The Sedona Conference Working Group 1 on Electronic Document Retention & Production 2019 Midyear Meeting Thursday–Friday, May 2–3, 2019 The Ballantyne Hotel, Charlotte, NC

The Sedona Conference wishes to acknowledge and thank the following members for volunteering to take notes at the WG1 Midyear 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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Contents

[Session 1] eDiscovery Case Law Update

Panel	Dawson Horn *AIG, New York, NY*
	Leeanne Mancari *DLA Piper LLP, Los Angeles, CA*
Moderator	Kenneth J. Withers *The Sedona Conference, Phoenix, AZ*

Duty of Preservation: The Trigger

In re Abilify (Aripiprazole) Product Liability Litigation, No. 16-MD-2734, 2018 WL 4856767 (N.D. Fla. Oct. 5, 2018)

- Alleged drug contributed to or caused pathological gambling
- Auto deletion of email subjected custodians
- No duty to preserve, must be contemplated, reasonable anticipation, credible opportunity
- Alleged should have preserved because of lawsuits and media attention, medical literature falls short to require preservation, drugs from same family
- Drug was from same family as other drugs alleged
- No intent because of auto delete, court says inherent authority for sanction requires intent to delete

Preservation: "Reasonable Steps"

Radiologix v. Radiology and Nuclear Medicine, No. 15-4927, 2019 WL 354972 (D. Kan. Jan. 29, 2019)

- Reasonable steps do not require perfection
- Plaintiff did not need formal legal hold citing Sedona, reasonable steps do not necessarily require a formal legal hold, also no intent to deprive under FRCP 37(e), no strict liability standard

Franklin v. Howard Brown Health Center, No. 17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018); *report and recommendation adopted*, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018)

- Hostile work environment case; plaintiff requests text, email, and instant messages
- Allowed employees to decide on own what was responsive; instant messages saved in outlook folder for two years but gone by time of litigation because litigant did not understand how it worked
- Unable to determine whether acted with intent to deprive, MJ recommends to D court judge to provide evidence and instruct the jury to find intent

Paisley Park Enters. v. Boxill, No. 0:17-cv-01212, 2019 WL 1036058 (D. Minn. Mar. 5, 2019)

- Text messages are not novel or new
- Alleged Prince music released without permission of estate
- Text messages were integral and relevant to case, auto delete running on phone and messages no longer available, also phones discarded
- Such messages require only simple steps such as turning off auto delete
- Discarding of phone intentional act
- In today's world, Court holds must recognize importance of texts messages. Not novel or new or emerging.

NuVasive, Inc. v. Kormanis, 1:18-CV-282, 2019 WL 1171486 (M.D.N.C. March 13, 2019); *report and recommendation adopted*, 2019 WL 1418145 (M.D.N.C. March 29, 2019)

- Kormanis enabled 30-day auto destruction feature on iphone for text messages but did not know when or how, did not have cloud backup
- Evidence suggests intent to deprive
- Must know how phone works and to preserve text messages.
- Attorneys must understand new and emerging applications
- Texts are like emails 20 years ago

Cooperation

SEC v. Rio Tinto PLC, No. 1:17-cv-7994 (S.D.N.Y. Apr. 5, 2019)

- Court advises parties should work cooperatively by adopting Sedona Cooperation Proclamation and follow associated library of Sedona memoranda

Entrata, Inc. v. Yardi Systems, Inc., No. 2:15-cv-00102, 2018 WL 5470454 (D. Utah Oct. 29, 2018)

- Cited Judge Peck Law Tech News article to seek agreement on TAR or proceed to court for guidance

Proportionality

Lareau v. Northwestern Medical Center, No. 2:17-cv-81, 2019 WL 1379872 (D. Vt. Mar. 27, 2019)

- Could not agree on number of search terms, used 8 terms which produced a significant number of insignificant documents. Much time spent reviewing insignificant documents.
- Court says cost of review outweighs benefit, burden

Corel Software, LLC, v. Microsoft Corporation, No. 15-CV-00528, 2018 WL 4855268 (D. Utah Oct. 5, 2018)

- Patent Infringement by Microsoft against Corel
- Def argued further production was not proportional although had produced some prior documents on telemetry, no particular evidence or showing of burden although raised GDPR
- The data sought was directly relevant to the claims and defenses in the case and the defendant's resources "weigh against a finding that the information sought by [plaintiff] is unduly burdensome."

Henson v. Turn, No. 15-cv-01497, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018)

- Privacy as a Non-monetary proportionality factor used to curtail discovery
- Wanted all browser history and not limited to claims and defenses

Proportionality and MIDPP

The "Mandatory Initial Discovery Pilot Program" (MIDPP) is in effect in Districts of Arizona and Northern Illinois

- Mandatory discovery requirement which compress time of discovery and case

Life After Hate, Inc. a/k/a ExitUSA v. Free Radicals Project, Inc., No. 18 C 6967 (N.D. Ill. Jan. 10, 2019)

- Court grants Protective Order in trademark case for broad discovery requests
- Limited to discovery against two claims, discovery can be phased even under MIDPP

Brennan v. New 4125 LLC, Inc., No. CV-18-01717, 2019 WL 1150799 (D. Ariz. Mar. 13, 2019)

- Did not understand Text messages were required to be produced under MIDPP
- Produced screen shots of text messages in case that they failed to produce in MIDPP; dismissed complaint without prejudice to enable filing of amended complaint, discovery was not adequate although complaint was sufficient

Non-party Discovery

Zeleny v. Brown, No. 17-cv-07357, 2019 WL 1084177 (N.D. Cal. Mar. 7, 2019)

- Section 1983 case against city and police department for harassing plaintiff during protesting
- Sought communications between city and NEA who was non-party
- NEA argues burdensome to search through emails for communications with city

Privacy

D'Amico Dry D.A.C. v. Nikka Finance, Inc., CA 18-0284, 2018 WL 5116094 (S.D. Ala. Oct. 19, 2018)

- What will be the effect of expanded privacy regulations on civil discovery? Have people been seeing "privacy" raised as a proportionality consideration or bar to discovery?
- Admiralty case
- Argued no video of deposition permitted under GDPR of Greek witness
- Court says deposition was properly noticed and court permitted to go forward but court designated transcript and video as confidential
- Privacy interests will not outweigh where a party is in litigation
- Audience reports that increase in objections being made to discovery on the basis of privacy

Rule 34 Responses and Objections

Futreal v. Ringle, No. 7:18-CV-00029, 2019 WL 137587 (E.D.N.C. Jan 7, 2019)

- Hit-and-run drunk driving case
- Prior offender has ignition interlock but rented car from Enterprise
- Should not make general privilege and other objections without informing that withholding documents on that basis
- Discussion that attorneys should not use general objections and must rid files of old templates

Rule 30(b)(6) Depositions

Proposed amendment to the Federal Rules of Civil Procedure, Rule 30(b)(6):

"Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify."

ICTSI Oregon, Inc. v. Int'l Longshore and Warehouse Union, No. 3:12-cv-1058, 2019 WL 1500698 (D. Ore. April 5, 2019)

- Labor dispute in unlawful boycotting activities
- Defendant witness refused to answer questions regarding litigation hold when deposed

- Court held Plaintiff did not include a mention of litigation hold in notice, must be listed as a topic

Defense of Process/Sedona Principle 6

Disney Enterprises, Inc. v. VidAngel Inc., No.: CV 16-4109, 2019 WL 1423767 (C.D. Cal. Mar. 18, 2019)

- Court holds not thorough production, so court instructs how to fix the problem and what party must do. Court saw that party was trying and gave no sanction--just instructions how to fix problem

FRE 502: Why isn't everyone using it?

Ranger Construction Ind., Inc. v. Allied World National Assurance Co., No. 17-81226-CIV, 2019 WL 436555 (S.D. Fla. Feb. 5, 2019)

- Documents produced inadvertently that were privileged and since no 502(d) order, went through 502(b) analysis
- Court surprised that the parties did not enter into 502(d) order and encourages such order in opinion

In re Qualcomm Litigation, 17-cv-00108, 2018 WL 6617294 (S.D. Cal. Dec. 18, 2018)

- Case concerns failure to present adequate 502(b) support

Arconic, Inc. v. Novelis, Inc., No. 17-1434, 2019 WL 911417 (W.D. Pa. Feb. 26, 2019)

- Arconic clawback many documents so not using sufficient diligence
- MJ proposes to revoke order in future
- But Judge Conti stressed importance of order and needed to know more information before would revoke order in future

In re Testosterone Replacement Therapy Products Liability Litigation, 301 F. Supp. 3d 917 (N.D. Ill. 2018)

- Party argues inadvertent and unintentional language insertion in 502(d) order reasserts 502(b) analysis, but court says no, that 502(d) intends otherwise despite language
- Inadvertent and unintentional language in 502(d) order confuses the issue and should not be included

Costs and Cost-shifting

Camesi, et al. v. University of Pittsburgh Medical Center, 753 Fed. Appx. 135 (3d Cir. 2018)

- Copying costs from ESI vendor as taxable costs, converting native files to tiff and loading to vendor document review platform, court convinced copying costs and ordered taxable

Spoliation – State Courts

Rule 37(e) and Circumstantial Evidence

Worldpay, US, Inc. v. Haydon, No. 17-cv-4179, 2018 WL 5977926 (N.D. Ill. Nov.14, 2018)

- Defendant employee creates new domain and moves data to new domain.
- Not obvious intent to shut down an email account is an intent to be deleted or that did so for purpose of hiding adverse information. Seems that court will not speculate on intent.

Rule 37(e) and Circumstantial Evidence

Flair Airlines, Inc. v. Gregor LLC, No: 18 C 2023, 2019 WL 1465736 (N.D. Ill. Apr. 3, 2019)

- Videos and emails for call center being recorded on employees
- No evidence that loss of ESI was intentional

[Session 2] Managing eDiscovery in Small Cases

Panel	Hon. Jerome B. Abrams *State District Court Judge, First Judicial District of Minnesota, Hastings, MN*
	Kevin M. Clark *Thompson & Knight LLP, Dallas, TX*
	Trena M. Patton *Epiq, Charlotte, NC*
	Michael J. Scimone *Outten & Golden LLP, New York, NY*
Moderator	Greg M. Kohn *Nagel Rice, LLP, Roseland, NJ*

Note: Please review draft and submit any comments to comments@sedonaconference.org by June 3.

WHAT IS A SMALL CASE?

- Polling audience on what a small case is, $$$, complexity, volume of ESI, other factors. Polling on whether "small cases" should be treated differently in terms of eDiscovery
- Money alone as a factor for determining what is a small case is not appropriate
- In truth, it doesn't matter unless there is a process in place that treats certain cases differently in terms of discovery timing and obligations
- If you can presumptively identify what the case is going to need at the outset, that better frames how discovery can be tailored to it.
- Principles of efficiency and cost-efficiency apply more forcefully in small cases
- Test: "If you are reading this commentary, then you probably think you have small case."
- Goes to proportionality. This is really about "low-cost" discovery, not so much "small case" discovery.
- Volume of cases may be a factor, too. What if you have hundreds of small cases? Collectively may be very large.
- Proportionality is a red herring. Dollar amount at stake is not as significant as the volume of the ESI. Focusing on $$$ alone does not get to the heart of the matter. Maybe call it "discovery lite"?
- Very easy to get too lawyer-centric on this. Instead, think about the regular folks who come seeking justice. Part of this may be thinking about how do we get to a decision quicker? That saves both cost and delivers justice sooner. Maybe the default should be that all cases are small with limited discovery unless the parties can justify that more is needed?

- Complexity of the case may be the factor. Is it a typical case for the client? Complexity and repeatability make cases "small" and routine, whereas others that are more complex and atypical may be "large"
- Should parties complete a court checklist for complexity at the outset of a case? $ Stakes? # of Witnesses? Unusual ESI? Any Experts? Court could then make an assessment of complexity and what discovery and process is then needed.
- Access to justice is a good point. At what point do even small cases become so expensive that parties seek alternative paths to obtain justice other than the courts? Online dispute resolution, etc. That's a problem.
- Kind of like pornography: "You'll know a small case when you see it."
- Let's come up with a default setting that all cases are small and presumption that discovery very limited until parties demonstrate that more is justified.
- Should the evidentiary standards be relaxed in "lite" cases? (e.g. Showing judge text message on phone). Can that reduce the burden?

TIPS AND TRICKS FOR THE BAR

- Starts with the existing body of Sedona work product, The Sedona Principles 3rd Edition, The Sedona Conference Cooperation Proclamation, etc.
- Suggestions may seem obvious to those in the Sedona bubble, but this is aimed at those outside the bubble
- Should preservation be treated differently in a small case?
    - It is about finding the right balance
    - This is a really important paper. But concern is that it doesn't streamline enough and jumps to things that don't sound like small cases, e.g. IT rep, advanced analytics, tech vendors. Should be heavier on proportionality analysis. Tips and tricks caveat should not start with involving in-person meeting with IT rep.
- Meet & confer process
    - Need to implement some kind of default process? How should it be tailored to a small case?
    - Are mandatory initial disclosures a possible way of streamlining this process? Reduce need for written discovery, disputes, etc.
- Proportionality
    - Is it a different analysis in a small case?
    - Yes, it is <u>all</u> about proportionality in a small case

  - The rule and factors don't change but they apply more forcefully with a simple case

TIPS AND TRICKS FOR THE BENCH

- The more time a judge spends up front the less the judge will spend down the road. Evaluate early.
- Triage. AI-tool being developed to help with this analysis

EFFECTIVE USE OF E-DISCOVERY TECHNOLOGY IN SMALL CASES

- Should redefine what we think of as "tools." Not always a software tool that is designed for collection, review, etc. Should expand definition to whatever you have in-hand. Mention Facebook and Gmail exporting functions, for example. Note that there is likely not any BYOD, just "D".
- Tool can be whatever you think it is. Should discuss role of the attorney in the authentication process. Also call out privacy issues. Example of a "tool" can be using the sorting function on text messages on a phone. Focus on appreciating what can be done with what you already have. It is okay to be a little messy if you are getting to a prompt and appropriate outcome.
- Should there be different tech standards or best practices for small cases? Parties need to be more reasonable in their expectations. Doesn't have to be perfect.
- May have started to evolve to point where it is now viewed as okay to use Dr. Phone for $20 instead of Encase for $$$$$
- There's more and more inexpensive tech out there that delivers a result that is "good enough"
- When dealing with screen shots and the like, watch out for fabrication of text messages, though. May have a challenge if reliability or authentication is an issue.
- Make sense to give more concrete examples of what you can do with what you have?
- Real problem is not cost but a lack of education. (For example, native format is cheap, but many do not understand how to handle it.) Be proactive. Talk to other side about what you need and how you want it. Change tone of paper to be more directed to less-tech-informed lawyers. It is about understanding what you need and what can be done to get it.

[Session 3] Explore the Fear and Rising Prominence of Artificial Intelligence and Its Use in Litigation

Panel	Aaron D. Crews *Littler Mendelson P.C., Sacramento, CA*
	Nicolas Economou *H5, New York, NY*
	Tara S. Emory *Driven, Inc., Falls Church, VA*
	Hon. Katharine H. Parker *U.S. Magistrate Judge, Southern District of New York, New York, NY*
Moderator	Amy E. Sellars *Walmart, Bentonville, AR*

What is AI?

- Neither artificial nor intelligent
- Augmented intelligence
- Not artificial - huge amount of human judgment and consultation

AI in litigation

- Document review - perfection is not the standard
- Courts are receptive to parties using TAR
- Use when it makes sense

AI in other areas of litigation

- AI use in creating pleadings, evaluation of case (predictive tools), evaluate jury members
- Ross research tool - how is it changing law practice? Doesn't do what it purports to do. Opens window to future
- Inputs are the hardest part of AI - publicly available inputs are not enough
- Snake oil is high in this space, but when they work, they are great
- Batson challenge issues with regard to juror selection issues
- 2 versions of what is out there - public info, or create your own based on your data points so the quality might be better and work well

Is there an obligation to use better process if it exists?

- Doc review - auto vs. manual
- Evaluation drives innovation - if you don't know what to evaluate in order to know which tool to use - issues with cost of time to review and compare tools

- How is better defined? Faster and cheaper or improved results
- Tools exist on a spectrum - with human involvement (human decisions, full computer decisions)
- TAR case law unhelpful with moving towards technology adoption

AI tools beyond litigation

- Contract generation to then review and create business policy generation - going after work completed by junior attorneys
- Budgeting tools - see in real time - dashboard is a communication method with your client - billable hour issue requires these type of tools
- Proactively do compliance monitoring
- Outputs of algorithms is the human learning – spellcheck example - fundamental change in the legal industry and humans required to do more higher value work - the way we delegate the work needs to change
- Criminal context - scares people- panel wanted to avoid – neuro network – black box and unable to see within the middle before it comes out the other end - bias within off the shelf tools in a criminal context - Maslow's hierarchy - if it touches the top it should be transparent - here is what happened and why - at the other end - I don't care that Netflix keeps recommending My Little Pony.
- WG11 - paper on algorithm transparency - look at algorithm outputs with at least a skeptical eye - some level of bias testing to check outputs
- Human bias - Israeli study about parole and lunch
- Hiring - HR struggle to find the right people - so this is where you will see these tools - years of decision making to train tools - predicting tsunami of class action litigation - educating EEOC Chair on this - prioritization of candidates - asking for a safe-harbor around use of these tools - as long as solve the problem then you don't get sued - help improve adoption
- NY city using AI for building code violations - moved success rate for prioritization from 12% to 80%

Implications for professional conduct and responsibility

- Duty of competence - counsel keep abreast of technology to service one's clients
- FRCP Rule 1 - efficiency
- Impact on profession: 1. Growth of specialist; 2. Actual use of tools and evaluation; and 3. Regular lawyers - antitrust example

- Counselling clients in advance on issues - knowing when to ask for help - how do you help the business

[Session 4] ESI Evidence & Admissibility

Panel	Endel Kolde *King County Prosecutor's Office, Civil Division, Seattle, WA*
	Hon. Thomas I. Vanaskie (ret.) *JAMS, Philadelphia, PA*
	Kristin Walinski *Scribe, Richmond, VA*
	Martin E. Wolf *Gordon, Wolf & Carney, Chtd., Towson, MD*
Moderator	Kevin F. Brady *Redgrave LLP, Chantilly, VA*

Note: Please review draft and submit any comments to comments@sedonaconference.org by June 3.

Authentication vs. Admissibility

- Read Loraine - still key case
- Hearsay is often the barrier
- More criminal cases than civil cases in authentication
- Care about who wrote the communication

ESI Types

- Apps
- Telematics

US v. Safavian

- Pre-iPhone case
- Act of forwarding email could be considered an adoption

Lamb v. State

- Criminals load video of committing crime to Facebook – not on private settings
- Victims testified
- Opinion says they didn't need device, maker of video-authenticated through circumstantial evidence

Ephemeral Communication

- Snapchat usage by 71% of 18 to 24 year-olds
- Delete after very short time

- How do you do screen capture? there are apps, lots of google posts about how to defeat snapchat
- Confide: screenshot proof messaging - very difficult for recipient to capture message; redacted text - take a video with a second device
- WG6 working on ephemeral data
- Does the fact that people use ephemeral communication get you into 37(e) territory?

Website Content

- Dynamic programing language - usually JavaScript – example - ESPN customization
- Wayback Machine - digital archive of the web - not a forensic collection method
- ISO 28500 WARC

Group Collaboration Tools

- Unstructured bulletin board
- Free version of Slack only keeps 10,000 messages - paid version gives some retention but difficult to deal with

Rule 902(14)

- If authenticated by a certification with advance notice to opposing party
- Problem is anticipating authentication at the time of collection (hash value logs and chain of custody)
- MD5 hash has been broken
- SHA3 - seems to be the most secure

Understanding Limits of Technology - Blockchain

- Technology still the same - hashing, encryption
- Blockchain definition
- Strengths of blockchain: not vulnerable to attack, decentralized, strong chain of custody and establishes identity, manipulation and completeness
- Weaknesses of blockchain: human verification of input, shares all vulnerabilities of technology on which it relies

Cases with Blockchain

- United States v. Ulbricht
- Alibaba Grp v. Alibabacoin Found
- Usage in land transactions

Vermont Law - 12 Vt. Stat. Ann. Sec. 1913

- Blockchain record is authentic and accompanied by declaration is a business record

[Session 5] Moving Data Overseas: Update on Cross-border Transfer Mechanisms

Panel	Denise E. Backhouse *Littler Mendelson P.C., New York, NY*
	Taylor Hoffman *Swiss Re, Armonk, NY*
	David C. Shonka *Redgrave LLP, Chantilly, VA*
Moderator	Jeane A. Thomas *Crowell & Moring LLP, Washington, DC*

- Will talk about developments using old transfer mechanisms, then about new methods using GDPR. Then about discovery mechanisms that foreign parties are using to get discovery in the U.S. for use in foreign proceedings.
- Hague Convention of 1970 a means of providing international transfer. Use to transfer between signatories when there are otherwise blocking statutes. Problem is Aerospatiale case under which most courts have found that U.S. discovery trumps foreign limitations, and therefore allows circumvention of Hague Convention. The Hague Convention has been dead in the water since then.
- Parties can put in place a private commissioner under the Hague Convention to conduct discovery. There was a case out of Arizona which found that the parties could put this commissioner process in place to get discovery out of France. The case settled before the whole process went forward.
- Also a case in the SDNY under the directive that preceded the GDPR in which discovery was obtained in France through a commissioner procedure.
- Hague Convention provides procedures that can be employed without risking civil or criminal violation in foreign jurisdictions.
- Problem with the Hague Convention procedures is that the bureaucracy involved slows things down tremendously.
- To the extent you don't have signatories to the Convention involved, you can still use letters rogatory.
- About half of the audience deals regularly with cross-border transfers and about the same percentage deals with European data.
- Privacy shield: What preceded it was a permission to transfer to jurisdictions that provide the same.
- Safe harbor allowed data to be transferred outside of privacy shield, until Schrems in which the safe harbor was struck down. Importantly, the flaws the court found did not

deal with the transfer mechanisms but the unavailability of a judicial oversight process in the EU.

- Led to the privacy shield being negotiated. On the U.S. end, allows and provides for mediation.
- Parties can certify to the Dept. of Commerce that they will comply with the privacy shield's principles. Provides for the protection of the data once it is transferred to the U.S. You have to specify the purpose of the transfer in the privacy shield documents. The companies certified under privacy shield are all identified on a website. There are about 4,000 of them today. Among them are only about four law firms. Raises the question about how law firms are getting documents from the EU. The privacy shield is enforced by the FTC. Basis for the enforcement is that you have deceived consumers about your protection of their data.
- A company or law firm that receives data from the EU pursuant to the privacy shield is in possession of data from the EU and cannot then freely transfer onward the data. All the privacy shield does is to allow the data to be transferred. Does not allow you to do other things with it.
- Other transfer mechanisms: Model contract clauses and derogations (exceptions), and binding corporate rules.
- Downsides of model contract clauses are that they only allow transfer and don't allow onward transfer, and a level of uncertainty regarding future legality.
- BCRs are very difficult to get and very few have been obtained. Also don't allow onward transfer and the same questions about future legality.
- Max Schrems continues to be active and to challenge these mechanisms in various jurisdictions in Europe.
- There has been a lot of activity and potential lawsuits to attack the current regime of procedures. Recent ruling in Europe that Facebook could be sued without going through the DPA to do it. Attacks on Irish data protection authority for its handling of Facebook data.
- WG11 is working on a paper regarding court enforcement of judgments and rulings under GDPR. Hoping for publication this year.
- None of the mechanisms we've discussed so far are perfect in the litigation context.
- Derogations: A DPA representative has said that we need to treat the derogations as not the rule, but rather the exceptions to the rule. Would only apply in very limited circumstances.
- Pleasantly surprised when the e-privacy directive ("ePD") delivered a favorable interpretation in 2018. Derogation for litigation. But it's not a "get out of jail free" card. Must limit what you take out. Need to cull within the jurisdiction. Occasional and non-

repetitive transfer. Outside the regular course of actions. Requires anonymization and minimization. Does not overcome blocking statutes.

- Recent case out of Northern District of California allowing discovery from the UK. It's an unfortunate decision, in that the decision was based on nothing more than a four-page letter brief. Court did not have a lot to go on. No discussion that the rights of non-party individuals were involved.
- 28 USC 1782: Several cases at the end of the materials. Statute enables a foreign litigant to come into U.S. and ask for discovery in the U.S. in aid of a foreign proceeding. Applicant must be an "interested person" in foreign proceeding. The proceeding must be before a foreign "tribunal." People have also read in a requirement that the discovery sought must not be subject to a privilege recognized in the U.S.
- Issues have arisen regarding who is an "interested person" and whether it is limited to a party to the foreign proceeding. Also about whether an arbitration is a "tribunal." Cases find that it is not. And also whether the discovery is unduly burdensome and invasive. In 10 years, the number of cases under this provision has grown five-fold. Expect that number to grow a lot because of the perception that discovery is wide open here in the U.S. (the "wild west").
- U.S. Supreme Court has described the "twin aims" of 1782. One of which is to encourage foreign courts to follow suit in allowing U.S. discovery in foreign jurisdictions.
- Some of these have been sought against law firms, e.g., materials that were produced or obtained in litigation (non-privileged materials). There have been decisions against and for allowing these 1782 subpoenas to law firms. Third Circuit has allowed it. Described as "going down a very dangerous path." It was noted that the 1782 subpoenas are issued by the court on an ex-parte basis. Once the subpoena is issued, then you are limited to dealing with the subpoena on Rule 45 types of terms.
- Demonstrates the importance of law firms and vendors not keeping materials after the case is resolved.
- Pointed out that the U.S. discovery process is not as wide open as foreign litigants might think. For example, in the 7th Circuit subject to the pilot program limitations and also to cooperation.
- Note that most of the guidance out of Europe is that barristers are considered to be data controllers.
- The 1782 cases provide some food for thought about how much and what data you really want to transfer to the U.S.
- Finally, noted that, on the one hand, there are serious ethical considerations if a law firm receiving data is only a "data processor" and thus has no control over the data. On the other hand, serious exposure to liabilities for the law firm if it is a "data controller."

[Session 6] Crafting eDiscovery Requests with Specificity

Panel	Rebekah Bailey *Nichols Kaster PLLP, Minneapolis, MN*
	Audra C. Eidem Heinze *Banner Witcoff, Chicago, IL*
	Henry J. Kelston *Milberg Tadler Phillips Grossman LLP, New York, NY*
	Donald W. Myers *Littler Mendelson P.C., Philadelphia, PA*
Moderator	Lauren E. Schwartzreich *Littler Mendelson P.C., New York, NY*

Note: Please review outline and submit any comments to comments@sedonaconference.org by June 3.

- Following the 2015 Rules amendments, WG1 steering committee queried how TSC should address vague, ambiguous, and overbroad discovery requests
    - Typically, when a producing party challenges vague discovery requests, the requesting party gets a do-over—a result that doesn't provide incentive to follow the "reasonable particularity" mandate of Rule 34(b)(1)
- The brainstorming group posed a big-picture question: How can TSC encourage the drafting of written discovery requests that get the requesting parties what they need and still comply with Rule 1's mandate?
- Brainstorming group focused on interplay between "reasonable particularity" from Rule 34(b)(1) and "proportionality" from Rule 26(b)(1)
    - In describing requested documents with "reasonable particularity," the requesting party should focus on the needs of the case
- Discussed the use of definitions and instructions
    - Group agreed that copying and pasting from prior work product with no editing is not advisable
        - Leads to inclusion of definitions of terms that do not appear in requests
        - Leads to nonsensical instructions (including where a party carries over instructions from, e.g., requests for production to interrogatories)
    - Definitions and instructions should be consistent with the Federal Rules or applicable law
    - Definitions and instructions should not, themselves, seek information that is the subject of a separate discovery request (e.g., defining term "identify" to require the "names of all individuals with knowledge about the information identified")
    - Some members said they employ definitions to avoid the objection that a particular term is undefined, but others pointed out that courts can see through the gamesmanship of disingenuous objections to terms where the basic dictionary definition is understood to apply

- In general, templates from previous matters should never be used for requests (or responses)
- Discussed the pros/cons of using iterative requests (i.e., starting with narrowly tailored, targeted requests; then meeting and conferring with the producing party; and if needed, propounding additional requests)
    - One of the largest hurdles to this approach is time—requesting parties do not want to run the risk of running out of time and not having the opportunity to pursue other legitimate discovery beyond their initial targeted requests
    - Some members proposed serving early Rule 34 requests to discuss with the producing party at the Rule 26(f) conference
    - As a counterpoint, some members discussed that documents are needed early in discovery, otherwise the requesting party runs the risk of, e.g., taking a deposition and then after the deposition receiving key documents and needing to re-depose the witness
- Courts can help enforce the "reasonable particularity" requirements
    - Encourage resolution through the meet-and-confer process
    - Assess what the requesting party knew at the time it propounded the request and whether the information sought had been addressed via meet and confer
    - Employ Rule 37(a)(5)(B) to award expenses to the producing party where the requesting party moves to compel and the court denies the motion as not substantially justified
- Discussed language to avoid in Rule 34 requests
    - E.g., "any and all"; "including but not limited to"
    - But requesting parties should use "documents sufficient to show"—this language is all the more appropriate since the revision of 26(b)(1) to include proportionality as part of the scope of discovery
    - Responding parties may incorporate the "documents sufficient to show" to indicate a proportional response
- As a practical matter, counsel for a requesting party (where that person is a former employee) should talk with their client about corporate jargon, where information is stored, etc.

[Session 7] Judicial Roundtable: Explore the Judicial Perspective for 2019 and Beyond

Panel	Hon. Jerome B. Abrams *State District Court Judge, First Judicial District of Minnesota, Hastings, MN*
	Hon. Iain D. Johnston *U.S. Magistrate Judge, Northern District of Illinois, Rockford, IL*
	Hon. Katharine H. Parker *U.S. Magistrate Judge, Southern District of New York, New York, NY*
	Hon. Andrew J. Peck (ret.) *DLA Piper LLP, New York, NY*
	Hon. Karen Wells Roby *Chief U.S. Magistrate Judge, Eastern District of Louisiana, New Orleans, LA*
	Hon. Thomas I. Vanaskie (ret.) *JAMS, Philadelphia, PA*
Moderator	Timothy M. Opsitnick *Technology Concepts & Design, Inc., Cleveland, OH*

How proactive are lawyers at raising ESI issues at judicial conferences?

- Parties do raise the issues. Facilitates the discussions by scheduling CMCs. Believes parties bring issues to the court's attention.
- Scheduling order includes instructions for how to address issues and believes counsel come prepared to address the issues.

How proactive should a judge be at raising discovery and ESI issues?

- 2015 amendments were meant to strike a balance between party-based discovery and judicial case management. Letting issues fester creates greater problems. Feels strongly about being proactive in addressing discovery issues throughout the litigation.
- Amazing how many issues re ESI are lurking just below the surface of litigation. Often, parties will not indicate that there are any issues, but then an issue will be raised at the close of discovery that has been troubling the parties for months or longer.
- Rules committee has been emphasizing the need for active judicial case management; a "steady drumbeat" of emphasis on this since 1980 and through the 1990s up until now. Many districts have "tracks" to help with case management. District judge and Magistrate Judge should be proactive to accomplish goals of litigation among the parties within the time limits set by the case management order. Congress has also emphasized this point.
- Why is it that "sloth" seems to be the principal attribute of most civil cases? Regardless of why, courts have a responsibility to push cases along to satisfy case management objectives. Lawyers do push back on these objectives in many cases. To address this

pushback, judges need to raise the point that issues raised in a tardy (instead of timely) fashion will not be heard with the same level of patience as timely raised issues. It's like a type of "estoppel" that arises.

- "Begs for motion to compel" to get the issues front and center. Nevertheless, many motions or other discovery issues are unreasonably delayed until near the close of discovery.
- 2015 amendment to Rule 16 spotlights the possibility of informal discovery motion conference to get issue teed up in front of the court more quickly; done by letter. Often, issues are resolved more quickly.
- Judges in a particular district vary as to whether letters should be joint (among adversaries) or should be separate submissions by counsel. Polling the audience – prefers the joint letter versus the separate letters. Nearly everyone in the audience confirms they prefer separate letters. The theory behind the joint letter is that it forces parties to cooperate, but believes that is only theoretical and does not transpire in practice.
- "I hate joint letters," but believes it can facilitate compromise despite the acrimony that it might create by working with an adversary.
- Don't have a joint letter; believes it's too much to ask litigants to develop a joint letter reflecting the nature of their disputes.
- Doesn't believe in the Rule 16 pre-conference to eliminate the "unnecessary" motion practice. Imposes a quick turnaround on all discovery motion practice (except privilege issues) and requires full briefing over a period of a short number of days. And then rules quickly to keep the case moving.

What kind of eDiscovery frustrates judges?

- Requests to resolve disputes on search terms
- Disputes over text messages – production and reliability
- Disputes where adversaries have not conferred with one another
- Disparity of knowledge re ESI discovery
    - How much is it the obligation of the judge to level the playing field on this knowledge? Unknown
- Sufficiency of the parties' respective privilege logs

Document Review

- Discussion re *City of Rockford* decision
- Merits of sampling the "null set" – those which were deemed nonresponsive because they did not reflect any search term hits.
- Does document review require a scientific method?
- Lawyers should take quality control of documents to make sure they are indeed responsive or nonresponsive.

- Reserving the issue of burden in *City of Rockford* is important. There are times when testing could become unduly burdensome. If it were unduly burdensome in *City of Rockford*, parties could come back and discuss with the judge.
- Does testing the null set go against Sedona Principle Six?
- Several commentators found this testing of the null set going against the concepts of Sedona Principle Six, but others found it to be non-offensive.
- Important aspect of the decision was that nonresponsive documents were not ordered to be shown to litigation adversaries. Very important.
- This opinion is one of my favorites because it explains and then debunks the circularity of the argument supporting the lack of need to engage in validation testing. Got to sample the production and non-production sets.
- Demonstrates that lawyers need to learn a little bit of math.
- What are the best ways to discern the range of reasonable documents for production purposes?
- Sampling helps parties gain confidence regarding what documents are in their production and non-production sets.
- Believes that early QC can facilitate validation later on
- Cautious about being forced to disclose statistics and reliability measures
- Has concerns about turning discovery into a process of perfection; discovery is not about making a process perfect, but about developing a reasonable process that satisfies Rule 26(g).
- Some of the issues can be addressed through transparency. There is a lot of distrust in the adversarial process. The higher the degree of transparency, the greater the trust between the parties. What level of transparency is appropriate at the outset of a case?
- Do we want discovery about discovery in every case to prove the statistical perfection of a production? No. If an adversary is not raising the issue, then why should the court care?
- Requesting parties do have concerns about how a production is being made and transparency early on can perhaps facilitate the resolution of those concerns.
- In terms of the intersection of cooperation and Sedona Principle Six, it requires counsel having information from the client so an intelligent discussion can transpire on the issues with a litigation adversary. Having that information places counsel in a much better position to address the issues.

Are litigants struggling with admissibility issues re social media or other new technologies?

- Problem with that question is that admissibility issues don't get raised until trial. So few cases go to trial that neither the parties nor the judges often handle this evidence.
- Surprising number of criminal and family law cases that involve this information. And admissibility always seems to be a problem with this evidence. We're typically dealing with screenshots, which are really just pictures.

- Admissibility issues are often raised at the summary judgment stage. Few lawyers handle this issue well.

What do judges think of privilege logs and their usefulness?

- "Not very useful at all." Most privilege logs are prepared by a paralegal who has no knowledge of privilege at all. Most privilege claims are overly broad and encompass both work product and attorney-client privilege
- Supports the Facciola-Redgrave framework with categorical logs
- Believes in a combined approach including categorical and traditional privilege logs
- Privilege logs may include material that is not privileged at all such as affidavits
- Categorical logs may create trouble by sweeping in a number of non-privileged documents under generalized categories
- Has examined categorical logs and documents under those categories *in camera*; believes parties need to confer on the proper categories of particular logs.
- Does the judge need to issue caution on overly broad categories?
- Judges may find it difficult to evaluate a privilege claim on categorical logs. Speaks to the need for transparency among counsel in discussing the types of categories at issue and the nature of the documents categorized in each category.
- One case had one party separating out documents under 90 separate categories while the adversary had only 11 separate categories.
- Not a chance in the world would a judge look at thousands upon thousands of documents from a particular category. Instead, examine reasonable number of samples. If that approach is rejected, then a special master may need to be engaged to review the thousands of documents at issue.

502(d) orders – where there is a 502(d) order in place, how do you practically handle clawbacks on the eve of deposition or if the document has already been disclosed and used in deposition?

- Not sure there is a clawback under 502(d) that is allowed if the document has been used without objection during deposition. Clawing back the night before a deposition is probably okay, but not after the deposition and there is no objection.
- If a document is used at a deposition without objection, a clawback won't be permitted.
- Difficulty, though, in recognizing a privileged document sometimes when there are so many millions of documents being produced in litigation.
- It may not be practical to clawback documents during deposition or even right after
- The answer might be to develop a better 502(d) order and then abide by its provisions. *Entrata* case involved a rejected clawback because the party did not follow the requirements provided for making a clawback in the 502(d) order.

502(d) in MDL case without time limits and a clawback is issued on the eve of trial for hundreds of documents. Any problem with this?

- A 502(d) stip and order can be styled in any way the parties and court wish to handle
- State ethics rules on how counsel must handle privileged documents produced by litigation adversaries. Those rules continue to be at issue regardless of the clawback.
- Waiver may still be a tool in the judicial toolbox for resolving the issues ("voluntary relinquishment of a known right"). It is a strong tool.

What is the state of the law on using inherent authority to impose sanctions when one or more of the elements of Rule 37(e) have not been satisfied?

- Judge Francis indicated that he still had inherent authority and wrote a law review article with Eric Mandel that a committee note did not deprive judges of inherent authority.
- Court could arguably use inherent authority to address a party's intentional spoliation that otherwise does not affect the case or create prejudice.
- Believes he could use inherent authority to create a solution to this problem, but that completely undermines the concept of uniformity – a national standard for spoliation – that Rule 37(e) was designed to create.
- Inherent authority is typically only used now where there is another hook beyond ESI destruction such as violation of a court order or a party has misrepresented something to the court
- Inherent authority is only foreclosed when all conditions of Rule 37(e) have been satisfied.

Are monetary sanctions beyond attorney fees and costs authorized by Rule 37(e)?

- Rule does not prohibit sanctions of that nature and is intended to deter sanctionable conduct, believes it could

Is the specific intent element of Rule 37(e)—intent to deprive—a question for the judge or for the jury?

- Believes it is more for the judge and its administration of the rules . . . after an evidentiary hearing
- Close call with circumstantial evidence as opposed to direct evidence; maybe it's for a jury? It would be a much harder call for the judge to decide in the case
- There are easy and hard calls. Thinks it's more for the judge because judge handles the orders, understands the conduct, evaluates the facts and law, etc. Does not believe a jury could handle all of that without confusing the issues with the substantive issues a jury has to decide.

- If the court handles this issue, then court avoids the "trial within a trial" scenario where a jury gets confused on the issues and ultimately focuses on the evidence destruction instead of the actual claims being tried.

How to handle an objectionable request? Fix the request?

- Courts usually try to help parties fix problems
- Court should assume that counsel has sufficient knowledge to develop their own requests, though the court could help address the issues.

[Session 8] Diversity Awareness and Its Unique Benefits to eDiscovery

Panel	Kelly Atherton *NightOwl Discovery, Minneapolis, MN*
	Tracy Greer *U.S. Department of Justice, Washington, DC*
	Corey Lee *Hunton Andrews Kurth LLP, Miami, FL*
	Hon. Karen Wells Roby *Chief U.S. Magistrate Judge, Eastern District of Louisiana, New Orleans, LA*
Moderator	Niloy Ray *Littler Mendelson P.C., Minneapolis, MN*

- Diversity is not unique to eDiscovery, but cultural differences in the way litigants communicate affects eDiscovery uniquely
- A member of the judiciary shared an example of her communication with African-American parties in a settlement conference where she asked one party if a co-defendant was his "side piece," to which he replied yes.
    - Her knowledge of that communication style facilitated her finding of the facts and the lawyers understanding of the lawsuit.
    - Diversity in chambers means that different points of view help dive deeper into the meaning of facts and circumstances and help identify biases.
- Attorneys need to understand how messaging apps like Snapchat, Instagram, Telegram, WhatsApp, Confide, Wickr, etc. work and understand how to preserve and review.
    - Attorneys need to understand that different communities use messaging applications differently – for instance, women use messaging platforms for different purposes than men.
- Linguistic differences can make communications difficult to interpret, especially when the interpreter does not belong to the community involved in the communications.
    - Problem of court transcripts where court reporters do not understand a witness's dialect
    - Example of the primary witness in the Trayvon Martin case
        - Hundreds of derogatory comments posted online about the fact that the witness was unintelligible and mumbled – challenge to understand her affected credibility; jury did not consider her testimony in reaching verdict
- Emojis are a common form of expression that can also be difficult to interpret
    - Emojis are Unicode-based but display differently in different platforms

  - Emojis may display differently in different versions of the same platform
  - Emojis will be interpreted differently in different cultures
    - Thumbs up in Greece considered vulgar
    - Peace sign in UK considered vulgar
    - Angel emoji in China equates with death
    - Materials provide additional examples
  - Even within one country and one platform the same emojis may be interpreted differently
    - Judicial example of high school students where a girl said a smile emoji plus a skull emoji was a threat; members of same age group said it means "dying laughing"
    - Another panelist gave the example of high heels and a bag of money was solicitation (bring high heels to make some money)
    - Generational differences in use and interpretation that require attention to diversity issues
  - Example of contract case in Israel where court found that a text containing a string of emojis constituted the intent to form a contract
- Not all emojis are Unicode; some are only pics-not text-based
  - Standardization is difficult because of IP and copyright issues
  - Even text based emojis render differently – may need to collect BOTH sides of a conversation
    - One Sedona member gave the example that she was sending her partner hearts in text, but they rendered as hamburgers on his side, leading to confusion for both
  - Review platforms can tell you the Unicode characters used but NOT how the emoji rendered
  - Practitioners should discuss emojis with vendors as these can represent an engineering problem – see if they are using the Unicode list for processing
- In a recent case, practitioners skipped over review of emojis
- Important to use reviewers who know the language/dialect/community
  - Examples from reviews in different Spanish dialects and same words with different meanings in Spanish language use in other countries (Spain – PR – Venezuela)

  - Example of financial transaction call center – importance of understanding different ways of discussing money

- U.S. workforce increasingly diverse – diversity in justice system and importance of diversity in eDiscovery only increasing

[Session 9] Privilege Review and Logging

Panel	Alison A. Grounds *Troutman Sanders LLP, Atlanta, GA*
	Ted S. Hiser *Redgrave LLP, Cleveland, OH*
	Hon. Iain D. Johnston *U.S. Magistrate Judge, Northern District of Illinois, Rockford, IL*
	Colleen M. Kenney *Sidley Austin, Chicago, IL*
Moderator	Todd Presnell *Bradley, Nashville, TN*

1. How have things been going since the Commentary was published?
2. Four Principles:
    a. Parties and counsel should understand law of privilege
    b. Parties and counsel should use 502(d) orders
    c. Parties and counsel should follow reasonable procedures to avoid inadvertent production of privileged materials
    d. Parties and counsel should make sure of protocols and technology to aid in the identification of privilege
3. Litigants don't understand privilege
4. BDP—There's no such thing as a bad document privilege.
    a. The more you don't want to produce the document, the more likely it isn't privileged.
5. There is a disparity in knowledge of privilege.
6. Some privilege calls are hard—reasonable minds can differ on whether something is privileged.
7. Attorney client communication: Attorney client relationship, confidential communication, seeking or providing legal advice.
8. Is there a true attorney client relationship? Parent company attorney talking to subsidiary employees —relationship??
9. Communication—must be shared. Written or oral exchanges.
10. Confidentiality—must be confidential when made and kept confidential later.
11. Legal Advice. What is the line between legal and business advice?
12. Presumptions courts apply: employee and outside counsel, privileged. Employee—In-house counsel, not necessarily privileged.

13. Two non-attorney employees can have a privileged conversation. When they are discussing legal advice or preparing to present something to counsel.
14. In-house counsel and outside counsel—presumed privileged.
15. Consultants—case law out there that says that if a consultant is acting like an employee-then they are an employee for privilege purposes.
16. Former employees—some courts say that communications with former employees are not privileged, others say it's okay.
17. Control group states—narrow privilege even more.
18. In-house counsel sometimes not deemed to be lawyers capable of creating privilege. Must make a clear showing that in-house counsel acted in a professional legal capacity.
19. Dual purpose emails can be challenging (mixing legal and business discussions in a single email).
20. When you have lawyers from various countries/states etc… FRE 501 determines what law applies.
21. Privilege logging is broken.
22. Preparing clients to improve privilege identification
23. Negotiating Privilege Production Agreements
    a. Exchange a sample log to understand what you are going to do/will be getting
    b. Language about disclosure of the doc in deposition
    c. Combination of categorical/metadata logs can sometimes work
    d. Logging cutoff dates
24. How much do you get the client involved before negotiating the law?
    a. Must align understanding of breadth of privilege. (Do you take a narrow view, and the client takes a broad view?) Need to get together and understand the risks each way.
25. Asymmetric litigation makes privilege logging negotiations harder.
26. Government regulators mostly dictate the parameters of the log. But negotiation is possible.
27. Metadata log—with individual review of documents flagged by the other party as questionable.
28. Metadata log can be more reliable than an entry written specially
29. 502(d) orders
    a. Are judges really doing 502(d) orders?

b. Do attorneys understand it? Many of them don't.

c. Some judges make it part of their case management order (an opt out order)

d. 502 can allow you to intentionally produce documents that have "no nutritional value" to give the other side comfort that they are not unreasonably withheld.

e. Sentence in 502(d)—the provisions of 502(b) expressly do not apply.

f. Is there abuse of 502(d) – not really—lawyers have an ethical obligation not to turn over the privilege documents. But with TAR—if they are not reviewing all documents produced then you can get a lot of privileged documents.

g. Costs can be raised if there is a lot of clawback.

h. Search terms can be the best way to find privilege (particularly domain names of law firms).

i. Is 502(d) increasing or decreasing in camera review? Too early to tell.

j. Not a lot of inadvertent disclosure cases.

k. Do you allow the opposing party to use documents to challenge privilege? No, violates 26(b)(6)—also state law often prevents you from using the document. Given over privilege log entry that can be used as the basis.

30. Privilege logging

a. Metadata logging plus downstream parties in emails

b. Presumptively privileged documents excluded from the log

c. Categorical log—metadata plus categorical description

d. Redaction can be helpful—avoids logging

e. Defining privileged persons on the law

31. What can be done to fix the privilege log issue?

a. It's complex—had to make a simple solution

b. Presumptively privileged docs don't get logged

c. Find out what your opponent wants

d. We need to have a sense of what the objective is in the process. You want to get detailed logs on as little as possible.

e. Don't try to come up with a list of categories at the 26(f) conference—you can't do it because you don't know about the documents yet.

f. Applying technology to a rule that is from 1993.

g. Trust is key—got to build that trust.

h. Maybe if there were clearer lines on what is and is not privileged.

i. Biggest problem is the in-house counsel role. Too many people think that inviting a lawyer to the meeting makes everything privileged. Business people don't understand privilege—transactional lawyers don't necessarily understand privilege.

j. Mine the data that's out there and see if there are trends that could help make new rules about privilege.

k. Withholding entire families for one privileged family member reduces the cost of the log…but not necessarily correct in all cases.

l. In-house counsel needs to send the message that we want privilege log done correctly but we don't want it to cost a fortune. In-house needs to accept more risk (and own it).