The Sedona Conference Working Group 1 on Electronic Document Retention & Production 2018 Annual Meeting Thursday – Friday, Oct. 25–26, 2018 Loews Hollywood Hotel, Los Angeles, CA

The Sedona Conference wishes to acknowledge and thank the following members for volunteering to take notes at the WG1 Annual meeting. Their efforts allow the members not able to attend to remain informed about the focus and opportunities that are available within the electronic document retention and production working group.

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[Session 1] eDiscovery Case Law Update

Panel	Philip J. Favro *Driven, Inc., Alpine, UT*
	Hon. James R. Knepp II *AIG, New York, NY*
	Rachael L. Zichella *Taylor English Duma LLP, Atlanta, GA*
Moderator	Kenneth J. Withers *The Sedona Conference, Phoenix, AZ*

1. Opening remarks

Over 300 eDiscovery opinions from the federal courts this year. Two oddball, potentially milestone, cases:

A. Democratic National Committee v. Russian Federation—not really an eDiscovery case. The lawsuit involves the hacking of DNC servers. The DNC requested, and the court authorized, service on WikiLeaks via Twitter posting and First-Class Mail.

B. Emerson v. Dart—employment action in which the plaintiff threatened fellow employees via social media posts if they presented evidence against her in her employment case. The court dismissed plaintiff's case on summary judgment and sanctioned her $17,000 for threatening posts. Seventh Circuit affirmed.

2. Introduction of panel

3. Cooperation

Vallejo v. Amgen, Inc., No. 17-1730 (8th Cir. Sept. 10, 2018). In a pharmaceutical products liability action, the Magistrate Judge ordered phased discovery, but the plaintiff pressed discovery requests that the court found to be overbroad and burdensome, requiring the review of files of nearly 100,000 employees. For its part, the defendant was equally uncooperative, failing to provide any meaningful estimates of the time and cost of responding to any discovery. The magistrate judge commented, "the attorneys in this case put the onerous responsibility on the court to balance proportionality while failing to provide substantial and reasonable guidance on this key point: In its current state the court is being forced to 'wade through generalized and conflated arguments of need, burden, and relevance.'" The plaintiff appealed a series of discovery orders issued by the Magistrate Judge to the District Judge, who sustained them all. The defendant finally moved to sanction the plaintiff's attorney under FRCP 11, 28 U.S.C. § 1927, and the court's inherent power. The Magistrate Judge found that plaintiff counsel had engaged in abusive and dilatory tactics, and in particular sought to re-litigate discovery issues that had already been ruled upon. The Magistrate Judge imposed a $25,665 award of fees and costs. This, too, was appealed, this time to the Circuit Court, which found no abuse of discretion in the lower court's actions. The appellate court stated that the "The district court has the

discretion to exercise its inherent power to achieve the orderly and expeditious resolution of cases ... [C]ourts assess whether and when an attorney's conduct became not just 'merely the disruption of court proceedings ... [but] disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.' ... In addition to filing multiple motions as barely veiled attempts to relitigate decided issues, Vallejo's counsel also became unnecessarily argumentative with the magistrate judge."

This case is an example of lack of cooperation gone wild.

City of Rockford v. Mallinckrodt, 2018 WL 3766673 (N.D. Ill. Aug. 7, 2018). In a pharmaceutical industry antitrust action, the judge ordered sampling of the "null set" of documents deemed non-responsive as the result of a key word search, finding such quality assurance testing to be reasonable and proportionate in the context of large-scale eDiscovery, citing The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in eDiscovery for the proposition that the "process of key word searching has pros and cons," The Sedona Conference Commentary on Proportionality (2017) for the value of reliable statistics in determining proportionality, and Judge Shaffer's article, "Deconstructing Discovery About Discovery" from The Sedona Conference Journal, for the proposition that "the Court will not micromanage the litigation and force TAR onto the parties. Court found random sampling of the "null set" is reasonable and proportional.

Discussion:

What is the role of cooperation in litigation? Can a judge force the parties to cooperate?

Feel the court in Rockford didn't go far enough to make parties show burden before he ordered the null set sampling. Vallejo wasn't a discovery dispute as much as it was a lawyer dispute. Judges don't mind discovery disputes, but they hate lawyer dispues. Cooperation is not antithetical to vigorously representing your client.

Webastro Thermo & Comfort v. BesTop, Inc., 2018 WL 3198544, (E.D. Mich. June 29, 2018). In a patent action, the court rejected the defendant's proposed search terms after the plaintiff provided facts to support its assertion that the proposed discovery would be too burdensome. Citing The Sedona Conference's Cooperation Proclamation, the court gave the defendant 14 days to submit an amended discovery request with narrowed search terms, but denied the plaintiff's request for cost-shifting.

Discussion:

Webastro is instructive. Shows importance of continuing to dialog with adversary; continuing to be open to cooperation beyond the 26(f) conference. Also important for proportionality. The judge didn't use term proportionality, but he did a proportionality analysis to determine the proposed search terms were overly burdensome. Hard numbers are needed to show burden.

In re Broiler Chicken Antitrust Litig., 2018 WL 3586183 (N.D. Ill. July 26, 2018). In this ongoing antitrust action, defendant Agri Stats moved for a protective order to limit an email production request from the End User Consumer Plaintiffs (EUCPs), citing undue burden and expense, claiming it would cost between $1,200,000 and $1,700,00 to review the email produced using the keywords negotiated. The court was not convinced by these assertions, stating "It seems that Agri Stats itself also does not know for sure what it would have to do and how much it would cost because the parties have not finished that discussion. ... Agri Stats falls woefully short of satisfying its obligation to show that the information EUCPs are seeking is not reasonably accessible because of undue burden or cost."

Discussion:

Proportionality means what do you need to win you case…focus on what is necessary to prove claims, not what you want. The case emphasizes the question "what do you need to win your case" versus "what did the lawyers want." In seeking a protective order, the Defendant came in with non-specific cost estimates and failed to take into account the narrower search terms proposed by the Plaintiff, which resulted in the Defendant's estimate being inflated.

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation, No. 3:15-md-02672, MDL 4967 (N.D. Cal. Apr. 24, 2018). A group of Volkswagen dealers alleged that the engineering firm Robert Bosch conspired with Volkswagen to cheat on automobile emissions test. Bosch had previously been the subject of a government investigation ion the "clean diesel" emission fraud matter and had responded to several requests from state and federal regulators. The dealers sought discovery of Bosch's productions to these government agencies, to which Bosch objected, saying that the dealers' request was overbroad, as the subject matter of the government investigations was not coextensive with the dealers' claims. The court agreed and ordered the dealers to make "subject-matter-specific-requests."

Discussion:

Judges spend half their time handling criminal cases. It might be a good idea to present discovery disputes by showing the judge "probable cause" that your proposed solution will find relevant documents. End goal is to help the judge.

Proportionality arguments don't always limit discovery.

Kennicott v. Sandia Corp., 2018 WL 2206880 (D.N.M. May 14, 2018). In a putative class action alleging systematic discrimination against women in pay and promotion, the court held that discovery into pregnancy discrimination, sexual harassment, and other non-pay/promotion complaints by women may be relevant to questions of class certification. The court cautioned, however, that this broad scope of discovery at the initial stages of the litigation does not mean that the discovery would be considered relevant after class certification, or that the evidence produced would be relevant at trial.

Satmodo, LLC v. Whenever Communications, LLC, 2018 WL 3495832 (S.D. Cal. July 20, 2018). In an unfair competition action between two satellite phone retailers, the plaintiff alleged that the defendant engaged in Internet manipulation to prevent potential customers from finding the plaintiff's paid advertising in response to online searches. The plaintiff moved to compel responses to special interrogatories identifying all of the defendant's devices, and to allow forensic inspection of those devices. The defendant argued that the requests were overbroad and disproportionate. The court found that the special interrogatories were appropriate and proportionate to the needs of the case. The court also granted, in part, the request for forensic examination, but ordered a protocol that defined the scope of the examination, permitted the defendant to have its own expert participate, and required a joint status report to the court.

Discussion:

Proportionality is nuanced and doesn't always result in narrowing discovery. Sometimes it depends on what stage discovery is in.

Differentiated case management. AZ has differentiated case tracks. It is a catalyst for early judicial involvement. For discovery disputes in depositions, pick up the phone and call the judge; 85% resolved on calls with the judge. The great thing about differentiated case management is that it is a catalyst for early judicial intervention, which prevents so many unnecessary discovery disputes. Differentiated case management works better in some jurisdictions than others. In Arizona, differentiated case management is not based on the amount the parties claim in controversy.

4. Whether proportionality extends to preservation

Small v. University Medical Center, 2018 WL 3795238 (D. Nev. Aug. 9, 2018). In a collective action under the Fair Labor Standards Act, the court appointed a Special Master to investigate and report on the defendant's various discovery failures. The Special Master produced a 1500-page report that documented systemic failures in preservation, identification, and collection that resulted in the destruction of ESI responsive to the plaintiffs' requests, as well as unnecessary costs and delay in the litigation. The Special Master recommended case-dispositive sanctions, and the court accepted the findings in the report, but not the recommendation for extreme sanctions, opting instead to allow the jury to hear all the evidence, plus the imposition of costs related to the discovery dispute.

Franklin v. Howard Brown Health Center, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018). In an employment action, the court sanctioned the defendant for failing to preserve "instant messages" and other ESI, stating in Footnote 2, "The Sedona Conference has recommended that a 'reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation....' Spanish Peaks Lodge, LLC v. Keybank Nat. Ass'n, 2012 WL 895465, at *1 (W.D. Pa. 2012)."

Discussion:

Small case suggests sanctions should be proportionate to the harm caused by spoliation. On appeal, the court used a proportionality analysis to reduce the special master's recommended sanction of dismissal to an adverse inference instruction. In Franklin, the judge didn't really go through a full analysis nor does he say what the employer could have done under the circumstances to preserve the text messages. This case could result in over preservation of text messages. There should be some application of proportionality to preservation; that said, there must be some way to preserve the truly relevant text messages. Screen shots of text messages can suffice in some instances. Forensically sound collection isn't always necessary.

5. TAR

In re Domestic Airline Travel Antitrust Litigation, MDL No. 2656, 2018 WL 4441507 (D.D.C. Sept. 13, 2018). In this antirust action, the plaintiffs moved for an extension of discovery to review one of the airline's productions, which totaled more than 3.5 million documents, of which only 17% were found to be responsive. The large recall, and relatively low precision, was blamed on the airline's technology assisted review (TAR) process. The airline opposed the plaintiff's motion, stating that the plaintiff should use their own TAR process to streamline review. The court noted that this argument was beside the point, as the issues in a motion for an extension of time were whether the moving party had acted diligently but were prevented by unforeseen circumstances to complete discovery within the established schedule. The court found that the plaintiffs demonstrated sufficient "good cause" for an extension, and that the defendant failed to demonstrate any countervailing prejudice

Discussion:

Broiler Chicken orders validation of search results. City of Rockford orders sampling of the null set to validate review. Domestic Airlines basically said you can't just dump documents and shift the burden of sifting through the noise documents to your opponent.

6. Privilege

Winfield v. City of New York, 2018 WL 2148435 (S.D.N.Y. May 10, 2018). In an action challenging New York's method of allocating available affordable house units, the court denied a plaintiffs' request for a "quick peek" at 3,300 documents listed on the defendant's privilege log and instead proposed that a special master conduct a privilege review of the documents at issue, citing The Sedona Conference Commentary on Protection of Privileged ESI and a 2009 article from The Sedona Conference Journal, "Federal Rule of Evidence 502(d) & Compelled Quick Peek Productions."

Discussion:

Does 502(d) authorize quick peek productions? Judge Parker explains why Fair Homes is bad law. Quick peek decisions and blanket production orders run roughshod over the privilege.

In re Abilify (Aripiprazole) Prods. Liab. Litig., 2018 WL 4856767 (N.D. Fla. Oct. 5, 2018). In a pharmaceutical products liability action, the court held that defendant Bristol-Myers Squibb Co. may claw back portions of a privileged PowerPoint slide deck that it inadvertently produced, finding that the slide deck is protected by the attorney-client privilege even though a nonlawyer assisted in creating the slide deck and is identified in the metadata as "author." The court cites The Sedona Conference Commentary on Legal Holds (2010) to define "reasonable anticipation of litigation."

Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc., 892 F. 3d 1264 (D.C. Cir. 2018). In a dispute that resulted in at least five reported decisions over seven years, a pharmaceutical company refused to comply with an investigative subpoena for documents on the basis of attorney-client privilege. Finally, Circuit Judge Kavanaugh held that the documents were indeed subject to the privilege, finding that obtaining or providing legal advice was "one significant purpose" of the communications, even if the communications were between corporate employees and corporate counsel and the content of the communications was purely factual, significantly broadening the application of the "primary purpose" test.

Discussion:

If you take these too cases together, it is bad news for people who use automated tools to find privilege documents. Those tools might be useful for first cut, but they cannot make the kinds of distinctions in privilege recognized in these cases. The Boehringer case is a very practical decision. It recognizes it can be very difficult to discern the "primary" purpose of a communication. It seems every new case adds a new wrinkle to privilege analysis.

7. Sanctions

Hernandez v. City of Houston, 2018 WL 4140684 (S.D. Tex. Aug. 30, 2018). In a civil rights class action alleging that the city had an unconstitutional policy of detaining warrantless arrestees, the city was very slow in responding to discovery and missed several deadlines. At one point, in an in-person conference, the city represented that "(i) it had not interviewed any of the custodians listed in the ESI Order, (ii) it had not collected documents from any of the custodians listed in the ESI Order and (iii) it had "wiped" the hard drives of six custodians listed in Appendix B of the ESI Order who were no longer employed by the City." However, the city continued to delay production and made misrepresentations to the court, claiming that it had to review 2.6 million documents, although the search terms in the ESI Order only resulted in 78,702 documents. The city also admitted to wiping six hard drives associated with named custodians after litigation commenced. In the end, the court found the city's actions "were intentional or the result of deliberate indifference. The City knew well that the evidence existed, that it was material to this litigation and that spoliation was an affront to discovery rules and the Court's order. The affirmative acts that caused the spoliation found has not been credibly explained." Invoking Rule 37(e)(2), the judge issued a sanction in the form of a preclusion order, establishing that the city acted unlawfully in detaining the class members, that city policymakers

were aware of this policy, and that they acted with deliberate indifference to the constitutional violations.

Porter v. City & County of San Francisco, 2018 WL 4215602 (N.D. Cal. Sept. 5, 2018). In a wrongful death action alleging that a public hospital lost a psychiatric patient under its care, the city was sanctioned for erasing a recording of a dispatch call and failing to timely hand over a privilege log. The call was the only contemporaneous record of whatever information was reported to the sheriff's department about the incident. However, because there was no evidence that the recording was intentionally destroyed, the sanction was limited to the jury being informed that a duty of preservation existed, but the recording was deleted. The plaintiff was also awarded attorneys' fees and costs incurred in bringing the sanctions motion.

Discussion:

Courts are using Rule 37(e), but there is a preference to try cases on the merits, whenever possible. Also, courts are pushing Rule 37(e) finds to a jury, which is not contemplated in the rule. Judges do not like taking decisions away from a jury. Read KCI v. Healthcare Essentials, 2018 WL 3196950. Lawyers and firm sanctioned for making false representations to the court because of their bad actor clients.

[Session 2] Not Reasonably Accessible: What does Rule 26(b)(2)(B) give us that other rules don't? Reconciling the differences between proportionality and not reasonably accessible.

Panel	Eric B. Evans *Mayer Brown LLP, Palo Alto, CA*
	Hon. Anthony E. Porcelli *U.S. Magistrate Judge, M.D. Fla., Tampa, FL*
	Todd Presnell *Bradley, Nashville, TN*
	James Zucker *Patterson Belknap, New York, NY*
Moderator	Lea Malani Bays *Robbins Geller Rudman & Dowd LLP, San Diego, CA*

Note: Please review and submit any comments on the draft to comments@sedonaconference.org by Nov. 30.

- Rule 26(b)(2)(B) exists and we need to address/explain it. That doesn't stop us from saying that it should die. I think it is important to say to the Federal Rules Committee whether we think it should be destroyed. When do we call something proportional? Is scope of discovery coterminous with scope of preservation? I think we are creating multiple branches of analysis when it comes to the same thing. There is no need to have a technology-specific option. … If we say this rule applies to the collection/preservation phase, there is a certain logic that costs are for the purpose of collection or preservation phase of the EDRM. At first I had a real problem with what I had viewed as a conflict within the order of the steps, but if the identification process shows the information is clearly relevant and then we see there is an issue with collection or preservation, then the logic described in the paper makes sense and we still have a proportionality issue when we are going from Principle 5 to Principle 8. So, I see a logical structure to the paper and I am appreciative of it now.
- We already addressed the question (regarding whether Rule 26(b)(2)(B) is needed) and the consensus was that it is needed. Consensus had already been reached and this team will explore these issues and show why the Rule is needed.
- Hypothetical of mobile device that was lost but later found: No password is available, and the device was three password attempts away from being wiped. No forensic expert would attempt to chip off the device, except one. But the data in the chip-off would still be encrypted, even if collected.
- There should be a Step 0.5 to the process that there is some probable cause that relevant information is in the data source to begin with.
- The technological impediment perhaps could always be solved by throwing enough money at it. So, how do we scope a technological impediment? Is the carve out the review and production cost and that the technological impediment has to be earlier in the EDRM?

- It seems like the discussion around Rule 26(b)(2)(B) is about a technological impediment, but where do you find that in the Rule? I haven't soaked in this Rule the way you all have, but at what stage is something not reasonably accessible when you could throw enough money at something to make it accessible?
- As a defense lawyer, what is the benefit of arguing Rule 26(b)(2)(B)? It seems I would have to go through a lot to have to show that it is not accessible. I am going to make both objections.
- Early on in a case I know what is and is not reasonably accessible, because I am in-house and I know my systems and what can or cannot be accessed. At that early stage, however, I do not know what is proportional or not, because that is determined on a case-by-case basis. This is why Rule 26(b)(2)(B) is important from my perspective.
- Rule 26(b)(2)(B) has burdens of production and persuasion that the proportionality rules do not. If the Rules Committee were to go over this Rule again, they could move the rules around to better address the seeming conflict between Rule 26(b)(2)(B) and Rule 26(b)(1). The 2015 Committee Notes show Rule 26(b)(2)(B) was intended to address technology and explains that "in most cases the accessible sources should be sufficient for a party."

[Session 3] eDiscovery Best Practices for Small Cases: What guidance can Sedona provide?

Panel	Trena M. Patton *Nelson Mullins, Charlotte, NC*
	Sonali Ray *Nextpoint, Chicago, IL*
	Hon. Joel Schneider *U.S. Magistrate Judge, D.N.J., Camden, NJ*
	Amy Sellars *Walmart, Bentonville, AR*
Moderator	Martin T. Tully *Actuate Law LLC, Chicago, IL*

Note: Please review and submit any comments on the outline to comments@sedonaconference.org by Nov. 30.

Background provided:

- Background of the brainstorming team
- Brainstorming focused on four subgroups
    - What is a small case?
    - What existing Sedona work product is out there that is relevant?
    - Tips and tricks
    - Tech and tools

What is a small case? General consensus – definition of a small case can vary and there are many factors to take into account.

- Thinks it is a big mistake to classify a small case just on the amount of money in controversy
- In one state, by way of example, magistrates handle all pretrial proceedings including all discovery, so the magistrates have their hands on all cases passing through.
- On average these magistrates handle 500 cases at a time.
- Between 70-80% of those cases are considered small; they do not take 70-80% of the time, but they do take up the majority of the docket.
- There is a lot of diversity within these cases, e.g., people slip and fall in bathrooms, fall off bar stools, fair debt collection action cases tend to settle between $5-15k, 1983 cases, excessive force with no permanent injury (settle between 40-60k)
- Large cases – FCA, class actions
- No plaintiff would ever say that they have a small case

- Sometime there are big damage cases with little to no eDiscovery – no esi issues, e.g., med mal
- On the other hand, may have a case with a small dollar amount that turns into a big case (e.g., excessive force case, followed by many cases against the same unit; case may get a lot of publicity)
- Seemingly small cases with counterparts around the country
- Cutting issue cases tend to be considered or treated like large cases, regardless of dollar amount.
- One factor – is it fee shifting or not? No secret that fee shifting is an incentive for plaintiff's attorney to do more work than they ordinarily would
- Is it a case that is in the papers? Where there is publicity a small case will be litigated more like a large case.
- Though dollar value might be small, if there is important declarative or injunctive relief, it might be treated like a larger case.
- A small case can become a big case overnight. How do we address this problem if we are trying to advise people on those cases?
- Sometimes you have smaller cases within a large case, e.g., a class action has smaller plaintiffs' cases within.
- Some corporations internally divide cases between large and small.
- Additional factors include the number of facts in issue or number of legal issues.
- Cases that may have a public interest issue

Should there be different standards for small cases?

How does it change the Sedona analysis or guidance?

Should the size of the case factor into the proportionality analysis?

Collection – are preservation obligations different for small cases? (e.g., NYC case where a plaintiff faked his photos, defendant asked for the metadata, plaintiff said they did not know what it was. Case was dismissed, nothing happened to plaintiff.

- Some small cases may involve small companies, who will seek out a smaller firm, and those smaller firms may not have as much eDiscovery expertise, and then there are ethical requirements of competence.
- Large entities may also have small cases.
- Proportionality factors may change if it is not a large case.
- Analysis can be tricky because of the fact specific nature of discovery – e.g., CA case about preservation (surfer beating up people to keep them off his beach). Individual may claim that they should not have to engage in the same preservation methods as a

corporation. Messages were lost. Magistrate ruled that an individual cannot just say I am poor and do nothing; they could have at least taken screenshots. There is plenty of software available to back up your phone.

- Struggling – how do we provide guidance because there are very fact intensive inquiries to make these determinations?
- Is it even possible to come up with a set of guidelines to distinguish between the types of cases? And then would you even treat them differently?
- Example of a struggle – text messages are highly relevant to a case, you need to know the cost, and are you really going to say that they do not need to be preserved? Examples provided
    - In small cases – preserved the right way – but collect differently
    - Prioritizing or picking custodians differently
- Team may have to provide specific examples to explain.
- Are there cases where people do not want to use a litigation support vendor because they think the case is too small? How can a vendor help in such a case? Help them pinpoint data, surgical collection, format of production, pdf, tiff, native.
    - Vendors can generally help with small cases, especially collecting personal email. Technology issues – screenshot – what day and time were the photos taken, is a screenshot unreasonable if all the metatdata is provided?
    - Less can be more in discovery. One example, someone volunteered to allow opposing counsel to use their service. We need to change the mindset about how to approach small cases
    - There are a few cases where the evidence is pasted into word or a screenshot. This can be fine if you have the custodian and they can authenticate it – you do not need all of the metadata – this stuff does not have to be that hard – keep it simple.
    - Reasonable efforts may be good enough. Some concerned that this team would suggest that there are other means they should be taking.
    - Where judges see Rule 37 and Rule 26 – there is concern that they could be used to inflict great burdens on individuals in small cases.
    - Self-collection by witnesses in smaller cases – frowned upon; but in a small case, why have a client incur significant costs to collect entire email accounts for a bunch of people, when the witness could just search for them. Perhaps include something to say that in the smaller case, self-collection might be tolerated more.
    - Metadata may not matter in the smaller case, but say you forward emails to lawyers to be produced it does change the header and the metadata – maybe allow self-collection, but make sure that they do it correctly – maybe add instructions

  - From the perspective of a large company – it might be harder to collect by screenshots or self-collection because there is already a process and systems in place.
  - Conversely:
  - e.g., in employment case – you want the lawyer to talk to the client to be able to certify that they really produced everything; you really want the lawyer to do the review
  - Is counsel actually taking the time to identify the email that was forwarded to the client, or the text they saw on the phone, to make sure it is authentic?
  - What about fabrication of evidence? Something to consider for the small case
  - Self-collection – 26g implications – attorneys who work on small cases tend to get only what the clients send to them
  - Some people seeing more fabricated electronic evidence
  - Is there really a different standard for the small case?
- Limitations may be too easy to circumvent; e.g., limit the number of depos or requests to a specific no. and end up with one really broad request.

[Session 4] Rule 45 and Non-party Discovery: Updated guidance in the age of proportionality and the rise of third-party apps.

Panel	John K. Baker *Mitchell Williams PLLC, Little Rock, AR*
	Anthony J. Diana *Reed Smith LLP, New York, NY*
	Nathaniel C. Giddings *Hausfeld LLP, Washington, DC*
	Hon. Andrew J. Peck (ret.) *DLA Piper, New York, NY*
	Hon. Suzanne H. Segal *U.S. Magistrate Judge, C.D. Cal., Los Angeles, CA*
Moderator	Ross M. Gotler *Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY*

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Introduction - The way we do business has changed. Commentary is intended to address changes.

Topics for Feedback Today

1. Redefining non-parties

Discussion at mid-year meeting. Setting rules so clear definition of non-parties. Case law all over the place. True v. related non-party. One of the things we did was to come up with a better definition and implications:

- *True non-party*: Has sole and exclusive possession, custody, and control of the requested information; No financial or other interest in litigation; Neutral non-party with no significant relationship with parties in litigation
    - Rule 45 created for this type of party. Judges should protect from burden.
- *Custodial non-party*: Companies sending data to third parties - e.g., cloud. Defined by relationship to the party to the litigation. Has custody or possession of requested information; Party to the litigation has "control" of the information—it is the party's information; Standard of possession, custody, or control: Legal right, legal right plus notification, and practical ability; Sedona has taken position that standard should be the legal right to obtain and the ability to produce documents on demand (*The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control"*)
    - If party has "control" but then third party has it, then subpoena should not be sent to custodial non-parties.
- *Related or Interested Non-party*: Has a prior or current relationship with party to the litigation; Has financial interest in outcome of litigation; Received a preservation notice from a party.

- Some protections but should be subpoenaed and there may be cost-shifting.

Comment:

- Define related party. What does it mean to be interested in a litigation? Should be much closer than you are in the industry.
- There will always be a blurring of the categories. Idea is to create these with some presumptive categories.
- Everyone should receive the protections of the rule if they receive a subpoena under the rule. Creative to have these, but not really appropriate.
- Illustrations that law firms, hospitals, and banks house other people's docs is inaccurate.
- Body of law of regarding who has possession of business records. Reason to treat corporations as separate entities. Concerns about this section expressed. Including in preservation and other areas.
- Difference between real and interested. Interested could mean different things. If industry of only 3 players, then really interested. Interested should not be in same as related.
- Difference between true and custodial — if I need data that I have to pay for, does that make me a true or custodial non-party?
- Non-content and content - ISP - Verizon or Google may say hands off. Rule 45 has provided us with information to figure out witnesses. Just because ISP it is hands off - review.
- Section 1782 petitions
- Large section wants to explore Related non-parties.
- The relationship between non-parties and parties is issue that percolates. Evaluation of interest and how that impacts the burden the court is willing to put on that non-party. Helpful to have guidance. Clarity would be great for the bench.
- Still calling it a related non-party — may need to change the rules on Possession, Custody or Control (PCC). Difference between sub or affiliate and true non-party.
- Unified national standard of legal right. Number of related parties are pretty small because practical ability would be large. If we have a standard that is not tied to a national rule of what constitutes PCC, we are opening the legal right jurisdiction to piecemeal the practical ability.

2. Preservation

- Spectrum of preservation obligations: true = least, and related = most.
- Does not require a formal preservation process. So preserve for a reasonable time; provide best practices. Related or Interested have some preservation obligations.
- Consistent with discussion at mid-year. Something short of a subpoena does not create a preservation obligation on a true non-party. Clapping.

- Cooperation and communication
- Rule 45 does not specify a timeline for a motion to compel, the non-party should communicate when it plans to destroy or no longer keep. This would provide the requesting party with notice to go to court.
- Receipt of subpoena is not a trigger to preserve.
- Duty to preserve in legal holds paper. Fuzzy. 2010 position is that duty to preserve triggered when subpoena. One decision - inconsistent with this statement in this paper.
- Piece of paper does not mean anything.
- How do you preserve, as a party, ESI with third party, if third party has no duty to preserve?
- Rule 45 purports subpoena, but it is for the "preservation" and not a subpoena.
- Conflict where plaintiff operating at a disadvantage
- Paper does not go far enough on true non-parties. Once produced, then can stop preserving. If no deadline, then they do not know when end of matter happens. So, non-parties can be forced to hold docs for years. I think rule should have this.
- Motion to compel so unfair to non-party
- Paper approach:
    - Propose rule amendment
    - In the meantime, paper could argue courts can do standing motions to supply a time limit.
    - Paper does this as a best practice - give requestor notice that done with production and will lift preservation x days. This provides notice to file motion.
- Local rules can change faster. Pilot program. Judges disagree they can change quickly.
- True non-parties and consideration for others.
- Local rules can't change fast because approval needed from Circuit. Red flag that you are not in conflict with Federal Rules — raise issue with consistency.
- 45F transfer compliance from subpoena court going into effect and issuing.

3. Key Best Practices

- Confirm that records can't be obtained from party
    - Seen from both sides of the v.
    - What do you do when a party says we have it all but they do not? Need the subpoena as a check.
        - May find evidence that party does not have what they should have.

- Should we be encouraging or discouraging this? We took the position to discourage.
- I am not opposed to requestor having to pay for this check.
- The judge should make the decision.
- If you wait for a party to participate in good faith, and find out this has not happened, and then have to subpoena, you may have prejudiced your client. Obligation to get as quickly as you can.
- Local Rule 37 —go back.
- **cost shifting—already received from non-party. May use as argument if know this.
- Reasonable to negotiate—10 days trying to negotiate.

- 45(d)(1)—designed to lessen the burden the non-party and lessen the cost of litigation.
- Aspirational but truly a best practice?
    - A non-productive 26(f) conference. In theory, yes you should be able to get. Sometimes get only a part of the records received.
- Identify non-party in initial disclosures
- Trying to encourage early discussion about records under party control
- There is no confer requirement under the Rule.
    - Encourage to amend rules. Look at local rules — trying to keep out of court.
- Do they have to object with specificity? Rule 45 silent. Likely facilitate resolution. Anyone think that Rule 34 should not apply to Rule 45? - two hands up.

4. Structure of commentary

- More scholarly than most commentaries.
- Too long, cut or move to appendix.

[Session 5] ESI Evidence & Admissibility: Updates to Sedona's 2008 Commentary are underway.

Panel	Holly A. Dyer *Foulston Siefkin LLP, Wichita, KS*
	Hon. Kent A. Jordan *U.S. Appellate Judge, 3rd Cir., Wilmington, DE*
	Timothy M. Opsitnick *TCDI, Cleveland, OH*
Moderator	Kevin F. Brady *Redgrave LLP, Chantilly, VA*

Note: Please review and submit any comments on the outline to comments@sedonaconference.org by Nov. 30.

Discussion of changes to the 20-year-old document exception - Ancient Document Rule: FRE 803(16)

Discussion of addition of FRE 902(13) and (14) to the rule

Why did these new provisions get added? Techs go and gather the ESI; other side challenges authentication then stipulates at the last moment = big waste of time and resources.

902(13) & (14) allow for a certification to establish authentication to avoid this problem.

What if other side objects to certification? Raise it with judge in a motion in limine. What is your issue with the certification?

Hashing and 902(13) & (14): is that creating any issues in terms of documenting?

Are you exposing yourself too much by providing information on how you collected and generated hash values? Open question.

Does self-collection by clients and custodians undermine your ability to authenticate ESI later via such rules?

In some situations, it may be beneficial not to use this rule because you want to offer the evidence at trial.

New types of evidence will be a focus of revised commentary.

More use of ephemeral messaging

How much should we talk about admissibility as well as talking about authentication?

Recent case in SDNY in which a series of emails were admitted: then proved that they had fabricated the emails

Comment: It's important to understand that authentication is the first hurdle, there are other steps to getting your evidence in.

What about block chain? Lots of questions about whether it's the latest fad or breakthrough tech. Can it be used for authentication? Chinese Supreme Court said block chain can be used to authenticate evidence.

One attendee stated that we should not duplicate the authentication work of the Primer on Social Media.

[Session 6] Litigating at the Intersection of Sedona Principle 6 and Cooperation & Transparency: Guidance on how to find the right balance.

Panel	Hon. Cathy Bissoon *U.S. District Judge, W.D. Pa., Pittsburgh, PA*
	Jennifer S. Coleman *Hopkins & Carley, ALC, San Jose, CA*
	Thomas C. Gricks III *Catalyst, Irwin, PA*
Moderator	Gareth T. Evans *Redgrave LLP, Los Angeles, CA*

Note: Please review and submit any comments on the annotated outline to comments@sedonaconference.org by Nov. 30.

1. Status Discussion
    a. Project in its early stages and picking up steam but found a good track
    b. Introduction of panel
    c. Large drafting team which is intentional, 3 leaders and 3 steering committee reps
    d. Care deeply about Principle 6 and open dialogue and expect robust discussion
    e. Vast majority of attendees read draft outline
    f. Panel suspects that there are misconceptions about the project
2. Need to hear direction and context for the project
3. Discussion regarding how drafting team and leadership reached a consensus to even start or discuss the project
    a. Concern that the project should not even begin as no consensus to have project in first place
    b. Consensus is not whether to have project, but whether to publish the project as Sedona consensus publication
    c. We have dialogue before we reach consensus
    d. Concerns expressed that the project is going to change Principle 6
    e. No problem to talk about the topic as that is how we reach dialogue
    f. Brainstorming team is how we began the project
        i. Formed drafting team
        ii. Attempt to have balance team on drafting
        iii. Drafting team includes some members of the original brainstorm team
4. Never any intention to change Principle 6
5. Flavor of Cooperation Proclamation
6. Commentary on how to negotiate the situation where intersection and potential conflict
    a. Need to talk about the tensions and how to negotiate the conflict
    b. Practical guidelines to get through that conflict rather than avoid judicial resolution

7. Approach is not one of obligation but of resolution
    a. Provide a toolkit to get past problems while avoiding conflict and cost
8. One of best ways to do this is to break discovery process down into steps, identify where the tensions will arise, and look at them and provide practical solutions to consider employing at that point
9. Goal today is to resolve directive, do we want to do anything?
    a. What is our true directive?
    b. General organizational approach, i.e., do you agree that segmenting is appropriate way for resolution?
10. Comments:
    a. Seem to be opening wounds from The Sedona Principles, Third Edition
    b. Let us run its course like we did with Principles update
    c. Concerned that it will be cited against me
    d. Philosophically it is dangerous for Sedona, but we must let it run for some time
    e. While there is no paper, the outline headings themselves are a problem, insufficient explanation
    f. Afraid of looking like I am unreasonable as result of what the project might suggest
    g. Concerned that if we continue with this project, that it will gain momentum and there will be movement to publish "something"
    h. Steering Committee has check points for all papers and momentum alone will not get a paper published – must have consensus
11. Question asked if we can benefit from guidance how to navigate conflict
    a. Judge responds that the two coexist and tension are real
    b. Keeper of the information is in charge of how the information is turned over and what the process looks like
    c. Keeper figures it out and it is pretty basic
    d. Other issue is if conflict between parties over completeness and whether something missing or turned over
    e. How did you do it, which is the transparency piece
    f. The tensions exist and understand the fear, but why the hesitancy to talk about the issue?
12. Tension over this issue (Principle 6) has been around for 12 years and we just finished this with Principles last year
13. Consensus was reached over Principle 6 after much dialogue.
    a. The drafting team is able to work together
14. Drafting team member discusses approach and process
    a. Room to provide practical guidance but does the final product need to demonstrate consensus? Does not think consensus will be reached. At best, will be able to illustrate the perspectives on the issue.
    b. Danger of prescription as that will not be consensus

c. Must be sufficient not to reach consensus on prescription
d. Successful focus on tension and touchpoints

15. Discussion of the project of updating Principles for Third Edition and specifically 6 and the associated emotions and passion
    a. Falling out of that experience felt that we needed to address the conflict
    b. Important that the community at large understand what we mean by Principles and tension with Proclamation and explain how they can work together as both part of Sedona
    c. Great solution to Principles 3 and 6 and their associated Commentary that was updated
    d. Do not want to restart and go through this again but need to do a better job of explaining
    e. We need to institutionalize how we solve these problems outside of bubble. Celebrate Principles and Cooperation Proclamation
    f. Problem may be title creates wrong impression of project
    g. Talk about things to do if you want to cooperate
    h. Courts want people to cooperate and reach consensus, should avoid motions
    i. Stay away from lightening rod of conflict between principles 3 and 6
    j. Saying it is an intersection is causing the problem and the conflict
    k. Cooperation is possible when competent counsel but seem to be small group
    l. Transparency is often impossible with adversaries
16. Consensus
    a. Have not been in the room for a while; four clients told attendee to come and believes title is a lightning rod
    b. Real issue is many organizations have checked out and consensus in the Sedona room is no longer consensus in the community
    c. Projects becoming more polarized as no consensus in the room as they are one sided
    d. Transparency is pushed upon producing party under guise of cooperation
    e. Transparency being used to implicate my actions under Principle 6
    f. Will soon effect both sides as even plaintiffs have data
    g. Transparency being weaponized
17. Issue of transparency being used as club was first issue raised by drafting team so need available solutions to get past that point
    a. Principle 6 not talked about because it is where drafting team started
    b. Can we take the group and find potential solutions?
    c. Maybe it can help, so we should try.
    d. Outline that was provided is only part of the many pieces of the work product; scaled-down draft for meeting discussion
    e. Drafting team has come very far in process
18. Producing party has a bias within the courts that the producing party is at fault

   a. No effort to control requesting party to act responsibly
   b. Requesting party acts unreasonably and not held to same standard
   c. Requires honesty and good faith by both parties and second level that is not required but may engage in it if in my client's best interest
19. Cannot understand the discussion of why we can't reach consensus
   a. People in this room come to consensus all the time on behalf of our clients so why can't we do it here?
   b. Disagrees with posturing; we will get there and not get stuck as we are able to get consensus
20. Drafting team member talks about what does consensus mean
   a. We all come from different perspectives
   b. Rule 34 Primer was all about what is wrong with objection but not enough about requests and should be included, not much consensus on what requestors should do. Go back and work on balanced Rule 34 Primer
   c. Project should not go forward at this time
21. Project is skewed in favor of disclosure and the cure being more transparency or disclosure
   a. Not appropriate weight to producing party
   b. More discovery is not necessarily better discovery
   c. Strategic reasonable transparency
   d. Afraid Sedona Conference WG1 will lose legitimacy if continue with guidance unless it discussed legitimacy of both sides' obligations
22. Status of paper
   a. Not a final paper, not a final perspective
   b. The outline had the effect wanted: to get the discussion that we wanted to find the right balance and practical alternative tools taking both into consideration
23. Original Principles took a long time to develop
   a. Good but not perfect, we will get there
   b. We have consensus of current Principle 6
   c. Sedona should continue to try and find consensus
   d. Cooperation is a best practice but should not necessarily be required
   e. Don't always look at perfect for one side otherwise not standard bearers
   f. Let's see where we get in a year
24. New to Sedona
   a. On the drafting committee and very surprised by reaction
   b. Feel bad that there is not more content because much of responsibility of both sides there and much Principle 6
25. Afraid will get entrenched and will not allow checks and balance because want to complete
   a. Wants to know if there can be a stop if it is not going as should

b. Think Principles Third should be left out there in the public for a while before moving forward with this topic

26. Duties of confidentiality and ethics conflicts with transparency

[Session 7] Judicial Roundtable: Explore the judicial perspective for 2018 and beyond

Panel	Hon. Cathy Bissoon *U.S. District Judge, W.D. Pa., Pittsburgh, PA*
	Hon. Kent A. Jordan *U.S. Appellate Judge, 3rd Cir., Wilmington, DE*
	Hon. James R. Knepp II *U.S. Magistrate Judge, N.D. Ohio, Toledo, OH*
	Hon. Andrew J. Peck (ret.) *Senior Counsel, DLA Piper, New York, NY*
	Hon. Anthony E. Porcelli *U.S. Magistrate Judge, M.D. Fla., Tampa, FL*
	Hon. Joel Schneider *U.S. Magistrate Judge, D.N.J., Camden, NJ*
	Hon. Suzanne H. Segal *U.S. Magistrate Judge, C.D. Cal., Los Angeles, CA*
Moderator	Peter Pepiton *Dinsmore & Shohl LLP, Cincinnati, OH*

Question for Judges: Use of Discovery Pre-Motion Conferences – are they effective or not?

- I always do them – they are very useful, and I do not engage discovery motions from parties without having one of these conferences. We get on the phone with the lawyers and 99% of the time we resolve the issues right then. I rarely address motions to compel or other discovery issues.
- Local rules prevent straight motion practice for one particular judge. The only time this judge sees discovery motions is on privilege issues.
- Another judge opines that most issues are addressed through pre-motion conferences.
- Another district requires telephone conference prior to any motion practice; briefing in truly "brief" fashion by a brief letter
- Meet and confer prior to motion practice for one judge requires discussion over the phone or in person; no letters to satisfy this requirement
- Another judge indicates in their district, there is little use of pre-motion conferences, though this judge feels that it would be more effective to hold those conferences and seeks to do so
- Audience confirms that most lawyers practice in districts where these conferences are required

Follow up question: requirements associated with use of pre-motion conferences

- Meet and confer process is required; if both lawyers are "in county," then they must meet in person

- Some judges require pre-motion meetings with the judge before a motion *can* be filed
- One judge recommends looking at a court website, a standing order, or other individual guidance from a particular judge before engaging in motion practice

Audience: concerned when a jurist is not active or involved in discovery practice

- Responses
    - Engage the judge and don't let a discovery dispute fester for months (this was the scenario posited by the audience member)
    - Know your judge
    - Not all judges are active case managers
    - Discuss possible procedures – check points – at FRCP 16(b) conference
    - If you perceive that a case needs active case management, then raise the issue at the FRCP 16(b) conference
    - Not every case is the same, though. Cases have different needs. FLSA cases, for example, don't require a lot of judicial oversight
    - Addressing the issues may also depend on how cases are assigned. Are cases assigned "on the wheel" or are they given out by assignment? Are Magistrates used for settlement conferences?
    - Some believe special masters are appropriate for engagement while others do not. In one case, a special master was needed because the judge was addressing discovery issues with the parties' counsel every day.

Audience Question: How often are clients involved in discovery hearings?

- Rarely, and often there is tension between counsel and the client over discovery issues
- In some instances, courts have required clients to get involved, but rarely
- It's very useful, though, if a court can get an in-house eDiscovery lawyer involved in certain discovery disputes
- One judge feels it's useful to have a client involved in a hearing
- Another judge imposes strict procedures to get lead counsel or clients involved. If clients can see how very petty many discovery disputes are, they often can go away

Audience Comment: Sometimes *clients* are driving the contention in discovery. Bringing the client in can help get the client to stop driving the contention

Audience Comment: Submit "brief" briefing to the court; it's more effective for addressing the issues.

Audience Comment: 30(b)(6) deposition may require mastery of various topics and could involve IT personnel or counsel if they are sufficiently well versed in a client's information systems protocols

Audience Comment: Interfacing with the judge by the client is a possibility, but outside counsel should ask better questions and insist on getting better information from the client to present to the court

Question for Judges: Where do things stand with boilerplate objections and FRCP 34(b)?

- Nothing has changed
- Something has changed: they used to read "overly broad, vague, burdensome" . . . and now we see "disproportionate"
- Many lawyers are still unaware of the rule changes. They use the same form discovery responses
- One judge feels more strongly against "boilerplate discovery" as opposed to "boilerplate responses"
- One judge feels that general objections should certainly be "dead;" also feels that there is trouble with requesting parties that serve requests with broad definitions and instructions
- The more the courts call out troubling behavior on the boilerplate objections, the more that litigants will learn the issues and how to address problematic objections (and requests)

Audience Comment: Invoke FRCP 26(g) to ensure discovery requests and objections are compliant with the law

- Judge feels FRCP 26(g) should be read by every lawyer, though many do not know about it
- Another judge mentions that sanctions are mandatory for violations of FRCP 26(g); counsel must "stop and think" – which is the mandate of FRCP 26(g) – before signing and serving requests and responses

Question for Judges: What is the biggest "pet peeve" for the judges?

- Discovery can be like a "cancerous growth" when the rules are ignored and then an issue devolves into a nonsensical dispute

Audience Comment re: Instructions/Comments: Most plaintiffs' counsel wants to advance a claim as quickly as possible. Interrogatories seem useless. Useful discovery seems to focus on document requests and depositions.

- No comment from the judges on this.

Audience Question: How to address overly broad instructions and definitions? And then the corresponding reflexive response?

- The reasonable person is always going to have the advantage. Dealing reasonably with overly broad discovery is the effective method. When responding to an overbroad request, provide a reasonable, limited response and chances are the judge will support you.
- Many lawyers serve overly broad discovery or objections for client control purposes.
- It's going to be impossible to change the culture of overbroad requests

- Having overbroad requests should be welcomed; use this opportunity as the responding party to provide a sensible answer.

Audience Question: How to address the "subject to" responses?

- Recent Rule 34 amendment requires disclosure of what documents have been withheld based on specific objections; no more hiding that information
- An effective way of addressing this as a responding party is to delineate in a response where the relevant information is located, which sources will be searched, and perhaps which ones will not be searched

Audience Comment: Beneficial to narrow discovery searches with litigation adversaries

- Judges do not see cases where there are reasonable solutions that have been embraced. Where there are solutions, those matters are not presented to the court.

Audience Question: Concerns about practical application of Federal Rule of Evidence 502(d). What do the judges think about adversaries who seek to place limitations about 502(d) orders?

- Parties and lawyers seems to be terrified of Rule 502(d) orders; very few are willing to rely on 502(d).
- If this conference can write more and provide more instruction on 502(d), the fears might be ameliorated.
- And yet, litigants are afraid of judges circumventing 502(d) and finding waiver, which is why they don't get used as often as it should.

Audience Comment: Does not view 502(d) as an excuse to dump documents on adversaries.

Audience Comment: Believes 502(d) has been weaponized as a method to perversely clawback documents that are key to an adversary's case. Where documents are attached to pleadings or otherwise disclosed for months, it seems unfair to allow for a clawback.

Audience Comment: Can address the "weaponized" issue by imposing a clawback time limit as well as a cost shifting provision in a 502(d) agreement

- Hard to believe for this judge that a document that has been used in deposition or attached as an exhibit can be claimed as privileged
- Also cannot rewrite the rule to change provisions of 502(d) and its application

Audience Comment: California ethics rules may have an impact on the use of 502(d) orders in federal court

Judges responses on all of these 502(d) issues:

- One judge still believes that the merits of 502(d) outweigh the perceived risks associated with the order
- Many lawyers are still unaware that 502(d) even exists
- Local rules also have incorporated 502(d) into the discovery process

- Another judge imposes 502(d) prophylactically into case management orders
- Judges will almost certainly address abuses of 502(d)

Question for Judges: How to address privacy issues, particularly in the criminal realm?

- Collection of digital evidence under the 4th Amendment has a significant issue
- Supreme court has issued a number of cases (*Riley*, *Carpenter*, *Jones*) on the issue of privacy in criminal context. Courts are struggling to balance privacy rights against the third-party doctrine. Think of the mosaic of information that can be gleaned by tracking a person's online purchasing habits.
- Those cases will eventually affect civil discovery
- Third parties have relevant, significant evidence that may affect civil discovery
- Genealogy websites have tremendous stores of electronic data about personal details and characteristics
- Unknown how all of the criminal privacy cases will eventually affect civil cases, but there will be an impact. "The story is yet to be told on how those principles will work themselves into privacy limitations in civil litigation."
- Privacy limitations in social media have no impact on the discoverability of relevant evidence. Absent perhaps the GDPR, there is no limitation on discoverability of evidence.

[Session 8] Optimizing the Attorney-Client Relationship: In-house counsel discuss practical approaches and ethical considerations in handling eDiscovery.

Panel	Claire Hass *Google Inc., Mountain View, CA*
	Heather Kolasinsky *Humana, Louisville, KY*
	Amy Sellars *Walmart, Bentonville, AR*
	Robb D. Snow Jr. *FDIC, Arlington, VA*
Moderator	Niloy Ray *Littler Mendelson PC, Minneapolis, MN*

Ethics Panel

Rule 1.1- Competence. What sort of (in)competence do you see from your outside counsel?

Outside counsel shows a general lack of understanding of their ethical obligations. Law students should be taught ethics focused on eDiscovery to improve the competence of our in-house lawyers and outside counsel. They should be trained to have meetings with people. Tired of people engaging in boilerplate discovery and responses. These problems are not unique or distinct among different groups – see them amongst lawyers at firms of all sizes and levels of sophistication. Problems are across the board. Lawyers everywhere are not aware of the ethical obligations, etc. Our lit support group tries to employ Sedona best practices. The general Bar, however, are just not complying with what I consider to be competence in the eDiscovery realm.

Corporations are businesses first; litigation is secondary. Trying to get resources allocated to litigation is a hurdle for in-house counsel. Outside counsel doesn't always understand the big rolling machine of a company. The recent incompetence of firms – for example, the basics of failing to run conflicts correctly – a very basic thing – happens at firms everywhere. Big law firms are really screwing up conflicts searches. Generally, re: security – site security and cyber security measures – firms are dropping the ball as to both of these things.

Pain point we see the most is making sure our law firms are keeping our data confidential; segregating our data from the law firm's data. We are really concerned about cyber security. Law firms are targets and we don't want our data stored with them.

Paradigm that eDiscovery is separate from the law firm.

eDiscovery counsel – you can't rely on a team that you are not bringing into a case until things have gone south. Put differently, all litigators need to be competent in eDiscovery, not just one. And in-house counsel worries about the level of competence of the team. We want to know who all the lawyers are and what their experience is.

With firms – security gets put in a corner; eDiscovery gets put in a corner.

If you haven't trained your associates not to share client data and informed them that what they do personally can really endanger security – you are not meeting your ethical obligations. Untrained associates; untrained people = huge risk … People who aren't focusing on security and don't understand the dangers of phishing and who will click on anything. Cyber and eDiscovery do not need to be put in the corner; should be front and center.

Law firms are targets; clients are crown jewels. What is the adversary doing to make sure the documents you are producing are safe?

Suspicious activity reports filed by banks on customers. We provide our counsel with double authentication into a vendor. Counsel doesn't get print/ download capabilities. Outside counsel doing investigation and litigation. Example: they were downloading suspicious activity reports or other documents that were prohibited by statute from being shared. Lawyers were downloading them and taking them. Outside counsel were always the one doing it; cannot do that. Client had to protect itself from the law firms.

In-house budgets have gone up since the Rules amendments; more expensive for outside counsel to respond; takes more time to be specific. Data sizes have been increased. Also, business is good, so litigation is good. Trends change; we have done a lot to invest in technology to lower the costs. Specificity for responses; we are doing a lot of investigative work internally so tailoring the answers is just another piece of that.

Budgets have increased on these subjects; costs have gone up for some companies. But that's because business is good, so litigation is booming. And that just happens.

After 2015 amendments, got boilerplate responses from outside counsel and had to admonish outside counsel. We've had virtually no motions practice for a few years, because we make sure our outside counsel complies with the Rules and we have standard ESI protocols, protective orders, data specs, meet and confers. We generally try to wear the white hat. Proportionality has resulted in a decrease in the amount of ESI, so our costs are less.

Ethical obligation to keep client information/data confidential and secure. What does your better counsel do to help you?

One of the biggest challenges is having outside counsel understand the level of security we expect with our data. Carefully vet vendors and security protocols etc. Outside counsel will interact with vendors, but then they download stuff and stick it on their networks, which do not meet our security standards.

We prefer receiving stuff in links rather than attachments.

We expect outside counsel to operate through our eDiscovery vendor. Our outside counsel took our documents and put them in other places. Totally incompetent and angry about it. If our vendor is not meeting your needs, tell us. We need to know. We will help you work through it. Don't circumvent our protocols and what we are trying to achieve.

To the extent you can evangelize this in your workplaces, I need my in-house counsel to carry the same message about security and technology competence. Need to be messaging the

importance of individual knowledge of good security practices; we expect you to do this through the vendor. You don't make that production yourself or through your firm. Say them repeatedly.

This is a huge deal. We are in full lockdown mode with our data. Risks are usually with older and younger generations. No one is allowed to print and download until deposition time. We have requirements with vendors – vetted by security folks. Can be very frustrating because it takes 6-8 months to get through the security gauntlet. This is a top, top priority for government agencies and companies.

When you retain outside counsel, how thoroughly do you vet their security and response measures?

We try to put firms through standard audit process/vendors. We had to abandon it because law firms were so insecure. They ALL failed; epic failure of firms to meet industry standards.

We tried to go through standard questionnaires, site visits, etc. Size and IT functionality in small firms did not match up.

My centralized vendor's interactions with the computers at the other law firms are something that always troubles us because we are always worried about the firms being the weak links. WG6 work will be helpful.

We wouldn't have firms to work with if we required them to comply with our security standards. We have less stringent guidelines for firms. Want to give opportunities, but if you are a firm of a certain size, it's a challenge.

If you get to where your confidential info is being used in litigation and going to someone who is not your vendor, what do you expect of outside counsel to make sure your data is safe?

At some point you are turning your docs to the other side; you have to rely on the protective order issued and hope for the best. Courts will not require that the protective order include encryption or require encryption. They won't keep our data safe to our standards. Judges don't seem to care about our data.

There are people (opposing parties) out there who refuse to use a review tool; we offer to host the data for them, and sometimes they are receptive. We explain to them we will be walled off and can't see their data. But difficult to get other side to agree to this.

Duty of supervision – the question is this – we have to apportion or delegate –how do you supervise?

Depends on the definition of supervision. Lots of teams are involved in each matter – vendor team, outside counsel teams; KNOW WHO IS ON YOUR TEAM. Key thing. My outside counsel roster changes without realizing it. Outside counsel moves lawyers around and I really don't like it. Same thing happens with vendors. I know my in-house people and can help with their level of confidence. Sometimes I have to delegate and there is no choice. At law firms and vendors, I don't know who the people are. When you add people to my team, tell me who they are and what their experience is, and why they are there and how they are going to help me. Have a roster from every entity you are touching. At a bare minimum if you are outside counsel

and you have a lot of people on it, be very clear about what each person's role is and what their capabilities are. I see a lot of sloppiness in that. But keep me apprised. Tell me who these people are and what their role is. Maybe you can make better decisions about certain things. Always inform the client about changes, including to the roster. Errors will happen, but why was this person performing this task? Is your level of supervision right?

How are you making these delegation decisions? Teams – we have to have a primary person. What is the training? What is the experience?

When you are putting a team together, are diversity initiatives important? The struggle I am having as outside counsel is once you have the team put together you have to throw more bodies on the project. When you throw more bodies on the team and because we need more competent people on the job, we can't always fit in your parameters.

When I do outside counsel reviews, I tell them: you may not be able to show me diversity tangibly, but I am looking holistically. I want to know based on the group report. I need to know what the diversity is in the pipeline. Show me your recruiting plan. Show me mentoring. Show me giving people a chance. Competency can be taught. Diversity of thought and experience cannot. Giving me a myopic experience and people who are one kind of person does not help me evaluate a case in a broad way.

You may need to train people and coach them. You cannot continue to grow unless you are uncomfortable and constantly changing. Give them a chance to try and fail and do your best. I want good intention and you to be pushing that ball forward for me. We try to and strive to hire folks who have varying skills and abilities.

Don't have mandates, but we try really hard to promote diversity in our vendor selection. Seek minority businesses to work with.

When you start to talk about diversity and you dig in, you are talking about the lack of access to education for socioeconomic classes. The best minority candidates are hard to get. You need to think about how you are reaching back to help people develop. Think further back than law school. Don't put people in situations where they are destined to fail.

Diversity goes beyond the color of your skin; where are you from, are you a vet, etc?

Sometimes you have to throw something out to see what you get back. Try doing things differently. Show us your best intentions. Do what you can.

The litigation team in my company is the most diverse group. When law firms say they can't do diversity, it falls on deaf ears for me. I have 80 percent women; non-Caucasian is 40 percent. We walk the walk. Of course, we have work life balance. In this day and age, it's not ok to say this is the way it's always been. We need variation of opinion. People are intolerant to inaction in the present climate. Do something.

How does technological competence drive a lawyer's duties?

If you don't know who to use a computer or make a pivot table, I don't want you near my stuff. How do you make the law department run in a better way? I have to show efficiencies; how we get through this quicker; I have to explain why I am preserving data. I believe expedited

litigation is generally to the benefit of a corporate client. There are nuances there, but if you do not have the right people who are technically competent to talk about the right issues – you are not doing your client a service and you are hurting your client.

This is the Achilles heel of our profession. We are 30 years into a great revolution. Fortunate to live in this era, but we are still doing search terms. We are adverse to learning new tricks; people don't want to use TAR. It could be malpractice not to use TAR. Lawyers are way behind the times. They don't know what they don't know. We try to get around it. As outside counsel – small or sophisticated firm – if you want to make yourself valuable, learn technology and how to be efficient at it and be strategic. You miss out on that opportunity if you are not taking advantage of it.

I caution again – using TAR can be a problem. It can be difficult. Make sure you are doing it the right way – people are not comfortable with BrainSpace or TAR or various tools that are out there. Or analytics. Let us help you learn this.

Go to a CLE – go to Sedona – make yourself more competent. People come to us as the train is derailing – help people with what they need to understand.

We see outside counsel use a specific platform and then they throw young associates at it but there is no partner overseeing them. The work gets done over and over again because the partner isn't involved, and it gets more expensive. There is an assumption that associates understand data. They do not. They are used to things just appearing on their phone. They don't know how to do anything with technology. They are not used to what we do in eDiscovery. They are not trained to think about tables, columns, rows, analytics, and slicing and dicing data. Keywords don't get you there all the time – they don't understand. They don't know how important it is to sample.

In the next 40 years there will be a huge shift in the practice of law. A lawyer is not a data scientist. But we need to think about what our hiring mix is. Diversity is a big deal. Try to teach people. Legal education has to catch up. We mentor people. We give them stuff. On the tech side, I make sure my young lawyers get their feet dirty.

Actively mentor and promote. Find the data scientist.

All lawyers need to know eDiscovery. You have to deal with electronic documents all the time. How do we convince law schools of that?

We are in the bubble. The last of our colleagues are still caught in the last century. You recruit from law schools. Tell them you need students who have this training. Give me students with this on your resume. If you keep saying, "Give me the people with a 4.0," then you aren't getting the people, or asking the for the people, who have cyber security, privacy, and eDiscovery experience.

Maybe you don't have all those people now, but are you doing something to invest in an opportunity to have these people later?

If lawyers don't understand eDiscovery technology and aren't as competent as they need to be, what do we do with AI and Blockchain?

Help. It's not eDiscovery, but there will be overlap.

Recently, I wanted to understand what Blockhain is. I didn't understand it – was trying to learn it and how it overlapped with the law. It's a block chained together. Who owns it at this point and who is responsible at this point, etc.? I was reading all this stuff. Local business journal quoted a scientist knowledgeable about Blockchain. I emailed them and got in touch with the guy and asked, "You know about Blockchain?"; he explained it to me and now I get it. We are trying to create a medical insurance Blockchain (as an industry).

You can read all you want on Blockchain, but I need to see it and understand it. Can you show me the interface and how the data comes out? What's the deal – can we get it – for how long can we get it? There are so many questions. Who has possession, custody, and control? Will we accept print screens? What do we do? People are using it for food safety. This is challenging for the business to understand the legal issues. The people developing it get it. But how do you explain it to politicians and legislators and outside counsel and judges? How do you explain it to anyone?

What is a good format of production for Blockchain?

People are developing Blockchain technology for medical purposes, and for the DMV. People are trying hard to develop reporting capabilities for Blockchain.

It's more than just producing. How do you request Blockchain and cryptocurrency info? How do you make a document request for cryptocurrency? How do you get evidence of cryptocurrency? How do you figure out how to ask these questions? How do you look at these esoteric things? How do you get a report on it?

We need to be held to a higher standard. The level of incompetence we see daily [from lawyers] is unacceptable for a professional. We shouldn't have a level of 10 percent of folks who are high performers with everyone else below that.

Competence plays into transparency and cooperation. Can't be transparent or cooperate about things you do not know. We have a lack of competence and then a lack of competence about how you resolve it. They are linked and working on any of them helps resolve all of them.

[Session 9] Evolving Challenges: Communications in the cloud.

Panel	Andrea L. D'Ambra *Norton Rose Fulbright US LLP, New York, NY*
	Paul H, McVoy *Meta-e Discovery*
Moderator	Paul D. Weiner *Littler Mendelson PC, Philadelphia, PA*

- Cloud is taking over IT. Total cloud market is huge and growing
    - Controlling costs is compelling more and more orgs move to the cloud — server, software, support personnel, etc.
    - Cloud communications (CC) has only existed for the past 12 years, came from Amazon excess capacity. Azure growing fast in market share. Other smaller providers expanding, too.
    - On demand: Advantageous to be able to add whatever components/tools you need, as you need them, without long-term commitments.
- Discussion of some of the new vocabulary associated with the modern cloud. Important to understand for eDiscovery purposes in conducting custodian interviews, doing searches, composing and responding to requests, etc.
    - Different CC providers use different terms to describe their buckets, objects, and keys
    - Blob = block blobs, page blobs, append blobs
    - Virtualization
    - Containerization
    - Function as a service
    - Hyper-converged
- Legal risks associated with virtualization and containerization
    - Your data is in someone else's hands
    - SaaS agreement terms are key to understand. What are rights & responsibilities?
- Trouble pinning vendors to responsibility. They try to pass it to AWS, etc., with whom you cannot negotiate.
- Yes, that may be the case, have to take informed risks.
- What about stories of foreign government installing backdoors to some of these services?
- Have to look under the hood and test the vendors you use. May negotiate, or decide not to use for certain data. Can require penetration testing of vendors, look at incident response plan, etc.

- Note that Office 365 does not have disaster recovery back up and some states require back up of client data in cloud in case vendor/server goes away. So, you have to figure out a way to do that or not use Office 365. Not specific with how, but need to provide replication for some data.
- Some clients demand notice and authorization before using cloud for their data. May also need to provide for back-up in case CC provider implodes.
- Why doesn't archiving get around this?
- Some firms and companies don't like archiving; prefer back-up only because archives keep too much
- Do CC providers have some metadata about what is stored there that the client is not privy to?
- Depends. Some yes, some no. Can also buy components in some platforms to timely conduct e-discovery functions
- Contract provisions to consider, e.g.:
    - Provider has no ownership interest
    - Enforceable obligation to preserve security
    - Receive notice if request from government for access
- Sedona should partner with the tech transaction pros to add guidance
- Securing protected data in U.S. legal proceedings – protective orders
    - See Weiner-Backhouse paper done for WG6
    - Protective orders need to speak to security issues, notification, cooperation, etc.
    - See template language for use in protective orders
- WG11 has draft paper on data security and privacy in civil litigation that picks up on Weiner/Backhouse paper and template protective order
- Noting new ABA Formal Opinion 483 regarding lawyer obligations after an electronic data breach or cyber attack
- Ethical considerations when dealing with the Cloud
    - Many local bar associations have now given opinions; say, yes, you can use cloud but need to take "reasonable precautions" but don't really define "reasonable"
    - Some also say you have to tell client that you are using cloud for their data and advise of the risks
    - Need to do due diligence and understand what your vendor is doing
- Discussion of *Harleyville Ins. Co*. case

    - Waiver of atty-client privilege by company using Box to share data with opposing counsel, but then used it again for internal sharing of privileged material not realizing that opposing counsel still had access via the link sent earlier

- Practical recommendations for using cloud
    - Zip and encrypt files shared through cloud
    - Do not send link and password in same email
    - Understand agreements you are signing with cloud providers
    - Get info sec language into protective orders