THE SEDONA CONFERENCE® WORKING GROUP SERIES℠

WGS℠

THE SEDONA CONFERENCE® COOPERATION GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL

A Project of The Sedona Conference®
Working Group on Electronic Document
Retention & Production

MARCH 2011 VERSION

The Sedona Conference®

The Sedona Conference®
Cooperation Guidance for Litigators & In-House Counsel

A Project of The Sedona Conference® Working Group on
Electronic Document Retention & Production (WG1)

MARCH 2011 VERSION

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Preface

Welcome to the 2011 Version of *The Sedona Conference® Cooperation Guidance for Litigators and In-House Counsel,* another major publication in The Sedona Conference® Working Group Series℠ ("WGS℠").

The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) issued its *Cooperation Proclamation* in 2008 to "to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." In 2009, The Sedona Conference® published "The Case for Cooperation," a companion piece to the *Cooperation Proclamation,* which articulated the reasons supporting the *Cooperation Proclamation* (10 Sedona Conf. J. Supp. at 339). *The Sedona Conference® Cooperation Guidance for Litigators and In-House Counsel* is the final element of the "paradigm shift in the discovery process" and provides a practical toolkit to train and support litigators and in-house counsel in techniques of discovery cooperation, collaboration, and transparency consistent with the *Cooperation Proclamation*.

On behalf of The Sedona Conference®, I want to thank the drafting and editorial team, and all WG1 members, whose comments contributed to this publication and for all of their efforts to make this work product as helpful as possible.

We hope our efforts will be of immediate and practical assistance to both litigators and in-house counsel. If you wish to submit a comment, please utilize the "public comment form" on the download page of our website at www.thesedonaconference.org. You may also submit feedback by emailing us at info@sedonaconference.org.

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

I. Background & Introduction

The Sedona Conference® issued its *Cooperation Proclamation* in 2008, launching "a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'" The Sedona Conference® *Cooperation Proclamation,* 10 SEDONA CONF. J. 331 (2009 Supp.). The intent is "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 *Proclamation* challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes." *Id.* As noted in the Conclusion to the *Proclamation,* "[o]ur 'officer of the court' duties demand no less. This project … is a tailored effort to effectuate the mandate of court rules calling for a just, speedy, and inexpensive determination of every action' and fundamental ethical principles governing our profession." *Id.* at 333.

The *Cooperation Proclamation* acknowledged that what is required is a "paradigm shift for the discovery process" and that The Sedona Conference® envisioned a three-part process: (1) awareness (the *Proclamation* itself), (2) commitment (the writing of a Brandeis brief-style "The Case for Cooperation" developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding (*see* "The Case for Cooperation," 10 SEDONA CONF. J. 331, 339 (2009 Supp.)), and (3) tools—"developing and distributing practical "tool kits" to train and support lawyers … in techniques of discovery cooperation, collaboration, and transparency." *Proclamation* at 333.

This document comprises the third part of the three-part process—practical toolkits designed for training and supporting lawyers in techniques of discovery cooperation, collaboration, and transparency. The separate guidance documents for litigators and in-house counsel are each organized around "cooperation points"—opportunities to engage in cooperative behavior in an effort to bring efficiency and efficacy to the discovery process allowing more disputes to be resolved on their merits consistent with Federal Rule of Civil Procedure 1. A companion document for the Bench—*Cooperation Proclamation: Resources for the Bench*—is being published contemporaneously with these toolkits for counsel.

Of necessity, there is some overlap of topics and opportunities in the guidance for in-house counsel and litigators—parties and their counsel may assume different roles or take on different tasks depending on their approach to litigation generally or the needs of a specific case.

Finally, a few overarching points: when making decisions unilaterally—before opposing counsel is identified—do so in anticipation of cooperation. Document the reasonable and good faith efforts you are making to comply with your obligations in a manner that you can share with opposing counsel once identified, if necessary. All cooperative efforts, actually, should be transparent so that if opposing counsel does not reciprocate and motion practice ensues, the court will know the steps you have taken to try to avoid unnecessary discovery disputes. Lastly, even if your case is already under way, it is never too late to adopt a cooperative approach to fact-finding consistent with the Cooperation Points set forth below.

II. Cooperation Guidance for Litigators

Introduction

The Sedona Conference® *Cooperation Proclamation*[1] calls for cooperation by all parties to the discovery process in order to achieve a just, speedy, and inexpensive determination of every action. This Guidance for Litigators focuses on ways that outside counsel can advance this goal.

Litigators are, of course, expected and ethically required to be advocates for their clients. They are also expected and ethically required to conduct discovery in a diligent, efficient, and candid manner.[2] The tone of a case is usually set at the beginning, so it is important for all counsel to abide by and advance the principles of cooperative discovery at the outset of the case.

This guidance document will identify opportunities for constructive, mutually beneficial cooperation with opposing counsel and provide a few pointers on how to take advantage of such opportunities. In addition to discussing the benefits of cooperation, this paper will also highlight some of the consequences of non-cooperation, such as increased costs, increased court intervention, and increased risk of sanctions to name a few. Occasionally, some parties will elect to stonewall, to intimidate, and to seek capitulation through hardball discovery tactics. While such tactics may produce the isolated favorable result, they are much more likely to engender reciprocal intransigence, increased costs and increased risks to the litigants and their counsel. Given that the touchstones of most rule-based or court-based analyses regarding discovery, including electronically stored information ("ESI"), are "reasonableness" and "good faith," both the producing party and the requesting party should have strong incentives to act reasonably and in good faith. Doing so will go a long way in achieving mutually beneficial cooperation. It is not the task of this document to restate all of the possible governing principles; litigators may find additional helpful information in the following Cooperation Guidance for In-House Counsel.

Cooperation Point #1: Identification of the Material Factual Issues in Dispute and Potentially Relevant Data

1. *An early discussion with opposing counsel should serve to focus attention on the material factual issues in dispute, so the parties can focus their discovery efforts on what is needed to resolve the case.*

    a. The Opportunity:

    No matter the size of the case, there will be a finite number of issues to be resolved. In some matters, only a handful of factual issues are seriously in dispute. The quicker the parties identify the disputed material issues, the sooner their respective resources can be dedicated to discovery of facts required to resolve those issues. Having an early discussion with opposing counsel regarding the material factual issues in dispute will guide the parties in

[1] 10 SEDONA CONF. J. 331 (2009 Supp.).

[2] *See The Case for Cooperation,* 10 SEDONA CONF. J. at 339 (2009 Supp.). To ensure that clients understand these obligations and their benefits, an engagement letter is an appropriate vehicle for agreeing with the client to follow the principles espoused by Federal Rule of Civil Procedure 1 and by The Sedona Conference® *Cooperation Proclamation.*

their determinations of what is reasonable to do with respect to preserving, collecting, and producing only that ESI required to resolve those issues.

It is also important to note that these early conversations will set the tone for the case and counsel should approach each other with professionalism. Whether the first discussions are triggered by a preservation letter or other demand letter or the filing of a claim, counsel should engage in a respectful, reasonable, and good faith manner, with due regard to the mandate of Federal Rule of Civil Procedure 1 that the rules of procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding," and to counsel's professional and ethical obligations, with candor to the court and without intent to obfuscate.[3] Note that the issues discussed will need to be revisited throughout the litigation.

Cooperation Point #2: Identification of Data Sources & Preservation—Part I

2. *Early and thorough identification of potential sources of relevant data will place the parties in a position to agree on a scope of preservation consistent with principles of proportionality.*[4]

   a. The Opportunity:

   Once a triggering event occurs putting an individual or company on notice of their duty to preserve relevant data (e.g., in reasonable anticipation of litigation), it becomes essential to identify (i.e., identify, locate, and categorize) all potentially relevant data, including ESI. Very early on, counsel is faced with a choice: make unilateral identification decisions or reach agreement on identification with the opposing party.

   If opposing counsel is identified, and counsel can reach agreement with the other side regarding the scope of preservation and reasonable steps to preserve potentially relevant ESI, it is highly unlikely that a court will later determine that counsel behaved unreasonably or impose spoliation sanctions. Cooperating with the opposing party whenever possible—as early in the matter as possible—may be a significant time and cost saver.

   b. Examples:

   To determine the most reasonable dataset needing to be preserved, litigants should consider:

   - The material, factual issues potentially in dispute.
   - The time frames, geographic locations, and people involved in the issues potentially in dispute.
   - The types of data that may bear on the issues. Are communications between individuals at issue? Is information contained in financial or other structured

[3] *See* The Sedona Conference®, *The Case for Cooperation,* 10 SEDONA CONF. J. at 349 (2009 Supp.).
[4] *See* The Sedona Conference®, *The Sedona Conference® Commentary on Proportionality in Electronic Discovery,* 11 SEDONA CONF. J. at 289 (2010).

databases at issue? Are recent communications at issue? Are communications outside of email, such as instant messages, voicemail, blogs, etc., at issue?

- The current locations and custodians of such data.
- The need to know the IT topography of the information systems involved.
- The accessibility of potentially relevant, non-duplicative data.
- How dispersed is such information among non-relevant information?
- How much of the volume is duplicative?
- The need to preserve any legacy, archived, or offline data sources, such as server backup tapes.
- The identity of any priority custodians, locations, etc., that should be produced prior to other data sources to assist in early evidence assessment or dispute resolution efforts.
- Whether there are any ephemeral sources of potentially relevant information.
- The need to take a snapshot (or preserve a preexisting snapshot) of any non-static data such as databases.
- Whether there are any third party sources of potentially relevant information and what must be done to have these third party custodians preserve the relevant data.
- Whether home computers or other employee-purchased or employee-controlled hardware or storage media are potentially relevant.
- Whether an early and limited information exchange to facilitate early evidence assessment or dispute resolution is feasible.
- Whether any automatic retention, destruction, or overwriting procedures need to be modified.[5]
- Whether the preservation or hold notice needs to cover documents created in the future (i.e., is or should the hold notice be "evergreen")?

Cooperation Point #3: Identification of Data Sources & Preservation—Part II

3. *Appreciating and addressing opposing counsel's legitimate concerns is an important prerequisite to cooperative fact-finding.*

   a. The Opportunity:

   Inability to reach agreement can result from a failure or unwillingness to appreciate the legitimate concerns that are driving opposing counsel's position. Recognizing those concerns, including each party's burden of proof, and being creative and sincere when proposing solutions will go a long way toward facilitating reciprocity and eventual agreement with respect to the scope of preservation. Before concluding that opposing counsel is being obstinate, consider the legitimate client interests opposing counsel must protect. Responding counsel should be specific in expressing any concerns or objections. It is also important to recognize that what might be an appropriate scope for preservation at the outset may, and probably will, change and narrow as the scope of the dispute gets refined and the parties'

[5] *See* THE SEDONA CONFERENCE®, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2d ed. 2007), Principles 5b & 5c at 44, *available at* http://www.thesedonaconference.org.

knowledge curve goes up. Scope of preservation issues require revisiting as the case progresses to help reduce burden and cost.

b. Examples:

Volume Asymmetry. Significant disparity in the volume of ESI each party controls may present a significant obstacle to agreement. When the requesting party does not have its own significant volume of ESI to preserve, the producing party may believe that the requesting party has incentive to call for a broad scope of preservation without considering the actual need for the information to resolve the dispute on the merits. The producing party may also believe that identifying numerous sources of potentially responsive data during discussions will only result in the requesting party calling for additional data to be preserved—thereby expanding the litigation hold beyond a reasonable scope. However, it is key to meaningful and unbiased preservation discussions to remember that the requesting party is, in fact, strongly motivated not to ask for more than it needs to avoid excess review, delay, and out-of-pocket costs, and that the requesting party faces the prospect of reciprocal preservation requests to temper its own demands.[6]

Information Asymmetry. The producing party should recognize that the requesting party is almost always operating with little to no information about the producing party's ESI. It can be difficult, therefore, for the requesting party to have comfort agreeing that a source of ESI is duplicative or cumulative of other data and need not be preserved. As a general principle, the more information the producing party is willing to provide to the requesting party on these topics (including the early exchange of "low-hanging fruit"), the easier it should be for the requesting party to focus its requests on data sources of ESI that are most likely to contain information important to the material issues in dispute. Of course, both sides much recognize that it can be difficult to gain detailed knowledge of all potentially important data sources quickly. Until data is actually accessed or at least assessed at some level (which often requires some level of preservation and review), it can be difficult to know whether a particular source is relevant and whether it offers a reasonable substitute for other, less readily available, sources. Nevertheless, to facilitate agreement, the producing party could, for example, provide a summary, at a level of detail appropriate to the matter, of its IT operations and a basic overview of its information infrastructure, perhaps along with documented estimates of costs associated with preserving various types and sources of data. Furthermore, the producing party could survey its potential data sources (systems, custodians, media, and so on) in order to determine where relevant information is most likely to exist. Such information could then be shared with the requesting party. The requesting party should, however, appreciate the producing party's concern about revealing privileged or work-product protected information during such information exchanges and discussions.

Technical Expertise Asymmetry. A lack of technical expertise on either side may impede reaching meaningful agreement if one or both parties lack a working knowledge of how to

[6] *See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010), *amended and superseded by* 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010), *and amended on* May 28, 2010 (S.D.N.Y. No. 05-9016).

effectively work with ESI. Initial emotions and lack of comfort with opposing counsel may compound these impediments. Using third party technical advisors, mediators, or special masters may provide both sides comfort and practical solutions. Often even experienced lawyers can benefit from the latest thinking by independent, non-lawyer, technical specialists.

Cooperation Point #4: Identification of Data Sources & Preservation—Part III

4. *Sound preservation practices serve as a foundation for many types of agreements.*

   a. The Opportunity:

   Parties who exercise sound preservation practices are in a better position to inspire confidence in opposing counsel and, therefore, to reach various forms of agreement and concession.

   b. Example:

   Limitations on Preservation. As a general principle, the more a producing party is able to demonstrate that it has taken appropriate and sufficient preservation efforts with respect to the most important data, the greater the likelihood that the requesting party may agree that certain other ESI sources not be preserved and the less likely that motion practice will ensue. Similarly, even if agreement cannot be reached that certain sources of ESI need not be preserved, agreement may be reached that certain ESI sources may be preserved with less costly methods, such as relying on the company's internal procedures and systems rather than engaging in third party forensic preservation.

Cooperation Point #5: Collection

5. *Reaching agreement with opposing counsel on the scope and sequencing of data to be collected can serve to locate relevant data faster and less expensively.*

   a. The Opportunity:

   Collecting more data than is necessary to resolve a matter wastes time and money for all concerned. Collecting too little data risks matters not being resolved on their merits. It is essential that the parties cooperate to develop a sound strategy that accomplishes and balances two goals: (i) that the production burden on the producing party is fair and reasonable given the size and nature of the issues and the dispute and (ii) that the requesting party receives the facts and information fairly needed to resolve the dispute on the merits

   The producing party will instinctively want to minimize the amount of ESI collected because it will drive subsequent costs for processing, hosting, reviewing, and producing the data. To require a producing party to collect ESI from every possible source can be prohibitively expensive and wasteful. Instead, dialogue and cooperation (rather than unilateral action or court intervention) is likely to lead to a collection plan that will find the most important

discoverable information, possibly from fewer sources, and likely more quickly and less expensively, and with less uncertainty.

b. Examples:

Reaching agreement on ESI collection priorities faces many of the same hurdles and solutions to reaching agreement as discussed above regarding ESI preservation efforts. Additionally, the parties should consider the following:

Be Knowledgeable. Requesting parties can focus their requests on the most important information by becoming knowledgeable about the elements, defenses, or issues for which information is needed. Producing parties can focus discussion on the most efficient sources to satisfy the request by becoming knowledgeable about the sources of potentially relevant data and the organization of that data. (*See, e.g.,* FED. R. CIV. P. 26(g)).

Exchange Meaningful Information. The more specific the requesting party is about the information it seeks, the more efficient the producing party can be at locating the relevant ESI. Similarly, the more specific the producing party is about the sources of potentially responsive information and the technical or other limitations with respect to accessing that data, the more focused the requests for data can be. The more transparent the parties are about their needs, concerns, and data, the more likely it is that agreements will be reached. As discussed above regarding preservation, the requesting party usually operates with little to no information about the producing party's ESI. It can be difficult, therefore, for the requesting party to have comfort agreeing that a source of ESI is duplicative of other data and need not be collected. Generally, the more information the producing party is willing to provide to the requesting party about sources of potentially relevant data, the easier it is for the requesting party to focus (and stage, where appropriate) its requests: In a discovery dispute before the court, the producing party can more easily show good faith and reasonableness if it has given information to the requesting party that justifies its collection plan.

Be Flexible. The requesting party should be willing to accept substitute sources of information or, if the circumstances dictate, review more easily obtained data before insisting on sources of information that are more difficult to locate and produce. However, court pressure and tight discovery timelines may compel more collection to be done at the front end—especially if there has been extensive pre-discovery motion practice that leaves little time for a methodical tiered process. A party's desire to produce individuals for deposition only once is also an obstacle to staged or tiered document production because a party will not want to produce an individual for additional questioning following subsequent document productions. Nevertheless, given the often tight timeframes for discovery, it may be difficult to hold all depositions until document discovery is complete – especially if there is staged discovery. Litigants may have to offer certain deponents before document production is complete and reserve rights to reopen a deposition if new evidence is later produced. Agreeing to produce documents by custodian, identifying key players up front, and/or to an early 30(b)(6) deposition to identify key players and data types, can advance the dialogue on this issue.

Transparent, Effective Preservation Practices. Strong preservation practices enhance the parties' ability to reach agreement. The requesting party will be more amenable to agreement if it is confident that information not immediately collected will later be available. Adequate documentation and tracking of the preservation and collection processes inspires confidence in both sides in the reliability of the processes.

Establish and Test Collection Priorities and Protocols. Whether by agreement or by unilateral decision-making, the producing party should establish a collection plan. The plan should address which sources of ESI are collected, in what sequence, by whom, and by what method (e.g., by internal staff, outside firms, downloading data, taking forensic images or collecting deleted files in the special occasions that is needed, etc.). Collection priorities might be based on geographic location, title and responsibility of custodian, date ranges, file type, keywords, relevant types of metadata (system, substantive, embedded), etc. Such priorities should be established to secure and begin processing the most important ESI first. Employee interviews and initial sampling and content searching may assist in establishing appropriate priorities. Assumptions about what data is available, from what sources, and their relevance should be reviewed and tested with adjustments made as necessary. For example, it may be initially understood that a certain department was responsible for providing service to the customer at issue in the litigation. Upon initial review of the data collected from that department, it may be apparent that the work was transferred to another department or location that was not on the collection priority list. When evaluating collection priorities, consider whether any adjustments should be made to the prior litigation hold notices and preservation decisions, and whenever opposing counsel is known, discuss and seek agreement with opposing counsel.

Identify Potentially Relevant ESI That is Not Reasonably Accessible. Counsel should consider whether any potentially relevant data is not reasonably accessible, and if so, whether duplicate or substitute data exists elsewhere in a reasonably accessible form. If so, cooperating parties should be able to agree on production from reasonably accessible sources. If the not-reasonably-accessible data is arguably unique, then counsel should assess the factors that determine whether it must be preserved or produced.[7]

Consider Using Experts. Experts in ESI preservation, collection, and processing may be able to provide the parties with additional solutions and provide both sides with greater confidence that their agreements will be implemented appropriately.

Consider Privacy Laws and Other Restrictions. Where a party has certain types of discoverable ESI containing personal or confidential data, especially if those ESI sources are maintained outside the United States, it is important to consider the legal framework that may affect how such materials may be accessed, reviewed, and produced.[8] Requesting parties should appreciate the legal constraints under which a producing party may be operating and be flexible in developing a solution to obtain the needed information in a way that complies with the various legal requirements. Similarly, producing parties should be flexible in

[7] *See* FED. R. CIV. P. 26(b)(2)(C)(i), (iii).

[8] Several countries outside of the United States have various protection laws that range from personal data protection to "state-owned" data protection in the case of a "state-owned" company involved in litigation or U.S. agency investigation.

working toward a procedure that produces relevant ESI without interposing privacy laws as a tactic to avoid production.

Cooperation Point #6: Data Processing, Hosting, and Production

6. *Discuss possible hosting, review, and production platform vendors with opposing counsel.*

   a. The Opportunity:

   In many cases it may be useful to seek opposing counsel's input and, if possible, agreement on the choice of vendor to host ESI for review and production. This will make it more likely that the chosen vendor will meet both parties' needs and make it less likely that any issues with the chosen vendor become the responsibility of only one party. Factors that should be considered by both parties include conflicts and preexisting contractual relationships with parties or law firms (such as having developed or maintained the ESI architecture at a company, or having developed a litigation or due diligence database).

   b. Examples:

   Counsel should consider the issues discussed in *Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors*[9] and discuss them with opposing counsel in an effort to reach agreements that can minimize expense and delay and increase efficacy.

Cooperation Point #7: Form of Production

7. *Reaching early agreement on the format and specifications for production of ESI will ensure a more efficient and less risky review and production process.*

   a. The Opportunity:

   As a general proposition, ESI should be produced in a format that the requesting party can use in a manner substantially similar to that of the producing party in the ordinary course of business. Cooperation regarding the details of the format of production for ESI (e.g., email, spreadsheets, word processing documents) is already common practice and should be one of the easiest points of cooperation. *See* FED. R. CIV. P. 34. By reaching early agreement on the format of production and testing sample batches, the parties might be able to reduce the costs of production. The parties will almost certainly reduce the risk of a court-ordered re-production. Because the desired form of final production may dictate some of the decisions to be made during the processing and loading of ESI, it is best decided at the outset.

   b. Examples:

   The following considerations will assist the parties in reaching agreement:

[9] For more information please refer to THE SEDONA CONFERENCE,® NAVIGATING THE VENDOR PROPOSAL PROCESS: BEST PRACTICES FOR THE SELECTION OF ELECTRONIC DISCOVERY VENDORS (2007), *available at* http://www.thesedonaconference.org.

Involve Vendors and Experts. Vendors for both parties will require detailed instructions from the legal team about the production format to minimize any technical issues that commonly arise. As such, it is good practice to seek opposing counsel's input when providing such instructions to one's vendor to be sure that the requesting party will be able to use and access the data as intended. The technical personnel and vendors themselves can often play a constructive role in this process by offering a menu of options for counsel to consider and agree upon, thus allowing an efficient production by each side. The technical team members should verify formatting requirements so the data can be loaded into the desired review platform. Even though much of the details can be quite technical,[10] there are certain common practices that experienced technical team members can implement. It is often beneficial to bring technical team members to meet and confer conferences to facilitate resolution of technical issues. The parties may decide to conduct a small scale test production to ensure formatting and compatibility issues have been addressed before the full production is undertaken.

Understand the Limitations of Various Forms of Production. The requesting party should let the responding party know how it wants the data produced. This may include different formats for different data sources. The parties will need to agree whether to produce native files or to produce images with associated load files of metadata and searchable text. Native format production ensures that the data is not impermissibly altered and that no metadata is lost. Native file production usually means that the requesting party will be able to use the data in the way the original business custodians used it. However, producing native files may raise concerns, for example, about producing metadata and imbedded data that the producing party has not been able to review (such as potentially privileged track changes and comments to documents) or the inability to assign Bates numbers to native files and otherwise ensure their integrity from intentional or unintentional alteration after production to opposing counsel.

Typically a balance is struck through the production of Bates-labeled image files of emails together with a load file containing only preselected metadata fields and searchable text. Alternatively, the parties could agree to a hashing system to authenticate and protect the integrity of native file documents. Given the difficulty in formatting spreadsheets for purposes of producing Bates-labeled image files, however, spreadsheets, structured data, etc., are typically produced in a hybrid fashion: native format together with a control image or designation.[11] With respect to metadata, there are certain metadata fields a requesting party would generally expect in a load file and a producing party would generally expect to provide (e.g., date, time, senders, receivers, etc.).[12] If a requesting party seeks more obscure metadata

[10] For more detail regarding the various technical terms and details of producing electronic documents, *see* THE SEDONA CONFERENCE,® THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2d ed. 2007), at Section 12, *available at* http://www.thesedonaconference.org.
[11] There is often a large cost to convert these types of documents into images because they can typically result in thousands of pages of images that are essentially useless. For example, an unformatted spreadsheet could result in thousands of pages of images with cells hundreds of pages away from their respective row or column headings. Trying to convert audio files (MP3 or WAV) into images can result in thousands of pages of useless images.
[12] *See, e.g.,* Dep't of Justice, Antitrust Division, Standard Summation Specifications for Load File Production, *available at* http://www.justice.gov/atr/public/electronic_discovery/246377.htm; Securities and Exchange Commission, Enforcement Manual, § 3.2.6.2, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

fields, it should be prepared to justify its request. Any changes from the native format that degrade the usability of the data should also be discussed with the requesting party prior to production.

Some typical production format discussions include:

- Native file format
- Single or multi-page TIFF images, with Bates labels[13] and confidentiality designations
- Initial page TIFF images together with links to native files for spreadsheets
- Extracted, searchable text
- Metadata fields
- Load file format
- Application specific formats
- Optical Character Reader (OCR) files for scanned images of typed hard copy documents
- Linking of email with attachments

Consider Platform or Cost Sharing. The parties may also cooperate by exploring the cost savings available through agreeing to a purely native production (without the expense of converting native files to Bates-labeled images), and/or sharing a production platform/document review site or software, etc. Of course, having a common platform will also eliminate potential issues with incompatible formats. Sharing a common platform is, however, not yet a common practice due to concerns about protecting each side's document tagging and other privileged or work-product protected analyses and the producing party's preexisting relationships or comfort with certain vendors. Careful planning with a competent vendor may be able to address confidentiality concerns.

Cooperation Point #8: Structured Data

8. *The parties should attempt to agree on how to produce useable information from databases and other structured and/or proprietary ESI.*

   a. The Opportunity:

   Data from proprietary systems, databases, and other voluminous structured data systems (such as complex accounting systems or systems hosted by a third party[14]) are difficult to produce in usable form. Without the user interface and reporting functionality, the underlying data is meaningless and/or not accessible by other software. Licensing

[13] To minimize the opportunities for the Bates-labeling process to cause delay in the production process, the producing party may wish to consider having separate Bates ranges or prefixes for different types of documents (hard copy and electronic documents at a minimum) so that multiple production series can be ongoing simultaneously without one group of documents waiting on another. Similarly, the producing party should consider the merits of a non-sequential numbering process (starting a group of documents at 1; another at 10,000; another at 100,000 etc.) to allow for multiple review and production processes to be ongoing simultaneously.

[14] Hosted data systems such as Oracle's "Accounting on Demand" are becoming more prevalent due to cost of storage, backup, and risk.

restrictions may also impact the ability to transfer the data. Often cooperation is the only way to produce usable discoverable information.

Parties should first determine if substitutes might exist for such structured data. If so, the parties and their technical experts should work toward solutions that will provide the data in a format that would allow the requesting party to use the information in a meaningful way. Creativity and flexibility are often required in this context. The burden of production can often be substantially altered through minor accommodations by the requesting party without sacrificing the usability of the information or access to information fairly needed.

b. Examples:

There are several solutions that may be tailored to the particular structured data at issue. For a thorough discussion of how to approach structured databases, see *The Sedona Conference® Database Principles Addressing the Preservation & Production of Databases & Database Information in Civil Litigation.*

Cooperation Point #9: De-Duplication

9. *Reaching agreement on how to de-duplicate voluminous ESI will make review and production processes more efficient.*

a. The Opportunity:

The parties should discuss how to minimize the review and production of duplicate materials without an undue risk of losing unique documents. This discussion can involve both collection issues (collecting duplicative data from different sources or custodians) and also the electronic de-duplication methodology to be applied to the data after it is collected. The production of duplicate information can become quite expensive. Both parties should be motivated to agree on a de-duplication protocol. Proper de-duplication will reduce costs for both sides.

Parties should agree on de-duplication methods. For example, they might de-duplicate documents only within each custodian (so that an email will appear in each user's mailbox from which it was collected), or they might de-duplicate across the entire database of collected documents (so that an email appears only once regardless of how many persons received it so long as tracking information regarding the email going to other custodians is provided). Usually when de-duplication is done across the entire database, the vendor is able to access information showing each of the mailboxes that received the email.

Depending on the flexibility of the software, decisions may be required as to how to handle near duplicate documents, family members, and email chains or decisions regarding how to classify documents as near duplicates. Reviewing and/or tagging such related documents together as a set can increase the consistency in responsiveness and privilege determinations and reduce the burden associated with changes to initial determinations.

Cooperation Point #10: Processing a Production

10. *Reaching agreement on priorities and sequencing for loading and processing voluminous ESI will make review and production more efficient and will facilitate important documents being identified faster and less expensively.*

    a. The Opportunity:

    Given the often huge volume of discoverable ESI, the parties should try to reach agreement on the sequence of processing the data for review and production. Implementing reliable and consistent procedures for processing and producing data can be time consuming. Merely indexing data for loading onto a review platform can take significant time. Once a collection, loading, and review process is implemented, it can be disruptive to change procedures or priorities. Typically, the producing party must prioritize its efforts. Doing so without agreement with opposing counsel may result in second-guessing by the courts. Accordingly, it is best if the parties can reach at least broad agreement on the order in which data will be processed (including the identity of which custodians' information will be scheduled for review). Cooperation will allow the producing party to stage discovery by producing the most important and easily accessible materials first, possibly increasing the likelihood that other materials need not be reviewed or produced because they are cumulative or because of early issue or case resolution. This can save money for both parties.

    The payment terms with the ESI collection and/or hosting vendors may affect decision making about sequencing. Some pricing methodologies may make it more cost-effective to reduce the volume of data loaded for review through preprocessing or more selective loading criteria at the front end, whereas other methodologies may make it more cost effective to load data more freely initially but then work harder to minimize the amount of data actually being produced on the back end.

    b. Examples:

    The sequencing of data can be based on several criteria. Some preprocessing or filtering may first be required.

    - Ease of access and collection
    - Key custodians or sources of data
    - Select date ranges
    - Certain file types
    - Keyword search terms for data culling/loading purposes (as opposed to review purposes discussed below)

Cooperation Point #11: Responsiveness and Privilege Review

11. *Reaching agreement on automated search methodology can help the parties efficiently locate and produce the most relevant ESI.*

    a. The Opportunity:

    Depending on the volume of ESI, it may be (and often is) necessary to apply various automated search and retrieval methods to identify responsive and privileged information efficiently. Search terms are the most widely used mechanism—though concept searching and other advanced analytical methods are becoming more common and useful.[15] Cooperation by the parties in agreeing on search terms (or other retrieval methods) can lead to more efficient discovery and ultimate resolution of the matter and avoid second-guessing and re-dos.

    A broad analysis of the development of automated search and information retrieval using different methodolgies is beyond the scope of this document. What is more important here are the characteristics of search strategies that will minimize the burden to the producing party while finding relevant information.

    In general, running search terms and other analyses of the data are low-cost exercises. Given the high cost of reviewing the search results, the parties should cooperate and possibly experiment with different search methods in an effort to agree on which is the most suitable. Keeping records and comparing the results returned by various searches and methods will assist in finding an appropriate balance between minimizing the cost and burden and finding the information relevant to the dispute.

    b. Examples:

    In developing search methods, and search terms in particular, the parties should consider the following:

    - What search methodology will be used.
    - How to sample or otherwise verify the accuracy of the chosen methodology.
    - Feedback loops to add new search terms or methodologies once actual review of the documents begins.
    - Under what circumstances may the requesting party add additional search terms or otherwise expand the scope of the review and production.
    - Non-searchable documents within the dataset, such as certain PDFs attached to emails.

[15] For more detailed information regarding search and retrieval methodologies, please see The Sedona Conference®, *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery,* 8 SEDONA CONF. J. 189 (Fall 2007).

Cooperation Point #12: Privilege

12. *Reaching agreement to minimize the cost of privilege reviews may now be easier under Federal Rule of Evidence 502.*

    a. The Opportunity:

    The cost of attorney time to review voluminous ESI for privilege prior to production often is one of the most expensive parts of the discovery process. It can also be one of the most risk-prone aspects of the discovery process as counsel strive to meet their ethical obligation to prevent production of privileged information. Cooperation between the parties has the potential to reduce dramatically these costs and risks. As discussed above, cooperation can reduce the population of documents needing privilege review through staged productions and search and retrieval methods. Cooperation can also reduce the review population by increasing the reliability of the tools used. The risk of using search and retrieval methods to conduct a privilege review without reviewing every document is minimized if the parties agree on the process and tools.

    Federal Rule of Evidence 502 addresses directly the rising costs and risks of privilege review in the age of ESI and makes the benefits of cooperation even more compelling. Under Fed. R. Evid. 502, if the parties agree to a quick-peek or clawback arrangement to protect the privilege and ask a federal court to enter their agreement as an order of the court, that order will be enforceable in other state and federal proceedings. Such agreement can encompass the methods and procedures used to conduct the privilege review so that if a privileged document is inadvertently produced despite use of the agreed procedures there will be no waiver. The additional protections provided by Fed. R. Evid. 502 may lessen the producing party's concerns about waiver, although there will still be concerns about revealing privileged communications to the opposing party. By its express terms, the rule requires only "reasonable steps" to prevent disclosure. The Explanatory Note discusses in additional detail what may constitute "reasonable steps," including explicit reference to use of software and linguistic tools.[16]

    The parties should be guided by the concept of reasonableness embodied in Fed. R. Evid. 502, The Sedona Conference® commentaries, and case law. They should balance the chance of inadvertent production with the burden of eliminating inadvertent production. In striking this balance, it is a given that one cannot "unring the bell" when there is inadvertent production. Even if the document is returned, the requesting party will have already read it. Also, the costs of complying with a clawback request could be substantial depending on the steps required.

    CAUTION: a quick peek agreement presents a heightened risk (compared to clawback agreements) of compromising the attorney-client privilege, and should not be entered into without the fully informed consent of your client.

[16] FED. R. EVID. 502, Committee Note (2008).

By adopting the concept of reasonableness and by allowing the parties largely to fashion their own definition of how reasonableness applies to the particular circumstances of their case, Fed. R. Evid. 502 provides a mechanism to incorporate the needed concepts of scale and proportionality into the privilege review. In addition to the carrot of Fed. R. Evid. 502, there are the mandates and sticks of Federal Rules of Civil Procedure 26 and 37, including Fed. R. Civ. P. 37(f) allowing for sanctions against a party or attorney who fails to participate in good faith in developing a discovery plan.

b. Examples:

In working cooperatively to develop an appropriate privilege review process, especially under Fed. R. Evid. 502, the parties should consider:

- Agreeing that certain privilege review procedures, search terms, etc., are "reasonable" under the circumstances and asking the court to memorialize that agreement under Fed. R. Evid. 502.
- Agreeing that certain materials (e.g., certain transactional databases, or correspondence to or from certain employees) are presumed not to be privileged and can be produced without a privilege review and with a non-waiver agreement in the event the presumption proves incorrect with respect to certain documents.
- Agreeing that certain materials are presumed to be privileged without need for a privilege review or log unless subsequent justification is offered (e.g., all emails containing the domain of counsel and dated after suit was filed).[17]
- Agreeing to a hierarchical privilege review in which certain documents are individually reviewed for privilege whereas other categories are reviewed on a sampling basis.
- Agreeing to a staged privilege review in which certain materials are reviewed for privilege and produced or logged first and other materials are reviewed and produced or logged later if necessary.
- Agreeing to the specific consequences of inadvertent production of privileged materials generally or to different consequences depending on what category of materials from which a privileged document was inadvertently produced or under which review process the document was inadvertently produced.
- Agreeing to a clawback provision and the procedures necessary to effectuate a clawback. Cost shifting could be part of such an agreement.
- Though uncommon and risky (see "Caution" above), agreeing to a quick peek provision under which a producing party will provide the opposing party with access to an entire data set without first reviewing the data for privilege. The requesting party will then take a "quick peek" and designate the portions of data that it wishes produced. The producing party may then choose to carry out a privilege review of the smaller portion of the data set.

[17] The parties could agree that it is not necessary to create a privilege log for documents withheld as privileged because they were created in the context of the litigation in which the discovery is propounded. *See* Texas Rule of Civil Procedure 193.3(c).

III. Cooperation Guidance for In-House Counsel

Introduction

Except for matters handled completely in-house (usually in larger organizations), in-house counsel will be working with outside counsel as the discovery process unfolds. Depending on the size of the organization, the importance of the matter, and the experience or work load of the in-house counsel, his or her interaction with outside counsel can range from intense day-to-day involvement in discovery to more of a turn-key approach. In every case, however, in-house counsel should obtain outside counsel's complete agreement with the organization's approach to cooperation in discovery.

An organization should expect its outside lawyers to be advocates on their behalf, but also to conduct discovery in a diligent, efficient, and candid manner. The tone of a case is usually set at the beginning, so it is important to obtain commitment by all outside counsel that their entire team will abide by and advance the principles of cooperative discovery.

In-house counsel commonly sends outside counsel a retention letter that includes the organization's retention policy. Such policies typically cover various issues such as billing policies and expectations on interaction with in-house counsel. A retention letter is a good vehicle for emphasizing those parts of the retention policy that describe the organization's commitment to the principles espoused by The Sedona Conference® *Cooperation Proclamation*.

An effective records management program can significantly advance the goal of cooperation.[18] Cooperation is more effective and efficient if a records management program is up-to-date and ready to be produced if requested, and if outside counsel have adequate knowledge about the organization's records management policies and data map. It helps if in-house counsel has an effective working relationship with key players in the organization's business functions, the Records and Information Management team, and the Information Technology team. It can be useful to attempt to agree early with the requesting party concerning whether disaster recovery media such as backup tapes will be preserved and searched, and concerning handling of deleted, shadow, slack space, or other types of information that are not routinely managed by an organization's records management policies.

[18] It is not the task of the IN-HOUSE COUNSEL GUIDANCE to restate all of the principles of an effective records management program. There are many resources available to assist an organization in developing or improving its electronic information and records management program. For example, see THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2d ed. 2007), *available at* http://www.thesedonaconference.org. In particular, Appendices B and C to THE SEDONA GUIDELINES provide an extensive list of resources, standards, toolkits, forms, organizations, and surveys relating to information and records management. Most of these resources include links to Web sites that provide portals to a rich array of relevant information located on the Internet.

Cooperation Point #1: Identification

1. *Early and thorough identification of data sources underlies successful efforts at early communication and cooperation.*

   a. The Opportunity:

   Once a triggering event occurs putting a company on notice that it has a duty to preserve relevant data (e.g., in reasonable anticipation of litigation), it becomes essential to identify (i.e., define, categorize and locate) all potentially relevant data, including electronically stored information. Very early on, counsel is faced with a choice: make unilateral identification decisions or reach agreement on identification with the opposing party.

   If counsel can reach agreement with the other side regarding the reasonable steps it will take to preserve, it is highly unlikely that a court will later determine that he/she behaved unreasonably. Cooperating with the opposing party whenever possible—as early in the matter as possible—may be a significant time and cost saver.

   To be able to identify and preserve relevant data, counsel should promptly consider factors such as:

   - The issues, time frames, and people involved
   - The types of data that may bear on the issues
   - The custodians of the data
   - The need to understand the IT topography of the information systems involved
   - The accessibility of potentially relevant, non-duplicative data

Cooperation Point #2: Scope of Preservation—Part I

2. *As soon as possible after the hold trigger, obtain at least a preliminary understanding of the scope of the information that might be identified as required to be preserved. Usually this will mean speaking to those with knowledge of the facts of the matter and, based upon that information, those with an understanding of the IT systems containing the information. Similarly, Counsel should begin to assess the scope of the information that Counsel might expect the other party to possess. Counsel could then reach out to the other party to begin a cooperative assessment of the information that should be preserved.*

   a. The Opportunity:

   Counsel should consider the scope of the preservation obligation in light of the nature of the proceeding or threatened proceeding, and should consider the procedures of the forum as well as the substantive laws at issue. Applicable statutes and regulations may define a party's preservation obligations.

   Counsel needs to review reasonably available information about the claim or claims being made, including pleadings or draft pleadings, demand letters, or other preliminary

correspondence. Diligent counsel will perform this assessment as soon as possible after recognizing a triggering event so that meaningful contact can be engaged in with opposing counsel.

Cooperation Point #3: Scope of Preservation—Part II

3. *At the outset, counsel can set the tone for upcoming discovery cooperation. He/she can inform opposing counsel of his/her understanding of the scope of the preservation obligation—the claims and material facts in dispute, the time frames involved, and the people involved.*

    a. The Opportunity:

    At the earliest opportunity, discuss the material factual issues that will need to be resolved to help define the scope of the preservation obligation. Consider possible data sources and custodians once the material issues have been identified, and the form such potentially relevant data might take. Are communications between individuals potentially at issue, such as email, IM, voice recordings, blogs? Are unstructured files at issue, and who might have created or reviewed such files? Is relevant ESI contained in one or more databases? Are there numerous duplicate copies of such data?

Cooperation Point #4: Scope of Preservation—Part III

4. *An early, cooperative discussion with opposing counsel can serve to limit the scope by identifying the types and parameters of data to be preserved.*

    a. The Opportunity:

    Learn about potential data sources and relevant custodians so that you are prepared to discuss the same with opposing counsel in an effort to reach agreement on the appropriate scope of preservation efforts. Working closely with involved business functions, IT and Records Management counsel can identify the custodians of the potentially relevant data, including ESI. The people identified as being involved in and/or knowledgeable of facts at issue are most likely to be custodians. These "key players" should be considered as possible custodians of potentially relevant data and their relevant data stores preserved and searched. In addition to such "key custodians," and based upon their input related to the types of information relevant, IT may be able to identify additional data stores—such as ESI housed on the network or remote storage devices and databases—and the custodians who exercise control over them. Finally, Records Management can assist in identifying the custodian of any official company record or database potentially containing information relevant to the claims or defenses at issue.

    Having identified the potentially relevant data to the claims and defenses at issue, counsel should determine if unique iterations of the data exist. It is often productive for counsel to work closely with IT at this stage. Furthermore, counsel should be familiar with at least a basic map of the data that is repeatedly at issue. This information should then be shared with opposing counsel in an effort to reach agreement on the scope of preservation.

Cooperation Point #5: Scope of Preservation—Part IV—Sources of ESI

5. *A detailed IT topography can be an important part of any litigation preparedness effort. But beyond such a detailed analysis, consider preparing a high level description or schematic of various IT systems that repeatedly contain potentially relevant data that can serve as a basis for disclosure with opposing counsel and can assist both sides in the cooperation effort.*

   a. The Opportunity:

   Counsel should consider whether and to what extent IT topographies or relevant portions thereof should be shared with counsel to assist in discussions regarding the scope of preservation.

Cooperation Point #6: Not Reasonably Accessible ESI

6. *Cooperating parties dealing with identification of Not Reasonably Accessible ESI should consider the factors that determine whether it must be preserved or produced under Fed. R. Civ. P. 26(b)(2)(C)(i)(3) and the value of any metadata and/or duplicate and near-duplicate copies of data. Through early cooperation efforts, counsel can attempt to agree on whether forensic data retrieval is necessary.*

Cooperation Point #7: Receipt and Response to Preservation Demand Letters

7. *Both the drafting and receiving party should view a preservation demand letter as an opportunity to engage in a reasonable and good faith manner, consistent with to Fed. R. Civ. P.1and counsel's ethical and professional obligations.*

   a. The Opportunity:

   Often, a litigant may send a pre-litigation or post-service preservation letter to an adverse party demanding that the receiving party preserve documents that are potentially germane to facts of a potential or pending litigation. The letter may demand that the recipient suspend any automatic destruction procedures.[19]

   A preservation demand letter may lead to the first point of collaboration and cooperation between parties and may provide an opportunity for a more efficient Rule 26(f) meet and confer.[20] Such collaboration could result in court endorsed preservation orders, protective orders, and scheduling orders.

   Both sides can benefit from early, candid, and focused discussions regarding the scope of preservation. A requesting party can use a preservation demand letter to open the discussion of preservation. It can provide litigants an alternative to later motions to compel or for sanctions.

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[19] *See* Comment 5b-5c. THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE, (Nov. 2007 Public Comment Version), *available at* http://www.thesedonaconference.org.

[20] FED. R. CIV. P. 26(f).

Cooperation Point #8: Drafting a Preservation Demand Letter

8. *When drafting a preservation demand letter, the drafting party should cite specific allegations, specific time periods, and expected sources of potentially relevant information*

   a. The Opportunity:

   Overbroad demands and boilerplate objections may result in an ineffective preservation routine and violate Fed. R. Civ. P. 26(g). Courts may later find such tactics examples of bad-faith or breaches of legal or ethical obligations.[21] Preservation demand letters should not be a tactic to force settlement. Demanding an overbroad non-specific legal hold could lead a court to determine that the preservation demand letter is ineffective[22] and could lead to sanctions.[23] In sum, a litigant drafting a preservation demand letter should:

   - Draft the preservation demand letter with reasonableness and good-faith including a willingness to meet and confer.
   - Specifically tailor the preservation demand letter with an eye for precision in the determination of key players, sources of data, relevant time period, and the issues in controversy.
   - Avoid using the preservation demand letter as a source of settlement leverage.

Cooperation Point #9: Responding to a Preservation Demand Letter

9. *A receiving party should respond to a preservation demand letter in a reasonable manner, considering the specificity of the request, the likelihood of relevance of the requested information, the cost of preservation in relation to the amount and issues in controversy, and the reasonable methods and format the responding party will consider in preserving the information.*

   a. The Opportunity:

   A receiving party should view a preservation demand letter as an opening offer to negotiate a specific preservation strategy that will lead to a mutually agreed upon case management order. Both sides can benefit from early, candid discussions regarding the scope of preservation. For example, if the issues in controversy occurred during a limited and specific time period, the responding party could propose to limit its preservation obligations (and the cost of meeting those obligations) to a discrete set of information after discussing with the opposing party the relevant sources of data. In sum, a litigant receiving a preservation demand letter should:

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[21] *See Mancia v. Mayflower Textile Servs. Co.,* 2008 WL 4595175 at *5 (D. Md. Oct. 15, 2008).
[22] *See* Thomas Y. Allman, *Pres. in the Absence of Formal Discovery Requests: The Quest for Certainty* (Masters Conference Oct. 16 2008), *available at* http://www.themastersconference.com/PDF/Preservation%20in%20the%20Absence%20of%20Formal%20Discovery%20Requests.pdf (citing *Frey v. Gainey Transp. Servs., Inc.,* 2006 WL 2443787 (N.D. Ga. Aug. 22, 2006).
[23] *Mancia v. Mayflower Textile Servs. Co.*, *supra.*

- Respond to the preservation demand letter with an appropriately scoped preservation plan or willingness to meet and confer.
- Avoid boilerplate objections when responding to the preservation demand letter.
- Prepare to discuss the cost and format in which the relevant information will be preserved.[24]

Cooperation Point #10: Resolve Preservation Issues Without Motion Practice

10. *Parties should consider resolving preservation demand letter disputes in a Rule 26(f) "meet and confer" prior to hearings and conferences with the court.*

Negotiating in good faith to resolve issues raised by a preservation letter can avoid time-consuming and expensive motions practice;[25] this is true with respect to all pre-trial issues. Whenever possible, pick up the phone first and attempt, with candor and in good faith, to resolve the matter *inter se*.

Cooperation Point #11: Collection—Part I

11. *Before the Rule 26(f) Meet and Confer, in-house counsel should take the lead in coordinating meetings between outside counsel, business units responsible for the responsive ESI, and appropriate IT department personnel that provide underlying administrative support for the data.*

a. The Opportunity:

What is responsive? Who are the logical custodians? Where is potentially responsive enterprise data? The team should consider the type of software used and where relevant data may be found. The team should discuss, where possible, appropriate search methodologies with those tasked with the collection prior to discussing how to best approach collection with opposing counsel. Data sampling may be appropriate to determine the likely sources and accessibility of responsive data and the appropriateness of various search methodologies.

The more informed a party is before the meet and confer, the more likely opposing counsel can reach agreement as to how to best approach collection efficiently.

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[24] *See Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 2006 WL 5097354, (E.D. Ky. Dec. 18, 2006), *Mich. First Credit Union v. Cumis Ins. Soc'y, Inc.*, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007), *Wyeth v. Impax Laboratories, Inc.,* 2006 WL 3091331 (D. Del. Oct. 26, 2006).

[25] *See* Jason Krause, *Rockin' Out the E-Law*. A.B.A. J., July 2008, quoting Magistrate Judge David J. Waxse of the U.S. District Court in Kansas,

> If someone comes to me and says, "So and so is impossible to deal with and we can't get a deal done," I tell them, "Well, videotape the next [discovery conference] and let me watch it to see what's going on." …I've never had to watch one of those videotapes. Just the idea that I'll be watching it seems to put them all on their best behavior and suddenly they have an agreement.

Cooperation Point #12: Collection—Part II

12. *Discussion guidelines for a cooperative collection effort should center on developing a methodology that describes a step-by-step process of how the data can be collected most effectively within an organization.*

    a. The Opportunity:

    Parties should discuss and try to reach agreement on the methodologies for collecting all data in the case. Assuming the methodology is followed in good faith, this can prevent or reduce later challenges to the data collection and the risk of costly do-overs or sanctions.

Cooperation Point #13: Collection—Part III

13. *Understand the technical details.*

    a. The Opportunity:

    Understand and work to reach agreement on the technical details of what is really needed, and why. This can help avoid unnecessarily driving up the cost of e-discovery.

    To reasonably narrow the scope, ask questions such as:

    - Do you need to search for deleted files or in areas of a computer requiring forensic analysis? If so, why?
    - Is the underlying metadata relevant? (If so, what type: System, Substantive, Embedded, or any combination of the 3).
    - Who will be responsible for the ESI collection (Vendor, Internal IT dept., etc.)?
    - What keyword search or other search parameters will be used?

Cooperation Point #14: Processing—Part I

14. *Prepare participants at the Rule 26 conference to discuss issues relating to the processing of data for production.*

    a. The Opportunity:

    In-house counsel need to work closely with outside counsel to assure that there is a thorough knowledge, based upon the input of internal IT support, business functions, and e-discovery vendors or consultants as appropriate, of how the organization processes ESI on a regular basis as well as available proven alternative methods. This will result in the ability to have an informed discussion between requesting and responding parties at the Rule 26 conference, and can forestall disputes and misunderstandings as discovery proceeds.

    There are many processing options available as witnessed by the large number of e-discovery vendors with differing techniques and capabilities. The selection of a processing approach is often dictated by the form of production. A difference or change in the contemplated form

of production may result in the need to reprocess data. Thus, the form of production of ESI is an issue that is best discussed as early as possible.

Cooperation Point #15: Processing—Part II

15. *At the Rule 26 conference be prepared to discuss the ESI environment that is applicable to the issues in the matter, including how the data is stored and the retrieval and output options.*

    a. The Opportunity:

    A practical aid to advance the discussion is an organization's sources of potentially relevant ESI. Regardless of the format or level of detail that is undertaken, and whether the IT topography itself will be shared, the content allows all parties to understand the basic elements that will need to be addressed such as:

    - Content
    - System architecture
    - Search and retrieval capability
    - Output options
    - Ability to produce in native format and limitations
    - Custodians

Cooperation Point #16: Processing—Part III

16. *Discuss with opposing counsel the vendors to be used for a matter.*

    a. The Opportunity:

    Organizations often have contractual relationships with one or more vendors selected after a due diligence review. While flexibility may be desirable, an organization needs to thoroughly understand the capabilities of vendors to comprehensively deal consistently and accurately with large amounts of its data in relatively short time periods. Inside counsel should be prepared to discuss the vendors the organization uses in an effort to achieve efficiencies and cost savings, taking into consideration such elements as:

    - Metadata changes and preservation issues in conversion and processing
    - File types supported
    - Foreign language character support
    - Encryption and password processing
    - Document type protocols (e.g., excel formulas and cell display)
    - Search term review and application
    - Concept searching
    - TIFF, PDF and embedded document search limitations
    - Ability to adapt to versions (e.g., Lotus Notes)
    - De-duping methodologies

Cooperation Point #17: Production

17. *Be prepared to discuss how contracted vendors can accommodate requesting party preferences.*

    a. The Opportunity:

    It is helpful to have a preferred range of form of production options to propose to opposing counsel. Such options are usually based upon experience with what has worked in previous litigation and the manner(s) in which your organization manages its ESI. Options can be developed with outside counsel, IT, and vendors. It helps in reaching agreement in a cooperative manner to be able to explain how the proposals will meet the needs of the parties.

    It is often productive to request that opposing counsel have an experienced litigation support or vendor representative available to discuss options. Some typical format discussions include:

    - Native format
    - Single or multi page TIFFS
    - Extracted text
    - Metadata fields
    - Load file format
    - Application specific formats

    Careful, accurate, and consistent procedures for processing and producing data inevitably takes more time than might be expected. In-house counsel need to understand the ability to produce in given time periods and be able to explain timing issues. Vendor capability and the volume and complexity of data are key factors that influence timing.

Cooperation Point #18: Review

18. *Cooperation with opposing counsel at the review stage offers a tremendous opportunity for cost savings.*

    a. The Opportunity:

    The review phase(s) of litigation generally accounts for a significant percentage of discovery costs. In-house counsel have a meaningful opportunity before any eyes-on review begins to set expectations and guide strategy, which can result in a more efficient and more cost effective review.

    By the time review commences, preferably, both sides have already committed to cooperate on issues vital to discovery. Prior to beginning the review process, the parties have the opportunity to cooperate on several items that can lead to more efficient review practices:

- **Joint Repository:** Typically, ESI is processed and uploaded to a repository to enable counsel to review the information employing a client based or web based review tool. Such a repository can be very expensive. The parties may consider agreeing to use and split the cost of a joint repository. Such cooperation may eliminate the need to transfer the information to the opposing counsel at the conclusion of review. Rather, once the review is complete, the information deemed responsive could be segmented in a way that would allow review by opposing counsel without fear of exposing privileged and/or confidential information.

- **Shared Review Tool License Fees:** Depending on your company's or your counsel's agreement with review tool vendors, you may be incurring cost for review in varying ways, such as per case, per license, or a hybrid of both or other arrangements. Cooperating with opposing counsel on using the same review tool may be a way to reduce costs for both sides.

- **Rule 502:** Taking advantage of the opportunities provided by Federal Rule of Evidence 502 may reduce the costs of expensive privilege review by allowing production under a protective order so that inadvertent disclosure of privileged information does not waive privilege. The revisions to Fed. R. Evid. 502 encourage such a cooperative approach. However, privilege issues and an organization's approach to such agreements need to be carefully evaluated, and in-house counsel should carefully consider the cost, risk, and benefit analysis, **especially** if a quick-peek agreement is proposed. (See **CAUTION**, *supra* at 15).

Cooperation Point #19: Review Plan

19. *A review plan should take into account numerous inputs, all of which play a vital role to a cost effective and successful review.*

    a. The Opportunity:

    The Rule 26(f) meet and confer conference may be an important opportunity to cooperate on the scope of future review. The parties should try to agree on approaches for asserting privilege and work product protection, as well as and methods and timing or the strategic and cost-effective staging of review.

    Agreeing on search methodology, key custodians, and enterprise data sources will often help to reduce the scope and ultimate cost of ESI collection and review. If initial choices result in larger than expected amounts of ESI, counsel should utilize a feedback loop to work to narrow reasonably and fairly the scope to ultimate processing, hosting and review.

    b. Example:

    Consider including in your project plan specific deadlines and tasks that will allow counsel to communicate progress of the review to the opposing counsel. Transparency into the status of collection and review may help avoid unnecessary motions to compel and may lead to

cooperation over production deadlines requested by opposing counsel, and cooperative efforts to reasonably and fairly narrow the scope of information that needs to be processed.

Consider sharing the technical training piece of review for a review tool that both parties will employ as part of the discovery process. Such training can focus on the manner in which to use the review tool.

Appendix A: The Sedona Conference® Jumpstart Outline

Introduction

This outline sets forth, by way of example only, a series of topics and questions to ask your client and your adversary as you prepare for meeting obligations related to preservation, requests for production, court conferences, and Fed. R. Civ. P. 26. The answers to these questions will guide you in (i) instructing your client about its preservation and production obligations and (ii) understanding your adversary's systems and preservation efforts to date, and (iii) structuring and tailoring your discovery requests addressed to your adversary. This is a simplified outline to assist, in particular, those people who have had only limited experience in dealing with electronic discovery. As those with extensive experience in this arena know, the process of questioning—and even the questions themselves—are iterative in scope. With each answer you elicit, inevitably additional questions must be asked. Hopefully, having an outline like this within easy reach will serve as a "jumpstart" to encourage transparency and dialogue in the discovery process, as contemplated by the Rules and The Sedona Conference® *Cooperation Proclamation.*

1. Document Retention Policy

1.1 Do you have a document retention (or records management) policy? Is it a written policy?

1.1.1. If yes, when was the policy implemented?

1.1.2. If yes, is the policy enforced? By whom? How?

1.1.3. If yes, did the policy change during [insert relevant time period]?

1.1.4. If yes, are you willing to produce the policy/policies?

2. Key Custodians of Potentially Relevant Information

2.1. Given the facts of the case, who are the key custodians of potentially relevant information? Who is responsible for maintaining/administering the company's electronic systems?

2.2. To what extent has information in the possession, custody, or control of the key custodians been preserved? (Discuss what those efforts have been to date and what, if any, additional efforts are underway.)

2.2.1. If conferring with your client, address efforts to date and further efforts that need to be made.

2.2.2. If conferring with your adversary, discuss efforts to date and, if insufficient, request that further efforts be made, if appropriate.

2.3. Disclosure of identities of key custodians

2.3.1. In representing your client, consider disclosing to your adversary the identities of the key custodians for whom information has been/will be preserved.

2.3.2. If you are a requesting party, consider identifying those people who you believe are key custodians to memorialize your request for preservation of their information.

2.4. Are there any third parties that may hold potentially relevant information?

2.4.1. To what extent has information in the possession, custody, or control of third parties been preserved? (Discuss what those efforts have been to date and what, if any, additional efforts are underway.)

2.4.2. If conferring with your client, address efforts to date and further efforts that need to be made with respect to third parties.

2.4.3. If conferring with your adversary, discuss efforts to date and, if insufficient request that further efforts, be made, if appropriate.

2.4.4. In representing your client, consider disclosing to your adversary the identities of the third parties for whom information has been/will be preserved.

2.4.5. If you are a requesting party, consider identifying those people who you believe are third parties that may have relevant data to memorialize your request for preservation of their information.

NOTE: This is an iterative process. You should plan to confer with your adversary on a recurring basis so that you can continue to update your adversary on any additional key custodians.

3. Network Servers

The questions below concern current and former database and file servers on any potentially relevant network that now store or previously stored discoverable electronic data (hereinafter referred to as "network servers"). These questions should be asked of both your client and your adversary.

3.1. Do you use, for any purpose, a network-based system? If yes, please describe.

3.2. Do you have a system that serves to back up the information managed and/or stored on the network(s)?

3.2.1. If yes, do you have at least one computer (i.e., non-incremental) backup of each of your network servers for each month for the period [insert relevant time period]?

3.2.2. If not, for which months do you/do you not have at least one complete backup?

3.2.4. For those months, if any, for which you do not have a complete backup, do you have incremental backups or other backups from which a full backup can be created of all data as of a given date in each such month?

3.2.5. If so, please describe the nature of such incremental or other backups and identify the months for which you have them.

3.3. Can specific files contained on network backups be selectively restored?

3.3.1. How? By what means?

3.3.2. Have you ever done this before?

3.3.3 In what context? Is the context such that the data restored might be deemed relevant in the context of the current litigation?

3.4. As a matter of firm policy, do you overwrite, reformat, erase, or otherwise destroy the content of the backups of your network servers on a periodic basis?

3.4.1. If so, under what circumstances?

3.4.2. If so, what is the rotation period?

3.4.3. If the rotation period has changed since [insert date], please describe the changes.

3.5. Do you maintain a company-wide intranet or other database accessible to any employees that provides/stores potentially relevant information? [Consider being more specific, e.g., "regarding [a particular subject]."]

3.6. Do you maintain network servers at any of the company's divisions/business units/locations/offices/subsidiaries that exist separately from or in addition to company-wide server(s)?

3.6.1. If yes, to what extent do any of those servers store any potentially relevant information in the context of this litigation?

3.6.2. Ask follow-up questions consistent with the network server-based questions above.

4. Email Servers

The questions below concern the current or former servers on your network ("email servers") that now or previously stored discoverable electronic internal or external peer-to-peer messages, including email, third party email sources, and instant messages (collectively, "email").

4.1. Identify the systems (client and server-side applications) used for email and the time period for the use of each such system, including any systems used at any [overseas] facilities.

4.2. Do you maintain email servers at any or all of the company's divisions/business units/locations/offices/subsidiaries that exist separately or in addition to the company-wide server(s)?

4.2.1. Are the systems the same/different from those identified in Question 4.1 above? Discuss any differences.

4.3. Are end-user emails that appear in any of the following folders stored on (i) the end-user's hard drive, (ii) an email server, or (iii) a server of a third party application service provider:

4.3.1. "In Box"?

4.3.2. "Sent Items"?

4.3.3. "Delete" or "trash" folder?

4.3.4. End user stored mail folders?

4.4. If any of your email systems have changed since [insert relevant period], identify any legacy systems, the current system(s), and the date of the last backup made with each relevant legacy system.

4.5. Do you have at least one complete (i.e., non-incremental) backup of each of your email servers for each month [for the period _____ to _____]?

4.5.1. If not, for which months do you not have at least one complete backup?

4.5.2. For those months, if any, for which you do not have a complete backup, do you have incremental or other backups from which a full backup can be created of all data as of a given date in each such month?

4.5.3. If so, please describe the nature of such incremental or other backups and identify the months for which you have them.

4.6. Does each complete email backup contain all messages sent or received since creation of the immediately prior complete email backup?

4.6.1. Do your email backups contain the messages that are in each employee's "In Box" as of the time such backup is made?

4.6.2. Do your email backups contain the messages that are in each employee's "Sent Items" folder as of the time such backup is made?

4.6.3. Do your email backups contain the messages that are in each employee's "delete" or "trash" folder as of the time such backup is made?

4.6.4. Do your email backups contain the messages that are in each employee's stored mail folders as of the time such backup is made?

4.6.5. Do your email backups contain the messages that have been stored to each employee's hard drive?

4.7. Can specific email boxes contained on email backups be restored selectively?

4.7.1. Does the company have or maintain an index or mapping resource that would serve as a reference to identify which employees' email is stored on particular backups?

4.8. As a matter of firm policy, do you overwrite, reformat, erase, or otherwise destroy the content of the backups of your email servers on a periodic basis?

4.8.1. If so, what is the rotation period?

4.8.2. If the rotation period has changed since [insert date], describe the changes.

4.9. Did you, at any time, have a system that maintained electronic copies of all emails sent or received by certain of your employees? Do you have such a system now?

4.9.1. If so, describe the system(s) and the date(s) of first use.

4.9.2. If so, does such system(s) contain copies of all emails captured from the date of first use until the present?

4.9.3. If so, does such system(s) capture a copy of all emails sent and/or received by employees in [identify relevant departments/groups that might be relevant]?

5. Hard Drives

The questions below concern the current and former local or non-network drives contained in current or former employees' laptop and desktop computers or workstations.

5.1. As a matter of firm policy, are employees' desktop and laptop hard drives backed up in any way?

5.1.1. If so, under what circumstances?

5.1.2. If so, how long are such backups retained?

5.1.3. Please describe the backup system.

5.2. As a matter of firm policy, are employees permitted to save files, emails, or other data (excluding system- and application-generated temporary files) to their desktop or laptop hard drives?

5.3. Since [insert relevant date], has it been technically possible for firm employees to save files, emails, or other data (excluding system and application generated temporary files) to their desktop or laptop hard drives?

5.4. Do you implement technical impediments to minimize the opportunity for employees to save files, emails, or other data (excluding system and application generated temporary files) to their desktop or laptop hard drives?

5.4.1. Is it possible for employees to override such impediments?

5.5. To what extent has a search been done to determine the extent to which any of the key custodians in this litigation did, in fact, save files, emails, or other data to their desktop or laptop hard drives? Flash drives?

5.6. As a matter of firm policy, are employees' desktop and laptop hard drives erased, "wiped," "scrubbed," or reformatted before such hard drives are, for whatever reason, abandoned, transferred, or decommissioned?

5.6.1. If so, are, as a matter of firm policy, files, emails, or other data stored on such hard drives copied to the respective employee's replacement drive, if any?

5.6.2. If so, as a matter of firm policy, are such files, emails, or other data copied on a "bit-by-bit" basis?

6. Non-Company Computers

6.1 Does firm policy permit, prohibit, or otherwise address employee use of computers not owned or controlled by the company to create, receive, store, or send work-related documents or communications?

6.1.1. If so, what is that policy?

6.2. Is there any technical impediment to employees using computers not owned or controlled by the firm to create, receive, store, or send work-related documents or communications?

Appendix B: Other Resources

The Sedona Conference® has prepared numerous commentaries—Principles, Best Practices, and Guidelines—in an effort to help the parties (and the bench) understand and address the many issues raised by e-Discovery. The following should be consulted when and as appropriate:[26]

The Sedona Conference®, *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* (3d ed. 2010).

The Sedona Conference®, *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process* (2010).

The Sedona Conference®, *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process* (2009 Public Comment Version).

The Sedona Conference®, *The Sedona Conference® Commentary on Inactive Information Sources: Guidance Principles for Identifying, Classifying, Retaining and Destroying Orphaned, Legacy and Dormant ESI* (2009).

The Sedona Conference®, *The Sedona Conference® Commentary On: Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* (2008).

The Sedona Conference®, *The Sedona Conference® Commentary on ESI Evidence & Admissibility* (2008).

The Sedona Conference®, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. 2007).

The Sedona Conference®, *Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process* (2007).

The Sedona Conference®, *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* (2007 Public Comment Version).

[26] These Commentaries, Principles, Best Practices, and Guidelines, are all located in the publications folder on The Sedona Conference® website (www.thesedonaconference.org).

The Sedona Conference® Working Group Series℠ & WGS℠ Membership Program

The Sedona Conference® Working Group Series℠ ("WGS℠") represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today.

"DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED & JUST WAY."

The WGS℠ begins with the same high caliber of participants as our regular season conferences. The total, active group, however, is limited to 30-35 instead of 60. Further, in lieu of finished papers being posted on the website in advance of the Conference, thought pieces and other ideas are exchanged ahead of time, and the Working Group meeting becomes the opportunity to create a set of recommendations, guidelines or other position piece designed to be of immediate benefit to the bench and bar, and to move the law forward in a reasoned and just way. Working Group output, when complete, is then put through a peer review process, including where possible critique at one of our regular season conferences, hopefully resulting in authoritative, meaningful and balanced final papers for publication and distribution.

The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles: Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the Southern District of New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer's *Digital Discovery and E-Evidence, "The Principles*...influence is already becoming evident."

The WGS℠ Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member's Roster is included in Working Group publications.

We currently have active Working Groups in the areas of 1) electronic document retention and production; 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) *Markman* hearings and claim construction; (6) international e-information disclosure and management issues; and (7) e-discovery in Canadian civil litigation. See the "Working Group Series℠" area of our website www.thesedonaconference.org for further details on our Working Group Series℠ and the Membership Program.