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THE SEDONA CONFERENCE® COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY

AUGUST 2011

PUBLIC COMMENT VERSION

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Table of Contents

Preface

These Resources are the product of a collaborative effort initiated by Working Group 1 of The Sedona Conference® in September of 2008, with the active participation of state and federal judges. Early drafts of the Resources were presented at annual and midyear meetings of Working Group 1. Comments were also received at programs sponsored by a variety of courts and judicial education organizations, including the Federal Judicial Center, the United States Court of Appeals for the Fifth Circuit, the American College of Business Court Judges, and the New York State Judicial Institute.

In drafting this publication, the drafting team had the following vision, mission, and goal in mind:

Vision

The Sedona Conference® Cooperation Proclamation provides the overall vision for the Resources – the just, speedy, and inexpensive resolution of legal disputes on the merits facilitated by cooperative, collaborative, and transparent discovery.

Mission

The Resources are intended to assemble and promote a variety of proven judicial management tools to help parties develop and execute appropriate, cost-effective, cooperative discovery plans; avoid unnecessary discovery disputes; and resolve discovery disputes that may arise in a fair and expeditious manner.

Goal

The Resources will be posted on an interactive web site for judges to view, comment on, and contribute to over time. The Resources will:

- Articulate a clear judicial philosophy of case management and discovery dispute resolution
- Identify the stages of civil litigation when judicial involvement is most appropriate or desirable
- Identify the issues that a judge is likely to face at each stage
- Suggest strategies for case management or dispute resolution that encourage the parties, whenever possible, to reach a cooperative solution at each stage
- Recommend further reading on the issues presented at each stage

The Resources are not intended to be authoritative. Rather, the Resources identify issues that federal and state judges may confront in the management of civil actions that involve electronic information and suggest strategies. The Resources also provide, in some instances, sample forms of orders that illustrate approaches taken by specific judges to those issues in specific actions. Moreover, the Resources include non-exhaustive references to written materials that judges may

which to consult. With the exception of The Sedona Conference® Working Group Series publications, no referenced forms, or other materials are endorsed by the Resource's authors, editors, or contributors. Moreover, judges should exercise caution in the incorporation of any provisions of the referenced orders. Each action calls for individualized assessment of facts and law, and independent resolution of the issues presented.

The editors wish to acknowledge the contributions of Working Group 1 members that lead to the initial draft of the Resources, including Craig Ball, Bobbi Basile, Theresa Beaumont, Debra Bernard, Judge John Carroll (ret.), Cecilia R. Dickson, Judge Herbert Dixon, Paul Doyle, Laura Ellsworth, Sean Gallagher, Sherry Harris, Theodore Hirt, Richard P. Holme, Jerami Kemnitz, David Kessler, Shannon Kirk, Michael Leonard, Judge James D. Lovett, Vivian Polak, Judge James Rosenbaum, John Rosenthal, Ira P. Rothken, Judge Ben Tennille, and Judge David Waxse.

It is intended that these Resources will become an interactive, online forum for state and federal judges to exchange ideas on active case management, particularly for cases involving complex discovery-related issues. This is a preliminary "paper" edition designed to elicit ideas and contributions for the editors to consider when they launch the online version in a few months. Throughout this publication you will find invitations to add links to valuable background information, illustrative court opinions, sample orders, etc. Please send all such contributions to Senior Editor Kenneth J. Withers, kjw@sedonaconference.org.

Richard G. Braman
Board Chair
The Sedona Conference®
August 2011

I. Introduction

The Resources recognize 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 the latter reactive. The Resources are intended to assist judges who follow either.

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" ("ICM"), this fosters active case management in the federal courts and in those state courts (or units thereof, such as dedicated business courts) that have adopted ICM.

On the other hand, many state courts, for reasons of volume and history, do not use ICM. Instead, from the commencement to conclusion of an action, different judges may preside over select events (such as an initial conference, discovery dispute or motion, etc.). This model makes active case management difficult or impossible to implement.

In additional to these structural factors, there may also 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 Resources focus) is "party-driven" as opposed to "judge-driven." There are judges who, for example, deem it appropriate to bring parties in on a regular basis to work out discovery procedures and address anticipated discovery problems. 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 with problems after they have arisen. Large caseloads may also necessitate this model of discovery management.

With the goals of Rule 1 of the FRCPs of Civil Procedure ("FRCPs") in mind, which is to secure the just, speedy and inexpensive resolution of civil litigation, the Resources urge the adoption of the active case management model whenever possible. The Resources do so given the nature of electronic discovery ("e-discovery"), which can lead to protracted disputes and the substantial burden of e-discovery dispute resolution on the resources of courts and parties.

By urging the active case management model, the Resources do 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. 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.

These Resources recognize, however, that being a "discovery manager," as opposed to an "active case manager," may be the only workable model for a number of judges, who can only intervene after a discovery dispute has arisen. The Resources provide practical assistance to all judges.

II. Review of Existing Literature on eDiscovery for Judges

The Resources assume that the judicial reader is familiar with e-discovery in general – including the differences between e-discovery and paper discovery; the problems of volume, complexity, and cost; and the recurring issues of preservation, accessibility, form of production, and waiver of privilege or work product protection.

For judges who are unfamiliar with e-discovery, or who wish to become reacquainted with it, several publications provide an overview that is unbiased, peer-reviewed, practical, and well-suited for judicial readers. Any judge who is currently presiding over, or who anticipates, litigation involving e-discovery is encouraged to be familiar with the following resources, each of which was the product of collaborative study and consensus:

A. *The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2007) [http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf]

This document *("The Sedona Principles"*) is the culmination of a process by which judges, practitioners, and academics considered e-discovery as it has developed since the publication of the First Edition and the 2006 amendments to the FRCPs. Considered to be an authoritative text on e-discovery, The Sedona Principles provide a lens through which e-discovery can be managed.

B. *The FRCPs of Civil Procedure,* and in particular the Advisory Committee Notes accompanying the 2006 amendments [http://www.law.cornell.edu/rules/frcp/]

Effective December 1, 2006, the FRCPs were amended to make explicit that electronically stored information ("ESI") was discoverable and to establish a framework for judges, attorneys, and parties to address and engage in e-discovery.

The Resources do not urge the adoption of the FRCPs by any state. However, the Resources do suggest that the FRCPs provide both the outline of a judicial management philosophy and practical suggestions for state judges as they deal with e-discovery. Indeed, the FRCPs have been favorably cited by State courts.[1]

C. *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (FJC: 2007) [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf]

[1] *See, e.g., In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009).

This is a short, concise introduction to the FRCPs and to the issues that judges may encounter as they deal with e-discovery. It is published by the Federal Judicial Center, an arm of the United States courts which provides education materials and programs to federal judges and court staff.

D. Conference of Chief Justices, *Guidelines for State Court Trial Judges Regarding Discovery of Electronically-Stored Information* [http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf]

The Guidelines, which predate the 2006 amendments to the FRCPs, represent a set of best practices recommended by the Conference of Chief Justices that may be available to state judges as they confront e-discovery in their courts. The Guidelines have particular applicability to judges in state courts that have no rules that specifically address e-discovery.

E. *The Uniform Rules Relating to Discovery of Electronically Stored Information* [http://www.ediligent.net/resources/attachments/uniform-rulesfinal.pdf]

The Uniform Rules, promulgated in final form after the 2006 amendments to the FRCPs by the National Conference of Commissioners for Uniform State Laws, essentially mirror the amendments. Although the Uniform Rules have not been adopted by any state, these are the product of extensive deliberation and public comment. Like the FRCPs, the Uniform Rules embody a philosophy of judicial management and provide a number of practical suggestions for avoiding and resolving e-discovery disputes.

G. *Seventh Circuit Electronic Discovery Pilot Program* [http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf]

The Pilot Program is based on a set of Principles developed by a broad-based committee of the Chicago-area federal bar in 2009 and adopted by standing order by many of the trial judges in the Seventh Circuit of the United States Courts. The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery. The Pilot Program plans to periodically study the effectiveness of the Principles and issue reports.

H. New York State Unified Court System, *Electronic Discovery in the New York State Courts,* February 2010 [http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf]

> This report was commissioned by the Chief Judge and Chief Administrative Judge of the New York State courts. It is based on an extensive review of the literature addressing e-discovery and interviews with judges, law clerks, and practicing attorneys. It identifies a set of specific "action items" to improve the management of e-discovery.

In addition to these general works, there are articles and publications that address particular issues in e-discovery, such as preservation, attorney-client privilege, work product protection, evidential foundations, and discovery from non-parties. Representative articles and publications are cited where appropriate below.

III. General Recommendations for Judges

A review of the sources cited above reveals a common thread: The key to reducing the cost and delay associated with e-discovery is judicial attention to discovery issues starting early in, and continuing throughout, any given stage of an action. The expenditure of a small measure of judicial resources at the beginning of litigation to set the tone and direction for discovery – and the judge's availability to the parties at each stage of discovery – will most likely save the expenditure of significantly more judicial resources later.

The Resources make the following recommendations:

- Judges should adopt a "hands-on" approach to case management early in each action
- Judges should establish deadlines and keep parties to those guidelines (or make reasonable adjustments) with periodic status reports or conferences
- Judges should encourage the parties to meet before discovery commences to develop a realistic discovery plan
- Judges should encourage proportionality in preservation demands and expectations and in discovery requests and responses
- Judges should exercise their discretion to limit or condition disproportionate discovery and shift disproportionate costs
- If necessary, judges should exercise their authority to issue sanctions under the relevant statutes, rules, or the exercise of inherent authority on counsel or parties who create unnecessary costs or delay, or who otherwise frustrate the goals of discovery by "gaming the system"

These broad recommendations should not be interpreted to mean that judges should issue blanket orders that dictate the scope of discovery, the nature of the parties' 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 judges conduct discovery, and e-discovery in particular is fraught with highly technical and case-specific issues that are better left to the parties to resolve. Moreover, the recommendations transcend the specific rules of civil procedure that may be in effect in any particular jurisdiction. The recommendations can be applied equally to federal or state litigation, and in every court or action in which discovery is allowed, from family court to complex commercial court.

The following section briefly analyses each juncture in discovery at which judicial action is necessary and desirable, presents the issues the judge is likely to confront, suggests possible strategies for encouraging cooperative solutions to those issues, presents forms, stipulations, and orders that have been used to resolve the issues, and recommends further reading for those who wish to learn more about those particular issues.

IV. The Stages of Litigation From a Judge's Perspective

A. Preservation

Preservation of relevant ESI is the key to e-discovery. Absent preservation, meaningful discovery cannot be conducted. Indeed, absent preservation, a judge will soon be faced with the task of determining whether to impose spoliation sanctions and what those sanctions should be. Nevertheless, preservation decisions are usually made before the parties see a judge for the first time and, for that matter, before litigation commences. Preservation decisions also implicate questions of attorney-client privilege and work product protection. Thus, judges should be prepared to address preservation issues as early as possible in the action, and may be called upon to address these issues later as well.

1. Issues presented

   First, at least some significant preservation decisions are made before litigation commences. The duty to preserve arises when the likelihood of litigation is known or reasonably foreseeable. Presumably, a putative plaintiff must begin to preserve 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, it must preserve at the earlier date. The "trigger" for the existence of a duty to preserve is fact-sensitive and often in dispute.

   Second, there is no realistic mechanism available for judicial determination of the existence or scope of a duty to preserve before litigation commences. This may lead to disputes between parties that will cry for judicial resolution as soon as possible.

   Third, the decision to preserve and the scope of preservation are questions that attorneys should advise their clients about. That advice, as well as the communication of that duty (to, for example, employees and independent 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.

2. Suggested judicial management strategies

   - Ensure that the parties discuss preservation at the initial conference between the parties required by FRCP 26(f)
   - 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

3. Sample orders

   New York Supreme Court, County of Nassau, Commercial Division, form of "Preliminary Conference Stipulation and Order" [hyperlink to be added]

   In re "Deepwater Horizon" Oil Spill, 10-MD-02179 (E.D. La., Jan. 4, 2011), "Pretrial order No. 22 Relating to the United States' Preservation of Documents and Electronically Stored Information" [hyperlink to be added]

   In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, 10 ML 02151 (C.D. Cal. July 20, 2010) "Order for Preservation of Documents and Tangible Things" [hyperlink to be added]

4. Further reading

   The Sedona Conference Commentary on Legal Holds (2010) [http://www.thesedonaconference.org/dltForm?did=legal_holds_sept_2010.pdf]

B. Parties' early case assessment

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 can lead to a better-informed and more effective FRCP 26(f) conference and initial case management order under FRCP 16(c)(2).

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 take into account the preservation, collection, review, and production of ESI in making that assessment.

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, undertaking the cost-benefit analysis necessary for any assessment is an important step from a party's prospective and the knowledge that one was performed by a party may inform the judge of the likelihood of early settlement.[2]

C. Initial scheduling order

An "initial scheduling order" is issued under the authority of FRCP 16(a) or its state equivalents. The initial 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." FRCP 16(a)(2). This initial order

[2] 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.

is an opportunity for the judge to communicate the court's expectation that attorneys and parties will meaningfully prepare for the FRCP 26(f) meet-and-confer and the first Rule 16(b) conference. It may serve to remind parties or counsel that sanctions may be imposed under FRCP 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 discovery should be conducted.

1. Issues presented

   One of the major problems that judges face is the preparation (or lack thereof) of parties for the first conference with the judge. FRCP 26(f) describes when parties should have their first meeting. It also describes the required topics for parties to discuss at that meeting (the "meet-and-confer") and how the results of that meeting should be presented to the judge. In federal courts, local rules may supplement the list of factors to be discussed under FRCP 26(f).

   A number of states have adopted statutes, rules, or orders that function in much the same way as FRCP 26(f). In states courts where there is no equivalent to FRCP 26(f), it might be useful for the judge presiding over a particular action to direct the parties to meet before the initial conference, discuss e-discovery issues, and report to the court. This would, at the least, compel the parties to consider the issues suggested by FRCP 26(f) and local rules and enable the parties to avoid conducting e-discovery "in a vacuum."

2. Suggested judicial management strategies

   - Encourage each party to assess the scope of preservation of ESI, documents, and tangible things, and the adequacy of its preservation efforts
   - Encourage the parties to discuss the scope of preservation
   - Encourage the parties to engage in early case assessment for the purpose of focusing them on the projected cost and duration of litigation and the prospect of settlement as opposed to litigation
   - 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 FRCP 26(f) meet-and-confer and later in the litigation
   - Encourage the parties to consider any issues of privilege, the inadvertent disclosure of privileged information, and the form and timing of privilege logs. Refer the parties to FRE 502 (discussed in section K), as they may not be familiar with it.
   - Require the parties to meet-and-confer on e-discovery and any other topics enumerated in FRCP 26(f) and local rules before the initial case management conference
   - Direct the parties to report on any agreements reached at the meet-and-confer as well as any disagreements

3. Sample orders

   Circuit Court of Cook County, Illinois, County Department, Chancery Division, "Standing Order Governing Discovery of Electronically Stored Information" [hyperlink to be added]

   New York, Administrative Order of the Chief Administrative Judge of the Courts, amending Section 202.12(c) of the Uniform Civil Rules for the Supreme and County Courts [hyperlink to be added]

4. Further reading

   Supreme Court of New York, County of Nassau, "Guidelines for Discovery of Electronically Stored Information" [hyperlink to be added]

D. The "meet-and-confer" to formulate a discovery plan

The initial meet-and-confer contemplated by FRCP 26(f) is central to the management of e-discovery (indeed, all discovery). If done correctly, this meet-and-confer will enable the parties to establish on a cooperative basis how the action will proceed and will also reduce the cost of e-discovery and any delay associated with the resolution of discovery disputes. FRCP 26(f) also requires the parties to report their agreements – and disagreements – in a discovery plan submitted to the court. The discovery plan should guide the issuance of the initial case management order.

Judicial management of the meet-and-confer should be minimal. The meet-and-confer is party – not judge – driven. Indeed, the judge need not even be aware that a meet-and-confer took place until a discovery plan is submitted.

1. Issues presented

   - Did the meet-and-confer take place?
   - If in fact there was a meet-and-confer, did a meaningful one take place?
   - Did the parties explore all topics set forth in FRCP 26(f) and applicable local rules?
   - Was a comprehensive discovery plan submitted?

2. Suggested judicial management strategies

   - Develop, with the concurrence of colleagues, a form of discovery plan that supplements and expands on Form 52 of the FRCPs and incorporates any additional topics identified in local rule.

- Advise the parties that the court will be available by e-mail, telephone, or letter should disputes arise in the meet-and-confer process to resolves disputes
- Suggest that involvement of knowledgeable party representatives or experts in a meet-and-confer may be beneficial in addressing ESI-related topics, with appropriate stipulations regarding any statements made by them
- Advise that, at least in complex actions with likely e-discovery issues or large volumes of ESI, the meet-and-confer may be an 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.

3. Sample orders

In re Rail Freight Fuel Surcharge Antitrust Litigation, MDL 1869, Misc. No. 07-489 (D.D.C. Oct. 8, 2009), "Rule 26(f) Stipulation and Order Regarding Discovery Protocols" [hyperlink to be added]

United States v. Louisiana Generating LLC, C.A. No. 09-100 (M.D. La. Mar. 5, 2010), "Amended Stipulation Regarding Preservation, Review and Production of Certain Electronically Stored Information and Privileged Materials" [hyperlink to be added]

4. Further reading

United States District Court for the District of Delaware Default Standard for Discovery of Electronic Documents, Standard 2 ("Discovery conference").
[http://www.ded.uscourts.gov/Announce/Policies/Policy01.htm]

United States District Court for the District of Kansas Guidelines for Discovery of Electronically Stored Information, Guideline 4 ("Duty to meet and confer regarding electronic information").
[http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf]

United States District Court for the District of Maryland Suggested Protocol for the Discovery of Electronically Stored Information, Protocol 4 ("Conference of Parties and Report").
[http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf]

United States District Court for the District of New Jersey Local Civil Rule 26.1 (d) ("Discovery of Digital Information Including Computer-Based Information").
[http://www.njd.uscourts.gov/rules/completeRules2011.pdf]

R. J. Hedges, "Rule 26(f): The Most Important E-Discovery Rule," New Jersey Law Journal (May 18, 2009). [hypertext link to be added if we obtain permission to republish]

The Sedona Conference® "Jumpstart Outline" (2011).
[http://www.thesedonaconference.org/dltForm?did=jumpstart_outline.pdf]

E. Initial Case Management Order

FRCP 16(b)(1) authorizes federal judges to issue case management orders, including an initial case management order, after the parties have engaged in the meet-and-confer process and submitted a discovery plan. State judges, of course, are not bound by the FRCPs. Nevertheless, the topics that FRCP 16(c)(2) contemplate a federal judge address 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.

1. Issues presented

   How should a judge react when parties have not conferred before their first meeting with the judge, either in violation of FRCP 26(f), a state equivalent, or a direction to do so? Should sanctions be imposed? Should the judge send them to a jury or court conference room and tell the parties to come back in an hour or so with at least a rudimentary discovery plan? Should the judge adjourn the conference to a later date and tell the parties to "go back and get it right?"

   Assuming that the parties have reached one or more agreements, should the judge execute an initial case management order that embodies those agreements verbatim or should the judge, while giving due deference to what the parties agreed to, exercise discretion to fashion an order that meets the needs of the calendar?

   How should the judge schedule subsequent conferences? Should the judge set a firm date for the next conference? Should the judge, assuming that discovery is sequenced, schedule conferences after particular discovery is expected to conclude?

2. Suggested judicial management strategies

   - Incorporate, as appropriate, party agreements in the initial case management order
   - Resolve any disagreements as soon as practicable, perhaps at the initial case management conference itself
   - Schedule a further conference or conferences as needed in the initial case management order
   - Suggest that, rather than directed interrogatories or FRCP 30(b)(6) depositions, the parties informally exchange information about their respective electronic information systems

3. Sample orders

   New York Supreme Court, County of Nassau, Commercial Division, form of "Preliminary Conference Stipulation and Order" [hyperlink to be added]

4. Further reading

Managing Discovery of Electronically Stored Information, supra, at 4-5

The Elements of Case Management: A Pocket Guide for Judges, at 3-7 (Second Edition) (FJC: 2006) [http://www.fjc.gov/public/pdf.nsf/lookup/elemen02.pdf/$file/elemen02.pdf]

Ronald J. Hedges, "Case Management and E-Discovery: Perfect Together?" 9 Digital Discovery and E-Evidence 220 (2009) [hypertext link to be added if we obtain permission to republish]

Maura R. Grossman and Ronald J. Hedges, "An Addendum to Case Management & eDiscovery" 9 Digital Discovery and E-Evidence 262 (2009) [hypertext link to be added if we obtain permission to republish]

F. Defining the scope of eDiscovery

All discovery in the federal courts is governed by FRCP 26(b)(1), which provides that parties can seek discovery of information relevant to any party's claim or defense and, for good cause shown, "information relevant to the subject matter involved in the action." The scope of discovery may be different in state rules. However, the scope of e-discovery is essentially the same as that of discovery generally.

1. Issues presented

Requests for discovery of ESI often lack relation to the issues in the action. For example, parties may seek "all email" or "all databases" from an opposing party. In the first instance, the scope of e-discovery should be defined by the parties with reference to claims and defenses set forth in the pleadings. However, the parties may request, and the court may consider, broader "subject matter" discovery for good cause. Since one or both parties may desire broader discovery, or may be unsure as to what the appropriate scope of discovery should be, the court should require that the parties negotiate the scope of discovery and attempt to reach agreement at the outset. The scope may later be modified by agreement or by court order, but it should not be undefined or allowed to drift.

2. Suggested judicial management strategies

- Require that the discovery plan address the scope of e-discovery and describe any disputes as to scope
- Require the party seeking discovery into matters beyond the claims and defenses of the parties to explain why the proposed broader discovery is relevant and necessary

- Require parties seeking broader discovery to demonstrate that the proposed discovery is proportionate to the natter, with reference to FRCP 26(b)(2)(C)
- Resolve any disputes as to scope in the initial case management order
- Consider "sequencing" or "phasing" e-discovery, focusing on discovery of ESI directly related to claims and defenses in the pleadings in the first instance to expedite the discovery process and deferring rulings on broader e-discovery requests until the first phase is completed

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading
Manual for Complex Litigation Section 11.221 ("Case-Management Plan") (Fourth Edition) (FJC: 2004). [http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf]

G. Proportionality

FRCP 26(b)(1) makes clear that *all* discovery is subject to proportionality. FRCP 26(b)(2)(C), known as the "Proportionality Rule," embodies an analysis that a judge should perform in permitting parties to engage in what might be costly and time-consuming e-discovery. 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 requests. The exercise of proportionality by federal and state judges is perhaps the strongest tool available to manage e-discovery.

Proportionality is more than just a simple cost-benefit analysis. For example, FRCP 26(b)(2)(C)(iii) speaks of "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake… and the importance of the discovery in resolving the issues."

1. Issues presented

Discovery can be expensive. Indeed, some argue that discovery costs and burdens, particularly those related to discovery of ESI, are so expensive that they prevent parties from fully and fairly litigating their claims and defenses in federal or state court.

How can proportionality be realized? First, attorneys have a duty recognized in FRCP 26(g)(1)(B)(iii) to engage in proportionate discovery both to refrain from making unreasonably burdensome or harassing requests, and to refrain from raising boilerplate "blanket" objections. In other words, when engaging in discovery, the parties are under an obligation to "stop and think." Second, judges are obligated under FRCP 26(b)(2)(C) to use proportionality as a tool to limit the potential costs and burdens of discovery.

Judicial proportionality strategies, although not described as such, have already been suggested in preceding sections of these Resources. Later sections will also suggest strategies that call for judges to engage in the analyses inherent to proportionality.

2. Suggested strategies

- Direct the parties to discuss in the meet-and-confer and include in the discovery plan estimates of the cost of responding to particular requests for discovery of ESI in comparison with the reasonable ranges of outcomes of the action
- Require attorneys to develop discovery budgets with the approval of their clients
- Issue scheduling orders with the assistance of counsel (and, as appropriate, the parties) that allow only discovery proportionate to the reasonable range of outcomes
- Limit e-discovery in the first instance to ESI that can be produced by least expensive means and is most likely to produce relevant information
- Use all the judicial management strategies described above to determine whether and when further discovery should be allowed
- Appoint third parties such as neutral experts or special masters to assist the court, if necessary, given the nature of a particular action or as agreed by the parties, to monitor discovery and ensure that proportionate discovery is conducted.

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

The Sedona Conference® Commentary on Proportionality (2010)
[http://www.thesedonaconference.org/dltForm?did=Proportionality2010.pdf]

The Sedona Canada℠ Commentary on Proportionality in Electronic Disclosure and Discovery (2010)
[http://www.thesedonaconference.org/dltForm?did=Canadian__Proportianality.pdf]

H. Identification of "not reasonably accessible" sources of ESI

Rule 26(b)(2)(B) of the FRCPs provides that a party need not produce ESI from sources that the 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 "good cause" exists for the production of ESI from those sources, the judge may order the ESI to be produced under the limitations of the Proportionality Rule, and may also impose other conditions, including cost-sharing or cost-shifting.

Production of ESI from sources that are not reasonably accessible is, however, distinct from *preservation* of that ESI. Identification of a source of ESI as being not reasonably accessible does not relieve the party of any obligation to preserve evidence, absent agreement of the parties.

1. Issues presented

   First, how should the "source" be identified or described? The Committee Note to FRCP 26(f) suggests 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.

   Second, is the source of the requested ESI not reasonably accessible *in fact*? The burden is on the party asserting that designation. Discovery may be needed to enable a party to contest an adversary's assertion that the source is not reasonably accessible. Discovery may include sampling of ESI from the source, depositions of witnesses knowledgeable about the responding party's information systems, or allowing some form of inspection of the source.

   Third, 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 Committee Note to FRCP 26(b)(2)(B) suggests that a court may consider a number of factors in determining whether good cause exists. Note, however, as does the Committee, that, as technology advances, what is and is not considered "reasonably accessible" will change.

   Finally, FRCP 26(b)(2)(B) directs the judge to consider the proportionality limitations of FRCP 26(b)(2)(C) and allows the judge to place conditions on any discovery.

2. Suggested judicial management strategies

   - Require the parties, at the FRCP 26(f) meet-and-confer or its state equivalent, to identify sources of ESI that a party deems not reasonably accessible and address any dispute arising from that identification
   - Direct the parties to include in their discovery plan any agreement – or disagreement – pertaining to discovery from not reasonably accessible sources
   - Direct the party which asserts that requested ESI is on a not reasonably accessible source to identify any accessible sources from which the ESI can be found
   - Limit discovery, at least in the first instance, to ESI from "accessible" sources and defer any consideration of discovery from not reasonably accessible sources
   - Allow the parties to engage in focused and limited discovery to test whether, in fact, ESI is on a not reasonably accessible source

- Direct the requesting party to narrow its requests to minimize or at least reduce any undue burden or cost

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

"The Sedona Conference Commentary on: Preservation, Management and Identification of Information That Are Not Reasonably Accessible" (2008) [http://www.thesedonaconference.org/dltForm?did=NRA.pdf]

Thomas Y. Allman, "The 'Two-Tiered' Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?" 14 Richmond J. L. & Tech. Art. 7 (2008) [http://law.richmond.edu/jolt/v14i3/article7.pdf]

I. Agreeing on search and collection methodologies

One goal of judicial case management should be to encourage parties to agree on a search and collection methodology before discovery begins. This should reduce cost and delay and conserve judicial resources. Defining such a methodology in terms of date ranges, data sources, and custodians enables parties to conduct e-discovery 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, tremendous cost-savings can 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.

1. Issues presented

First, 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 be work product.

Second, 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.

Third, parties may not be familiar with advanced technological tools to reduce the cost of manual search and collection procedures.

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.

2. Suggested judicial management strategies

- Direct the parties to collaborate on a sample search of ESI to determine the most effective search methodology to apply to a larger collection
- Direct the parties to attempt to reach agreement on the use of automated search technologies, and advise the parties that insistence on the use of costly manual procedures will be viewed with skepticism.
- Direct the parties to agree on a reasonable set of "key words," if key word searching is an appropriate methodology. Avoid having the court be forced to select key words for the parties, as the court is not in a position to determine whether any given set of key words will be effective in retrieving relevant information and filtering out irrelevant information.
- Consider staging searches, focusing on those data sources most likely to yield relevant information. "Staging" here means staging by data source rather than issue, as is often employed in complex litigation.
- Suggest that the parties engage (or order the appointment of) a neutral to assist them in developing a search methodology, come to agreement on a methodology, or resolve any dispute with regard to the application of a methodology.

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

The Sedona Conference® Best Practices Commentary on Search & Retrieval Methods (August, 2007) [http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods___revised_cover_and_preface.pdf]

Jason R. Baron & Edward C. Wolfe, "A Nutshell on Negotiating E-Discovery Search Protocols," 11 Sedona Conf. J. 229 (2010) [hypertext link to be added]

Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, 17:3 Rich. J.L. & Tech. Art. 11 (2011), [http://jolt.richmond.edu/v17i3/article11.pdf]

J. Agreeing on the form or forms of production

ESI exists, and can be produced, in various forms. Form of production can be a particularly contentious issue in e-discovery. Parties can dispute whether ESI should be produced in, for example, paper, PDF, TIFF, or native forms.[3] This section addresses form of production and why a particular form or forms may be appropriate for the needs of a particular action.

1. Issues presented

The first issue arises when parties request production of ESI in a particular form or forms. FRCP 34(b) describes the means by which parties deal with form of production in the federal courts. Many states have adopted identical or similar rules.

Under FRCP 34, the requesting party may designate the form or forms in which it wants ESI produced. The designation is intended to "facilitate the orderly, efficient, and cost-effective discovery of electronically stored information." Committee Note to 2006 Amendment, Rule 34(b). "If a request does not specify a form …, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." FRCP 34(b)(2)(E). 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 FRCP 37(a)(2)(B) in an effort to resolve the dispute. 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. . ." Committee Note, 2006 Amendment, Rule 34(b).

FRCP 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, FRCP 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."

[3] *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* (Third Edition, 2010), 23.

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 reveal, for example:

- date of creation, edits, comments
- file size and location
- deletion dates and times
- access and distribution
- authorship or the username associated with those tasks[4]

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

2. Suggested judicial management strategies

- Direct the parties to describe the manner in which they maintain ESI so that the parties can discuss the appropriate form or forms of production
- In an action pending in state court that does not have an equivalent to FRCP 34(b), direct the parties to follow the procedure set forth in that rule
- Apply Sedona Principle 12, which provides that, in the absence of agreement or an order, production should be made in either the form or forms in which the information is ordinarily maintained or in a reasonably usable form, "taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."
- 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.

3. Sample Orders

In re Urethane Antitrust Litigation, MDL No. 1616 (Nov. 25, 2008), "Stipulation and Order Regarding the production of Documents and Electronically Stored Information" [hyperlink to be added]

[4] *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* (Third Edition, 2010), 34

4. Further Reading

Guidelines for the Discovery of Electronically Stored Information (ESI), United States District Court for the District of Kansas.
http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf

Suggested Protocol for Discovery of Electronically Stored Information, United States District Court for the District of Maryland.
http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf

The Sedona Conference, The Sedona Principles Addressing Electronic Document Production, Second Edition (June, 2007).
http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf

K. Protection of attorney-client privilege and confidentiality

Protection of attorney-client privilege and confidentiality goes to the heart of the adversary system. Production of ESI, which can often be voluminous and contain non-apparent information, leads to the risk that information subject to privilege or work-product protection, or information that is confidential in nature, is inadvertently produced or is produced without adequate protection.

1. Issues presented

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. See, e.g., FRCP 26(b)(5)(A).

FRCP 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."

FRCP 26(b)(5)(B) is a procedure 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 raise to a waiver in many state courts. Until recently, 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.

Therefore, the risks associated with inadvertent production of privileged information have been very high and, consequently, the cost of privilege review is often cited as a major component of the overall cost of litigation.

Rule 502 of the FRCPs of Evidence ("FRE") was enacted in the fall of 2008 to address these concerns. Several states have adopted equivalents of FRE 502.

FRE 502(a) limits the risk of subject matter waiver to instances in which the waiver was intentional. FRE 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. FRE 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. FRE 502 was intended to reduce the cost and risks associated with the production of large-scale collections of information, particularly ESI.

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. Protective orders issued pursuant to FRCP 26(c) or its state equivalents must be looked to for protection here.

2. Suggested judicial management strategies

- Ensure that the parties meet-and-confer on privilege and confidentiality issues before discovery begins and before presenting any disputes to the court
- 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 FRCP 16 scheduling order
- Consider entering a non-waiver confidentiality order with or without the parties' agreement under FRE 502(d), after providing the parties an opportunity to express any concerns about such an order
- 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
- In the event that the privilege or confidentiality designations of a large volume of documents are challenged, direct the parties to attempt agree on "categorizing" disputed information so that a ruling on samples will apply to each category
- Suggest that the parties engage (or order the appointment of) a neutral to rule on challenges to privilege or confidentiality designations

3. Sample orders

   Franco v. Connecticut General Life Ins. Co. 07-CV-6039 (D.N.J. Oct. 28, 2010), "Stipulation and Order Under FRCP of Evidence 502(d)" [hyperlink to be added]

   Rajala v. McGuire Woods, LLP, CA No. 08-2638 (D. Kan. July 22, 2010), "Protective Order Containing Clawback Provisions" [hyperlink to be added]

4. Further reading

   Martin R. Lueck & Parick M. Arenz, "FRCP of Evidence 502(d) & Compelled Quick Peek Productions," 10 Sedona Conf. J. 229 (2009) [hyperlink to be added]

   Patrick L. Oot, "The Protective Order Toolkit: Protective Privilege with FRCP of Evidence 502," 10 Sedona Conf. J. 237 (2009) [hyperlink to be added]

   Maura R. Grossman and Ronald J. Hedges, "Do the FRCPs Provide for 'Clawless' Clawbacks?" 9 Digital Discovery and E-Evidence 285 (2009) [hyperlink to be added if we obtain permission to republish]

   The Sedona Guidelines on Confidentiality and Public Access (2007) [http://www.thesedonaconference.org/dltForm?did=3_07WG2.pdf]

L. The privilege log

As noted above in Section IV.K., FRCP 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.

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 judicial resources.

1. Issues presented

   The parties must be clear on the level of detail a privilege log must contain. FRCP 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 the log should take. Absent party agreement, the court must prescribe the form. For example, should logged e-mail 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, for example, the simple phrase "attorney-client privilege" or the name of an attorney appearing in a document.

Second, how specific should the claim of privilege be stated? Is it sufficient to describe the document as "giving legal advice?" Should the description read, "giving legal advice on issue 'x'?"

Third, what can the judge or the parties do to reduce the volume of a potentially voluminous log? Would it be acceptable to fully describe exemplars of documents in each of several categories?

Fourth, what about message strings? 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. How should strings be described on a log? Should only privileged messages on a string be logged? Is it sufficient to log only the "latest" message? Should non-privileged communications within the string be logged?

2. Suggested judicial management strategies

- Require the parties to address the form and content of privilege logs at the initial meet-and-confer
- Require the parties to attempt to agree at the initial meet-and-confer 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
- Address the form and date of production of the log at the initial case management conference or as soon thereafter as practicable
- Encourage the parties to identify presumptively-privileged documents that may be segregated and excluded from production based on some agreed methodology
- 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
- Encourage the parties to agree on how message strings should be logged
- 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
- If necessary, conduct an in camera review or refer disputes about logs to a special master

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

J.M. Facciola & J.M. Redgrave, "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," 4 Fed. Cts. L. Rev. 19 (2009)[http://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf]

Jeane A. Thomas, "Reducing the Costs of Privilege Reviews and Logs," National L. J. Mar. 31, 2009 [hyperlink to be added if we obtain permission to republish]

M. Allocation of costs

Cost-shifting came to e-discovery with the iconic Zubulake decisions in the context of production of ESI from "inaccessible" sources. Cost-shifting and cost-sharing are implicit in FRCP 26(b)(2)(B), under which "[t]he court may specify conditions for the discovery" of ESI from not reasonably accessible sources. Many judges have relied on the Proportionality Rule to require cost-shifting or cost-sharing in lieu of "limit[ing] the frequency or extent" of discovery. FRCP 26(b)(2)(C). Other judges have limited cost-shifting or cost-sharing to production of ESI from not reasonably accessible sources.

Cost-shifting or cost-sharing are inconsistent with the so-called "American Rule" that each party bears its own litigation costs. The party seeking cost- shifting or cost–sharing bears the burden of overcoming that presumption.

1. Issues presented

Cost-shifting or cost-sharing questions may not be limited to the production of ESI. Preservation of ESI may entail significant costs, and parties may seek to have these costs shifted or shared. This should be discussed at the initial FRCP 26(f) meet-and-confer, if not sooner. There is an absence of authority or precedent for courts to follow in addressing this issue. However, Sedona Proportionality Principle 1 suggests that the "burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation."

There may be actions in which crucial ESI is known to be available only from sources that are not reasonably accessible, for instance, email that no longer exists on accessible systems, or word-processing documents from retired applications. In such actions, cost-shifting or cost-sharing questions are likely to arise during the initial FRCP 26(f) meet-and-confer.

The FRCPs do not set forth factors for a cost-shifting or cost-sharing analysis. What factors might be used? Factors suggested in the Committee Note to the 2006 amendments to FRCP 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.

2. Suggested judicial management strategies

- Limit production of ESI to reasonably accessible information, which is ordinarily subject to the American Rule on cost allocation
- Address cost-shifting or cost-sharing only after all relevant reasonably accessible information has been produced and reviewed by the requesting party
- Require the party seeking to shift 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"
- 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 entire data set

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

The Sedona Conference® Commentary on Proportionality (2010)
[http://www.thesedonaconference.org/dltForm?did=Proportionality2010.pdf]

The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible (2008)
[http://www.thesedonaconference.org/dltForm?did=NRA.pdf]

N. Discovery from non-parties

Discovery of ESI can be particularly troubling when nonparties are involved. Plainly, FRCP 45 and its state equivalents allow such discovery. However, the ESI sought may be voluminous and expensive for a nonparty to produce.

1. Issues presented

Promoting cooperation with respect to nonparty subpoena practice can be both simpler and more difficult than elsewhere in e-discovery. On the one hand, FRCP 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 nonparties 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. FRCP 45(c)(1).

On the other hand, nonparty involvement in discovery may complicate case management for a judge. For instance, FRCP 45 has no meet-and-confer requirement, so there is no formal mechanism for parties to work together to reduce costs and burdens. Moreover, subpoenaed nonparties may be outside the jurisdiction of the case-management judge. This may lead to more complication, as a court in another jurisdiction may be responsible for ruling on any dispute about scope of a subpoena.

2. Suggested case management strategies

- Encourage the parties in their initial meet-and-confer to address any intent to secure information from nonparties and to include such intent in their discovery plan
- Direct the parties to present any dispute between themselves as to nonparty discovery to the court at the initial scheduling conference or as soon thereafter as possible
- Once a subpoena is served, request the issuing party and the subpoenaed nonparty to meet-and-confer in an attempt to resolve any of the latter's objections to the subpoena without formal motion practice
- Encourage the parties and the subpoenaed nonparty to stipulate to an extension of time for the latter to object to the subpoena. The limited time period for objection under FRCP 45(c)(2)(B) may frustrate any effort to resolve disputes amicably and without judicial involvement.
- 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

3. Sample orders

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas (2008) [http://www.thesedonaconference.org/dltForm?did=Rule_45_Subpoenas]

O. Evidential foundations

All civil actions proceed as if they will be disposed of by dispositive motion or trial. Discovery itself is intended to produce information that will be admitted into evidence. These considerations may become lost on attorneys, parties, and judges.

1. Issues presented

   In planning and executing discovery, the parties may lose sight of the ultimate goal of producing admissible evidence. ESI presents unique evidential issues, because electronic files are derived from complex information systems and the files can often be complex themselves. Making a sufficient demonstration for admissibility of ESI from information systems may be difficult if the offering party has not kept sight of all the elements needed to establish foundation, relevance, and authenticity. This requires attention to detail at every stage of litigation, from preservation through collection, review, and production. The parties may need to retain experts in information systems to assist with e-discovery, and these or other experts may be called upon to testify or submit affidavits if admissibility questions arise.

   Preliminary admissibility questions are determined by the court under FRE 104(a) and its state equivalents. The court is not bound by the rules of evidence in making these determinations, and may be assisted by proffers from the offering party or its expert that are not measured under Daubert or Frye standards. However, final admissibility questions may require expert opinion admitted subject to rules of evidence.

2. Suggested judicial management strategies

   - Parties may preserve and collect ESI before a civil action has commenced or service of process effected. At this pre-litigation stage, the FRCPs do not provide guidance that might assist the parties or the court in making decisions about methods of preservation and collection of ESI which will have a direct bearing on admissibility later. Perhaps the best that can be done by judges is to educate the Bench and Bar on these questions.
   - Remind the parties at the initial case management conference that, as the parties collect, produce, and review ESI, admissibility should be taken into account. This is especially important when ESI is produced by a nonparty in response to a subpoena.
   - 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

3. Sample orders

   [If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

   The Sedona Conference® Commentary on ESI Evidence & Admissibility (2008) [http://www.thesedonaconference.org/dltForm?did=ESI_Commentary_0308.pdf]

   George L. Paul, Foundations of Digital Evidence (ABA: 2008).

P. Electronic trials

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 e-discovery with the use of ESI at trial in mind.

1. Issues presented

   First, opposing counsel in a civil action may have different preferences as to the type of electronic evidence presentation system they want to use. Counsel should agree on the system that will be used, and most importantly, that system must be compatible with the court's resources.

   Second, opposing counsel may have different levels of skill in the preparation of electronic presentations or in the use of electronic evidence presentation systems. Counsel must have adequate technical support. The court must be on 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.

2. Suggested judicial management strategies

   - Require the parties to exchange information not later than the final pretrial conference about what evidence they intend to introduce in electronic form
   - Urge the parties to use a common evidence presentation system
   - Require the parties to perform "dry runs" of their electronic evidence to avoid any technical problems
   - Require the parties to have knowledgeable operators of the evidence presentation system or systems present at trial
   - Charge the jury to be attentive to, but not mesmerized by, electronic evidence

3. Sample orders

   [If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

   Effective Use of Courtroom Technology (FJC: 2001)
   [http://www.fjc.gov/public/pdf.nsf/lookup/cttech00.pdf/$file/cttech00.pdf]

Q. Discovery motion practice

Discovery motions can be the bane of a judge's involvement with ESI. Discovery motions can disrupt the timing of discovery and grow into satellite litigation when the merits of an action are pushed aside. Active judicial management of motion practice is essential and may eliminate or minimize motions.

FRCPs 26(c)(1) and 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 United States 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. District of New Jersey, Local Civil Rule 37.1(a)(1). Going one step further, the United States District Court for the Eastern District of Texas maintains a "Discovery Hotline" so that parties can have an "immediate hearing on the record and ruling" by a judge on discovery disputes. Eastern District of Texas, Local Rule CV 26(e). These rules demonstrate an attempt to reduce formal motion practice in the federal courts, and many state courts have followed suit.

1. Issues presented

   First, is the motion timely? Has the moving party exhausted reasonable alternatives to a formal motion? Has the responding party made, or offered to make, discovery that might obviate the need for a motion?

   Second, has the moving party made a sufficient showing to allow the motion to be decided? What proofs should the moving party make?

2. Suggested judicial management strategies

   - Advise the parties, at the initial 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
   - Be available to resolve disputes informally and promptly should disputes arise or make arrangements for a colleague to be available in a particular instance

- Require the parties to submit their dispute as a joint letter to the court requesting resolution
- Meet with the parties on an informal basis to attempt to resolve the dispute prior to the filing of any motion
- Ensure that the parties confer pursuant to FRCPs 26(c)(1) or 37(a)(1) or their state equivalents in an attempt to resolve any dispute
- Insist that any formal motion 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
- Similarly, insist that the responding party describe why the discovery sought cannot or should not be allowed and, if appropriate, a detailed description of costs.

3. Sample orders

Time Domain, Inc. v. Bekaert Specialty Films, LLC, 08-CV-0902 (N. D. Tex. Apr. 28, 2009) "Standing Order on Non-Dispositive Motions" [hypertext link to be added]

4. Further reading

[If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

R. Sanctions

The risk of sanctions is a serious concern in e-discovery. Imposition of sanctions is one of the most unpleasant tasks a judge might be required to undertake. Moreover, as with discovery disputes generally, sanctions applications run the risk of extended—and expensive— satellite proceedings.

Parties may view any adverse discovery decision by a judge to be a "sanction," no matter how routine or minor. A sanction, however, is a "penalty or coercive measure that results from failure to comply with a law, rule, or order… [e.g.] a sanction for discovery abuse."[5] A true sanction should be distinguished from a case management order that may result from actions or failures in discovery, such as an order to limit or compel discovery, to extend the discovery period, or require a witness to be re-deposed with the shifting of costs. True sanctions must be based on findings by the court, for example, that a party or counsel engaged in culpable conduct, without substantial justification, that led to a violation of a court order, prejudice to the opposing party, or interference with the administration of justice. The power to sanction may be based on statute, rule, or the inherent authority of the court.

[5] *Black's Law Dictionary* (8th Edition, 2004), p. 1368.

1. Issues presented

   When a party formally complains of another party's conduct in e-discovery and seeks "sanctions," what is nature of the conduct being complained of and what is the relief sought? Is the requested sanction really addressed to a case management issue, for example, a need for additional time to conduct or complete discovery? Can such a dispute be resolved without a formal motion or by a simple extension of court-ordered deadlines?

   What proofs should a moving party present? What opportunities should be given the responding party to present any defenses? What should the record consist of? Given the varying standards for the imposition of sanctions, a judge who considers sanctions must carefully document the findings of fact and legal conclusions of law.

   The timing of a sanctions motion can be troublesome for a judge. When should such a motion be made, assuming that a judge has discretion to permit filing at a specific time? Should the judge require that other discovery (or perhaps all discovery) be completed before any motion is made? "Piecemeal" motion practice can lead to excessive cost to the parties, delay in resolution of an action, and stress on already-strained court resources.

2. Suggested case management strategies

   - Inquire, whenever the word "sanction" arises, about the nature of the dispute. Ascertain exactly what relief is sought and why.
   - Conduct an informal proceeding in the first instance. Determine whether a party is using the word "sanction" to request an extension of some deadline.
   - 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.

3. Sample orders

   [If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org.]

4. Further reading

[During Fall 2011 a complete bibliography of material on sanctions will be assembled in conjunction with the consideration of amendments to the FRCPs of Civil Procedure and made available online.]

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