

**The Sedona Conference Working Group 1
Electronic Document Retention & Production
Midyear Meeting**

**Radisson Blu
Minneapolis, MN**

Wednesday, May 3, 2017

5:30 — 7:30 Evening Welcome Reception

Thursday, May 4, 2017

7:30 — 8:30 Buffet Breakfast & Sign-In

8:30 — 8:45 Welcome and Announcements
(K. Brady, C. Weinlein)

8:45 — 10:00 What's Next: Exploring the Evolution of Proportionality
(Judge Abrams, B. Borden, D. Cuthbertson, P. Pepiton*, A. Stanton)

The 2015 amendments to the Federal Rules of Civil Procedure were meant, among other things, to restore the concept of proportionality to its original place as part of the definition of the scope of discovery. Has it worked? Now 18 months' post-amendments, we will look at the recent case law applying the proportionality factors, the effect of The Sedona Conference *Commentary on Proportionality*, and the relationship between proportionality and 'accessibility' found in Rule 26. We will also cover how Rule 26 and its state equivalents might look, and new and non-traditional sources of ESI and public policy concerns like privacy.

Required Material

1. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* (April 2017 Near-final Post Public Comment Draft)

Background Materials

2. Thomas Y. Allman, *Proportionality Today* (April 2017)
3. The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* (July 2008)
4. *Selected eDiscovery Case Law: December 1, 2015—December 31, 2016* (Kenneth J. Withers, ed. April 23, 2017)

10:00 — 10:15 Morning Break

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Thursday, May 4, 2017

10:15 — 11:15 Preservation and Discovery of Social Media
(A. D'Ambra, P. Favro, Judge Lee, L. Schwartzreich, R. Solomon*)

Social media is an increasingly important source of discovery in civil litigation, and it is fraught with complications, both for individual litigants and organizations. Proponents of, and respondents to, social media discovery must be attuned to the restrictions of the Stored Communications Act and other regulations; considerations of privacy and accessibility that implicate Fed. R. Civ. P. 26(b)(1); "possession, custody, or control" and appropriate form-of-production analysis under Rule 34; and the mechanics of preservation to meet the "reasonable steps" element of Rule 37(e). Working Group 1's Social Media Primer, published in 2013, introduced lawyers and judges to these complex issues; but since then, there has been significant development in case law, rules, and technology. This session explores those recent developments, presents an outline for a proposed updated edition of the Primer, and requests feedback from the WG1 membership.

Required Material

5. The Sedona Conference WG1, *Social Media Primer Outline* (April 2017)

11:15 — 12:15 What's Next: Anticipated Issues in the Authentication of ESI
(J. Hamilton, D. Kessler, Judge Rodriguez, G. Trimarco, M. Tully*)

Issues with admissibility of ESI generally occur when counsel has not laid a proper foundation or when the chain of custody (documentation indicating where the media has been, in whose possession it has been, and the reason for that possession) has been disrupted. A decade ago, cases such as *In re Vee Vinhnee* and *Lorraine v. Markel* served as stark reminders that the evidentiary hearing is not the time to first consider how digital evidence will be introduced. Instead, consideration must be given to how potential electronic evidence is handled by records management programs, and parties should be mindful of authentication possibilities throughout the discovery process. While the bench and bar has grappled with the nuances associated with admitting internet, social media, database, and text message evidence, even newer forms of ESI have emerged. Will the proliferation of the Internet of Things, autonomous vehicles, cloud computing, web-based services, and the increasing varieties of ESI create additional issues with authentication? This panel will discuss the various types of electronic evidence and the criteria by which courts evaluate each with respect to admissibility at trial or other evidentiary proceedings.

Required Material

6. Hon. Paul W. Grimm, Gregory P. Joseph & Daniel J. Capra, *Best Practices for Authenticating Digital Evidence* (2016)

Background Materials

7. Hon. Paul W. Grimm & Gregory P. Joseph, *Authenticating Electronically Stored Information, Practical Law – The Journal* (February/March 2017)
8. Judicial Conference of the United States, *Transmittal of Proposed Amendments to the Federal Rules of Evidence* (September 28, 2016)
9. The Sedona Conference, *Commentary on ESI Evidence & Admissibility* (March 2008)
10. Martin T. Tully & Dara C. Tarkowski, *Chapter 10: Authenticity and Admissibility of ESI*, Illinois Institute of Continuing Legal Education: E-Discovery (2012 Edition)

* = Panel Moderator

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Thursday, May 4, 2017

12:15 — 1:30 Lunch (provided)

1:30 — 3:00 What's Next: Cooperation, Transparency, and Sedona Principle 6: Defining Boundaries and Resolving Apparent Conflicts
(Judge Francis, J. Guglielmo, E. Mandel*, W. Matus, D. Stanton)

This panel will examine issues and cases related to cooperation and transparency under the Rules, and explore common ground to resolve conflicts in defining the boundaries of cooperation and transparency in discovery.

Required Material

11. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2017 Public Comment Version)

Background Material

12. Federal Rules of Civil Procedure 1 and 26

3:00 — 3:15 Afternoon Break

3:15 — 4:15 Defensible Disposition of Information: An Integral Component of an Information Governance Program
(Judge Bowbeer, T. Emory, K. Foster, L. Herlinger, D. Kuckelman*)

The panel will discuss what organizations can and should do to dispose of ESI before a preservation duty arises from pending or anticipated litigation. The panel will present the perspective of in-house counsel, outside counsel, and the bench on the practical and legal limits on organizations' ability to destroy ESI.

Required Material

13. Hon. Hildy Bowbeer & The Sedona Conference WG1, *Defensible Disposition: Questions from and Perspectives of Outside Counsel, In-House Counsel, and the Bench* (April 2017 Working Document)

Background Material

14. The Sedona Conference, *Commentary on Information Governance* (Oct 2014)

4:15 — 5:00 Governance of WG1

We will cover recent publications of WG1 and papers currently in the publication process, and have a dialogue on where WG1 should be focusing its publishing and thought-leadership efforts.

5:00 — 7:00 Reception (Guests Invited)

**The Sedona Conference Working Group 1
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Friday, May 5, 2017

7:30 — 8:30 Buffet Breakfast & Sign-In

8:30 — 9:45 Examining Amended Rule 34
(B. Clark, J. Coleman, A. Khoury, A. Martin*, Judge Peck)

The 2015 amendments included several changes to Fed. R. Civ. P. 34 concerning making and responding to requests for production of documents and things. To aid practitioners in getting up to speed with the amendments to Rule 34 and putting them into practice, a Working Group 1 drafting team put together this “Federal Rule of Civil Procedure 34 Primer.” This Panel will discuss the Primer and the case law on Rule 34, and provide an opportunity for working group members to comment on the Primer before it is finalized and published.

Required Material

15. The Sedona Conference, *Federal Rule of Civil Procedure 34 Primer* (WG1 April 24, 2017 Draft)

9:45 — 11:15 What’s Next: Judicial Roundtable on the Next Hot Button Legal Issues in Discovery
(Judge Abrams, Judge Bowbeer, K. Brady*, Judge Francis, Judge Lee, Judge Peck, Judge Rodriguez)

A panel of judges will examine the impact of recent developments in case law, recently released Sedona Conference WG1 commentaries, and impending changes to the Federal Rules of Evidence on such issues as proportionality, sanctions, discovery of emerging technologies, and discovery of social media. The panel will also discuss how these developments address current concerns of the bench, where battle lines are being drawn, and where the Sedona Conference’s thought leadership would be most valuable.

Required Material

11. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2017 Public Comment Version)

Background Materials

1. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* (Near-final Post Public Comment Draft)
15. The Sedona Conference, *Federal Rule of Civil Procedure 34 Primer* (WG1 April 24, 2017 Draft)

11:15 — 11:30 Morning Break

**The Sedona Conference Working Group 1
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Friday, May 5, 2017

11:30 — 12:45 Revisiting Sedona’s Guidance on Legal Hold Obligations and Best Practices
(H. Kelston, C. Lee, Judge Rodriguez, J. Weisshaar, K. Withers*)

The Working Group 1 *Commentary on Legal Holds: The Trigger & The Process* was first published in 2007 and last revised in 2010. Since then, there have been significant rule changes, case law developments, and emergent sources of ESI. Last year, a small brainstorming team “redlined” the 2010 edition and came up with a number of suggestions for updates. This session will address whether the Legal Hold Commentary has withstood the test of time, examine how the 2015 Federal Civil Rules Amendments and recent case law impact the concept of the Legal Hold, and explore options for developing a 3rd Edition to provide updated practical guidance on the “reasonable steps” required to preserve discoverable ESI for civil litigation and investigations.

Required Material

16. The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process* (2010 edition; redlined and annotated)

Background Material

17. The Sedona Conference, *Recent Court Decisions Addressing “Reasonable Steps” for Preserving Discoverable ESI* (April 2017)

12:45 — 1:00 Wrap-up

1:00 Adjournment and Grab & Go Lunch (provided)