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BNA INSIGHT

Baker Hostetler partner Gilbert S. Keteltas describes the search process quality standard needed to enable counsel to conduct defensible searches of electronically stored information with confidence.

The Need to Bridge the Technical and Legal Divide: An Argument in Favor of Information Retrieval Process Quality Standards for Counsel



BY GILBERT S. KETELTAS

A technical expert, when asked about the International Organization for Standardization's (ISO) recently announced intention to take up eDiscovery standards, opined that standards are necessary because "E-discovery is not a legal process. It's a technical and engineering problem."¹

The expert's observation is faulty. Even with the "e," discovery is primarily a legal process defined by legal rules, executed or supervised by counsel and refereed by judges.

Although the proliferation of electronically stored information (ESI) and the rapid evolution of information technology have created technical and engineering challenges in the discovery process, the ultimate burden still falls on counsel to conduct reasonable and

¹ Evan Koblentz, *International Committee Could Standardize E-Discovery Process*, L. Tech. News, Feb. 7, 2013, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?pid=1202587234696&International_Committee_Could_Standardize_EDiscovery_Processes&slreturn=20130508082405 (quoting Tom Barnett) (last accessed May 25, 2013).

comprehensive searches for ESI. And counsel are ethically bound to "keep abreast of . . . the benefits and risks associated with relevant technology."²

Standards must bridge the technical and legal divide.

Search process quality standards will not gain wide acceptance if they are not understood by and become part of the day-to-day work flow of participants in the legal process. Standards focused on the certification of technology and technology providers are needed, but should be paired with standards that define a defensible path to "satisfying [counsel's] professional obligations to conduct a reasonable, comprehensive search in response to a Rule 34 request for documents and ESI."³

Standards must bridge the technical and legal divide. When one of the bench's eDiscovery "rock stars" questions the reasonableness of a party's search for relevant information, he or she is unlikely to be moved by counsel's response: "Your Honor, I used an ISO-certified

² ABA Model Rule of Professional Conduct 1.1 (Competence), Comment 8. *See also* Fed. R. Civ. P. 26(g)(1); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) ("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, to review and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality.") (Emphasis added).

³ Jason Baron, Edward Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 Sedona Conf. J. 229 (2010).

technology and vendor.” The next question will be, “How?”

Technology and service providers are eager to have their products and services certified. Lawyers worldwide are breathless at the prospect of newly-minted marketing brochures, e-mail signatures and press releases appropriately “publicizing, communicating and promoting your certification.”⁴

But search process quality standards that give counsel—the users of eDiscovery technology and services—a path to defensibility will do far more “to facilitate adoption of e-discovery products and services and accelerate the development of still more effective ones.”⁵

Challenges to the Development and Adoption Of Process Quality Standards for Counsel

Standardizing a Non-Standard Process. Although there is a need for process quality standards in eDiscovery and, in particular, for information retrieval conducted or overseen by counsel, the U.S. legal system leans away from standardization.

Some have suggested “standardization of process is an explicit requirement from the judiciary,”⁶ The Federal Rules of Civil Procedure and the decisions interpreting them, however, encourage process development on a case-by-case basis, in part to address the proportionality considerations relevant to assessing the reasonableness of a discovery process in a particular case.⁷

Further, Rule 26(f) requires parties to confer on, develop and propose a discovery plan or, absent agreement, discovery plans. Rule 26(f) even invites the parties to propose changes to the limitations on discovery imposed by the rules.⁸ The commentary to Rule 26(f) states,

“it is desirable that the parties’ proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.”⁹

eDiscovery thought leaders also acknowledge the importance of case-by-case flexibility:

“the reasonableness of a party’s discovery process must be evaluated on a case-by-case basis in the context of the value and importance of the matters in dispute, and no single

practice, process or quality-checking measure should be assumed to be appropriate in any and all circumstances.”¹⁰

The proportionality principles baked into the Federal Rules make case-by-case discussion of at least certain aspects of information retrieval necessary. Quality standards should support the least costly defensible process that “identifies, collects and produces relevant and responsive non-privileged materials from a larger universe of ESI using reliable methodologies that provide a quality result at costs that are reasonable and proportionate to the particular circumstances of the client and the litigation.”¹¹

The challenge, therefore, is to fit a third-party information retrieval process quality standard into a system that revisits process in nearly every case. Authoritative process quality standards that state minimum expectations for counsel (or a range of acceptable performance), and incorporate—either directly or by reference—standards for technology and technology service providers, would provide a useful reference for counsel in 26(f) discussions or a court faced with competing 26(f) proposals.

The goal of standard-setters should be to replace the daunting protocols and processes debated in the handful of technology-assisted review (TAR) cases reported to date with an authoritative and verifiable process quality standard that might be stated as follows:

The parties agree that [name of standard] is an established and authoritative standard for designing and executing a search of electronically stored information for relevant information. A search process that conforms to this standard is reasonable and comprehensive under [applicable procedural rules].

Counsel need not start from scratch in their quest to standardize a quality process. Legal and technical experts have already devoted substantial attention to the components of a quality search process.¹² Standard setters should leverage this work and also consider certification of counsels’ search processes. Recognition of proportionality factors could be part of a process quality standard that recognizes “[t]he choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.”¹³

Removing Courts’ Roles as Iterative Standard-Setters. In discussing the standard for spoliation sanctions, Judge Shira A. Scheindlin opined:

“The standard of acceptable conduct is determined through experience. In the discovery context, the standards have been set by years of judicial decisions analyzing allegations

⁴ See *Publicizing Your ISO 9001:2008 or ISO 14001:2004 Certification*, ISO 2010 (ISO guidelines intended to help organizations “avoid the pitfalls of false, misleading or confusing statements” about ISO certification).

⁵ Bruce Hedlin, Dan Brassil, Christopher Hogan, *Toward a Meaningful E-Discovery Standard* (2013), available at <http://www.umiacs.umd.edu/~oard/desi5/additional/Hedin.pdf>.

⁶ Chis Knox, Scott Dawson, *ISO 9001: A Foundation for E-Discovery* (2011), available at <http://www.umiacs.umd.edu/~oard/desi4/papers/knox.pdf>.

⁷ *The Sedona Conference® Commentary on Proportionality* (Jan. 2013), p. 13 (“Where appropriate, the application of technology to quickly isolate essential information serves the goal of proportionality by creating efficiencies and cost savings. Parties should meet and confer regarding technological approaches to preservation, selection, review, and disclosure that reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens.”)

⁸ Fed. R. Civ. P. 26(f)(3)(E).

⁹ Fed. R. Civ. P. 26, advisory committee comments.

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

¹¹ Hon. Craig Shaffer, *Defensible by What Standard?*, 13 Sedona Conf. J. 212, 218 (2012) (hereafter *Defensible by What Standard?*).

¹² See, e.g., *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189 (2007); *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299 (2009); Jason Baron, Edward Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 Sedona Conf. J. 229 (2010) (hereafter *A Nutshell on Negotiating E-Discovery Search Protocols*).

¹³ *A Nutshell on Negotiating E-Discovery Search Protocols*, p. 230.

of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding.”¹⁴

Time has become of the essence. Modern information retrieval processes and technologies are complex and the pace of technological development is rapid.

Litigators and technology developers will not be inclined to invest time or money in information retrieval technologies and processes if they must wait years to understand the standard for defensible use of those technologies and processes. Without authoritative standards for both information retrieval technologies and the deployment of those technologies in the trenches of litigation, both adoption and future innovation will be limited.

Judges are often called upon to resolve highly technical disputes involving scientific matters about which they know little or nothing. Justice Stephen Breyer noted:

A judge is not a scientist, and a courtroom is not a scientific laboratory. . . . [M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. Judges typically are generalists, dealing with cases that can vary widely in subject matter. Our primary objective is usually process-related: seeing that a decision is reached fairly and in a timely way.¹⁵

In discovery, this has played out in judicial decisions debating the need for experts to resolve not just the merits of complex cases, but the proposed approach to the search for information relevant to resolving those cases.¹⁶ While courts have been successful in understanding and assessing many aspects of the electronic discovery process, judges are far less comfortable assessing the reasonableness of search for relevant information from massive quantities of ESI.

Modern search presents technical questions beyond the ken of most lawyers and judges. “Even the most computer literate of judges would struggle to know what protocol is appropriate in any individual case, and the notion that a busy trial judge is going to be able to invent one out of whole cloth or to understand whether the proposed protocol meets ill-defined technical search standards seems unrealistic.”¹⁷

Authoritative standards for a quality search process could relieve the courts from overseeing and refereeing pitched discovery battles where “litigants and their vendor surrogates debate the efficacy of competing search methodologies.”¹⁸ Although *Da Silva Moore*, *Actos* and *Kleen Products* opened the door a crack to judicial ac-

ceptance, there is also an argument that they set up significant barriers to entry for litigators, clients and judges who may perceive the negotiation, implementation and assessment of technology assisted review as more burdensome than exhaustive manual review (with all its warts).

In addition, the burdens on the judiciary and the uncertainty faced by litigants where technological developments outpace judicial standard setting has spurred significant local experimentation contributing to ad hoc activities that, while valuable, may ultimately result in premature local commitment to standards and impede national process standardization.¹⁹

In his recent discussion of local rules, standing order and model protocols, Thomas Y. Allman described a “healthy proliferation of local eDiscovery initiatives for use in district courts in the federal judicial system,” without an “obvious pattern emerging as the dominant approach.”²⁰ Local rules, standards, forms, models and pilot programs fill a void but, as they take hold, may prove a disincentive to standardization.

Rather than have expert discussion of quality information retrieval processes play out in courtrooms over a period of years before arbiters who are not themselves expert in information retrieval, those discussions should play out in the halls of a standard setting organization. Standards may be more quickly adopted by the federal judiciary if they are built in collaboration with the Federal Judicial Center and the National Academy of Science’s Committee on Science, Technology and the Law.²¹

Addressing Judicial Discomfort With the Imperfect Product of a Quality Discovery Process

“There simply is no review tool that guarantees perfection . . . there are risks inherent in any method of reviewing electronic documents.”²² Statements like this one should give litigants who apply reasonable discovery processes some comfort.

¹⁹ P. Hatto, *Standards and Standardisation: A Practical Guide for Researchers* (European Union, 2013) p. 14 (“If, in the course of your research, you have found it necessary to develop a specific procedure or protocol to overcome a particular issue then it is possible, indeed likely that you have developed the basis of a standard. However, if you are simply using well established procedures to, for example, characterize a new material then it is unlikely that you have done anything to contribute to standardization.”) (last accessed May 20, 2013).

²⁰ Thomas Y. Allman, *Local Rules, Standing Orders, And Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 Rich. J.L. & Tech. 8 (2013).

²¹ *Reference Manual*, p. 5 (“The Committee brings together on a regular basis knowledgeable scientists, engineers, judges, attorney, and corporate and government officials to explore areas of interaction and improve communication among the science, engineering, and legal communities. The Committee is intended to provide a neutral, nonadversarial forum for promoting understanding, encouraging imaginative approaches to problem solving, and discussing issues at the intersection of science and law.”).

²² See *Da Silva Moore v. Publicis Groupe SA and MSL Group*, 11 Civ. 1279 (ALC) (ASP), 2012 BL 101971 *3 (S.D.N.Y. 2012) (“There simply is no review tool that guarantees perfection. The parties and Judge Peck have acknowledged that there are risks inherent in any method of reviewing electronic documents.”).

¹⁴ *Pension Comm. v. Banc of America Sec., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010).

¹⁵ Hon. Stephen Breyer, *Reference Manual on Scientific Evidence*, 3rd ed., Washington, D.C.: National Academies Press (2011), p. 4.

¹⁶ *Defensible by What Standard*, p. 231-32 (discussing the applicability of Federal Rule of Evidence 702 and *Daubert* to information retrieval processes).

¹⁷ *U.S. v. Farlow*, 2009 WL 4728690, 6 (D.Me. 2009). See also “*Defensible*” by *What Standard?*, p. 231 (“Application of the ‘reasonableness’ standard in the context of technology-assisted e-discovery process invariably will present the court with methodologies or forensic techniques which are beyond the knowledge or skills of a layperson, and certainly outside the experience of most judges.”).

¹⁸ *Defensible by What Standard?*, p. 219.

But while judges acknowledge it is unreasonable to expect perfection in the discovery process, they still wrestle with how to remedy imperfection in the outcome of the process.

Consider Judge Scheindlin's statement of expectations in *Pension Committee*:

Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy.²³

When it comes to discovery process, courts have a difficult time distinguishing process from outcome. That difficulty arises out of the challenge of deciding what remedy to impose if important information is not located despite a quality process. Indeed, courts typically are asked to analyze the quality of process only when faced with an outcome one party deems unacceptable.²⁴

Adherence to accepted search standards should be accepted as evidence the searching party acted reasonably and set a presumption against further judicial review. As Magistrate Judge Shaffer argued in his article *Defensible by What Standard?*, "the issue of defensibility will require a court to determine the appropriate legal standard for evaluating a technology-assisted search protocol and the factual showing that should be required to trigger judicial review."²⁵

In rolling out any new standards, there should be a renewed effort to educate courts and litigants on the difference between process and outcome. And, in deciding whether and how to "remedy" an imperfect outcome in the face of a certified quality process, courts should approach the question as they do in the tort world.

While negligence may not at first blush appear to be the stock and trade of most eDiscovery practitioners, it is noteworthy that sanctions determinations in eDiscovery matters are often based on shades of negligence.²⁶

Accepted quality standards could provide evidence of the standard of care due in the discovery process just as "professional standards are commonly looked to as evidence of the appropriate standard of care" in professional negligence matters, or as "advisory safety stan-

dards that are adopted by nongovernmental entities such as ANSI may represent a consensus regarding what a reasonable person in a particular industry would do."²⁷

"A technology-assisted e-discovery process cannot be held to a standard of perfection, but should produce discovery results that are defensible in terms of the producing party's discovery obligations and reasonable from the standpoint of cost and efficiency."²⁸ Expert standard setters could and should provide more timely standards for search with the goal of supplanting standards set by "years of judicial decisions analyzing allegations of misconduct."²⁹

Conclusion

If search process quality standards are to be widely accepted, standard-setters must build a bridge between technologists and lawyers and recognize the roles and expectations both face in a legal process for which lawyers are ultimately accountable.

As Justice Breyer stated, "In this age of science we must build legal foundations that are sound in science as well as in law. Scientists have offered their help. We in the legal community should accept their offer" and follow guidance that "open[s] legal institutional channels through which science—its learning, tools, and principles—may flow more easily and thereby better inform the law."³⁰

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²³ *Pension Comm.*, 685 F. Supp.2d at 461-62.

²⁴ *Defensible by What Standard?*, p. 218 ("Designing and implementing a defensible discovery process, however, is complicated by the *post hoc* nature of most discovery motions challenging the results.').

²⁵ *Defensible by What Standard?*, p. 221.

²⁶ *Pension Committee* "begin[s] with a discussion of how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls in each of these categories." *Pension Comm.*, *id.* at 462.

²⁷ *Hansen v. Abrasive Engineering and Mfg., Inc.*, 317 Or. 378, 384, 856 P.2d 625, 628 (Or. 1993).

²⁸ *Defensible by What Standard?*, p. 218.

²⁹ *Pension Comm.*, *id.* at 464.

³⁰ Hon. Stephen Breyer, *Reference Manual on Scientific Evidence*, 3rd ed., Washington, D.C.: National Academies Press, 2011, p. 9.