

THE SEDONA CONFERENCE

*The Sedona Conference Cooperation
Proclamation: Resources for the Judiciary,
Third Edition*

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Preface

This third edition of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* (“*Judicial Resources*”) continues a collaborative effort of The Sedona Conference. Initial drafts of what became the public comment version of the *Judicial Resources* were presented to litigators at meetings of Working Group 1 and to judges at programs sponsored by a variety of courts and judicial education organizations, including the Federal Judicial Center. After publication of the first edition in 2011, an updated edition was published in 2012, followed by a second edition in 2014, before the landmark 2015 amendments to the Federal Rules of Civil Procedure went into effect.

This edition of the *Judicial Resources* is being published in uncertain times for the American judicial system—both state and federal—and the nation. During the COVID-19 public health crisis, in-person appearances at both the trial and appellate levels are being curtailed or eliminated, and electronic communications between courts, attorneys, and parties are being encouraged or made mandatory. Nevertheless, the American judicial system continues to operate, and civil litigation continues to be managed by our judges. Courts are adjusting to a “new normal” that challenges the traditional ways in which the bench and bar are interacting to facilitate cooperation and establish mutual trust.

Even more significant for the future of civil litigation is that the current public health crisis has necessitated an almost-universal migration of business and personal communication to the digital world. From this point forward, conventional paper-based documentary evidence will diminish in importance in civil litigation. Email, text messages, database reports, word-processed memos, social media posts, and other forms of “electronically stored information” (ESI) will dominate discovery and evidence. Judges need to be prepared for this evolution and its consequences for the management of civil litigation.

The *Judicial Resources* assembles the most authoritative current guidance on the management of modern discovery, emphasizing practical solutions to recurring problems. The references have been carefully selected for balance and neutrality. The management strategies have been contributed by trial judges themselves, based on their personal experience.

The Sedona Conference acknowledges the contributions of Ronald J. Hedges and Kenneth J. Withers, who served as senior editors of this edition and were invaluable in driving this project forward. We also are indebted to our Judicial Reviewers—Hon. Helen C. Adams, Hon. J. Michelle Childs, Hon. Timothy S. Driscoll, Hon. Xavier Rodriguez, and Hon. Elizabeth M. Schwabedissen—for their guidance on what advice would be most helpful to their fellow trial judges and what advice from prior editions could be updated or removed entirely. The result is a slimmer and more easily digested edition of the *Judicial Resources*. We also extend our thanks to law student interns Kevin H. Jenco and Neil J. Pladus, both of the Georgetown Law Center Class of 2021, for helping us understand the nuances of emerging technology and updating the numerous citations to trial and appellate court decisions.

With the exception of publications of The Sedona Conference itself, no articles, forms, or other materials cited are necessarily endorsed by The Sedona Conference or the editors of the *Judicial Resources*. While we welcome those contributions, judges are reminded that civil actions call for individualized assessment of facts and law as well as independent resolution of issues.

Craig Weinlein
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June 2020

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I. INTRODUCTION

The Sedona Conference Cooperation Proclamation: Resources for the Judiciary (“*Judicial Resources*”) is focused on the management of electronically stored information (ESI) in civil actions.¹ A judge may have overall case management responsibility over a single action. Alternatively, a judge may be assigned to manage one or more phases or events of an action. Moreover, a judge may assign a court adjunct such as a special master to oversee certain phases or events. The *Judicial Resources* can assist in all these instances.

The *Judicial Resources* focuses on ESI under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. These rules are comprehensive and have been interpreted and applied in many federal judicial decisions. However, the *Judicial Resources* is intended for both federal and state judges and, accordingly, looks to federal rules and decisions as exemplars of how state judges can exercise their management function. Also, bear in mind that many courts have local rules or procedures that govern ESI, and many judges have individual chambers practices that do the same.

The *Judicial Resources* recognizes that there are different models for the appropriate role of judges in civil litigation. The primary models may be characterized as “active case management” and “discovery management.” The first is intended to be proactive and features court supervision of pretrial activities through periodic conferences and management orders. The latter is reactive, with the court intervening in pretrial preparation only to the extent required by the rules or upon motion by the parties. The *Judicial Resources* is intended to assist judges who follow either model or a hybrid model.

Discovery as practiced in state and federal courts creates the potential for protracted disputes and the imposition of substantial burdens on the resources of the courts and parties. The discovery of electronic information (“eDiscovery”), such as email, the content of social media, artificial intelligence, or information from databases, has multiplied those potential burdens. Active case management can prevent disputes and minimize burdens. For a discussion of the need for active case man-

¹ *The Resources for the Judiciary* was developed as a companion publication to *The Sedona Conference Cooperation Proclamation*, which was introduced in the 2009 edition of *The Sedona Conference Journal*, 10 SEDONA CONF. J. 331 (2009). The Proclamation had its origins in the Georgetown Data Deluge Summit of March 2007 at which, as he recounted it in the Preface to the *Journal*, U.S. Supreme Court Associate Justice Stephen G. Breyer expressed his concerns about the capacity of the legal system to “handle the data deluge.”

The intent of the Proclamation was to begin “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.” This Third Edition of *The Resources for the Judiciary* continues the development of those practical tools.

agement in civil litigation, see *DCP Midstream, LP v. Anadarko Petroleum Corp.*² and *The Reappearing Judge*.³

Consequently, the *Judicial Resources* recommends active case management by judges. However, that does not mean to imply that judges should be routinely making discovery decisions for the parties. Discovery is designed to be, and remains, party driven. Active case management provides a strong framework in which the parties should develop and execute their own cooperative discovery plans. Parties are provided a clear set of expectations designed to move the evidence-gathering phase of the litigation forward in a speedy and inexpensive way, without the cost, delay, and gamesmanship associated with unmanaged discovery. The dual role of the judge under active case management is first, to facilitate the cooperative formulation and execution of the discovery plan, and, second, to intervene if the parties fail to reach agreement or a dispute arises. Judges are reminded that civil actions call for individualized assessment of facts and law as well as independent resolution of issues. The recommendations and sample orders collected here have been selected and reviewed with the goal of encouraging the parties to cooperate in the conduct of discovery to the greatest extent possible, rather than imposing judicially dictated solutions.

There are “structural” reasons why a judge might follow one model and not the other. For example, in federal courts, civil actions are usually assigned to judges on an individual basis, that is, a particular civil action is assigned to one judge from commencement to conclusion. Known as “individualized case management,” this model fosters active case management in the federal courts and in those state courts (or units thereof, such as dedicated business courts) that have adopted individualized management. On the other hand, many state courts, for reasons of volume and history, do not use individualized case management. Instead, from the commencement to conclusion of an action, different judges may preside over specific events (such as an initial conference, discovery dispute, motion, trial, etc.). This makes “active case management” difficult or impossible to implement, and “discovery management” may be the only workable model for a number of judges who can only intervene after a discovery dispute has arisen.

In addition to these structural factors, there also may be a judicial philosophy that drives the adoption of a particular model by an individual judge. This philosophical question arises from consideration of whether discovery (on which the *Judicial Resources* focuses) is “party driven” as opposed to “judge driven.” There are judges who, for example, follow the active case management paradigm and deem it appropriate to bring parties into court on a regular basis to work out discovery procedures and address anticipated discovery problems. It may seem counterintuitive, but many judges who adopt the active case management model report fewer disputes and reduced pressure on judicial resources, as the parties are aware that they are being closely supervised by the court. By contrast, there are other judges who believe that, given the nature of civil litigation in our common-law tradition, parties should drive discovery and the pace of a particular action. These judges only deal

² 303 P.3d 1187 (Colo. 2013).

³ S.G. Gensler & L.H. Rosenthal, 61 U. KAN. L. REV. 849 (2013).

with problems after they have been brought to their attention by the parties. Large caseloads also may necessitate this model of discovery management.

The amendments to the Federal Rules of Civil Procedure,⁴ effective December 1, 2015, may lead federal judges toward greater involvement in the discovery process and indeed promote even more use of the active case management model. Amended Rule 1, which recognizes the need for all “actors” to strive for the “just, speedy, and inexpensive” resolution of civil litigation, suggests such involvement, as does amended Rule 26(b)(1), which emphasizes proportionality. Moreover, Rule 16(b)(3)(B)(v) authorizes a federal judge to encourage the informal resolution of discovery disputes by “direct[ing] that before moving for an order relating to discovery, the movant must request a conference with the court.” How these and other amendments may affect ESI-related discovery among the states remains an open question, as does the practical application of the amendments by federal judges. Moreover, the “uneven” nature of the application of the amendments by individual federal judges is likely to continue given the limited and deferential role of appellate review of most case-management-related decisions.

Whatever the judge’s role or case management philosophy, the *Judicial Resources* offers a framework for the management of ESI. This edition again focuses on the “stages of litigation from the judge’s perspective,” starting with the preservation of ESI through the initial case management order (whatever that may be called in a specific jurisdiction), the resolution of discovery disputes, trial, and post-trial awards of costs.

To assist judges, the *Judicial Resources*:

- Articulates a clear judicial philosophy of case management and of resolution of discovery disputes;
- Identifies the stages of civil litigation when judicial management is most appropriate or desirable;
- Recognizes that not all civil actions are equal in the resources of the parties, or the actual amount in issue, and encourages proportionality;
- Identifies key issues that a judge is likely to face at each stage of litigation;
- Suggests strategies for case management or dispute resolution that encourage the parties, when possible, to reach a cooperative resolution at each stage; and

⁴ For the sake of brevity, the Federal Rules of Civil Procedure will not be shortened to the commonly used abbreviations “Fed. R. Civ. P.” or “FRCP” when referenced in the body of the text of the *Judicial Resources*. However, they may occasionally be referred to simply “the Rules” in a broad or general context. Further, when individual rules are referenced, they will simply be referred to by their numerical indicator preceded by the word “Rule.”

- Recommends further readings on the issues presented at each stage that have been either published by The Sedona Conference or are peer-reviewed.

The *Judicial Resources* stresses cooperation and transparency in the search for, and collection of, ESI. However, parties seldom share or negotiate search and collection methodologies, nor are they required to do so under any state or federal rule of civil procedure. Rather, when a party receives a request for production, the party and its attorney must comply with that request in a reasonable manner, and the attorney must certify that any response is made in good faith, consistent with Rule 26(g)(1). Moreover, individual judges, on an ad hoc basis or pursuant to local rule or individual procedure, may require some level of cooperation in the search for and collection of ESI.

Note that issues that commonly arise in eDiscovery are posed throughout the *Judicial Resources*, without definitive “one size fits all” solutions. We cannot offer definitive answers to every question related to case management. The answer to a particular problem in any individual case will depend on the facts and the arguments presented by the parties. But the *Judicial Resources* provides practical examples of how trial judges have successfully addressed these issues in their cases. These examples can act as a roadmap or compass and can help “lead the way forward.”

The *Judicial Resources* is not intended to be authoritative and should not be cited as such. Rather, it identifies issues that federal and state judges may confront in the management of civil actions that involve ESI and suggests strategies that judges might employ. The *Judicial Resources* also provides, in some instances, sample forms or orders that illustrate approaches taken by individual judges in specific actions. In addition, the *Judicial Resources* includes non-exhaustive references to written materials that judges may wish to consult. And while the publications of The Sedona Conference represent broad, general consensus among The Sedona Conference Working Group Series members, neither those publications nor the supplementary materials referenced in the *Judicial Resources* necessarily represented the views of the authors and editors of this publication.

II. REVIEW OF EXISTING LITERATURE ON eDISCOVERY FOR JUDGES

1. The *Judicial Resources* assumes that the judicial reader is familiar with eDiscovery in general—including the differences between eDiscovery and paper discovery, the problems arising out of the volume, variety, complexity, and cost associated with eDiscovery, and the recurring issues of accessibility, form of production, and waiver of attorney-client privilege or work-product protection.
2. For judges who are unfamiliar with eDiscovery, or who may wish to become reacquainted with it, several publications provide overviews that are unbiased, peer-reviewed, and well-suited. Any judge who presides over, or who anticipates presiding over, civil litigation involving eDiscovery is encouraged to be familiar with the following, each of which was the product of collaborative study and consensus:
 - 2.1 *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition* (Feb. 2020). This provides a tool “to assist in the understanding and discussion of electronic discovery and electronic information management issues.”
 - 2.2 *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (Oct. 2017) [hereinafter *The Sedona Principles, Third Edition*]. The third edition of *The Sedona Principles* represents the culmination of a process by which judges, practicing attorneys, and academics considered developments in eDiscovery practice over the past decade, incorporating the 2015 amendments to the Federal Rules of Civil Procedure. Considered to be an authoritative text on eDiscovery, *The Sedona Principles* provides a lens through which eDiscovery can be managed.
 - 2.3 The Federal Rules of Civil Procedure and, in particular, the often-overlooked Advisory Committee notes to the 2006 and 2015 amendments to Rules 1, 16, 26, and 37 cited in these *Judicial Resources*. While the *Resources* does not urge the adoption of the Federal Rules of Civil Procedure in any state, it does suggest that the federal rules provide both the outline of a judicial management philosophy and practical suggestions for state judges as they deal with eDiscovery.
 - 2.4 R.J. Hedges, B.J. Rothstein & E.C. Wiggins, *Managing Discovery of Electronic Information, Third Edition* (2017), FEDERAL JUDICIAL CENTER. “This third edition of the pocket guide on managing the discovery of electronically stored information (ESI) covers the December 1, 2015, amendments to the Federal Rules of Civil Procedure and reflects the rise of new sources of ESI, particularly social media, and updates judges on how ESI may be searched. It also suggests case-management techniques that judges might use in smaller civil actions in which the costs of ESI discovery could hamper resolution on the merits.”
3. All of the above are “general” publications about eDiscovery. There are other publications that address specific issues in discovery such as preservation, non-party discovery, and admissibility. States may have their own primers as well, and state court judges are encouraged to review mate-

rials that are unique to their state. Further readings appear throughout the “Stages of Litigation from a Judge’s Perspective” section of the *Judicial Resources*. These readings are primarily publications of The Sedona Conference. Some court-specific publications include:

- 3.1 *2019 Florida Handbook on Civil Discovery Practice*, Ch. 3, Electronic Discovery (pp. 10–54).
- 3.2 *A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida* (rev. June 5, 2015), Ch. VIII, E-Discovery (pp. 23–27).
- 3.2 *Bench Book for New York State Judges Pertaining To The Discovery Of Electronically Stored Information (“ESI”)* (Aug. 2015 Edition).
- 3.3 District of Delaware, *Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”)*.
- 3.4 District of Delaware, *Default Standard for Access to Source Code*.

III. GENERAL RECOMMENDATIONS FOR JUDGES

1. A review of the literature cited in Section II reveals a common thread: The key to reducing cost and delay that may be associated with eDiscovery is judicial attention to discovery issues and case management starting early on and continuing through every stage of an action. The expenditure of a small measure of judicial resources at the beginning of litigation to set the tone and direction of eDiscovery—and a judge's later availability at each stage of the action—will likely save the expenditure of significantly more judicial resources later.
2. With the above in mind, the *Judicial Resources* makes the following recommendations:
 - 2.1 To the extent possible and consistent with their duties and calendars, judges should establish a hands-on approach to case management early in each action. The scheduling conference may be a good place to start this discussion and set expectations.
 - 2.2 Judges should establish deadlines and keep parties to those deadlines (or make reasonable adjustments as needed) with periodic reports from parties or conferences.
 - 2.3 Judges should demand attorney competence, which includes knowledge of their clients' relevant records and communications, and the ways they use information technology.⁵
 - 2.4 Judges should encourage parties to meet before discovery commences to develop realistic discovery plans.
 - 2.5 Judges should encourage parties to consider proportionality, balancing the needs of the case with the potential cost and burdens of discovery, when making demands for preservation and in discovery-related requests and responses.⁶
 - 2.6 Judges should exercise their discretion to limit arguably disproportionate discovery through appropriate protective orders, phased or prioritized discovery, cost shifting, or other mechanisms.
 - 2.7 If necessary, judges should exercise their authority to award sanctions under relevant statutes or rules or as an exercise of their inherent authority against parties and/or counsel who create unreasonable cost or delay, or who otherwise frustrate the goals of Rule 1 or its state equivalents.

⁵ See State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193, available at [https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20\(06-30-15\)%20-%20FINAL1.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL1.pdf).

⁶ See Federal Rule of Civil Procedure 26(b)(1) and accompanying Advisory Committee notes to the 2015 Amendments; see also Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure* (2016) (unpublished LL.M. thesis, Duke University School of Law), available at <https://scholarship.law.duke.edu/mjs/13>.

3. These broad recommendations should not be interpreted to suggest that judges should issue blanket orders that dictate the scope of discovery, the nature of party discovery requests or responses, the form or forms of production, or any other details of the conduct of discovery. Our civil litigation system does not contemplate that a judge conducts discovery, and eDiscovery in particular is fraught with highly technical and case-specific issues that are best left to the parties to resolve. Moreover, the recommendations transcend specific rules of civil procedure that may be in effect in a specific jurisdiction. The recommendations can be applied equally in federal or state litigation, and in every court or proceeding in which discovery is allowed, from family to complex commercial courts.
4. The recommendations are made with the understanding that there may be circumstances that require a judge to bring pressure to bear on parties and attorneys who, left to their own devices, might increase the burden and cost of an action.
5. The recommendation above that “judges should demand attorney competence” merits some extended discussion. Attorneys, for the most part, are generalists. Some focus on particular areas of the law. However, in whatever area they might practice, attorneys (as a general proposition) are not experts in the technologies that can be encountered in eDiscovery. For example, attorneys should not be expected to develop mechanisms for, or conduct, automated searches of data.
 - 5.1 What is expected of attorneys is competence within the meaning of ABA Model Rule of Professional Conduct 1.1, Comment 8. For example, an attorney should understand how to reasonably protect client confidences when communicating electronically. An attorney should also understand when he needs the assistance of an eDiscovery specialist or consultant. These are not simply matters of ethics: Attorney incompetence in eDiscovery can lead to the waste of party and court resources and frustrate the “just, speedy, and inexpensive determination of every action and proceeding.”⁷
6. In addition to the recommendations, judges may wish to consider whether to appoint a special master under Rule 53 or its state equivalents to address ESI-related issues in specific actions when the expense of a special master might be justified, and subject to local rules and practice. Plainly, the appointment of a special master should be a rare event. However, given a significant volume of ESI in issue, a special master might assist a court in, for example, undertaking the *in camera* review of ESI alleged to be nondiscoverable because of attorney-client privilege protection of work product, trade secret, private, or otherwise confidential.

⁷ FED. R. CIV. P. 1. For a discussion of competence, *see, e.g.*, R.J. Hedges & A.W. Wagner, *Competence with Electronically Stored Information: What Does It Currently Mean in the Context of Litigation and How Can Attorneys Achieve It?*, 16 DDEE __ (2016).

As an alternative to the appointment of a special master, judges might consider, if appropriate and authorized by rule or order, the appointment of an eDiscovery mediator to assist the parties in reaching the amicable resolution of their ESI-related disputes.

7. The recommendations apply to all civil actions and proceedings, but with the understanding that large or complex litigation might particularly need active case management. *Nonetheless, they are essential to eDiscovery that takes place in small actions, i.e., the vast majority of litigation in our civil litigation system.* Judges should take care to utilize all the tools available to them to limit ESI-related costs such that those costs are not disproportionate to the value of any particular small action.⁸
8. The next section of the *Judicial Resources*, “The Stages of Litigation from a Judge’s Perspective,” analyzes the steps in the litigation process at which judicial action is likely to be necessary and desirable. Each stage presents key issues a judge is likely to confront, suggests possible strategies for the management of those issues, identifies representative decisions and sample orders, and suggests further reading for those who wish to learn more.

⁸ For a discussion of ESI in small actions, see G.S. Freeman, et al., *Active Management of ESI in “Small” Civil Actions*.

IV. THE STAGES OF LITIGATION FROM A JUDGE'S PERSPECTIVE

1. Preservation

1.1 Preservation of relevant ESI is the key to eDiscovery. Absent preservation, meaningful discovery cannot be conducted. Indeed, absent preservation, a judge may be faced with the task of determining whether to impose sanctions for the loss of ESI (“spoliation”) and what those sanctions should be. Nevertheless, preservation decisions are usually made before the parties see a judge for the first time and often before litigation commences. Preservation decisions also implicate questions of attorney-client privilege and work-product protection. Thus, a judge should be prepared to address preservation issues as early as possible in the action.

1.1.1 Preservation must be considered by the parties at the Rule 26(f) conference.⁹ Scheduling orders issued pursuant to Rule 16(b)(3)(B)(iii) may also address preservation. These Rules allow federal judges to address issues of timing and scope of preservation soon after a responsive pleading is filed.

1.1.2 State judges may not have the benefit of rules equivalent to Rules 26(f) or 16(b) in terms of addressing ESI specifically. Case law, however, may provide similar principles. In any event, state judges should strive for early identification and resolution of any preservation-related disputes.

1.2 Issues presented

1.2.1 Significant preservation decisions may be made before formal litigation begins, and thus before the judge has any opportunity to manage the case. Generally speaking, the duty to preserve arises when a party knows of litigation or when litigation is reasonably foreseeable. Presumably, a putative plaintiff must begin to preserve at some point before the filing of a complaint. Similarly, a defendant may be aware that it will be involved in litigation before service of process. If so, the defendant must preserve at the earlier date. The *trigger* for the existence of a duty to preserve is fact-sensitive and often in dispute. It should be noted that preservation for the purposes of litigation may conflict with information governance policies, which, among other things, call for the routine and automatic deletion of data. Moreover, preservation may conflict with data privacy laws such as the California Consumer Privacy Act, the Illinois Biometric Information Privacy Act, and the New York SHIELD Act, all of which provide for, among other things, “rectification” and “minimization” of protected data.

⁹ FED. R. CIV. P. 26(f)(3)(C).

- 1.2.2 There is no realistic mechanism for judicial determination of the existence or scope of a duty to preserve before litigation commences. There may be significant costs involved in preservation, especially if a party, in the absence of any judicial direction, believes it must *overpreserve* discoverable information. This may lead to disputes between parties that will require judicial resolution at an early stage.¹⁰
- 1.2.3 The decision to preserve and the scope of preservation are questions that attorneys should address with their clients. That advice, as well as the communication of that duty (to, for example, employees and third-party contractors), is presumably subject to attorney-client privilege and work-product protection. Disputes pertaining to the nature of communications involving privilege—and the scope of any privilege or work product—frequently arise.
- 1.2.4 It should be emphasized that the scope of the duty to preserve may be broader than the scope of discovery. This is particularly so in the federal courts (and state equivalents) given the limitation of discovery, since the 2015 amendments, to information that is relevant to claims and defenses under Rule 26(b)(1).

1.3 Suggested judicial management strategies

- 1.3.1 Require by local rule that the parties discuss preservation at the initial conference between the parties as required by Rule 26(f) or its state equivalents.
- 1.3.2 Direct the parties to present any disputes about preservation to the court as soon as possible so that the judge can issue appropriate orders regarding what should or should not be preserved in the earliest stage of litigation.

1.4 Representative decisions

- 1.4.1 *4DD Holdings, LLC v. United States*, 143 Fed. Cl. 118 (Fed. Cl. 2019) (government’s failure to issue legal hold for three months after “trigger”).
- 1.4.2 *Culhane v. Wal-Mart Supercenter*, 364 F. Supp. 3d 768 (E.D. Mich. 2019) (risk manager’s failure to follow legal hold procedures).
- 1.4.3 *Grant v. Guzman*, No. 17-2797, 2020 WL 1864857 at *12 (E.D. La. Apr. 13, 2020) (failure to preserve relevant information because of “negligent continuation of . . . routine policy” did not warrant Rule 37(e)(2) sanctions).

¹⁰ Often, the court is only involved in preservation decisions after the fact, when considering a motion for sanctions for the failure to preserve discoverable information. Federal Rule of Civil Procedure 37(e), adopted in 2015, was designed to reduce overpreservation by limiting sanctions if the loss of discovery ESI was inadvertent or did not result in prejudice to the requesting party.

- 1.4.4 *Schmidt v. Shifflett*, CIV 18-0663 KBM/LF, 2019 WL 5550067 (D.N.M. Oct. 28, 2019) (finding duty to preserve defendant truck driver's cell phone and its data arose when nature of accident put defendants on notice of a claim in reasonably foreseeable litigation or, at the latest, on receipt of preservation demand from plaintiff's attorney).

1.5 Further reading

- 1.5.1 The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341 (2019).
- 1.5.2 [Rules of Civil Procedure for the Superior Courts of Arizona](#), Rule 37(g)(1)(A) ("A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.").
- 1.5.3 [Rules of Civil Procedure for the Superior Courts of Arizona](#), Rule 37(g)(1)(B) ("A person reasonably anticipates an action's commencement if: (i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or (ii) it seriously contemplates commencing an action or takes specific steps to do so.").

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

2. Parties' early case assessment

- 2.1 Early case assessment ideally takes place *prior* to joinder of issue. That assessment is a process by which a party undertakes an internal cost-benefit analysis to determine whether to settle or litigate. This process is nothing new. What is new, however, is the need to consider the preservation, collection, review, and production of ESI in making that assessment.
- 2.2 Early case assessment, although included here as a *marker* in the litigation process, is not a stage of litigation from a judge's perspective, but it can lead to a better-informed and more effective Rule 26(f) conference and initial case management order under Rule 16(c)(2).
- 2.3 Because early case assessment does not involve the judge, there are no "issues presented," "suggested judicial management strategies," "sample orders," or "further reading" presented here.
- 2.4 The results of an early case assessment in a particular action are likely to be protected from discovery by attorney-client privilege or work-product protection. Nevertheless, undertak-

ing the cost-benefit analysis necessary for any assessment is an important step from a party's perspective, and the knowledge that one was performed by a party may inform the judge of the likelihood of early settlement.

3. Initial scheduling order

3.1 Rule 16(a) provides that, “the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences” for various purposes. There may be state equivalents to Rule 16(a), and absent one, a state judge might, if within his authority, direct that a conference be conducted. An initial scheduling conference furthers the guiding principle in Rule 1 that requires the Rules be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

3.1.1 The Rule 16(a) order directs attorneys and *pro se* litigants to appear before a judge to establish, among other things, “early and continuing control so the case will not be protracted because of lack of management.”¹¹ This initial order is an opportunity for the judge to communicate the court’s expectation that attorneys and parties will meaningfully prepare for the Rule 26(f) conference and the first Rule 16(b) conference. It may also serve to remind parties and counsel that sanctions may be imposed under Rule 16(f)(1)(B) if they are “substantially unprepared to participate.” The initial order is also an opportunity for the judge to communicate the court’s expectation of how the parties should strive to cooperate in discovery.

3.2 Issues presented

3.2.1 One of the major problems that judges face is the parties’ lack of preparation for the first conference with the judge. Rule 26(f) describes when parties should have their first conference. It also describes the required topics for parties to discuss at the conference and how the results of that conference should be presented to the judge. In federal courts, local rules and chambers practices may supplement the list of factors to be discussed under Rule 26(f).

3.2.2 A number of states have adopted statutes, rules, or orders that function in much the same way as Rule 26(f). In state courts where there is no equivalent to Rule 26(f), it might be useful for the judge presiding over a particular action to direct the parties to confer before the initial conference with the judge, discuss eDiscovery issues, and report to the court. This would, at the least, compel the parties to consider the issues suggested by Rule 26(f) and enable the parties to avoid conducting eDiscovery in a vacuum. However, the rules of certain states may place limits on

¹¹ FED. R. CIV. P. 16(a)(2).

what courts may impose on parties, as in *Antero Resources Corp. v. Strudley*,¹² which held that a “modified” case management order that required a plaintiff to establish a *prima facie* evidence in support of a claim before obtaining discovery was not authorized under Colorado law.

3.3 Suggested judicial management strategies

- 3.3.1 Require the parties to confer on eDiscovery and any other topic enumerated in Rule 26(f) and local rules before the initial case management conference. This should impress on the parties the intent of the court that the parties and their counsel take their obligations to confer seriously and that the court will frown upon any failure to do so.
- 3.3.2 Remind the parties that under Rule 26(d)(2)(A), parties may deliver discovery requests under Rule 34 that will be “considered to have been served at the first Rule 26(f) conference” under Rule 26(d)(2)(B). This will allow the parties to raise objections to the requests and arrive at agreements pertaining to the delivered requests. Both disputes and agreements can then be presented at the initial case management conference.
- 3.3.3 Suggest that each party identify a person or persons particularly knowledgeable about the party’s electronic information systems and who is prepared to assist counsel in the Rule 26(f) conference and later in the litigation.
- 3.3.4 Encourage the parties to consider any issues of privilege, trade secret and confidentiality, the inadvertent disclosure of privileged information, and the form and timing of privilege logs. Refer the parties to Federal Rule of Evidence 502 (discussed in Section IV.12.2.5 and 12.2.6) or its state equivalents, as they may not be familiar with it.
- 3.3.5 Encourage the parties to identify whether discovery will be needed from non-parties, the scope of proposed non-party discovery, and an appropriate allocation of costs.
- 3.3.6 Encourage the parties to consider staged, sequenced, or phased discovery, where doing so is likely to reduce costs by narrowing the scope of discovery as the litigation progresses.

¹² 2015 CO 26 (Colo. 2015).

- 3.3.7 Direct the parties to report on any agreements reached or disagreements encountered at the Rule 26(f) conference as well as any disagreements and stipulations under Rule 29 or state equivalents.
- 3.3.8 Consider whether, given the nature of a particular dispute, the resources of the parties, and the rules of the jurisdiction, referral to a Magistrate Judge, appointment of a special master, or appointment of a discovery mediator would be appropriate.

3.4 Sample orders

- 3.4.1 New York State Unified Court System, Part 202: Uniform Civil Rules for the Supreme Court and the County Court, [Section 202.70: Rules of the Commercial Division of the Supreme Court](#).
- 3.4.2 Hon. William Alsup, U.S. District Court for the Northern District of California, [Supplemental Order to Order Setting Initial Case Management Conference Before Judge William Alsup](#) (providing guidance on “recurring practical questions that arise prior to trial and . . . [imposing] certain requirements for the conduct of the case”).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

4. The conference between parties to formulate a discovery plan

4.1 The conference itself

- 4.1.1 The initial conference between parties contemplated by Rule 26(f) is central to the management of eDiscovery (indeed, all discovery). If done correctly, this conference will enable the parties to establish, on a cooperative basis, how the action will proceed and will reduce the cost of eDiscovery and any delay associated with the resolution of discovery disputes. The discovery plan should guide the issuance of the initial case management order.
- 4.1.2 Judicial management of the conference itself should be minimal once the court establishes the expectations and the agenda. The conference is driven by the *parties*—not the *judge*. Indeed, the judge need not even be aware that a conference took place until a discovery plan is submitted.
- 4.1.3 The conference contemplated by Rule 26(f) is not a perfunctory or “drive-by” requirement. Depending on the nature of the particular action and the volumes and varieties of discoverable ESI from multiple sources, the conference may require

several meetings, in person or through remote access, and may involve representatives of corporate parties such as information management personnel and retained consultants. Judges should be mindful of the need for multiple meetings and consider extending deadlines for submission of a discovery plan, because these meetings might lead to agreements that would avoid or minimize discovery disputes to the benefit of judges and parties.

4.2 Issues presented

- 4.2.1 There may be instances where the conference does not in fact take place or, if it does, where the conference was not *meaningful*.
- 4.2.2 To be useful for the issuance of an initial scheduling order, a comprehensive discovery plan should be submitted to the judge.

4.3 Suggested judicial management strategies

- 4.3.1 Discourage use of perfunctory or “drive-by” conferences by the parties.
- 4.3.2 Develop, with the concurrence of colleagues, a form of discovery plan that supplements Rule 26(f) and incorporates any additional topics identified in local rules or chambers practices and sets forth the advice contemplated below.
- 4.3.3 Advise the parties that the court will be available by email, telephone, or letter to resolve disputes that might arise in the Rule 26(f) process and remind the parties of the availability of informal or expedited resolution of discovery disputes pursuant to Rule 16(b)(3)(B)(v).
- 4.3.4 Suggest that involvement of knowledgeable party representatives or experts may be beneficial in addressing ESI-related topics, with appropriate stipulations regarding any statements made by them.
- 4.3.5 Advise that, at least in complex actions with likely discovery issues or large volumes of ESI, the conference may be a continuing process requiring multiple meetings. This may require that appropriate time be afforded to the parties before a discovery plan is submitted, a case management conference conducted, or an initial case management order entered.

4.4 Representative Decisions

- 4.4.1 *AIDS Healthcare Foundation, Inc v. City of Baton Rouge/Parish of East Baton Rouge*, No. 17-229, 2018 WL 5259463 (M.D. La. Oct. 22, 2018) (noting “root cause of the in-

stant discovery disputes is the parties' overall failure to engage in timely, meaningful discussions regarding ESI discovery in this action" at the 26(f) conference).

- 4.4.2 *Crosmun v. Trustees of Fayetteville Tech. Cmty. Coll.*, 832 S.E.2d 223 (N.C. Ct. App. 2019) (citing *The Sedona Principles, Third Edition*); order allowing forensic examination of defendant's entire computer system vacated and remanded with identification of "several nonexclusive ways in which the trial court could resolve the discovery dispute").

4.5 Sample orders

- 4.5.1 U.S. District Court for the Western District of Pennsylvania, [Local Civil Rule 26.2, Discovery of Electronically Stored Information](#) (addressing party obligations in preparation for and with regard to Rule 26(f) conference).
- 4.5.2 U.S. District Court for the Western District of Washington, Redline [\[Model Agreement Regarding Discovery of Electronically Stored Information and \[Proposed\] Order\]](#) (addressing, among other things, scope of preservation).
- 4.5.3 U.S. District Court for the Southern District of Texas, [Procedures For Cases Assigned to Chief Judge Lee H. Rosenthal](#), 2. The Parties' Rule 26(f) Meeting (addressing topics parties are to discuss).

4.6 Further reading

- 4.6.1 Ariana Tadler, et al, [The Sedona Conference "Jumpstart Outline"](#) (Mar. 2016).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

5. Case management order

- 5.1 Rule 16(b)(1) directs federal judges to issue case management orders after the parties have engaged in the Rule 26(f) process and submitted a discovery plan. State judges are not bound by the Federal Rules of Civil Procedure. Nevertheless, the topics that Rule 16(c)(2) sets out for a federal judge to contemplate in an initial case management order suggest a useful framework for state judges to look to as they meet with parties for the first time.

5.2 Issues presented

- 5.2.1 There may be times when parties have not conferred before their first meeting with the judge, either in violation of Rule 26(f), a state equivalent, or a judicial direction to confer. The judge will then be faced with the option of sending the par-

ties off for a limited conference or proceeding to enter a case management order without the benefit of a plan.

- 5.2.2 Assuming that parties have reached agreement on one or more questions of fact or legal issues, the agreement should be incorporated in some way into case management. However, a judge presumably may need to exercise her discretion to incorporate party agreements into case management needs consistent with the goals of Rule 1.
- 5.2.3 The judge should consider when to schedule subsequent conferences with the parties. This might require flexibility in scheduling by the judge. For example, the judge might set a firm date. Alternatively, if the judge sequences discovery, she might schedule periodic conferences after a particular phase of discovery has been concluded.

5.3 Suggested judicial management strategies

- 5.3.1 Incorporate, as appropriate, party agreements in the initial case management order.
- 5.3.2 Resolve any disagreements as soon as practicable, perhaps at the case management conference itself.
- 5.3.3 Announce the judge's availability in between scheduled conferences upon presentation of a letter/email from the aggrieved party, or (preferably) a jointly prepared letter.
- 5.3.4 Schedule a further conference or conferences as needed in the initial case management order. Alternatively, given the complexity of a particular case, direct the parties to check in telephonically on a regular basis (perhaps biweekly or monthly) to monitor progress and apprise of pending or anticipated disputes.
- 5.3.5 Suggest that rather than directed interrogatories or Rule 30(b)(6) depositions, the parties informally exchange information about their respective electronic information systems.

5.4 Further reading

- 5.4.1 R.J. Hedges, B.J. Rothstein & E.C. Wiggins, *Managing Discovery of Electronic Information, Third Edition (2017)*, Federal Judicial Center.

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

6. Scope of discovery

6.1 Defining the scope of eDiscovery

- 6.1.1 All discovery in the federal courts is governed by Rule 26(b)(1), which provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or defense and proportional to the needs of the case”
- 6.1.2 The 2015 amendment eliminated the expansive “subject matter” language of the pre-2015 version of the rule but provides that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”
- 6.1.3 Rule 26(b)(1) stresses proportionality in discovery. The factors are:
 - importance of the issues at stake in the action;
 - amount in controversy;
 - parties’ relative access to relevant information;
 - resources of the parties; and
 - importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.
- 6.1.4 The scope of discovery may be different under state rules, at least some of which adopted the text of Rule 26(b)(1) before it was amended in 2015. Moreover, states may take different approaches to discovery, such as the Utah Rule of Civil Procedure 26(b), which expands on the text of Federal Rule 26(b).

6.2 Issues presented

- 6.2.1 Requests for discovery of ESI often lack a clear connection to the issues in the action. For example, parties may seek “all email” or “all databases” from an opposing party. Such requests may be acceptable if directed to a narrowly defined event, communication, or issue but would not be acceptable without such limitation(s). In the first instance, the scope of eDiscovery should be defined by the parties (within the confines of Rule 26(b)(1)) with reference to claims and defenses set forth in the pleadings. However, in state court actions, the parties may request, and the court may consider, broader *subject-matter* discovery for good cause, assuming such states allow subject-matter discovery. One or both parties may desire broader discovery or may be unsure as to what the appropriate scope of discovery should be.
- 6.2.2 There will always be new sources of ESI that will be relevant to litigation pending before a judge. Of particular concern for judges is the rise of social media, both in

terms of simple volume, near-universal access and use, and its potential as a source of discoverable ESI. Discovery of social media can be extensive and can implicate the privacy interests of parties and non-parties who participate on social media platforms. If agreement cannot be reached, there is no consensus as to how social media discovery should be conducted.

- 6.2.2.1 The discovery of social media should be governed by the same principles that govern discovery of other electronically stored information. While many social media platforms provide options to restrict public access to individual postings or whole accounts, such “privacy settings” do not shield relevant, nonprivileged ESI from discovery.
- 6.2.2.2 Discovery of particular social media platforms, or of particular applications supported by those platforms, may be subject to, and limited by, the Stored Communications Act.¹³ Discovery of social media may also require a judge to review terms of service to determine what content a party or subpoenaed non-party can retrieve from a social media provider. There may also be circumstances when a judge will be required to conduct an *in camera* review because of privacy concerns and when a party will require the assistance of a retained consultant to retrieve content.
- 6.2.3 There may be instances where a party in a civil action seeks to engage in so-called transnational discovery, that is, discovery of ESI that is located in another country and subject to the possession, custody, or control of an adversary party. In that circumstance, production of ESI may be alleged by the producing party to be “exempt” from discovery because of a data privacy law such as the General Data Protection Regulation (GDPR) of the European Union or a commercial blocking statute of the host country.

6.3 Suggested judicial management strategies

- 6.3.1 Require that the discovery plan address the scope of eDiscovery and describe any disputes as to scope.
- 6.3.2 Require any party seeking discovery into matters beyond claims and defenses to explain why the proposed broader discovery is necessary and relevant to the needs of the case.
- 6.3.3 Resolve any disputes as to scope in the initial case management order, if possible; otherwise, at the time a dispute arises.

¹³ 18 U.S.C.A. § 2701 *et seq.*

- 6.3.4 Require the parties to focus any requests for discovery of social media to relevant and necessary ESI.
- 6.3.5 Tailor discovery of social media to reduce volume and address legitimate privacy interests of parties and non-parties. For example, access to “private” social media content may be conditioned on a showing of relevance based on public postings. Alternatively, an attorney may be directed to search his client’s private postings to determine and produce what is responsive to discovery requests. A judge also could conduct an *in camera* review or appoint a special master to do so. That, in turn, might lead to the issuance of a Rule 26(c) protective order to protect privacy interests.
- 6.3.6 Require the parties to consider privacy interests of parties and non-parties and, if appropriate, consider issuance of a Rule 26(c) protective order limiting access to the ESI.
- 6.3.7 When transnational discovery is in dispute, require the parties to address any foreign law governing the production of *protected* ESI and consider, as an alternate to production, ordering the requesting party to proceed by first seeking data located domestically or by letters rogatory.
- 6.3.8 Consider *sequencing* or *phasing* eDiscovery, focusing on discovery of ESI directly related to claims and defenses in the pleadings in the first instance to expedite the discovery process and, if in state court, deferring rulings on broader eDiscovery requests until the first phase is completed.
- 6.3.9 Require that the parties negotiate the scope of discovery pursuant to Rule 26(b)(1) and attempt to reach agreement at the outset. The scope may later be modified by agreement or by court order.

6.4 Representative decisions

- 6.4.1 *Crossman v. Carrington Mortg. Servs., LLC*, No. 3:19-cv-1081, 2020 WL 2114639 (M.D. Fla. May 4, 2020) (plaintiff’s social media content relevant to alleged injuries and discoverable subject to confidentiality agreement between parties to minimize intrusion into her private life).
- 6.4.2 *Hardy v. UPS Ground Freight, Inc.*, Civil Action No. 3:17-cv-30162-MGM, 2019 WL 3290346, at *2 (D. Mass. July 22, 2019) (denying defendant’s motion to compel forensic examination of plaintiff’s cell phone because defendant failed to “articulate a basis for an accusation that Plaintiff may have engaged in spoliation of evidence.”).

- 6.4.3 *Rodriguez-Ruiz v. Microsoft Operations Puerto Rico, L.L.C.*, Case 3:18-cv-01806-PG, 2020 WL 1675708 (D.P.R. Mar. 5, 2020) (ordering production of plaintiff's social media content reflective of emotional state; content to be reviewed and produced by his counsel rather than by allowing defendant to have unrestricted access to plaintiff's account).

6.5 Further reading

- 6.5.1 The Sedona Conference, *Commentary on Rule 34 and 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467.
- 6.5.2 The Sedona Conference, *Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, 19 SEDONA CONF. J. 495 (2018).
- 6.5.3 The Sedona Conference, *Primer on Social Media, Second Edition*, 20 SEDONA CONF. J. 1 (2019).
- 6.5.4 Hon. Craig B. Shaffer, *Deconstructing "Discovery About Discovery,"* 19 SEDONA CONF. J. 215 (2018).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

7. Proportionality

7.1 Proportionality as a concept

- 7.1.1 Discovery can be expensive. Indeed, some argue that discovery costs and burdens, particularly those related to ESI, are so expensive that those costs prevent parties from fairly and fully litigating claims and defenses in federal or state courts. Judges should be mindful of such arguments when addressing costs and burdens.
- 7.1.2 One obstacle to proportionality may be broad discovery requests and objections that lead to disputes about relevance, scope, and disproportionality. The 2015 amendments to the Federal Rules were intended to require specificity in both requests and objections. State rules may not impose such a specificity requirement.
- 7.1.3 Rule 26(b)(1) makes clear that *all* discovery is subject to proportionality. The rule describes a cost-benefit analysis that a judge must perform in permitting parties to engage in what might be costly and time-consuming eDiscovery. Although states may or may not have adopted similar rules, state judges often engage in proportionality analyses—however these may be expressed—in ruling on discovery re-

quests. Although judges might prefer that the parties engage in a proportionality analysis—and Rules 1, 26(b)(1), and 26(g)(1)(B)(iii) require this analysis to be undertaken by attorneys—the exercise of proportionality by federal and state judges is perhaps the strongest tool available to manage discovery.

- 7.1.4 Proportionality is inherently an amorphous concept. Rule 26(b)(1) lists six factors—set forth in Section IV.6.1.3 above—that a judge should take into consideration, but, as the comments to the 2015 amendment to that rule make clear, the list is nonexclusive. Moreover, the factors are not listed in any order of priority, and although cost may be a factor, it may not be determinative.

7.2 Issues presented

- 7.2.1 There may be objections raised to one or more discovery requests based on allegations that they are disproportionate to the needs of a particular case. Such objections present a judge with the question of whether to direct the parties to the dispute to confer in an attempt to reach resolution and report back.
- 7.2.2 Should the parties be unable resolve their dispute, the judge will need to consider how to allocate the burden of proof on the proportionality objection, whether to conduct a hearing with witnesses, or whether to proceed only with written submissions.
- 7.2.3 The resolution of proportionality disputes may impact a judge's overall management of a particular case. He should consider how the resolution of the disputes may impact existing scheduling orders.

7.3 Suggested judicial management strategies

- 7.3.1 Direct the parties to confer in an attempt to resolve any proportionality dispute and have the parties report back on the success or failure of that conference. Incorporate any agreements into a case management order. Consider requiring the parties to file a joint letter to the court outlining any disagreements in lieu of formal motion practice.
- 7.3.2 Advise the parties whether formal motion practice will be required to bring the dispute before the court or whether the dispute can be presented by affidavit or written proof.
- 7.3.3 Allocate burden of proof before any argument or submission. Given the nature of proportionality, the requesting party should not be expected to demonstrate cost or burden on the objecting party. It should, however, be expected to demonstrate relevance and specificity. The objecting party should then bear the burden to

demonstrate, with an appropriate factual showing, that the discovery sought would be disproportionate to the needs of the case because of excessive cost for retrieval or privilege review, privacy concerns, business interruption, the availability of the information from less expensive alternative sources, delay in the case, etc.

7.4 Representative decisions

- 7.4.1 *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-cv-849, 2020 WL 1983069 (S.D. Ohio Apr. 27, 2020) (citing *The Sedona Principles, Third Edition*; affirms magistrate judge ruling that defendants need not preserve certain ESI file types for proportionality-related reasons).
- 7.4.2 *Lawson v. Spirit Aerosystems, Inc.*, No. 18-cv-1100, 2020 WL 1813395 (D. Kan. Apr. 9, 2020) (citing *The Sedona Principles, Third Edition*; court declines motion to compel defendant to perform second-level review and produce residual documents after TAR production on proportionality grounds).
- 7.4.3 *In re Mercedes-Benz Emissions Litig.*, No. 16-cv-881, 2020 WL 487288 (D.N.J. Jan. 30, 2020) (defendant ordered to produce information related to its German employees; proportionality objection based on GDPR rejected, but protective order issued to obviate objection).
- 7.4.4 *Pentel v. Shepard*, No. 18-cv-1447, 2019 WL 3729770 (D. Minn. Aug. 8, 2019) (production of three years' worth of database inquiries requiring 102, 200 separate searches and review of 306,600 pages found disproportionate).

7.5 Further Reading

- 7.5.1 The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017).
- 7.5.2 Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA. CONF. J. 55 (2015).
- 7.5.3 R.D. Keeling & R. Mangum, *The Burden of Privacy in Discovery*, 20 SEDONA CONF. J. 415, 441 (2019) (discussing ‘the emerging consensus that privacy burdens may properly be considered as part of the proportionality analysis required by Rule 26(b)(1) to determine the scope of discovery.’).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

8. Identification of “not reasonably accessible” sources of ESI

8.1 Rule 26(b)(2)(B)

- 8.1.1 Rule 26(b)(2)(B) provides that a party need not produce ESI from sources that a party identifies as being not reasonably accessible because of undue burden or cost. If a requesting party persists in requesting ESI from those sources, the judge must determine whether the sources are, in fact, not reasonably accessible. If the requested information is not reasonably accessible but *good cause* exists for the production of ESI from those sources, the judge may order the ESI to be produced under the proportionality limitations of Rule 26(b)(2)(C) and may also impose other conditions, including cost sharing or cost shifting.
- 8.1.2 *Production* of ESI from sources that are not reasonably accessible is distinct from *preservation* of that ESI. Identification of a source of ESI as being not reasonably accessible does not relieve the party of the obligation to preserve evidence, absent agreement of the parties or order of the court.

8.2 Issues presented

- 8.2.1 Identification or description of the alleged not-reasonably-accessible source is necessary. The Advisory Committee notes to the 2006 amendment to Rule 26(f) suggest that parties discuss whether ESI is reasonably accessible. This discussion should be in sufficient detail so that the requesting party can make an informed determination whether to seek production from any source not being searched.
- 8.2.2 The burden is on the party making the assertion that a source is not reasonably accessible to prove the source is, *in fact*, not reasonably accessible.
- 8.2.3 If the responding party shows that the source is not reasonably accessible, but the requesting party presses its request for production, the court must determine whether *good cause* exists for the production. The Advisory Committee notes to the 2006 amendment of Rule 26(b)(2)(B) suggest that a court may consider a number of factors in determining whether good cause exists. One factor may be whether the source was rendered not reasonably accessible by the action or inaction of the responding party.
- 8.2.4 As technology advances, what is and is not considered “reasonably accessible” will change. For instance, backup tapes were considered a *per se* “not reasonably accessible” source of ESI when the seminal *Zubulake*¹⁴ case was decided. Twenty years

¹⁴ *Zubulake v. UBS Warburg (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003)

later, access to ESI from backup media is not considered particularly burdensome or costly.¹⁵

8.3 Suggested judicial management strategies

- 8.3.1 Direct the party asserting that ESI is not reasonably accessible to identify any accessible sources where the ESI can be found or third parties that may have it on an accessible source.
- 8.3.2 Phase or limit discovery in the first instance to ESI from accessible sources and defer any consideration of discovery from sources that are not reasonably accessible until after an assessment of further need can be made.
- 8.3.3 Allow the parties to engage in *focused* and *limited* discovery to test whether, in fact, the ESI source is or is not reasonably accessible.
- 8.3.4 Direct the requesting party to narrow its requests to minimize any undue burden or cost, or shift costs in whole or in part.
- 8.3.5 Require the parties to present expert testimony, if necessary, on whether the source of the requested ESI is not reasonably accessible. Alternatively, require the parties to proffer testimony by information technology personnel.

8.4 Representative Decision

- 8.4.1 *Kang v. Credit Bureau Connection, Inc.*, No. 1:18-cv-01359, 2020 WL 1689708 (E.D. Cal. Apr. 7, 2020) (defendant's conclusory, unsupported statements and failure to show that review of relevant ESI would be unduly burdensome or costly were insufficient to establish that sources are not reasonably accessible; in any event, good cause existed to compel production).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

9. Search and collection methodologies

- 9.1 One goal of judicial case management should be to encourage parties to agree on a search and collection methodology *before* discovery begins. Such an agreement should reduce cost

¹⁵ For a useful list of factors to consider in determining the accessibility of a source of ESI, see The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281, 290 (2009), available at https://thesedonaconference.org/publication/Commentary_on_Preservation_Management_and_Identification_of_Sources_of_Information_that_are_Not_Reasonably_Accessible.

and delay and conserve judicial resources. Defining such a methodology in terms of date ranges, data sources, file type, and likely custodians enables parties to conduct eDiscovery in an efficient and cost-effective way. While traditional methods of identification and collection (interviews with custodians, manual searches through files, etc.) have their place, cost savings might be realized if parties agree to use automated search and collection technologies, particularly with larger collections. The more transparency and cooperation between the parties in the application of these technologies, the less the likelihood that parties will dispute the results.

9.2 Issues presented

- 9.2.1 Parties are not accustomed to sharing, let alone negotiating, the methodology they intend to use for search and collection of ESI. This resistance is compounded by concern that selection criteria may reveal the mental processes of counsel and constitute work product.
- 9.2.2 Parties *requesting* ESI are often unaware of the search and collection methodologies that might be available to the *responding* party. For example, the requesting party is unlikely to know how the responding party has organized its ESI or what search criteria could yield the most relevant and useful information.
- 9.2.3 Parties may not be familiar with advanced technological tools to reduce the cost of manual search and collection procedures. These tools may bear names such as, among others, Technology-Assisted Review (TAR), predictive coding, or machine learning. These technologies are intended to limit the need for manual review of large volumes of ESI for relevance and privilege. Properly used, such technologies may substantially decrease the cost and delay normally associated with document review.¹⁶ However, existing case law is sparse and, in the final analysis, merely finds that a particular technology is *reasonable*. Few courts have reviewed the *results* of an automated search and found that those results were reasonable. Moreover, there is no accepted definition of the *reasonableness* of an automated search.
- 9.2.4 Automated search raises another unanswered question: It may be necessary for a qualified expert to opine on the reliability of advanced search and collection technologies under Federal Rule of Evidence 702 or its state equivalent. Alternatively, a more lenient standard of *reasonableness* might be the measure.

¹⁶ In 2012, the ABA added Comment 1.8 to Model Rule of Professional Conduct 1.1 on Competence to emphasize that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” At least 38 states have followed with amendments to their own Professional Conduct codes and the institution of technology-focused continuing legal education requirements. For a complete list and links to the individual rules, see *Tech Competence*, LAWSITES, <https://www.lawsitesblog.com/tech-competence> (last visited June 19, 2020).

9.2.5 Finally, parties may fear that a court will reject a specific technological tool or method as being *unreasonable*, resulting in the need to repeat a search or production, the loss of privilege or work-product protection, or a sanction. This fear may be reduced or eliminated if the parties reach agreement on a tool or method and present that agreement to a court as a stipulation binding the parties. Absent such agreement, the party proposing to use a specific method may seek prior judicial approval.

9.3 Suggested judicial management strategies

- 9.3.1 Encourage the parties to agree on an appropriate methodology, depending on the needs of the case. Judges should be familiar with the options available, but parties are in the best position to determine the best methodology for locating and collecting responsive ESI.¹⁷
- 9.3.2 Encourage the parties to collaborate on a sample search of ESI to determine the most effective search methodology to apply to a larger collection.
- 9.3.3 If keyword searching is considered by the parties to be an appropriate methodology, encourage the parties to agree to reasonable set of keywords. Avoid having the court be forced to select keywords for the parties, as the court is not in a position to determine whether any given set of keywords will be effective in retrieving relevant information and filtering out irrelevant information.
- 9.3.4 Direct the parties to attempt to reach agreement on the use of automated search technologies if appropriate given the needs of a particular case, and advise that insistence on the use of costly and time-consuming manual procedures will be viewed with skepticism.¹⁸
- 9.3.5 Consider staging searches, focusing on those active data sources most likely to yield relevant information, rather than issues, as is often employed in complex litigation.

¹⁷ See The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 118 (2018) [hereinafter *The Sedona Principles, Third Edition*] (“Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”) and associated Comments, available at https://thesedonaconference.org/publication/The_Sedona_Principles.

¹⁸ *In re Mercedes Benz Emissions Litig.*, No. 16-cv-00881, 2020 WL 103975 (D.N.J. Jan. 9, 2020) (discovery master declines to order defendant to utilize TAR to identify responsive documents but cautions that future objections based on the cost of review will not be looked kindly upon).

9.4 Representative decisions

- 9.4.1 *Impact Engine, Inc. v. Google LLC*, No. 3:19-cv-01301, 2020 WL 1939023 (S.D. Cal. Apr. 21, 2020) (court declines to rule on disagreement over ESI search protocol given parties' failure to comply with its procedure for discovery disputes and because the parties are "best situated to evaluate the procedures, methodologies, and technologies appropriate" for production of their ESI).
- 9.4.2 *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489, 495 (N.D. Ill. 2018) (adopting agreed-on order establishing production protocol for ESI with "inclusion of Plaintiffs' proposal that a random sample of the null set will occur after the production and that any responsive documents found . . . will be produced.").
- 9.4.3 *Lawson v. Love's Travel Stops & Country Stores, Inc.*, No. 1:17-CV-1266, 2019 WL 7102450 (M.D. Pa. Dec. 23, 2019) (citing *The Sedona Principles, Third Edition*); absent party agreement, court fashions procedure for search of ESI that includes sampling).
- 9.4.4 *Nuvasive, Inc. v. Alphatec Holdings, Inc.*, Case No.: 18-cv-0347-CAB-MDD, 2019 WL 4934477, at *2 (S.D. Cal. Oct. 7, 2019) (citing Sedona Principle 6; denying motion to compel party to search its ESI using search terms proposed by moving party).

9.5 Further reading

- 9.5.1 The Sedona Conference, *TAR Case Law Primer*, 18 SEDONA CONF. J. 1 (2017).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

10. Form or forms of production

- 10.1 ESI exists, and can be produced, in various forms. Form of production can be a particularly contentious issue in eDiscovery. Parties can dispute whether ESI should be produced in, for example, paper, portable document format (PDF), tagged image file format (TIFF), or native form. This section addresses form of production and why a particular form or forms may be appropriate for the needs of a particular action.

10.2 Issues presented

- 10.2.1 Parties may neglect to follow the process by which a particular form or forms may be requested. Rule 34(b) permits a party to specify the form or forms in which it wants ESI produced. This is intended to "facilitate the orderly, efficient, and cost-

effective discovery of electronically stored information.”¹⁹ Absent such a specification, “the responding party must produce electronically stored information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”²⁰ If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must confer under Rule 37(a)(2)(B) in an effort to resolve the dispute.

- 10.2.2 If a court is forced to resolve the dispute, “the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in [the] rule . . .”²¹
- 10.2.3 Rule 34(b)(2)(E)(i) directs that a “party must produce documents as they are kept in the *usual course of business* or must organize and label them to correspond with the categories in the request . . .” (Emphasis added.) However, Rule 34(a)(1)(A) also permits the discovery of “any documents or electronically stored information . . . after translation by the responding party into a *reasonably usable form* . . .” (Emphasis added.) Thus, the default form of production should be the form in which the ESI is kept in the “usual course of business” or, alternatively, in a “reasonably usable form.”
- 10.2.4 A responding party may produce ESI in a form that is not in a “reasonably useable form” as required by the rule. This may be because the ESI has been produced in an unusual or proprietary format requiring specialized software to be searched or read, or in a jumbled and disorganized fashion, or in such large volume as to frustrate any effective review. This may also be the result of the parties’ failure to confer on the appropriate format prior to production, a failure of the requesting party to understand the consequences of its request, or an intentional effort by the responding party to “hide the ball.”
- 10.2.5 A second and more contentious issue arises from requests that seek a form that incorporates “metadata.” Metadata refers to ESI that is not apparent from the face of a given electronic “document” and may disclose, for example: the dates of creation, edits, and comments; file size and location; deletion dates and times; access and distribution; authorship or the username associated with those tasks.
- 10.2.6 Metadata also provides a means by which a party can conduct a meaningful and relatively inexpensive search of an adversary’s ESI. While the metadata itself may

¹⁹ FED. R. CIV. P. 34(b) advisory committee’s note to 2006 amendment.

²⁰ *Id.*

²¹ *Id.*

not be relevant to any claim or defense in a particular action, some types of metadata serve a useful purpose in helping the parties access and review relevant ESI.

10.2.6.1 Metadata may show the history of a backdated document or a party's improper attempts to delete relevant ESI. Thus, there are circumstances where metadata may be highly relevant.

10.2.6.2 The number of fields of metadata associated with particular sources of ESI is always expanding, as computer applications become more complex and require more sophisticated behind-the-scenes management. For instance, the "Dublin Core" set of metadata terms used in the first automated card catalogue system consisted of 15 fields (title, author, publication date, etc.) to describe every book in a library. Today, an email message or word-processed document could have hundreds of metadata fields associated with it, of which only a handful would likely be relevant or useful in litigation.

10.3 Suggested judicial management strategies

10.3.1 Direct the parties to describe the manner in which they collect and preserve ESI at their initial Rule 26(f) conference so that the parties can discuss the appropriate form or forms of production. Emphasize to the parties that an informal discussion may minimize or eliminate cost and undue delay.

10.3.2 In an action pending in state court that does not have an equivalent to Rule 34(b), direct the parties to look to Rule 34(b) for guidance.

10.3.3 Apply Sedona Principle 12, which provides that, in the absence of agreement or an order, production "should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case."²²

10.3.4 Require the requesting party to demonstrate why production of ESI should be in a particular form or forms and require a producing party to demonstrate why production of ESI in a particular form or forms does not unreasonably diminish its usability. For example, assume that a producing party proposed to produce a PDF of a spreadsheet. The PDF would not be useable in that form if the requesting party sought to learn how each cell in the spreadsheet had been populated. To be useable the spreadsheet would need to be produced in native form, showing the for-

²² *The Sedona Principles, Third Edition, supra* note 15.

mulae or source of each cell's data. Conversely, assume that a producing party proposed to produce an email as a PDF. If the requesting party sought the email for its content as the email had been transmitted then, presumably, the pdf would be useable. If, however, the requesting party intended to argue that the content had been modified after transmission, then native form might be required.

10.4 Representative decisions

- 10.4.1 *Frey v. Minter*, No. 4:18-CV-191, 2019 WL 5268548 (M.D. Ga. Oct. 17, 2019) (production of ESI in single 156-page PDF found “reasonably useable”).
- 10.4.2 *Copperhead Agric. Prods., LLC v. KB AF Corp., LLC*, 4:18-CV-04127, 2019 WL 6717699 (D.S.D. Dec. 10, 2019) (citing *The Sedona Principles, Second Edition* (2007); motion to compel defendants to reproduce ESI in native format denied, but defendants ordered to preserve all metadata for possible future production if plaintiff can show “persuasive reasons and particular facts . . . as to particular production”).
- 10.4.3. *Ice Cube Bldgs. LLC v. Scottsdale Ins. Co.*, No. 17-cv-00973, 2019 WL 4643609 (D. Conn. Apr. 8, 2019) (defendant’s production of ESI found “reasonably useable,” but defendant ordered to produce “Table of Contents or similarly structured document”).

10.5 Further reading

- 10.5.1 The Sedona Conference, *Federal Rules of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447 (2018).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

11. Confidentiality and public access

- 11.1 This topic may be raised in any civil action, state or federal. Rule 26(c)(1) (and its state equivalents) allows a party to “move for a protective order in the court where the action is pending.” The court may, for good cause, issue an order “to protect a party from annoyance, embarrassment, oppression, or undue burden or expense” for a number of reasons, including the confidential nature of a document.²³

²³ FED. R. CIV. P. 26(c)(1)(A-H).

11.2 Issues presented

- 11.2.1 Parties will often propose discovery protective orders with numerous categories of permitted or prohibited access, such as categories designated as “attorneys’ eyes only,” intended to prohibit access by particular parties, witnesses, or consultants. Unless these categories are justified and clearly delineated, they can result in confusion, delay, and ancillary disputes. The court should encourage simplicity.
- 11.2.2 There is a fundamental distinction between the burden imposed on a party to secure a confidentiality order and the burden imposed on a party to secure a filing under seal. The latter implicates First Amendment and common-law-based rights of access. This fundamental distinction requires a judge to: (a) appreciate the distinction and (b) apply the compelling interest test when *filing under seal* is sought.
- 11.2.3 Beyond protecting privilege and work product, parties often seek to protect information that might, for example, constitute a trade secret or reveal highly personal matters. If exchanged without some type of restriction of use or dissemination, that information may become known to the public at large. Parties seeking protection for these types of information must look to Rule 26(c) or its state equivalents.
- 11.2.4 Parties are often under the impression that social media postings, when designated as “private,” are shielded from discovery or can only be produced under a protective order. The privacy settings offered by social media platforms do not confer any special legal status, and these postings are discoverable if relevant, nonprivileged, and proportional to the needs of the case. See Section 6.2.2 above.

11.3 Representative decisions and orders

- 11.3.1 *Kannan v. Apple Inc.*, Case No. 17-cv-07305-EJD (VKD), 2019 WL 3037591 (N.D. Cal. July 11, 2019) (permitting defendant to produce confidential records of defendant’s employees on attorneys’-eyes-only basis to plaintiff’s counsel and directing that counsel not share contents with plaintiff).
- 11.3.2 [Local Civil and Criminal Rules of the U.S. District Court for the District of New Jersey](#), Appendix S, Discovery Confidentiality Order.
- 11.3.3 [Local Court Rules of the U.S. District Court for the Western District of Texas](#), Appendix H, Protective Order.
- 11.3.4 New York Supreme Court, [Stipulation and Order for the Production and Exchange of Confidential Information](#).

11.4 Further reading

- 11.4.1 The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141 (2007).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

12. Protection of attorney-client privilege and work product

- 12.1 Protection of attorney-client privilege and work product goes to the heart of the adversary system. Production of ESI can often be voluminous and contain privileged information, stored in nonapparent locations such as metadata. This leads to the risk that such information may be inadvertently produced or produced without adequate protection.

12.2 Issues presented

- 12.2.1 Responding parties that withhold relevant documents on privilege or work-product grounds are almost universally required to provide a privilege log identifying the withheld documents and stating why the documents were withheld.²⁴
- 12.2.2 Rule 26(b)(5)(B) establishes a default procedure for asserting claims of privilege after production of information in discovery. If privilege or work product is asserted over produced information, the producing party must timely notify the receiving party, who is obligated to “promptly return, sequester, or destroy the specified information and any copies it has.” The information should then be identified on a privilege log, subject to judicial resolution if challenged. “The producing party must preserve the information until the claim is resolved.”
- 12.2.3 Rule 26(b)(5)(B) is a procedural rule and does not afford any substantive protection for attorney-client communications or work-product material produced during discovery. While the *procedure* is designed to reduce cost and delay associated with disputes over inadvertently produced privileged documents and ESI during discovery, production itself may give rise to a waiver in many state courts. Prior to 2008, this was also true in many federal courts, and the scope of waiver may have extended to all information regarding the same subject matter as the inadvertently produced information.

²⁴ See, e.g., FED. R. CIV. P. 26(b)(5)(A).

- 12.2.4 Therefore, the risks associated with inadvertent production of privileged information have been very high; consequently, the cost of privilege review is often cited as a major component of the overall cost of litigation.
- 12.2.5 Federal Rule of Evidence 502 was enacted in 2008 to address these concerns. A number of states have adopted equivalents to Rule 502, but note that some have adopted only particular sections of that rule.
 - 12.2.5.1 Rule 502(a) limits the risk of subject-matter waiver to instances in which the waiver was intentional.
 - 12.2.5.2 Rule 502(b) establishes *somewhat* uniform standards throughout the federal courts to resolve claims of waiver by inadvertent production, adopting a three-part test to determine if an inadvertent production constitutes a waiver.
 - 12.2.5.3 Rule 502(e) allows parties to enter into nonwaiver agreements that are binding only as to those parties.
 - 12.2.5.4 Rule 502(d) has the greatest potential for cost savings and efficiencies. It provides for nonwaiver confidentiality orders under which parties can disclose ESI and other information in discovery without waiving attorney-client privilege or work-product protection. Such an order is binding in any other federal and state proceeding.

12.3 Suggested judicial management strategies

- 12.3.1 Direct that the parties confer on privilege and confidentiality issues before discovery begins and before presenting any disputes to the court.
- 12.3.2 Direct the parties to attempt to agree on issues of waiver and protection of confidential information, and that any resulting agreements be presented to the court at the initial case management conference and incorporated in the court's Rule 16 scheduling order.
- 12.3.3 Consider entering a nonwaiver confidentiality order with or without the parties' agreement under Federal Rule of Evidence 502(d) or its state equivalent, after providing the parties with an opportunity to express any concerns about such an order. In entering such an order, be aware of the confusion that sometimes exists between orders under sections (b) and (d) of this rule and remind the parties of the distinction between such orders so that they appreciate what they are agreeing to.

- 12.3.4 If the parties cannot agree on a nonwaiver order, the federal rule allows the court to enter an order under Rule 502(d) *sua sponte*, and state courts may also have that power if they have an equivalent to Rule 502.
- 12.3.5 Establish a procedure by which challenges to privilege or confidentiality assertions can be addressed in the most timely and efficient manner, ideally before disputed documents appear in depositions or as attachments to motions. Federal Rule of Civil Procedure 26(b)(5)(B) provides a default procedure.
- 12.3.6 In the event that the privilege or confidentiality designations of a large volume of documents are challenged, direct the parties to attempt agreement on *categorizing* disputed information so that a ruling on samples will apply to each category.

12.4. Representative decisions, orders, and local rules

- 12.4.1 *Ingham Reg'l Med. Ctr. v. United States*, 146 Fed. Cl. 424 (Fed. Cl. Jan. 14, 2020) (work-product protection not available for information prepared in general course of business rather than in anticipation of business).
- 12.4.2 *Proxicom Wireless, LLC v. Target Corp.*, No. 6:19-cv-1886, 2020 WL 1671326 (M.D. Fla. Mar. 25, 2020) (Rule 502(d) held not to protect “proprietary and confidential” materials; applicable to attorney-client communications and work product).
- 12.4.3 District of New Jersey, Local Civil Rule 16.1, provides:

Absent objection of a party or a form of order submitted on consent, either of which must be set forth in a proposed discovery plan submitted pursuant to Federal Rule of Civil Procedure 26(f)(2), a scheduling order entered pursuant to this subsection on or after September 30, 2016 shall be deemed to incorporate an order pursuant to Federal Rule of Evidence 502(d) that:

- (i) The production of materials, inadvertent or otherwise, shall not be deemed a waiver of attorney-client privilege or work product protection in this civil action or in any other federal or State proceeding.
- (ii) Nothing in (i) above shall limit the right of a party or subpoenaed nonparty to conduct a reasonable review of materials for relevance or otherwise in response to a discovery request or requests.

12.5 Further reading

- 12.5.1 The Sedona Conference, *Commentary on the Protection of Privileged ESI*, 17 SEDONA CONF. J. 95 (2015).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

13. The privilege log

- 13.1 Rule 26 (b)(5)(A) prescribes the preparation of a timely privilege log and, in general, describes its contents. The form or content of privilege logs may also be supplemented by local rules or chambers practices.
- 13.1.1 Absent agreement between the parties to forego these, privilege logs are essential to judicial resolution of disputes between parties about withheld information. Nevertheless, especially with ESI, privilege logs can be voluminous, a major source of satellite litigation, and a substantial drain on both party and judicial resources.
- 13.2 Issues presented
- 13.2.1 The parties must be clear on the level of detail that a privilege log should contain. Rule 26(b)(5)(A)(2) requires that a party “describe the nature of the documents . . . and do so in a manner that . . . will enable other parties to assess the claim.” This does not offer concrete guidance about what form a log should take. Absent party agreement, the court must prescribe the form. For example, logged email might include such metadata fields as “to,” “from,” “cc,” “bcc,” or the like. Should other metadata fields be included? Judges should be wary of automatically generated privilege “logs” based on arbitrary criteria, such as the simple phrase “attorney-client privilege” or the name of an attorney appearing in a document.
- 13.2.2 Privilege logs should be sufficiently specific to allow a reviewing party to accept or challenge a claim of privilege. For example, it might be insufficient to describe a document as “giving legal advice.”
- 13.2.3 As noted above, privilege logs can be voluminous. As an alternative to requiring every document on a log to be described, parties might be directed to fully describe exemplars of documents in each of several categories.
- 13.2.4 Message strings (or “threads”) consist of related email communications over time, initiated by a “parent” message. The parent message may be an attorney-client communication or work product, the status of which may not be obvious later in the string. Judges should consider alternatives to describing each message on a string. For example, a judge might direct a party to describe only privileged messages on a string. Alternatively, it might be sufficient to log only the “latest” message on a string that includes a privileged message. Moreover, it might be unnecessary to log nonprivileged communications in a string.

13.3 Suggested judicial management strategies

- 13.3.1 At the initial conference between the parties, encourage them to agree on the definition of privileged communications and work product as a precursor to any discussion of privilege logs. This and related agreements on topics such as those described below should be incorporated into stipulations under Rule 29 or its state equivalents.
- 13.3.2 Require the parties to address the form and content of privilege logs at the initial conference between the parties.
- 13.3.3 Require the parties to attempt to agree on a reasonable time to produce a privilege log, which may be more than the time otherwise allowed by local rule or practice if voluminous ESI must be logged.
- 13.3.4 Encourage the parties to identify presumptively privileged documents that may be segregated and excluded from production based on some agreed methodology; for example, communications with outside counsel after the filing of a complaint or answer.
- 13.3.5 Encourage the parties to agree that otherwise voluminous logs be prepared more economically; for example, by category of items rather than individual listing of each document.
- 13.3.6 Encourage the parties to agree on how message strings should be logged.
- 13.3.7 Require the designating party to submit an affidavit or affidavits that, for example, identify all persons named on a log and describe in greater detail why a particular document or documents are privileged.
- 13.3.8 If necessary, conduct an *in camera* review or refer disputes about logs to a special master. If the volume of disputed designations is onerous, consider reviewing a representative or random sample of the documents and entries.

13.4 Representative local rule

- 13.4.1 Joint Southern and Eastern Districts of New York, Local Civil Rule 26.2(c), provides:

Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that

groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

COMMITTEE NOTE

With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court. There is a growing literature in decisions, law reviews, and other publications about the need to handle privilege claims in new and more efficient ways. The Committee wishes to encourage parties to cooperate with each other in developing efficient ways to communicate the information required by Local Civil Rule 26.2 without the need for a traditional privilege log. Because the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case. The guiding principles should be cooperation and the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. See also [The Sedona Cooperation Proclamation](#), . . . whose principles the Committee endorses.

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

14. Allocation of costs during litigation

14.1 Cost shifting came to eDiscovery with the iconic *Zubulake* decision²⁵ in the context of production of ESI from “inaccessible” sources. Cost shifting and cost sharing are implicit in Rule 26(b)(2)(B), under which “[t]he court may specify conditions for the discovery” of ESI from not-reasonably-accessible sources. Note that the court’s discretionary power to allocate costs in the course of discovery are distinct from the post-judgment award of costs associated with discovery, which are more narrowly governed by rule and statute.

14.1.2 Cost shifting or cost sharing in discovery may appear to be inconsistent with the presumption, stated by the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*,²⁶ that each party bears its own litigation costs. The party seeking cost shifting or cost

²⁵ *Zubulake v. UBS Warburg (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003)

²⁶ 437 U.S. 340, 358 (1978)

sharing bears the burden of overcoming that presumption by a preponderance of the evidence.

- 14.1.3 Rule 26(c)(1)(B) expressly authorizes federal judges to order “the allocation of expenses” related to discovery. The Advisory Committee notes to the 2015 amendment to this rule state that authority to allocate costs “is included . . . and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”
- 14.1.4 Rule 26(b)(2)(b) also expressly authorizes federal judges to allocate costs if not-reasonably accessible information is ordered to be produced, but it does so in oblique language: “The court may specify conditions for the discovery.” The Advisory Committee notes to the 2006 amendment to the rule addresses costs expressly: “The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”

14.2 Issues presented

- 14.2.1 Cost-shifting or cost-sharing questions may not be limited to the production of ESI. However, production of ESI may result in significant costs, and parties may seek to have these costs shifted or shared. This should be discussed at the initial Rule 26(f) conference, if not sooner. There is little case law that addresses the allocation of costs. Sedona Proportionality Principle 1 suggests that the “burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.”²⁷
- 14.2.2 There may be actions in which crucial ESI is known to be available only from sources that are not reasonably accessible under Rule 26(b)(2)(B). For example, email may no longer exist on accessible systems or word-processing documents from retired applications. In such instances, when a party has preexisting knowledge of such facts, the parties should be able to discuss cost shifting or cost sharing during the initial Rule 26(f) conference.

²⁷ The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 146 (2017), available at https://thesedonaconference.org/publication/Commentary_on_Proportionality_in_Electronic_Discovery.

14.2.3 The Federal Rules do not set forth factors that guide the court's cost allocation analysis. What factors might be used? Factors suggested in the Advisory Committee notes to the 2006 amendments to Rule 26(b)(2)(B), concerning "good cause" for production of ESI from not-reasonably-accessible sources, may be informative. *Zubulake* set forth a related but slightly different set of factors specifically for cost shifting. Likewise, there is no uniformity among the state courts that have addressed this issue in the ESI context.

14.2.3.1 The *Zubulake* factors are:

- (1) the extent to which the request is specifically tailored to discover relevant information;
- (2) the availability of such information from other sources;
- (3) the total cost of production compared to the amount in controversy;
- (4) the total cost of production compared to the resources available to each party;
- (5) the relative ability of each party to control costs and its incentive to do so;
- (6) the importance of the issue at stake in the litigation; and
- (7) the relative benefits to the parties of obtaining the information.²⁸

14.3 Suggested judicial management strategies

- 14.3.1 Limit production of ESI to reasonably accessible information, the costs of which are presumably borne by the producing party.
- 14.3.2 Address cost shifting or cost sharing only after all relevant reasonably accessible information has been produced and reviewed by the requesting party.
- 14.3.3 Require the party seeking to allocate costs to describe in a detailed affidavit the cost and burden it expects to incur in producing ESI from sources it deems not reasonably accessible.
- 14.3.4 Require sampling of ESI that a party has been requested to produce from sources it deems not reasonably accessible, thus enabling the judge to ascertain the extent to which relevant information resides within the ESI and the cost of retrieval of the relevant data set.

²⁸ *Zubulake I*, 217 F.R.D. at 322.

- 14.3.5 Implement the above strategies when a producing party seeks to allocate costs for ESI due to undue burden or expense, even if the ESI at issue is reasonably accessible, through the application of the proportionality factors set forth in Rule 26(b)(1).

14.4 Representative Decision

- 14.4.1 *McCabe's Mechanical Serv. Inc. v. Ballweg*, No. 201900809, 2020 WL 1848082 (Del. Ch. Apr. 9, 2020) (court directs parties to confer on selection of third-party vendor to conduct search of defendant's ESI if plaintiff maintains that defendant's self-production incomplete, with costs to be shifted to defendant if vendor search revealed incomplete production or spoliation).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

15. Discovery from non-parties

- 15.1 Discovery of ESI can be particularly troubling when non-parties are involved. Plainly, Rule 45 and its state equivalents allow such discovery. However, the ESI sought may be voluminous and expensive for a non-party to produce.

15.2 Issues presented

- 15.2.1 Promoting cooperation with respect to non-party subpoena practice can be both simpler and more difficult than discovery between the parties.

- 15.2.1.1 On the one hand, Rule 45 specifically provides that requesting parties and attorneys "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." That rule also requires the court to protect non-parties from undue burden and expense, which may include an award of attorney's fees on parties or attorneys who fail to make reasonable efforts to avoid undue burden and expense.²⁹

- 15.2.1.2 On the other hand, non-party involvement in discovery may complicate case management for a judge. For instance, Rule 45 has no requirement that the parties confer, so there is no formal mechanism for parties to work together to reduce costs and burdens. Moreover, subpoenaed non-parties may be outside the jurisdiction of the case management judge. This may lead to more complication, as a court in another jurisdiction

²⁹ FED. R. CIV. P. 45(c)(1).

may be responsible for ruling on any dispute about the scope of a subpoena.

15.3 Suggested judicial management strategies

- 15.3.1 Encourage the parties in their initial Rule 26 conference to address any intent to secure information from non-parties and to include such intent in their discovery plan.
- 15.3.2 Direct the parties to present any dispute *between themselves* as to non-party discovery to the court at the initial scheduling conference or as soon thereafter as possible.
- 15.3.3 Once a subpoena is served, request the issuing party and the subpoenaed non-party to confer in an attempt to resolve any of the latter's objections to the subpoena without formal motion practice.
- 15.3.4 Encourage the parties and the subpoenaed non-party to stipulate to an extension of time for the latter to object to the subpoena. The limited time period for objection under Rule 45(c)(2)(B) may frustrate any effort to resolve disputes amicably and without judicial involvement.
- 15.3.5 In the event that another judge has jurisdiction over the subpoena, *with the knowledge of the parties*, coordinate with that judge as to who will be responsible for ruling on any dispute. Under Federal Rule of Civil Procedure 45(f), when the court in which compliance of the subpoena is required is not the issuing court, the judge may transfer the subpoena dispute to the district that issued the subpoena if the person subject to the subpoena consents or the court finds exceptional circumstances.

15.4 Representative decisions

- 15.4.1 *In re American Kidney Fund, Inc.*, 2019 WL 1894248 (D. Md. Apr. 29, 2019) (cost shifting held not available under Rule 45(d) when non-party complied with subpoena voluntarily).

15.5 Further reading

- 15.5.1 The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition* (Public Comment Version, Jan. 2020).

If you would like to contribute anything else that illustrates the strategies above, please contact us at resources@sedonaconference.org.

16. Discovery motion practice

- 16.1 Discovery motions can disrupt the timing of discovery and grow into satellite litigation where the merits of an action are pushed aside. Active judicial management of motion practice is essential and may eliminate or minimize motions.
 - 16.1.1 Rule 26(c)(1) and Rule 37(a)(1) require a moving party to certify that it has, in “good faith,” conferred or attempted to confer with the other affected parties in an attempt to resolve the dispute. The U.S. District Court for the District of New Jersey requires parties to bring any discovery dispute before a magistrate judge by conference call or letter prior to filing any formal motion.³⁰ Going one step further, the U.S. District Court for the Eastern District of Texas maintains a *Discovery Hotline* so that parties can “get a hearing on the record and ruling on the discovery” by an on-call judge.³¹ These rules demonstrate an attempt to reduce formal motion practice in the federal courts, and many state courts have followed suit.
 - 16.1.2 The Federal Rules also emphasize judicial involvement before a discovery motion is made. Rule 16(b)(3)(B)(iv) provides that a scheduling order may “direct that before moving for an order related to discovery, the movant must request a conference with the court.”
 - 16.1.3 Absent some prohibition under law, state judges who do not have the benefit of equivalents to Rule 16(b)(3)(B)(v) should also take steps to encourage informal resolution of discovery disputes.

16.2 Issues presented

- 16.2.1 There are several threshold inquiries that the judge should make when a motion is made. One is whether the motion is timely. Another is whether the moving party has exhausted reasonable alternatives to a formal motion. The judge might also ask whether there are any options available to the responding party that would obviate the need for a motion, such as offering to make, or making, additional discovery available.
- 16.2.2 The moving party must make a sufficient showing to allow the motion to be decided. The question for the judge is whether the proofs submitted by that party are sufficient for the judge to do so. The Federal Rules do not address burden of proof in general terms. However, the Advisory Committee notes to the 2015 amendment to Rule 37(e)(1) may provide helpful guidance.

³⁰ D.N.J., LOC. CIV. R. 37.1(a)(1).

³¹ E.D. TEX., LOC. R. CV-26(e).

16.2.3 Judges should be aware that expert reports submitted in support of, or in opposition to, discovery motions may be required to comply with Federal Rule of Evidence 702, its state counterpart, or the standards established by *Daubert*³² or *Frye*.³³ Such compliance may multiply the costs to the parties and the complexity of discovery motion practice.

16.3 Suggested judicial management strategies

- 16.3.1 Consider holding regular discovery conferences in complex civil actions to provide informal guidance to parties on emerging discovery disputes so as to avoid motion practice.
- 16.3.2 Advise the parties at the first case management conference that formal motion practice on discovery disputes is disfavored, and that the court expects parties to make good-faith efforts to resolve disputes on their own. Ensure that the parties confer pursuant to Rule 26(c)(1) or Rule 37(a)(1) or their state equivalents in an attempt to resolve any dispute.
- 16.3.3 Be available to resolve disputes informally and promptly should any arise or make arrangements for a colleague to be available in a particular instance.
- 16.3.4 Require the parties to submit any dispute as a joint letter to the court requesting resolution.
- 16.3.6 Require that any formal motion to compel discovery include sufficient detail, including affidavits from competent persons if needed, which describe the nature of the dispute and the reason for the relief sought as well as, if appropriate, a detailed description of costs.
- 16.3.7 Require that the responding party describe why the discovery sought cannot or should not be allowed and, if appropriate, a detailed description of costs.
- 16.3.8 If warranted, address with the parties compliance with Federal Rule of Evidence 702, its state equivalents, *Daubert*, or *Frye*.

16.4 Representative decisions

16.4.1 *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 743 (8th Cir. Sept. 10, 2018) (“Rule 26

³² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

³³ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

requires ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statement.”).

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17. Evidential foundations

- 17.1 All civil actions should proceed as if these will be resolved by dispositive motion or trial. Discovery itself is intended to obtain ESI that will be admitted into evidence. These considerations may become lost on attorneys, parties, and judges.

17.2 Issues presented

- 17.2.1 Making a sufficient showing for admissibility of ESI may be difficult if the offering party has not kept sight of all the elements needed to establish foundation, relevance, and authenticity. Moreover, parties may need to retain experts to testify or submit affidavits in support of or in opposition to admissibility. A judge should determine whether to bring these matters to the attention of the parties early in the case management process or defer doing so until the dispositive motion or pretrial stage.
- 17.2.2 Parties may face particular problems should they seek to introduce into evidence ESI secured from non-parties, either voluntarily or through subpoena. Problems might arise from concerns about, among other things, form or forms of ESI that has been secured or business practices of the non-party that could lead to expensive deposition practice. To avoid this cost and burden and to minimize or eliminate disputes, parties should be encouraged to stipulate to the authenticity of ESI secured from non-parties.
- 17.2.3 Preliminary admissibility determinations are made by the court under Federal Rule of Evidence 104(a) or its state equivalents. The court is not bound by the rules of evidence in making these preliminary determinations and may be assisted by profers from the offering party or its expert that are not subject to *Daubert* or *Frye* standards. Judges must consider when to make these determinations. They might do so at the pretrial stage or after commencement of trial. Judges should also consider whether there is a distinction in making the determinations for a nonjury as opposed to a jury trial.
- 17.2.4 Authentication of ESI may pose particular problems for trial management. First, ESI might not be self-authenticating under Federal Rule of Evidence 902. This concern may have been eliminated or at least minimized, however, by the adoption of Rules 902(13) and (14), effective December 1, 2017. The former addresses a

“record generated by an electronic process or system that produces an accurate result.” The latter deals with “[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification.” In either event, Rules 902(13) and (14) require the offering party to present a certification and give notice to other parties. A judge should presumably manage these requirements in such a way as to minimize delay.

- 17.2.5 Regardless of whether a state has adopted 902(13) or (14), a state judge should be prepared to address admissibility of ESI with whatever tools are available. For example, and absent agreement between the parties, the judge may rely on “conventional” admissibility procedures, with special attention to the business record exception to the hearsay rule.
- 17.2.6 Federal Rule of Evidence 806(16) also addresses admissibility of ESI. It provides that, “[a] statement in a document that was prepared before January 1, 1998 and whose authenticity is established” is not excludable as hearsay “regardless of whether the declarant is available as a witness.”

17.3 Suggested judicial management strategies

- 17.3.1 Remind the parties at the initial case management conference that as they collect, produce, and review ESI, admissibility should be taken into account. This is especially important when ESI is produced by a non-party in response to a subpoena.
- 17.3.2 Remind the parties that depositions present opportunities to establish authentication for admissibility purposes, especially non-party depositions.
- 17.3.3 Direct the parties, before any dispositive motion or final pretrial conference, to stipulate to the admissibility of relevant ESI or to identify, by specific exhibit, what objections to admissibility are expected to be raised.
- 17.3.4 Direct the parties, absent stipulation, to serve Requests for Admission in order to establish authenticity.

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18. Presentation of electronic evidence at trials

- 18.1 ESI is commonly admitted into evidence at trial. Doing so, however, may present technical as well as scheduling problems for the parties and the trial judge. As with evidential issues, the parties should plan and execute their eDiscovery with the use of ESI at trial in mind.

18.2 Issues presented

- 18.2.1 The form or forms of production that the parties agree to at the outset of discovery may influence the ability to use particular electronic presentation systems at trial.
- 18.2.2 Opposing counsel in a civil action may have different preferences as to the type of electronic evidence presentation system they want to use. The judge could encourage counsel to agree on a single system to be used at trial. Alternatively, assuming that the court has its own system available, the judge might need to address whether to allow counsel to use one that they prefer.
- 18.2.3 Opposing counsel may have different levels of skill in the preparation of electronic presentations or in the use of systems. All counsel must have adequate technical support.
- 18.2.4 The court should consider how to guard against the possibility that a jury will be confused or unduly influenced by the quality of the presentation and lose focus on the evidence being presented.

18.3 Suggested judicial management strategies

- 18.3.1 Suggest to the parties that they consider the method by which they intend to present evidence at trial when negotiating the form or forms of production in discovery.
- 18.3.2 Require the parties to exchange information, not later than the final pretrial conference, about what evidence they intend to introduce in electronic form.
- 18.3.3 Require the parties to use any evidence presentation system available from the court. Moreover, require parties to become knowledgeable about the use of that system through, among other things, practice runs of their electronic evidence to avoid technical problems at trial. Consider having the courtroom available at a set time and day each week (e.g., Thursdays between 3 and 5 p.m.) for counsel who wish to conduct a practice run.
- 18.3.4 Assuming that there is no existing evidence presentation system, require the parties to agree on and use a common one and to become knowledgeable about its use. Make the courtroom available before trial to allow counsel to install and test their system.
- 18.3.5 Require the parties to have knowledgeable operators of the evidence presentation system present at trial.

18.3.6 Establish procedures for the jury's handling of the electronic evidence, including whether tablet computers that may be used by the jury in the courtroom can be taken into the jury room, collecting and "scrubbing" such devices at the end of the trial, etc.

18.3.7 Charge the jury to be attentive to, but not mesmerized by, electronic evidence.

18.4 Sample orders

18.4.1 U. S. District Court for the Southern District of Texas, [Procedures For Cases Assigned to Chief Judge Lee H. Rosenthal](#), 17. Equipment (addressing technology available in the courtroom and the use of technology brought in by counsel).

18.4.2 U. S. District Court for the Eastern District of California, [Electronic Evidence Submission/Presentation](#) (requiring "[p]arties who intend to present evidence electronically via the Court's electronic evidence presentation systems [to] be familiar with the systems prior to the hearing/trial").

18.4.3 [Local Rules of the U. S. District Court for the Eastern District of California](#), Rule 138(l), Submission of Audio and Video Files on Portable Media (addressing how evidence submitted electronically must be in a court-designated format).

18.4.4 U. S. Bankruptcy Court for the District of Maine, [Electronic Evidence Presentation System](#) (requiring "[p]arties who have never used the Court's system [to] schedule time in advance of their reservation to practice and to test their electronic equipment's compatibility with the courtroom's system").

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19. Sanctions

19.1 Sanctions may be imposed for a broad range of discovery misconduct, including, but not limited to, the loss of ESI. Discovery misconduct may therefore be sanctionable under multiple rules or statutes or under the court's inherent authority. These include Rules 26(g)(1) and 37(b) and their state equivalents.

19.1.1 Judges should evaluate any discovery misconduct and determine which rule or rules apply to that misconduct as well as the standard for the imposition of sanctions under the selected rule.

- 19.1.2 The risk of sanctions is a serious concern in eDiscovery, and consideration of sanctions is a sensitive and time-consuming task that a judge might be required to undertake. Moreover, as with discovery disputes generally, motions for sanctions run the risk of extended—and expensive—satellite proceedings.
- 19.1.3 The 2015, amendment to Federal Rule of Civil Procedure 37(e) has altered the landscape of sanctions under the Federal Rules. Several states have followed suit. The *Judicial Resources* will not delve into that amendment in detail but will highlight significant features of Rule 37(e). These features are:
- Rule 37(e) applies only to the loss of ESI.
 - Rule 37(e) is applicable only after a duty to preserve had arisen.
 - Rule 37(e) is premised on the failure of a party to have taken “reasonable steps” to avoid the loss of relevant ESI.
 - If ESI is lost as the result of negligent conduct and the opposing party has been prejudiced by the loss of that ESI, the court can order “measures no greater than necessary to cure the prejudice.”
 - If a party “acted with the intent to deprive another party of the information’s use in the litigation,” the court may impose case-terminating or analogous sanctions, including a mandatory adverse inference charge.
- 19.1.4 Most states do not have an equivalent to Rule 37(e), and sanctions are governed by more general sanctions rules or the common law of spoliation.

19.2 Issues presented

- 19.2.1 Sanctions motions may present questions about the process used by a party to respond to an adversary’s discovery requests. Resolution of such questions may require “discovery about discovery,” that is, determining what process was used and what the results of that process did or did not include. Any such resolution is seldom relevant to the merits of the action before the judge but may be necessary to resolve the dispute. This discovery about discovery should be narrowly tailored, and the importance of proportionality stressed.
- 19.2.2 “Piecemeal” motion practice can lead to excessive cost, delay, and stress on already-strained court resources. The timing of a sanctions motion can be troublesome for a judge. A sanctions motion can disrupt other discovery and other case management. Therefore, assuming that a judge has discretion to do so, the motion might be scheduled to be made only after all discovery has been completed.

19.3 Suggested judicial management strategies

- 19.3.1 Inquire, whenever the word “sanction” arises, about the nature of the dispute. Ascertain *exactly* what relief is sought and why.
- 19.3.2 Conduct an informal proceeding in the first instance. Determine whether a party, rather than seeking a sanction, is in fact requesting an extension of some deadline.
- 19.3.3 In lieu of allowing a formal motion, consider whether other discovery may be conducted that could eliminate, or at least reduce, the need for the motion.
- 19.3.4 Consider whether to postpone any ruling on the imposition of sanctions or the amount of sanctions upon completion of discovery or following the resolution of the action on its merits.

19.4 Representative Decisions

- 19.4.1 *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3d Cir. 2019) (deletion of relevant email by executive of defendant led to monetary sanctions and adverse inference instruction; jury verdict in defendant’s favor vacated and remanded for new trial, and trial court directed to allow expert testimony related to effect of spoliation).
- 19.4.2 *Bellamy v. Wal-Mart Stores, Texas, LLC*, No. SA-18-CV-60-XR, 2019 WL 3936992 (W.D. Tex. Aug. 19, 2019) (sanctions imposed for failing to preserve surveillance video taken from camera positioned to view accident, while preserving video from another camera positioned elsewhere).
- 19.4.3 *Guarisco v. Bob Bros. Constr. Co., LLC*, 421 F. Supp. 3d 367, 381 (E.D. La. Oct. 3, 2019) (sanctions imposed under inherent power for alteration of photographs although photographs not “lost” under Rule 37(e); “it would be premature . . . to find Rule 37(e) applies here, as there is no proof any of the [other] digital evidence at issue is permanently lost.”).
- 19.4.4 *Mannion v. Ameri-Can Freight Systems Inc.*, No. CV-17-03262-PHX-DWL, 2020 WL 417492 (D. Ariz. Jan. 27, 2020) (court rejected proposed spoliation instruction and held that nonproduction or spoliation was to be resolved by the judge, not the jury).

19.5 Further reading

- 19.5.1 [Rules of Civil Procedure for the Superior Courts of Arizona](#), Rule 37(g)(1)(C)(ii) (setting out “factors that a court should consider in determining whether a party took reasonable steps to preserve” ESI).

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20. Post-judgment costs

20.1 This stage of litigation looks to the award of costs after a party secures a final judgment in its favor. It does not address cost sharing or shifting during discovery.

20.1.1 Under the Federal Rules, a prevailing party “should be allowed” its costs. In the first instance, costs are taxed by the clerk of the district court in which a judgment is entered.³⁴ Awardable costs are defined in 28 U.S.C. § 1920 and include costs associated with “[f]ees for . . . electronically reported transcripts necessarily obtained for use in the case,”³⁵ and “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”³⁶ Federal courts are divided regarding what eDiscovery charges are recoverable under Section 1920(4). We are unaware of any state decisions that have addressed post-judgment awards of ESI-related costs.

20.2 Issues presented

20.2.1 Understanding what vendor services were specifically provided is crucial to understanding whether section 1920 will allow for the recovery of those expenses.

20.2.2 Assuming that ESI-related costs *may* be taxed under a statute or rule, what challenges can be raised to the application by a losing party? For example, the necessity and reasonableness of the cost of creation of a database cannot be calculated with a simple mathematical formula and may require expert opinion.

20.3 Suggested judicial management strategies

20.3.1 Direct the parties to confer at the Rule 26(f) conference or its state equivalents or prior to the first case management conference and to agree on what ESI-related costs might be taxable under the controlling statute or rule. This might also inform the court on proportionality.

20.3.2 Require the requesting party to provide details as to what services were performed and how the expenses were necessarily obtained for use in the case.

³⁴ FED. R. CIV. P. 54(d)1.

³⁵ 28 U.S.C.A. § 1920(2) (2008).

³⁶ 28 U.S.C.A. § 1920(4) (2008).

20.3.3 Consider whether a clerk can take expert opinion into consideration when taxing costs.

20.4 Representative decisions and orders

- 20.4.1 *United States ex rel. Barko v. Halliburton Co.*, 954 F.3d 307 (D.C. Cir. Mar. 27, 2020) (adopting “narrow” interpretation of taxable eDiscovery-related costs under §§ 1920(2) and (4)) (the only eDiscovery costs that KBR may recover are those incurred in step (4)—converting electronic files to the production formats (in this case, PDF and TIFF) and transferring those production files to portable media (here, USB drives). These tasks resemble the final stage of “doc review” in the pre-digital age: photocopying the stack of responsive and privilege-screened documents to hand over to opposing counsel.).
- 20.4.2 *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A.*, 342 F. Supp. 3d 766 (N.D. Ohio Oct. 22, 2018) (court allowed as costs expenses for loading and exporting data into an eDiscovery vendor platform as “copying.” The opinion further stated that “data conversion, audio transcription, and export of data, all suggest a replication of data that would fit the broader definition of electronic ‘copying.’”).
- 20.4.3 *Gonzales v. Pan Am. Labs., L.L.C.*, No. 3:14-CV-2787-L, 2018 WL 2321896, at *5 (N.D. Tex. May 4, 2018), *report and recommendation adopted*, No. 3:14-CV-2787-L, 2018 WL 2317749 (N.D. Tex. May 22, 2018) (court rejected costs associated with gathering and hosting data in a platform because “the United States Supreme Court has underscored the ‘narrow scope of taxable costs’ and has emphasized that ‘taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920.’” (citing *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 573 (2012)). But see *Javeler Marine Servs. LLC v. Cross*, 175 F. Supp. 3d 756 (S.D. Tex. 2016) (creation of forensic electronic images of defendants’ hard drives qualified as “making copies of any materials,” as required for expense of creating images to be taxable as cost to employer; forensic electronic images were necessarily obtained for use in the case, but defendants were not entitled to reimbursement for expense of keyword searches).
- 20.4.4 *Vital v. Varco*, No. CV H-12-1357, 2015 WL 7740417, at *5 (S.D. Tex. Nov. 30, 2015), *aff’d sub nom. Vital v. Nat'l Oilwell Varco, L.P.*, 685 F. App’x 355 (5th Cir. 2017) (court declined to award as costs monthly expenses associated with maintaining a database of electronically stored information used to locate, retrieve, and store the plaintiffs’ emails).

- 20.4.5 *Parker Hannifin Corp. v. Federal Ins. Co.*, No. 2:13-CV-01456 (W.D. Pa. Oct. 9, 2014) (court allows parties to expand the scope of discovery, on the condition that any additional ESI collection costs will be considered “as a fee for exemplification or a cost of making copies,” recoverable by the prevailing party under 28 U.S.C. § 1920(4)).
- 20.4.6 *Eolas Techs. Inc. v. Adobe Sys., Inc.*, 891 F. Supp. 2d 803 (E.D. Tex. 2012), *aff'd sub nom. Eolas Techs. Inc. v. Amazon.com, Inc.*, 521 F. App'x 928 (Fed. Cir. 2013) (district court considered whether § 1920(4) reached several types of costs that may be generally classified as electronic discovery costs: (1) document scanning, (2) document collection, (3) document processing, (4) document hosting, and (5) conversion to TIFF format. The court concluded that “[d]ocument scanning is essentially copying paper documents to electronic form” and would be a recoverable cost. The court found that costs for document collection, processing, and hosting were not recoverable costs because § 1920(4) “is not so broad as to cover general electronic discovery costs that precede copying or scanning of materials.” The court also held that conversion to TIFF, as opposed to production in native format, was not necessary, and thus not a taxable cost.).
- 20.4.7 *Chenault v. Dorel Indus., Inc.*, No. A-08-CA-354-SS, 2010 WL 3064007, at *1 (W.D. Tex. Aug. 2, 2010) (prevailing defendant created an electronic database to respond to the plaintiff's discovery requests. The court noted that the electronic production saved the cost of printing and copying 800,000 pages, at an estimated cost of \$120,000. Because the electronic data “was produced in lieu of extremely costly paper production” and the defendant was “seeking to save costs by not printing out thousands of pages of documents which would have otherwise been required in response” to discovery requests, the court found that the expense fell within the category of costs recoverable for fees and disbursements for printing.).

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