Using Electronic Search Tools and Experts in E-Discovery:
A Discussion of Recent Federal Decisions

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Many attorneys are all too familiar with the painful task of manual document review—those long days or even weeks turning the pages of a seemingly endless supply of documents to identify those that are responsive to discovery requests or may be potentially privileged. The advent of document review software enabled attorneys to gladly move from dusty file rooms (and sometimes warehouses) full of precariously stacked bankers boxes to the relative comforts of their offices where they could review documents on their computers. But this new approach did little to reduce the time and cost consumed by manual review. And as companies and individuals continue to create and store more and more documents and data, the time and cost needed for manual review has become a substantial, if not overwhelming, burden for those in litigation.

Like most industries looking to save time and money, lawyers, and their clients, have turned to technology for a solution. Litigants are increasingly relying on electronic searches, both for collecting and producing documents in response to discovery requests and for identifying and culling out potentially privileged documents. This increasing use of electronic

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search tools has given rise to a seemingly simple question that has proven to have anything but a simple answer: How does one design an effective search? This question seems simple on the surface because lawyers, of course, are well accustomed to formulating electronic searches—ever since Westlaw and Lexis pulled attorneys out of the libraries and into their massive databases of cases, statutes and countless other authorities and reference materials. But do these day-to-day search skills qualify an attorney (or anyone) to design a search protocol sufficient to satisfy counsel's and client's discovery obligations? Three recent, and controversial, federal court opinions suggest that the answer is—at least under some circumstances—*likely not*.

In 2008, two highly respected United States magistrate judges issued three decisions addressing important considerations concerning the use of electronic tools for searching, collecting, culling and producing documents in discovery. *United States v. O'Keefe*[2] and *Equity Analytics, LLC v. Lundin*[3] were authored by Magistrate Judge John M. Facciola in the District of Columbia. *Victor Stanley, Inc. v. Creative Pipe, Inc*.[4] was authored by Chief Magistrate Judge Paul W. Grimm in Maryland.

The most significant considerations addressed in these decisions concern the knowledge and competence needed to design effective search protocols and to defend them if challenged by an adversary. Judge Facciola's two opinions suggest the need for an *expert* to design and defend electronic search protocols—and specifically, an expert who meets the requirements of Federal

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[2] 537 F. Supp. 2d 14 (D.D.C. 2008).

[3] 248 F.R.D. 331 (D.D.C. 2008).

[4] 250 F.R.D. 251 (D. Md. 2008).

Rule of Evidence 702.[5] Judge Grimm's opinion does not go so far as explicitly imposing the requirements of Rule 702 upon experts in discovery disputes, but nonetheless warns against attorneys designing electronic search protocols without the requisite qualifications to do so.[6] This warning is particularly significant given that in *Victor Stanley*, Judge Grimm found that the party's failure to effectively design and defend its electronic search protocol resulted in waiver of more than 150 purportedly privileged documents.[7] A fourth, more recent opinion by a district judge in the Eastern District of Pennsylvania purports to disagree with the *Victor Stanley* analysis, and sheds further light on how courts might address a dispute over the propriety of using automated searches in conducting a privilege review.[8]

The key lesson to take away from *O'Keefe*, *Equity Analytics*, and *Victor Stanley* (as well as *Rhoads*) is that clients and their counsel should ensure that those persons upon whom they rely to develop search protocols for collecting, culling and producing documents possess the requisite qualifications and experience—this means having sufficient knowledge of the relevant facts and data and using reliable principles or methodology.[9] This also could mean retaining an expert, who satisfies FRE 702, to help develop the search protocol, or to defend it if challenged. Failure to exercise a proper, defensible search protocol could result in waiver when dealing with potentially privileged documents.

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[5] *O'Keefe*, 537 F. Supp. 2d at 24; *Equity Analytics*, 248 F.R.D. at 333.

[6] *Victor Stanley*, 250 F.R.D. at 262.

[7] *Id*. at 259-60.

[8] *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, -- F. Supp. 2d --, No. 07-4756, 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008).

[9] *Id*.