that party’s failure to produce metadata and its deliberate manipulation of ESI.<sup>146</sup> Finally, in *S2 Automation LLC v. Micron Technology, Inc.*, the court required the producing party to provide the requesting party with “its search strategy for identifying pertinent documents,” where there was evidence that the producing party had failed to exercise appropriate diligence as required under Rule 26(g).<sup>147</sup>

At least one court also found good cause for discovery where it perceived inadequacies in the producing party’s participation in the Rule 26(f) process. In *Ruiz-Bueno v. Scott*, the Court ordered the responding party to answer interrogatories about how its search process was conducted, after observing that counsel, as part of the Rule 26(f) planning process or otherwise, “should have engaged in a collaborative effort to solve the problem,” which would have “require[d] defendants’ counsel to state explicitly how the search was constructed or organized,” because Rule 26(f) requires the parties to attempt in “good faith” to agree on a discovery plan that addresses, among other things, “any issues about disclosure or discovery of electronically stored information.”<sup>148</sup>

Setting aside the question of any legal obligation, as discussed in Principle 4 above, parties may find it in their best interest to voluntarily collaborate and cooperate regarding their e-discovery efforts. This imperative to cooperate applies to both requesting and responding parties. A requesting party should recognize that cooperation is more likely to be effective when document requests are not overly broad and unduly burdensome, are limited to information relevant to “claims or defenses,”<sup>149</sup>

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<sup>145</sup> 2011 WL 2198257, at \*3–5 (N.D. Cal. June 6, 2011).

<sup>146</sup> 2008 WL 3480321, at \*2 (M.D. Fla. Aug. 12, 2008).

<sup>147</sup> 2012 WL 3656454, at \*32 (D.N.M. Aug. 9, 2012); *see also* *Abadia-Peixoto v. U.S. Dep’t of Homeland Sec.*, 2013 WL 4511925, at \*2 (N.D. Cal. Aug. 23, 2013) (ordering producing party to disclose search parameters given the “apparent absence of specific types [of] documents that would be expected to be produced,” coupled with “previous withholding of documents that were later ordered produced after a review *in camera*”).

<sup>148</sup> 2013 WL 6055402, at \*4 (S.D. Ohio Nov. 15, 2013).

<sup>149</sup> FED. R. CIV. P. 26(b)(1).

and are not made for an “improper purpose,” such as “to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”<sup>150</sup> Conversely, a responding party should recognize that cooperation may forestall or avoid entirely more burdensome discovery, such as formal declarations or depositions. For example, in *Hinterberger v. Catholic Health System, Inc.*, the court denied a motion to compel disclosure of the defendants’ ESI search methodology where the defendants had expressed a willingness to meet and confer with plaintiffs regarding their production using TAR and had acknowledged their ongoing discovery obligations.<sup>151</sup> Reasonable, voluntary disclosures by a responding party about its discovery process should decrease the likelihood that a court, as part of a good-cause inquiry, will find further disclosures necessary and appropriate.

**Principle 13. The court should not decide a motion regarding the adequacy of an e-discovery process without a sufficient factual record. In many instances, such a motion may not be ripe for determination before there has been substantial or complete production.**

The Federal Rules of Civil Procedure impose a standard of reasonableness, rather than perfection, and the adequacy of a party’s e-discovery process ultimately must be measured by the fruits of that process. Rule 37 permits a party to move to compel production of ESI where the producing party “fails to respond” to a discovery request or “fails to permit inspection” of the requested ESI.<sup>152</sup> The same rule provides that an “evasive or incomplete” response must be treated as a failure to respond.<sup>153</sup> Rule 26(g) provides for sanctions where a party fails to conduct a “reasonable inquiry” for responsive ESI.<sup>154</sup> An abstract challenge, in the form of a motion under Rules 26(g) or 37(a), to an e-discovery process that has yet to be employed (or even finalized) by the responding party is generally

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<sup>150</sup> FED. R. CIV. P. 26(g)(1). Pursuant to Rule 26(g)(1), a requesting party’s signature on its discovery request is, in effect, a representation by that party that it has made a “reasonable inquiry” in formulating its request. The signature certifies, among other things, that to the “best of the person’s knowledge, information and belief formed after reasonable inquiry” that the response is “neither unreasonable nor unduly burdensome 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” and “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.” FED. R. CIV. P. 26(g)(1)(B)(i). *See also* *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008) (“If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. . . . [Rule 26(g)] aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party.”)

<sup>151</sup> 2013 WL 2250603 (W.D.N.Y. May 21, 2013).

<sup>152</sup> FED. R. CIV. P. 37(a)(3)(B)(iv).

<sup>153</sup> FED. R. CIV. P. 37(a)(4). In the same vein, Fed. R. Civ. P. 26(e) requires a party to supplement its discovery responses to the extent “the party learns that in some material respect the . . . response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”

<sup>154</sup> FED. R. CIV. P. 26(g).

premature, because the responding party cannot be said to have failed its obligations to produce relevant and responsive ESI under Rule 34(b)(2)(E).<sup>155</sup> The party seeking discovery or objecting to the reasonableness of the responding party's e-discovery process has "the burden of proving that a discovery response is inadequate."<sup>156</sup>

Very often, the court can better assess those challenges from the vantage point of an actual production.<sup>157</sup> Discovery motions made before this point can be wasteful because the "failure" to produce ESI or to conduct a reasonable inquiry may be, at that point, only theoretical, and any perceived shortcomings may end up being immaterial given the needs of the case and other discovery that has or will take place. Attempts to resolve discovery motions before production has taken place may require a court to conduct hearings and take expert evidence in order to evaluate abstract arguments and hypothetical concerns about whether a process might or might not result in a deficient production. Moreover, a party that files an early and unsuccessful motion to compel may find it harder to avoid the imposition of fees and costs pursuant to Rule 37(a)(5).<sup>158</sup>

For example, in *Kleen Products LLC v. Packaging Corp. of America*, the requesting party challenged—prior to document production—the responding party's reliance on search terms instead of TAR to identify responsive documents.<sup>159</sup> The court held two full days of evidentiary hearings on a discovery protocol, followed by eleven status hearings and conferences, "many of which lasted a half day or longer."<sup>160</sup> Months later, after an enormous outlay of judicial and party resources, the parties entered

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<sup>155</sup> A motion to compel filed in advance of the opposing party's production also may be denied by the court as premature to the extent it is inconsistent with the moving party's obligation to engage in good faith efforts to resolve the dispute without court intervention. *See, e.g., Assaf v. OSF Healthcare Sys.*, No. 11-4108, 2014 WL 321860, at \*2 (C.D. Ill. Jan. 29, 2014).

<sup>156</sup> *Abt v. Jewell*, 2014 U.S. Dist. LEXIS 50766, \*12–14 (D.D.C. Apr. 11, 2014) (citing *Barnes v. District of Columbia*, 289 F.R.D. 1, 6 (D.D.C. 2012) and *Equal Rights Center v. Post Props., Inc.*, 246 F.R.D. 29, 32 (D.D.C. 2007)). *See also* *News America Marketing In-Store Serv., LLC v. Floorgraphics, Inc.*, No. 09-0607, 2012 WL 1986493, at \*2 (D.N.J. May 30, 2012) (while acknowledging that defendants had used incorrect search terms and had not searched all appropriate avenues of electronic information, the court concluded that plaintiff's motion to compel was premature given defendants' representation that they were re-checking their production to ensure its accuracy; "there is no basis for an order compelling the production of documents until, at least, Defendants' production is complete"); *Kinetic Concepts, Inc. v. Convatec, Inc.*, 268 F.R.D. 226, 252 (M.D. N.C. May 12, 2010) (noting that "even an informed suspicion that additional non-privileged documents exist . . . cannot alone support an order compelling production of documents").

<sup>157</sup> *See* Hon. James C. Francis IV, *Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age*, LAW TECH. NEWS (Feb. 2013).

<sup>158</sup> FED. R. CIV. P. 37(a)(5)(B) (If a motion to compel is denied, the court must require the movant, the attorney filing the motion, or both to pay the prevailing party's reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court determines that the motion was "substantially justified or other circumstances make an award of expenses unjust.").

<sup>159</sup> No. 10-cv-05711, 2012 WL 4498465, at \*4 (N.D. Ill. Sept. 28, 2012).

<sup>160</sup> *Id.*

into a stipulated agreement on the protocol.<sup>161</sup> Similarly, in *Be&B Hardware, Inc. v. Fastenal Co.*, the plaintiff sought a hearing on a motion to compel “to determine what [the defendant] ha[d] done to meet its obligations to produce responsive ESI,” even though the defendant’s “time ha[d] not yet run for document production.”<sup>162</sup> Both parties deluged the court with filings relating to this motion (conduct which was described by the court as “madness”).<sup>163</sup> After ordering the parties to cease filing pleadings, the court summarily denied the motion for a hearing.<sup>164</sup> In its conclusion, the court directed “the lawyers for both sides to begin to act less like armed combatants and more like the highly skilled professionals I know them to be.”<sup>165</sup>

Of course, an e-discovery process may be so deficient that a discovery failure will appear inevitable even before it has been permitted to run its course. A party intent upon utilizing a process that is patently unreliable or transparently unreasonable in the context of a particular case or set of circumstances should not enjoy immunity from early challenge if the result is a pretrial process that is neither just, speedy, nor inexpensive. Similarly, a responding party’s obfuscation in the face of reasonable requests for information at the Rule 26(f) conference, or in advance of production, may warrant early court intervention. A party also may have reasonable grounds to request the court’s assistance where it is demonstrably obvious that opposing counsel intends to use a particular e-discovery process without any understanding of the fundamentals of e-discovery and the electronic discovery provisions of the Federal Rules of Civil Procedure.<sup>166</sup> In those circumstances, early motion practice should be considered.<sup>167</sup>

**Illustration:** In an antitrust action, the responding party (a corporation) is using TAR to identify documents for production. The requesting party contends that the

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<sup>161</sup> *Id.* at \*5.

<sup>162</sup> No. 10-cv-00317, 2011 WL 2115546, at \*2–4 (E.D. Ark. May 25, 2011).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at \*6.

<sup>165</sup> *Id.*; see also *Assured Guar. Mun. Corp. v. UBS Real Estate Sec., Inc.*, 2012 WL 5927379, at \*4 (S.D.N.Y. Nov. 21, 2012) (declining to resolve dispute concerning the “adequacy of the search terms” that had been “propose[d]” but not yet applied because “the parties have not provided me with the kinds of expert affidavits that would be necessary for me to offer an opinion as to the most efficient search protocol”).

<sup>166</sup> See, e.g., *Krentz v. Carew Trucking, Inc.*, No. 13-cv-1373, 2014 WL 2110022, at \*3, 8 (E.D. Wis. May 20, 2014) (endorsing the Seventh Circuit Electronic Discovery Pilot Program and its Principles Relating to the Discovery of Electronically Stored Information, including Principle 3.01 (Judicial Expectations of Counsel) and Principle 3.02 (Duty of Continuing Education)). The 2012 Amendments to Comment [8] of Rule 1.1 of the ABA Model Rules of Professional Conduct (addressing attorney competence) require that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

<sup>167</sup> Factors a court should consider in deciding whether to resolve a motion concerning an e-discovery process prior to production include: (a) whether there is good cause to believe that the discovery process is inadequate; (b) whether resolving the motion would require the court to resolve issues of fact that would be easier to evaluate following the production of ESI; (c) whether waiting until after production would carry the potential for significant waste or delay; and (d) the ease with which the adequacy of the process could be tested or proved prior to production.

particular TAR tool being used is sub-standard and likely to result in an inadequate production. Since it would be difficult to prove, in the abstract, whether the selected TAR tool will result in a legally inadequate search, the responding party should not have to defend its selection until after production is complete, once the requesting party has an opportunity to receive and evaluate the production. An early challenge in this instance is likely to delay the e-discovery process, may be completely unnecessary, and may be impractical for a court to resolve based on incomplete information.

**Illustration:** In a breach of contract action, the responding party (a corporation) has disclosed the date range to which it proposes to limit its search for ESI. This date range does not include the entire period during which the contract was negotiated. The requesting party has requested documents related to the negotiation of the contract, to which defendant has not objected. After the requesting party attempts in good faith to resolve the dispute without court intervention, a motion to compel a search for the earlier date range may be appropriate even before production has commenced, since an early challenge would forestall the need to expand the scope of e-discovery at a later stage in the case, when it might be disruptive to the case schedule, and a supplemental collection effort may impose additional costs and burdens.

The Federal Rules of Civil Procedure should be construed and administered to “secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>168</sup> To that end, early identification and discussion of potential e-discovery disputes may be helpful to their efficient resolution. However, where the adequacy of an e-discovery process can be more efficiently addressed after there has been substantial or complete production, formal motion practice challenging the producing party’s e-discovery process in advance of production may actually frustrate the objectives underlying Rule 1.<sup>169</sup>

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<sup>168</sup> FED. R. CIV. P. 1.

<sup>169</sup> *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 2014 WL 4636526, at \*7 (U.S. Tax Ct. Sept. 17, 2014) (rejecting petitioner’s challenge, made at the outset of discovery, to the respondents’ use of predictive coding: “If, after reviewing the results, respondent believes that the response to the discovery request is incomplete, he may file a motion to compel at that time.”).

# *The Sedona Conference Working Group Series & WGS Membership Program*

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AND JUST  
WAY.”**

The Sedona Conference was founded in 1997 by Richard Braman in pursuit of his vision to move the law forward in a reasoned and just way. Richard’s personal principles and beliefs became the guiding principles for The Sedona Conference: professionalism, civility, an open mind, respect for the beliefs of others, thoughtfulness, reflection, and a belief in a process based on civilized dialogue, not debate. Under Richard’s guidance, The Sedona Conference has convened leading jurists, attorneys, academics, and experts, all of whom support the mission of the organization by their participation in conferences and the Sedona Conference Working Group Series (WGS). After a long and courageous battle with cancer, Richard passed away on June 9, 2014, but not before seeing The Sedona Conference grow into the leading nonpartisan, nonprofit research and educational institute dedicated to the advanced study of law and policy in the areas of complex litigation, antitrust law, and intellectual property rights.

The WGS was established to pursue in-depth study of tipping point issues in the areas of antitrust law, complex litigation, and intellectual property rights. It represents the evolution of The Sedona Conference from a forum for advanced dialogue to an open think tank confronting some of the most challenging issues faced by our legal system today.

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