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The Sedona Conference Cooperation Proclamation: Resources for The Judiciary

December 2014
Public Comment Version

Dialogue Designed to Move the Law Forward in a Reasoned and Just Way

The Sedona Conference Cooperation Proclamation:
Resources for the Judiciary

December 2014

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PREFACE

This December 2014 edition of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary ("Resources"*) continues a collaborative effort of The Sedona Conference. Drafts of what became the public comment version of the *Resources,* which was published in 2011, were presented at meetings of Working Group 1 and at programs sponsored by a variety of courts and judicial education organizations, including the Federal Judicial Center. After publication of the first official edition in 2011, an updated edition was published in 2012.

The *Resources* are intended to aid State and federal judges in the management of electronically stored information ("ESI") in civil actions for which the judges are responsible. "Responsibility" is an elastic term. A judge may have overall case management responsibility over a single action. Alternatively, a judge may be assigned to manage one or more phases or events of the action. (Moreover, a judge may assign a special master to oversee phases or events, and these *Resources* can assist the special master in undertaking her duties).

Whatever the judge's role, the *Resources* offer a framework for the management of ESI. This December 2014 edition expands that framework and again focuses on the "stages of litigation from the judge's perspective," starting with the preservation of ESI through the initial case management order (whatever that may be called in a specific jurisdiction), the resolution of discovery disputes, trial, and post-trial awards of costs.

To assist judges, these *Resources:*

- Articulate a clear judicial philosophy of case management and of resolution of discovery disputes;
- Identify the stages of civil litigation when judicial management is most appropriate or desirable;
- Recognize that not all civil actions are equal in the resources of the parties or the actual amount in issue and encourage proportionality;
- Identify the issues that a judge is likely to face at each stage of litigation;
- Suggest strategies for case management or dispute resolution that encourage the parties, when possible, to reach a cooperative resolution at each stage;
- Recommend further readings on the issues presented at each stage.

The *Resources* are an evolving endeavor. Case law and other sources of information have been updated. Articles that have not been peer-reviewed, but which are noteworthy in the opinion of the Senior Editors, have been included in a new "Addendum." Perhaps most importantly from a judicial perspective, this December 2014 edition also includes a new, separate section on judicial ethics in the context of ESI and presents timely matters for

judges to consider. The Senior Editors trust that this new section will be the beginning of what will be a continuing—and evolving—dialogue on judicial ethics in the "Age of the Internet."

The *Resources* are not intended to be authoritative. Rather, the *Resources* identify issues that federal and State judges may confront in the management of civil actions that involve ESI and suggest strategies that judges might employ. The *Resources* also provide, in some instances, sample forms or orders that illustrate approaches taken by individual judges in specific actions. In addition, the *Resources* include non-exhaustive references to written materials that judges may wish to consult. With the exception of publications of The Sedona Conference, no forms or other materials cited are endorsed by The Sedona Conference, the Senior Editors, or anyone else who contributed to the *Resources.* Judges are reminded that civil actions call for individualized assessment of facts and law as well as independent resolution of issues.

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I. INTRODUCTION

The *Resources* recognize that there are different models for the appropriate role of judges in civil litigation. The primary models may be characterized as "active case management" and "discovery management." The first is intended to be proactive and the latter reactive. The *Resources* are intended to assist judges who follow either.

There are "structural" reasons why a judge might follow one model and not the other. For example, in federal courts, civil actions are usually assigned to judges on an individual basis, that is, a particular civil action is assigned to one judge from commencement to conclusion. Known as "individualized case management" ("ICM"), this fosters active case management in the federal courts and in those state courts (or units thereof, such as dedicated business courts) that have adopted ICM.

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

In addition to these structural factors, there may also be a judicial philosophy that drives the adoption of a particular model by an individual judge. This philosophical question arises from consideration of whether discovery (on which the *Resources* focus) is "party-driven" as opposed to "judge-driven." There are judges who, for example, deem it appropriate to bring parties in on a regular basis to work out discovery procedures and address anticipated discovery problems. There are other judges who believe that, given the nature of civil litigation in our common law tradition, parties should drive discovery and the pace of a particular action. These judges only deal with problems after they have been brought to their attention by the parties. Large caseloads may also necessitate this model of discovery management.

These *Resources* recommend active case management by judges. They stress cooperation and transparency in the search for, and collection of, ESI. However, as noted in 9.2.2 below, parties (and many judges) seldom share or negotiate search and collection methodologies, nor are they required to under any state or federal rule of civil procedure. Rather, when a party receives a request for production, the party and its attorney must comply with that request in a reasonable manner and the attorney must certify that any response is made in good faith and consistent with Federal Rule of Civil Procedure 26(g)(1).[1] Discovery as practiced in the United States creates the potential for protracted disputes and the imposition of substantial burdens on the resources of the courts and parties. The discovery of electronic information, such as email, the content of social media, or information from databases ("eDiscovery"), has multiplied those potential burdens. With the goals of Rule 1

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

of the Federal Rules of Civil Procedure in mind, which is to secure the just, speedy and inexpensive resolution of civil litigation, the *Resources* urge the adoption of the active case management model whenever possible. Active case management can prevent disputes and minimize burdens. For a discussion of the need for active case management in civil litigation, *see DCP Midstream, LP v. Anadarko Petroleum Corp.,* 303 P.3d 1187(Colo. 2013) and Steven G. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).

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

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

II. REVIEW OF EXISTING LITERATURE ON eDISCOVERY FOR JUDGES

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

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

2.1. The Sedona Conference Glossary provides a "tool to assist in the understanding and discussion of electronic discovery and electronic information management issues.[2]

2.2. THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Redgrave et al. eds., 2d ed. 2007), https://thesedonaconference.org/download-pub/81.

2.2.1. *The Sedona Principles* is the culmination of a process by which judges, practitioners, and academics considered eDiscovery as it has developed since the publication of the First Edition in 2004 and the 2006 amendments to the Federal Rules of Civil Procedure. Considered to be an authoritative text on eDiscovery, *The Sedona Principles* provide a lens through which eDiscovery can be managed.

2.3. The Federal Rules of Civil Procedure, and in particular, the Advisory Committee's Notes accompanying the 2006 amendments. *See,* Federal Rules of Civil Procedure Advisory Committee's notes (as amended April 12, 2006, effective December 1, 2006).[3]

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

2.3.2. The *Resources* do not urge the adoption of the Federal Rules of Civil Procedure in any state. However, the *Resources* do suggest that the

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[2] THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (Sherry Harris et al eds., 4th ed. 2014), https://thesedonaconference.org/download-pub/3689.

[3] There are proposals to amend the Federal Rules of Civil Procedure to address, among other things, proportionality and sanctions. Any amendments would not become effective to, at the earliest, December 1, 2015.

Rules provide both the outline of a judicial management philosophy and practical suggestions for state judges as they deal with eDiscovery. Indeed, the Federal Rules of Civil Procedure has been favorably cited by state courts.[4]

2.4. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT JUDGES, (6th ed. 2013), http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf.

2.4.1 This comprehensive reference manual for district judges in civil and criminal proceedings includes, among other things, a newly drafted Section 6.01 on civil case management, which emphasizes the role of the judge as an active case manager and addresses eDiscovery, including guidance for cooperation among the parties and dispute resolution.

2.5. BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, FED. JUDICIAL CTR., MANAGING DISCOVERY OF ELECTRONICALLY STORED INFORMATION 2d ed. 2012), http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf.

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

2.6. Conference of Chief Justices GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION, (2006), *available at* http://www.flcourts.org/gen_public/cmplx_lit/bin/reference/E-discovery%20and%20E-records/e-discovery/CS_ElDiscCCJGuidelines.pdf.

2.6.1. The Guidelines, which predate the 2006 amendments to the Federal Rules of Civil Procedure represent a set of best practices recommended by the Conference of Chief Justices that may be available to state judges as they confront eDiscovery in their court. The Guidelines have particular applicability to judges in state courts that have no rules that specifically address eDiscovery.

2.7. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, THE UNIFORM RULES RELATING TO DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007), *available at*

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

http://www.uniformlaws.org/shared/docs/discovery%20of%20electronically%20stored%20information/urrdoesi_final_07.pdf.

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

2.8. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Navigating_eDiscovery_2nd_Edition.pdf.

2.8.1. This document organizes various concepts, vocabulary and "well-known case law" for the benefit of state court judges.

3. Local rules and pilot projects

3.1. Since the 2006 amendments to the Federal Rules of Civil Procedure became effective, there has been a veritable explosion of discovery rules among the states. Some of these were first adopted in decisions of state supreme courts (i.e., Texas). Other states adopted the 2006 amendments in part or in whole (i.e., Florida), and other states, began experiments intended to combine various rule changes with efficiency and cost-savings. At the same time, federal courts of appeals and district courts began to develop local rules or procedures to expand upon the 2006 amendments and foster the goals of Rule 1. What follows are examples of federal and state rules and orders, sometimes experimental, intended to increase efficiencies, control costs, and further cooperation between parties.

3.2. Seventh Circuit Electronic Discovery Pilot Program, *Statement of Purpose and Preparation of Principles*, *available at* http://www.discoverypilot.com (last visited Jan. 20, 2014).

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

The Pilot Program plans to periodically study the effectiveness of the Principles and issue reports.

3.2.2. The Seventh Circuit Electronic Discovery Pilot Program has issued its "Interim Report on Phase Three May 2012 – May 2013." Among other things, this Interim Report includes in an Appendix a "Model Discovery Plan" and a "Model Case Management Order No. 2."[5]

3.3. [Model] Order Regarding E-Discovery in Patent Cases, E.D. Tex. Civ. R., App. P *available at* http://www.txed.uscourts.gov/page1.shtml?location=rules:local (last visited Dec. 30, 2013).3.3.1. This Model Order was developed to "to be a helpful starting point for [United States] district courts to use in requiring the responsible, targeted use of eDiscovery in patent cases." Among other things, the Model Order places presumptive limits on "'the number of custodians and search terms for all email production requests.' Given the unique nature of patent infringement litigation, however, judges should exercise care in attempting to *export* the Model Order to other types of civil litigation."

3.4. *In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, 1:11-mc-00388-LAP (S.D.N.Y. Nov. 1, 2011) (Oct. 2011) (Exhibit B: Joint Electronic Discovery Submission No. and standing order designating the case for inclusion in the Project), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf (last visited Jan. 21, 2014).

3.4.1. This Pilot Project was developed by the Judicial Improvements Committee of the Southern District of New York. Effective November 1, 2011, the Pilot Project focuses on complex civil actions, incorporates procedures intended to "improve the quality of judicial case management," and will be effective for an eighteen-month trial period.

3.5. *Default Standard For Discovery, Including Discovery of Electronically Stored Information ("ESI"), United States District Court for the District of Delaware*,, (Dec. 8, 2011)*.available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf (last visited Jan. 21, 2014).

3.5.1. This Default Standard encourages parties in civil actions to reach agreement on various topics, including proportionality, preservation, and privilege, and sets forth "parameters and/or timing of

[5] Seventh Circuit Electronic Discovery Pilot Program, *Interim Report on Phase Three* (May 2012-May 2013), *available at* http://www.discoverypilot.com/sites/default/files/phase_three_interim_report.pdf.

discovery ... until further order ... or the parties reach agreement." *Id*. at 1.a.

3.6. *Guidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas*, *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited Jan. 21, 2014).

3.6.1. These Guidelines are intended to "facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention."

3.7. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland, available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Jan. 06, 2014).

3.7.1. This Suggested Protocol has not been adopted by the court. Instead, it "is a working model" intended to assist counsel in dealing with ESI in civil actions. The Suggested Protocol is "intended to provide the parties with a comprehensive framework to address and resolve a wide range of ESI issues, [but] it is not intended to be an inflexible checklist." *Id*. at 2.

3.8. [Model] Order Regarding ESI Discovery, Ala. Civ. App., 10th Jud. Dist. (Jefferson County) [included in program materials, *see* https://thesedonaconference.org/node/5645.

3.8.1. This is a form of order developed by Judge Robert S. Vance, Jr. that requires parties, after a status conference, to "undertake a 'Meet & Confer' process, with the goal of promptly assessing what ESI needs and challenges will be" in a particular civil case. *Id*. at 1. Among other things, the order directs counsel to confer with their clients on certain matters prior to the "Meet & Confer." 3.9. [*Directive 11-02,] Adopting Pilot Rules for Certain District Court Civil Cases*, Sup. Ct. of Colo., Office of the Chief Justice (amended June 2013), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf.

3.9.1. This project, known by the acronym, 'CAPP,' was developed by a 'balanced committee' consisting of, among others, the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the Legal System. Adopted by the Colorado Supreme Court as a two-year experiment, the Project became effective January 1, 2012. CAPP is in effect in certain Colorado judicial districts and is "intended to study whether adopting certain rules regarding

> the control of the discovery process reduces the expense of civil litigation in certain business actions. ... "

3.10. A Report to the Chief Judge and Chief Administrative Judge, *Electronic Discovery in the New York State Courts* (N.Y. State Unified Ct. Sys. Feb. 2010), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

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

4. In addition to these general works, there are articles and publications that address particular issues in discovery, such as preservation, attorney-client privilege, work product protection, evidential foundations, and discovery from non-parties. Representative articles and publications are cited throughout the following Chapters and in the Addendum.

III. GENERAL RECOMMENDATIONS FOR JUDGES

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

2. The *Resources* make the following recommendations:

   2.1. Judges should adopt a *hands-on* approach to case management early in each action.

   2.2. Judges should establish deadlines and keep parties to those deadlines (or make reasonable adjustments) with periodic status reports or conferences.

   2.3. Judges should demand attorney competence.

   2.4. Judges should encourage the parties to meet before discovery commences to develop a realistic discovery plan.

   2.5. Judges should encourage proportionality in preservation demands and expectations and in discovery requests and responses.

   2.6. Judges should exercise their discretion to limit or condition disproportionate discovery and shift disproportionate costs.

   2.7. If necessary, judges should exercise their authority to issue sanctions under the relevant statutes, rules, or the exercise of inherent authority on parties and/or counsel who create unnecessary costs or delay, or who otherwise frustrate the goals of discovery by "gaming the system."

3. These broad recommendations should not be interpreted to mean that judges should issue blanket orders that dictate the scope of discovery, the nature of the parties' discovery requests or responses, the form or forms of production, or any other details of the conduct of discovery. Our civil litigation system does not contemplate that a judge conducts discovery, and eDiscovery in particular is fraught with highly technical and case-specific issues that are better left to the parties to resolve. Moreover, the recommendations transcend the specific rules of civil procedure that may be in effect in any particular jurisdiction. The recommendations can be applied equally to federal or state litigation, and in every court or action in which discovery is allowed, from family court to complex commercial court.

4. The recommendations are made with the understanding that there may be circumstances that require a judge to bring pressure to bear on the parties and attorneys, who, left to their own devices, may increase burdens and cost of litigation.

5. The above recommendation, that "judges should demand attorney competence," requires some extended discussion. Attorneys, for the most part, are generalists. Some focus on particular areas of the law. However, whatever area they may practice in, attorneys, as a general proposition, are not *expert* in the technologies that can be encountered in eDiscovery. For example, not every attorney should be expected to develop mechanisms for, and conduct, automated searches.

What attorneys should be expected to be is competent within the meaning of the Model Rules of Professional Conduct and/or its federal and state equivalents. For example, and at a minimum, an attorney should understand how to reasonably ensure client confidences when using email. Moreover, an attorney should understand when she needs the assistance of an eDiscovery consultant. These are simply not matters of ethics: Attorney *incompetence* in eDiscovery can lead to the waste of court and party resources and unnecessarily increase the costs and time of civil litigation.

6. In addition to the recommendations set forth above, judges may consider whether the appointment of a special master under Rule 53 or its state equivalent would be appropriate to address ESI-related issues in specific civil actions when the expense of a special master is justified. Plainly, the appointment of a special master should be a rare event. However, given the volume of ESI that might be in issue, a special master might assist a court in, for example, undertaking the in camera review of ESI alleged to be confidential because of, among other things, attorney-client privilege and/or work product protection.

As an alternative to the appointment of a special master, judges may consider, if authorized by rule or order, a *mediator* who might be appointed to assist the parties to resolve their discovery disputes.

7. The above recommendations apply to *all* civil actions, but with the understanding that—especially when Recommendation 7 is taken into consideration—"large" or complex civil actions might become a focus of case management. *It is, however, essential to recognize that eDiscovery also occurs in "small" civil actions, or, in other words, the vast majority of litigation in our civil litigation system.* Judges should take care to utilize all the tools available to them to limit eDiscovery costs such that those costs are not disproportionate to the amount in controversy in any particular "small" action.

8. The next section of the *Resources*, "The Stages of Litigation from a Judge's Perspective," briefly analyses each juncture in discovery at which judicial action is necessary and desirable, presents the issues the judge is likely to confront, suggests possible strategies for encouraging cooperative solutions to those issues, presents forms, stipulations, and orders that have been used to resolve the issues, and recommends further reading for those who wish to learn more about those particular issues.

9. The next section of the *Resources* also includes sample orders, representative decisions, and further readings published by The Sedona Conference. Moreover, as noted above, the separate Addendum to the *Resources* identifies various lawyer-authored articles.

10. What follows immediately below are *some* general references to materials that may inform the reader on the "General Recommendations for Judges":

10.1. *See*, The Sedona Principles, *Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production supra* Part II.2.2.

10.2. The Sedona Conference *Commentary on Ethics and Metadata* focuses on the ethical considerations of the inclusion and review of metadata in the non-discovery and discovery contexts.[6]

10.3. *In re Taylor*, 655 F.3d 274, 288 (3d Cir. 2011) ("We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer.").

10.4. Ronald J. Hedges, THE FLOW OF LITIGATION (2009) [included in program materials, *see* https://thesedonaconference.org/node/5645.

10.4.1. This one-page chart is intended to assist judges in visualizing the stages of a federal civil action, from pre-litigation issuance of a litigation hold through pleadings, discovery, motions and trial. It suggests opportunities for judges to, among other things, schedule meaningful status conferences, and stage motion-and-discovery practice to create opportunities for early case resolution.

10.5. *W. Holding Co. v. Chartis Ins. Co*., No. 11-2271(GAG/BJM), 2013 WL 1352562 (D.P.R. Apr. 3, 2013) (Memorandum Opinion attaching "Order Governing Discovery of Electronically Stored Information from FDIC-R").

10.6. Special Master's Order No. 1, *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC, 2012 WL 2060876 (D. Hawai'i June 18, 2012).

10.7. Preliminary Order Appointing Special Master*, Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai'i Apr. 9, 2012).

10.8. *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai'i Apr. 9, 2012) (order setting forth scope of special master's duties).

[6] The Sedona Conference *Commentary on Ethics and Metadata*, 14 SEDONA CONF. J. 169 (Fall 2013) *available at* https://thesedonaconference.org/download-pub/3111.

10.9. *Cannata v. Wyndham,* 2:10-CV-00068-PMP, 2012 WL 528224 (D. Nev. Feb. 17, 2012) (order discussing, among other things, the appointment of a special master).

10.10. *Short Trial Rules in the United States District Court for the District of Nevada,* (2013), *available at* http://www.nvd.uscourts.gov/Files/USDC%20Short%20Trial%20Rules.pdf.

10.10.1. These Rules are intended to expedite civil trials through procedures designed to impose restrictions on discovery.

10.11. In re *DCP Midstream, LP v. Anadarko Petroleum Corp.,* 303 P.3d 1187 (Col. 2013).

10.12. In re: Amendments to the Florida Rules of Civil Procedure – Electronic Discovery, No. SC11-1542 (Fla. December 5, 2012).

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

1. Preservation

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

1.2. Issues presented

1.2.1. First, at least some significant preservation decisions are made before litigation commences. Generally speaking, the duty to preserve arises when the likelihood of litigation is known or reasonably foreseeable. Presumably, a putative plaintiff must begin to preserve before the filing of a complaint. Similarly, a defendant may be aware that it will be involved in litigation before service of process. If so, the defendant must preserve at the earlier date. The *trigger* for the existence of a duty to preserve is fact-sensitive and often in dispute. It should be noted that preservation for the purposes of litigation may conflict with information management policies, which, among other things, call for the routine and automatic deletion of data.

1.2.2. Second, there is no realistic mechanism available for judicial determination of the existence or scope of a duty to preserve before litigation commences. There may be significant costs involved in preservation, especially if a party, in the absence of any judicial direction, believes it must *over preserve* discoverable information. This may lead to disputes between parties that will require judicial resolution as soon as possible.

1.2.3. Third, the decision to preserve and the scope of preservation are questions that attorneys should advise their clients about. That advice, as well as the communication of that duty (to, for example, employees and independent contractors), is presumably subject to attorney-client privilege and work product protection. Disputes pertaining to the nature of communications involving privilege—and the scope of any privilege or work product—frequently arise.

1.3. Suggested judicial management strategies

1.3.1. Ensure that the parties discuss preservation at the initial conference between the parties required by Rule 26(f).

1.3.2. Direct the parties to present any disputes about preservation to the court as soon as possible so that the judge can issue appropriate orders regarding what should or should not be preserved in the earliest stage of litigation.

1.4. Sample orders

1.4.1. *Prelim. Conf. Stipulation and Order (Form N.Y. Sup. Ct., Cnty. of Nassau, Com. Div.* (Feb. 1, 2009) [included in program materials, *see* https://thesedonaconference.org/node/5645.

1.4.2. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2012 (E.D. La. Aug. 10, 2010).

1.4.3. Order for Preservation of Documents and Tangible Things, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d 1145 (C.D. Cal. December 20, 2010).

1.4.4. Two agreed orders in: *John B. v. Emkes*, 852 F.Supp.2d 944 (M.D. Tenn, 2012). (on migration of email); and *John B. v. Emkes*, 852 F.Supp.2d 944 (M.D. Tenn, 2012) (on the protocol for migration of email).

1.5. Representative decisions

1.5.1. *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336 (Fed. Cir. 2011) *cert. denie*d, 132 S. Ct. 1540, 182 L. Ed. 2d 162 (U.S. 2012).

1.5.2. *Cf.* In re *John W. Danforth Grp.,*No.13-MC-33S, 2013 WL 3324017 (W.D.N.Y. December 1, 2013) (denying Rule 27(a) prefiling petition to preserve ESI).

1.5.3. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011), *on remand,* 917 F.Supp.2d 300 (D. Del. 2013).

1.5.4. *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010).

1.5.5. *Pippins v. KPMG LLP*, 279 F.R.D. 245 (S.D.N.Y. 2012).

1.5.6. *Simms v. Deggeller Attractions, Inc.,* Nos. 7:12–cv–00038, 7:12–cv–00039, 7:12–cv–00161, 2013 WL 49756 (W.D. Va. Jan. 2, 2013).

1.5.7. *Cf. State of Texas v. City of Frisco,* No. 4:07cv383, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008) (dismissing Declaratory Judgment action addressed to scope of preservation).

1.5.8. *United States ex. Rel. Baker v. Community Health Systems, Inc.,* No. 05–279 WJ/ACT, 2012 WL 5387069 (D.N.M. Oct. 3, 2012).

1.5.9. *Goldmark v. Mellina,* Docket No. L–2053–08, 2012 WL 2200921 (N.J. App. Div. June 18, 2012) (*per curiam*).

1.6. Further reading

1.6.1. The Sedona Conference *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010), *available at* https://thesedonaconference.org/download-pub/470.

2. Parties' early case assessment

2.1. Early case assessment ideally takes place *prior* to joinder of issue. That assessment is a process by which a party undertakes an internal cost-benefit analysis to determine whether to settle or litigate. This process is nothing new. What is new, however, is the need to take into account the preservation, collection, review, and production of ESI in making that assessment.

2.2. Early case assessment, although included here as a *marker* in the litigation process, is not a stage of litigation from a judge's perspective, but can lead to a better-informed and more effective Rule 26(f) conference and initial case management order under Rule 16(c)(2).

2.3. Because early case assessment does not involve the judge, there are no "issues presented," "suggested judicial management strategies," "sample orders," or "further reading" presented here.

2.4. The results of an early case assessment in a particular action are likely to be protected from discovery by attorney-client privilege or work product protection. Nevertheless, undertaking the cost-benefit analysis necessary for any assessment is an important step from a party's prospective and the knowledge that one was performed by a party may inform the judge of the likelihood of early settlement.

3. Initial scheduling order

3.1. An "initial scheduling order" is issued under the authority of Rule 16(a) or its state equivalents. The initial order directs attorneys and *pro se* litigants to appear before a judge to establish, among other things, "early and continuing control so the case will not be protracted because of lack of management." Rule 16(a)(2). This initial order is an opportunity for the judge to communicate the court's expectation that attorneys and parties will meaningfully prepare for the Rule 26(f) meet-and-confer and the first Rule 16(b) conference. It may serve to remind parties or counsel that sanctions may be imposed under Rule 16(f)(1)(B) if they are "substantially unprepared to participate." The initial order is also an opportunity for the judge to communicate the court's expectation of how the parties should strive to cooperate in discovery.

3.2. Issues presented

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

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

3.3. Suggested judicial management strategies

3.3.1. Require the parties to meet-and-confer on eDiscovery and any other topics enumerated in Rule 26(f) and local rules before the initial case management conference.

3.3.2. Direct each party to assess the scope of preservation of ESI, documents and tangible things, and the adequacy of its preservation efforts.

3.3.3. Direct the parties to discuss the scope of preservation.

3.3.4. Encourage the parties to engage in early case assessment for the purpose of focusing them on the projected cost and duration of litigation and the prospect of settlement as opposed to litigation.

3.3.5. Suggest that each party identify a person or persons particularly knowledgeable about the party's electronic information systems and who is prepared to assist counsel in the Rule 26(f) meet-and-confer and later in the litigation.

3.3.6. Encourage the parties to consider any issues of privilege, the inadvertent disclosure of privileged information, and the form and timing of privilege logs. Refer the parties to Federal Rule of Evidence 502 (discussed in Section IV.11.2.), as they may not be familiar with it.

3.3.7. Direct the parties to report on any agreements reached at the meet-and-confer as well as any *disagreements.*

3.4. Sample orders

3.4.1. *Standing Order Governing Discovery of Electronically Stored Information Individual Commercial Calendar "W" Courtroom 207*, *In the Circuit Court of Cook County, Illinois, County Department, Law Division* (effective Jan. 1, 2012), *available at* http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standing%20Orders/Tailor%20SO%20Governing%20Discovery%20of%20Electronically%20Stored%20Inform.pdf.

3.4.2. Admin. Order of the Chief Admin. Judge of the Cts., amending Sec. 202.12(c) of the Unif. Civ. R. for the Sup. and Cnty. Ct., N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c).

3.4.3. Joint Submission Regarding E-Discovery, *Cannata v. Wyndham Worldwide Corporation*, 2:10-CV-00068-PMP, 2012 WL 528224 (D. Nev. Mar. 17, 2012), (unfiled).

3.4.4. *See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles*, *supra* Part II.3.2.

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

3.5. Representative decisions

3.5.1. *DeGeer v. Gillis*, No. 09 C 6974, 2010 WL 3732132 (N.D. Ill. Sept. 17, 2010), *motion granted in part* and *denied in part*; *DeGeer v. Gillis*, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

3.5.2. *Littlefield v. Dealer Warranty Services, LLC*, No. 4:09 CV 1000 DDN, 2010 WL 3905226 (E.D. Mo. Sept. 27, 2010).

3.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

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

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

4.1.2. Judicial management of the meet-and-confer itself should be minimal once the court establishes the expectations and the agenda. The meet-and-confer is *party*—not *judge*—driven. Indeed, the judge need not even be aware that a meet-and-confer took place until a discovery plan is submitted.

4.2. Issues presented

4.2.1. Did the meet-and-confer take place?

4.2.2. If, in fact, there was a meet-and-confer, did a *meaningful* one take place?

4.2.3. Did the parties explore all topics set forth in Rule 26(f) and applicable local rules?

4.2.4. Was a comprehensive discovery plan submitted?

4.3. Suggested judicial management strategies

4.3.1. Develop, with the concurrence of colleagues, a form of discovery plan that supplements and expands on Form 52 of the Federal Rules of Civil Procedure and incorporates any additional topics identified in local rules.

4.3.2. Advise the parties that the court will be available by email, telephone, or letter should disputes arise in the meet-and-confer process to resolve disputes.

4.3.3. Suggest that involvement of knowledgeable party representatives or experts in a meet-and-confer may be beneficial in addressing ESI-related topics, with appropriate stipulations regarding any statements made by them.

4.3.4. Advise that, at least in complex actions with likely discovery issues or large volumes of ESI, the meet-and-confer may be a continuing process requiring multiple meetings. This may require that

appropriate time be afforded to the parties before a discovery plan is submitted, a case management conference conducted, or an initial case management order entered.

4.4. Sample orders

4.4.1. Rule 26(f) Stipulation and Order Regarding Discovery Protocols*, In re Rail Freight Fuel Surcharge Antitrust Litig*., MDL Docket No. 1869, No. 1:07-mc-00489-PLF-JMF, 2009 WL 3443563 (D.D.C. Oct. 23, 2009).

4.4.2. Amended Stipulation Regarding Preservation, Review and Production of Certain Electronically Stored Information and Privileged Materials, *United States v. Louisiana Generating, LLC*, 938 F.Supp.2d 615, (M.D. La. Mar. 5, 2010).

4.4.3. Joint Initial Report (Revised) *United States v. Apple, Inc.*, Civil Action Nos. 1:12-cv-2826-DLC and 11-md-02293 (S.D.N.Y. December 6, 2012). *available at* http://www.justice.gov/atr/cases/f285000/285031.pdf.

4.4.4. *See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles*, *supra* Part II.3.2.

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

4.4.5. *See Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, *supra* Part II.3.4.

4.4.6. *See Joint Submission Regarding E-Discovery, Cannata v. Wyndham Worldwide Corporation*, *supra* at Part IV.3.2.

4.4.6.1. This joint submission was prepared and submitted to a special master; it was intended to provide the special master with a comprehensive guide to the parties, the claims, and the status of discovery.

4.4.7. *See Order Regarding ESI Discovery supra* Part II.3.8.

4.4.7.1. This is a form of order developed by Judge Robert S. Vance, Jr. It requires parties, after a status conference, to "undertake a 'Meet &

Confer' process, with the goal of promptly assessing what ESI needs and challenges will be" in a particular civil case. Among other things, the order directs counsel to confer with their clients on certain matters prior to the meet-and-confer.

4.4.8. [MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES Federal Circuit Chief Judge Randall Rader.

4.4.9. Discovery Order, In the United States District Court for the District of Maryland, Honorable Paul W. Grimm, (D. Md. April 9, 2013), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf.

4.5. Representative decisions

4.5.1. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, Civil Action No. 01–cv–01644–REB–CBS, 2010 WL 502721 (D. Colo. Feb. 8, 2010).

4.5.2. *In re Facebook PPC Adver. Litig.*, No. C09–03043 JF (HRL), 2011 WL 1324516 (N.D. Cal. Apr. 6, 2011).

4.5.3. *Easley v. Lennar Corp.,* No. 2:11–CV–00357–ECR–CWH, 2012 WL 2244206 (D. Nev. June 15, 2012).

4.5.4. *Apple Inc. v. Samsung Elec. Co Ltd.,* No. 12–CV–0630–LHK (PSG), 2013 WL 1942163 (N.D. Ca. May 9, 2013).

4.5.5. *Zepeda v. PayPal, Inc.,* No. 4:10-cv-02500-SBA, 2013 WL 2051641 (N.D. Cal. May 14, 2013).

4.6. Further reading

4.6.1. THE SEDONA CONFERENCE: JUMPSTART OUTLINE, QUESTIONS TO ASK YOUR CLIENT & YOUR ADVERSARY TO PREPARE FOR PRESERVATION RULE 26 OBLIGATIONS, COURT CONFERENCES, & REQUESTS FOR PRODUCTION (Mar. 2011), https://thesedonaconference.org/download-pub/427.

4.6.2. *See Default Standard For Discovery, Including Discovery of Electronically Stored Information ("ESI"), supra* Part II.3.5.

4.6.3. *Guidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas*, Guideline 4 *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited Jan. 21, 2014).

4.6.4. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland,* Conference of Parties and Report, *available at*

http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Jan. 06, 2014).

4.6.5. United States District Court for the District of New Jersey Local Civil Rule 26.1 (d) ("Discovery of Digital Information Including Computer-Based Information"), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi36.pdf/$file/ElecDi36.pdf (last visited Jan. 20, 2014).

4.6.6. The Joint Electronic Technology Working Group, Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (Feb. 2012) *available at* http://mow.fd.org/final-esi-protocol.pdf. Although this document is directed to criminal e-discovery, it includes a useful "ESI Discovery Production Checklist."

4.6.7. *See Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, supra* Part II.3.4 Exhibit A: Initial Pretrial Conference Checklist.

5. Initial case management order

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

5.2. Issues presented

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

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

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

5.3. Suggested judicial management strategies

5.3.1. Incorporate, as appropriate, party agreements in the initial case management order.

5.3.2. Resolve any disagreements as soon as practicable, perhaps at the initial case management conference itself.

5.3.3. Schedule a further conference or conferences as needed in the initial case management order.

5.3.4. Suggest that, rather than directed interrogatories or Rule 30(b)(6) depositions, the parties informally exchange information about their respective electronic information systems.

5.4. Sample orders

5.4.1. *Preliminary Conference Stipulation and Order (Form), New York Supreme Court, County of Nassau, Commercial Division* (Feb. 1, 2009), *available at* https://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf.

5.5. Representative decisions

5.5.1. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

5.6. Further reading

5.6.1. Barbara J. Rothstein, Ronald J. Hedges, & Elizabeth C. Wiggins, *supra* II.2.5 at 4-5.

5.6.2. William W Schwarzer, Alan Hirsch, Fed. Judicial Ctr., THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES, 4–7 (2d ed. 2006).

6. Defining the scope of eDiscovery

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

6.2. Issues presented

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

6.2.2. Of particular concern for judges is the *rise* of social media, both in terms of simple volume, near-universality of access and use, and potential as a source of discoverable information. Discovery of social media can be extensive and can implicate privacy interests of parties and nonparties who participate in social media sites that include discoverable ESI. If agreement cannot be reached, there is no consensus as to how social media discovery should be conducted. For example, must access to a party's "private" social media be conditioned on a showing of relevance based on the party's public postings? Should an attorney be directed to search his client's postings to determine what is relevant? Should a judge conduct an *in camera* review? Should a special master?

6.2.3. The discovery of social media should be governed by the same principles that govern discovery of other electronically stored information. For example, must access to a party's *private* social media be conditioned on a showing of relevance based on the party's public postings? Should an attorney be directed to search his client's postings to determine what is relevant? Should a judge conduct an *in camera* review? Should a special master?

6.2.4. Discovery of particular social media sites, or of particular applications supported by those sites, may be subject to, and limited by the Stored Communications Act, 18 U.S.C.A. § 2701 et. seq.

6.2.5. There may be instances where a party in a civil action seeks to engage in so-called *transnational discovery*, that is, discovery of ESI that is located in another country and subject to the possession, custody, or control of an adversary party. In that circumstance, production (defined very broadly) of ESI may be subject to a personal privacy and/or commercial *blocking* statute of the *host* country. Production of such ESI in violation of such a statute may expose the party to civil and/or criminal sanctions.

6.3. Suggested judicial management strategies

6.3.1. Require that the discovery plan address the scope of eDiscovery and describe any disputes as to scope.

6.3.2. Require the party seeking discovery into matters beyond the claims and defenses of the parties to explain why the proposed broader discovery is relevant and necessary.

6.3.3. Require parties seeking broader discovery to demonstrate that the proposed discovery is proportionate to the matter, with reference to Rule 26(b)(2)(C).

6.3.4. Resolve any disputes as to scope in the initial case management order.

6.3.5. Require the parties, at least in the first instance, to focus any requests for discovery of social media to relevant and necessary ESI.

6.3.5.1. Focus discovery of social media to reduce volume and address legitimate privacy interests of parties and nonparties.

6.3.6. Require the parties to consider privacy interests of parties and nonparties and, if appropriate, consider issuance of a Rule 26(c) protective order limiting access to the ESI.

6.3.7. When transnational discovery is in dispute, require the parties to address any foreign law governing the production of *protected* ESI and consider, as an alternate to ordering production, ordering the requesting party to proceed by letters rogatory.

6.3.8. Consider *sequencing* or *phasing* eDiscovery, focusing on discovery of ESI directly related to claims and defenses in the pleadings in the first instance to expedite the discovery process and deferring rulings on broader eDiscovery requests until the first phase is completed.

6.4. Sample orders

6.4.1. Special Master's Order No. 1, *Kapunakea Partners v. Equilon Enterprises LLC*, No. 09-00340 ACK-KSC (D. Hawai'i June 18, 2012).

6.4.2. *Preliminary Conference Stipulation and Order (Form),* New York Supreme Court, County of Nassau, Commercial Division (Feb. 1, 2009).

6.4.3. THE SEDONA CONFERENCE, INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE, & DATA PROTECTION. BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION, (Amor Esteban et al. eds., European Union Edition, Public Comment Version, 2011) *available at* https://thesedonaconference.org/download-pub/495.

6.4.3. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.221, Case Management Plan (2004).

6.5. Representative decisions

6.5.1. *Fawcett v. Altieri,* 38 Misc.3d 1022 ((N.Y. Sup. Ct. Jan. 3, 2013) (social media).

6.5.2. *Mailhoit v. Home Depot U.S.A., Inc.,* 285 F.R.D. 566 (C.D. Ca. Sept. 7, 2012) (social media).

6.5.3. *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06–MD–1775, 2010 WL 2976220 (E.D.N.Y. December 23, 2010) (transnational discovery).

6.5.4. *Higgins v. Koch Dvlpt. Corp.,* No. 3:11–cv–81–RLY–WGH, 2013 WL 3366278 (S.D. Ind. December 5, 2013) (social media discovery).

6.5.5. *NOLA Spice Designs, LLC v. Haydel Enterprises, Inc.,* No. 12-2515, 2013 WL 3366278 (E.D. La. Aug. 2, 2013) (broad forensic examination inconsistent with Rule 34(a)(1)(A)).

6.5.6. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010) (Stored Communications Act).

6.5.7. *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (social media discovery).

6.5.8. *Genger v. TR Investors, LLC*, 26 A.3d 180 (Del. 2011).

6.6. Further reading

6.6.1. Kristen L. Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119 (2011).

6.6.2. Steven S. Gensler, *Special Rules for Discovery of Social Media?* 65 ARK. L. REV. 7 (2012).

6.6.3. *The Sedona Conference Primer on Social Media*, 14 SEDONA CONF. J. 191 (Fall 2013), *available at* https://thesedonaconference.org/download-pub/1751.

6.6.4. Decision Tree for Discovery of Social Media [included in program materials, *see* https://thesedonaconference.org/node/5645.

7. Proportionality

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

7.1.2. How can proportionality be realized? First, attorneys have a duty to engage in proportionate discovery in both their requests and responses, a duty recognized in Rule 26(g)(1)(B)(iii). Second, judges must be prepared to use proportionality as a tool to limit the potential costs and burdens of discovery, and to require parties to respond to reasonable discovery requests rather than raise *blanket* objections.

7.1.3. Rule 26(b)(1) makes clear that *all* discovery is subject to proportionality. Rule 26(b)(2)(C), known as the "Proportionality Rule," embodies a cost-benefit analysis that a judge must perform in permitting parties to engage in what might be costly and time-consuming eDiscovery. Although states may or may not have adopted similar rules, state judges often engage in proportionality analyses—however these may be expressed—in ruling on discovery requests. Although judges might prefer that the parties engage in a proportionality analysis, the exercise of proportionality by federal and state judges is perhaps the strongest tool available to manage discovery.

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

7.2. Issues presented

7.2.1. Requesting parties request "*any and all*" information related to the broad subject matter of the dispute, without tying their requests to specific factual issues related to the claims or defenses.

7.2.2. Requesting parties request information from sources that are not reasonably accessible to the responding parties, based on the cost and burden involved.

7.2.3. Responding parties oppose discovery on the basis of *burden* or *over breadth* without specifically identifying the costs involved in responding.

7.3. Suggested judicial management strategies

7.3.1. Direct the parties to discuss in the meet-and-confer, and include in the discovery plan, estimates of the cost of responding to particular requests for discovery of ESI in comparison with the reasonable ranges of outcomes of the action.

7.3.2. Require attorneys to develop discovery budgets with the approval of their clients.

7.3.3. Issue scheduling orders with the assistance of counsel (and, as appropriate, the parties) that allow only discovery proportionate to the reasonable range of outcomes.

7.3.4. Limit eDiscovery in the first instance to ESI that can be produced by least expensive means and is most likely to produce relevant information.

7.3.5. Use all the judicial management strategies described above to determine whether and when further discovery should be allowed.

7.3.6. Appoint third parties, such as neutral experts or special masters to assist the court, *if necessary given the nature of a particular action or as agreed by the parties,* to monitor discovery and ensure that proportionate discovery is conducted.

7.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

7.5. Representative decisions

7.5.1. *Jewell v. Aaron's, Inc.,* No. 1:12-CV-0563-AT, 2013 WL 3770837 (N.D. Ga. December 19, 2013).

7.5.2. *Chevron Corp. v. Donziger,* No. 11 Civ. 0691*(LAK)*, 2013 WL 1087236 (S.D.N.Y. Mar. 15, 2013).

7.5.3. *McNulty v. Reddy Ice Holdings, Inc.*, 271 F.R.D. 569 (E.D. Mich. 2011).

7.5.4. *U.S. ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235 (D.D.C. Jan. 24, 2011).

7.5.5. *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008).

7.6. Further reading

7.6.1. G.S. Freeman, P.S. Grewal. R.J. Hedges & C.B. Shaffer, *Active Management of ESI in 'Small' Civil Actions*, *FED. BAR ASSN* (Nov. 25, 2013) *available at* http://www.fedbar.org/Image- Library/Chapters/Hawaii-Chapter/ACTIVE-MANAGEMENT-OF-ESI-IN-SMALL-CIVIL-ACTIONS.aspx.

7.6.2. The Sedona Conference Working Group on Electronic Document Retention & Production (WG1), *The Sedona Conference Commentary on Proportionality*, 14 SEDONA CONF. J. 155 (Fall 2013) *available at* https://thesedonaconference.org/download-pub/1778.

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

8.1.1. Rule 26(b)(2)(B) provides that a party need not produce ESI from sources that the party identifies as being not reasonably accessible because of undue burden or cost. If a requesting party persists in requesting ESI from those sources, the judge must determine whether the sources are, in fact, not reasonably accessible. If *good cause* exists for the production of ESI from those sources, the judge may order the ESI to be produced under the limitations of the Proportionality Rule (Rule 26(b)(2)(C)), and may also impose other conditions, including cost-sharing or cost-shifting.

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

8.2. Issues presented

8.2.1. First, how should the *source* be identified or described? The Committee Note to Rule 26(f) suggests that parties discuss whether ESI is reasonably accessible. This discussion should be in sufficient detail so that the requesting party can make an informed determination whether to seek production from any source not being searched.

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

8.2.3. Third, if the responding party shows that the source is not reasonably accessible, but the requesting party presses its request for production, the court must determine whether *good cause* exists for the production. The Committee Note to Rule 26(b)(2)(B) suggests that a court may consider a number of factors in determining whether good cause exists. One factor may be whether the source was rendered not reasonably accessible by the action or inaction of the responding party. Note, however, as does the Committee, that, as technology advances, what is and is not considered *reasonably accessible* will change.

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

8.3. Suggested judicial management strategies

8.3.1. Require the parties, at the Rule 26(f) meet-and-confer or its state equivalent, to identify sources of ESI that a party deems not reasonably accessible and address any dispute arising from that identification.

8.3.2. Direct the parties to include in their discovery plan any agreement—or disagreement—pertaining to discovery from not reasonably accessible sources.

8.3.3. Direct the party who asserts that requested ESI is on a not reasonably accessible source to identify any accessible sources in which the ESI can be found.

8.3.4. Limit discovery, at least in the first instance, to ESI from accessible sources and defer any consideration of discovery from not reasonably accessible sources, until after an assessment of further need can be made.

8.3.5. Allow the parties to engage in *focused* and *limited* discovery to test whether, in fact, ESI is on a not reasonably accessible source.

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

8.3.7. Require the parties to present expert testimony, if necessary, on whether the source of the requested ESI is not reasonably accessible.

8.3.8. Appoint third parties such as neutral experts or special masters, if necessary, to assist the court in determining whether a source is not reasonably accessible.

8.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

8.5. Representative decisions

8.5.1. *Annex Books, Inc. v. City of Indianapolis,* No. 1:03–cv–918–SEB–TAB, 2012 WL 892170 (S.D. Ind. Mar. 14, 2012).

8.5.2. *General Electric Co. v. Wilkins*, No. 1:10–cv–00674 LJO JLT, 2012 WL 570048 (E.D. Ca. Feb. 1, 2012).

8.5.3. *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 (2011).

8.6. Further reading

8.6.1. The Sedona Conference *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281 (Aug. 2008) *available at* https://thesedonaconference.org/download-pub/66.

8.6.2. Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?,* 14 RICH J.L. & TECH. 7 *available at* http://law.richmond.edu/jolt/v14i3/article7.pdf.

9. Search and collection methodologies

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

9.2. Issues presented

9.2.1. Parties are not accustomed to sharing, let alone negotiating, the methodology they intend to use for search and collection of ESI. This resistance is compounded by concern that selection criteria may reveal the mental processes of counsel and be work product.

9.2.2. Parties *requesting* ESI are often unaware of the search and collection methodologies that might be available to the *responding* party. For example, the requesting party is unlikely to know how the responding party has organized its ESI or what search criteria could yield the most relevant and useful information.

9.2.3. Parties may not be familiar with advanced technological tools to reduce the cost of manual search and collection procedures. These technologies are intended to limit the need for manual review of large volumes of ESI for relevance and privilege. Properly used, these technologies hold the promise of substantially decreasing the cost and delay normally associated with document review. However, the existing case law on automated review is sparse and, in the final analysis, merely finds that a particular technology is *reasonable*. Few courts have reviewed the *results* of an automated search and found that those results were reasonable. Moreover, there is no accepted definition of *reasonableness* of automated search.

9.2.4. Automated search raises another unanswered question: Should the technology be measured under a *Daubert*[7] analysis—or its state equivalent—or should a more lenient *reasonableness* be the measure?

[7] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

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

9.3. Suggested judicial management strategies

9.3.1. Direct the parties to collaborate on a sample search of ESI to determine the most effective search methodology to apply to a larger collection.

9.3.2. Direct the parties to attempt to reach agreement on the use of automated search technologies, and advise the parties that insistence on the use of costly and time-consuming manual procedures will be viewed with skepticism.

9.3.3. Direct the parties to agree on a reasonable set of *keywords*, if key word searching is an appropriate methodology. Avoid having the court be forced to select key words for the parties; as the court is not in a position to determine whether any given set of key words will be effective in retrieving relevant information and filtering out irrelevant information.

9.3.4. Consider staging searches, focusing on those data sources most likely to yield relevant information. *Staging* here means staging by data source rather than issue, as is often employed in complex litigation.

9.3.5. Suggest that the parties engage (or order the appointment of) a neutral to assist them in developing a search methodology, come to agreement on a methodology, or resolve any dispute with regard to the application of a methodology.

9.4. Sample orders

9.4.1. Case Management Order: Protocol Relating to the Production of Electronically Stored Information ("ESI"), *In re Actos (Pioglitazone) Products Liab. Litig*., MDL No. 6:11–md–2299, 2012 WL 7861249 (W.D. La. December 30, 2012) (describing stipulated search methodology proof of concept).

9.4.2. Order Governing Discovery of Electronically Stored Information from FDIC-R, *W. Holding Co. v Chartis Ins. Co. of P.R.,* 2013 WL 1352562

(Apr. 3, 2013) (establishing a default protocol for obtaining ESI from a government entity/party).

9.4.3. Order RE: EEOC's Motion for Resolution of Discovery Dispute, *EEOC v. Original Honeybaked Ham Co.,* Civil Action No. 11–cv–02560–MSK–MEH, 2013 WL 753480 (D. Colo. Feb 27, 2013) (approving search terms in employment discrimination action).

9.4.4. *Fosamax/Alendronate Sodium Drug Cases*, Case No. JCCP 4664 (Ca. Super. Ct. Apr. 18, 2013 (minute order declining to require producing party to use predictive coding).

9.5. Representative decisions

9.5.1. *S2 Automation, LLC v. Micron Tech., Inc.,* No. 11-0884, 2012 WL 3656454 (D.N.M. Aug. 9, 2012) (requiring disclosure of a party's search methodology through application of 26(g)(1)).

9.5.2. *Software Rights Archive, LLC v. Facebook, Inc.,* Case No. C:12-03970 RMW, 2013 WL 4396719 (N.D. Cal. Aug. 13, 2013) (addressing ambiguities in a party's request for discovery of source code).

9.5.3. *Gordon v. Kaleida Health,* No. 1:08-cv-00378, 2013 WL 6018912 (W.D.N.Y. May 21, 2013) (addressing whether producing party must meet-and-confer with regard to an ESI protocol and use of predictive coding).

9.5.4. *EORHB, Inc. v. HOA Holdings,* C.A. No. 7409–VCL, LLC, 2013 WL 1960621 (Del. Ch. Ct. May 6, 2013) (unpublished opinion withdrawing *sua sponte* bench order for parties to show cause why they should not be using advanced technological search tools).

9.5.5. *Chura v. Delmar Gardens of Lenexa, Inc*., Civil Action No. 11–2090–CM–DJW, 2012 WL 940270 (D. Kan. Mar. 20, 2012).

9.5.6. *Da Silva Moore v. Publicis Groupe SA*, 287 F.R.D. 182 (S.D.N.Y. 2012), *aff'd,* No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. 2012).

9.5.7. *DCG Sys., Inc. v. Checkpoint Technologies, LLC,* No. C–11–03792 PSG, 2011 WL 5244356 (N.D. Cal. Nov. 2, 2011).

9.5.8. *In re Nat'l Ass'n of Music Merchants, Musical Instruments & Equip. Antitrust Litig.,* MDL No. 2121, 2011 WL 6372826 (S.D. Cal. Dec. 19, 2011) (describing what may be the inaccuracies of search terms).

9.6. Further reading

9.6.1. The Sedona Conference *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery* (Dec. 2013), https://thesedonaconference.org/download-pub/3669.

9.6.2. Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 SEDONA CONF. J. 229 (2010).

9.6.3. Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, XVII RICH J.L. & TECH. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

9.6.4. Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technologically-Assisted Review*, 7 Fed. Cts. L. Rev. (1) (2013) *available at* http://www.fclr.org/fclr/articles/html/2010/grossman.pdf.

9.6.5. Maura R. Grossman, et al., *Overview of the TREC 2011 Legal Track*, NIST SPECIAL PUB. 500–295: THE TWENTIETH TEXT RETRIEVAL CONFERENCE PROCEEDINGS (TREC 2011), http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.21904.12.pdf.

9.6.6. Briefs from Virginia court in *Global Aerospace Inc., et at. V. Landow Aviation:*

9.6.6.1. Memorandum in Support of Motion for Protective Order Approving the Use of Predictive Coding, *Global Aerospace Inc., et al. v. Landow Aviation*, No. CL 61040, 2012 WL 1419842 (Va. Cir. Apr. 9, 2012).

9.6.6.2. Opposition of Plaintiffs to Landow Defendants' Motion for Protective Order Regarding Electronic Documents and "Predictive Coding," *Global Aerospace Inc., et al. v. Landow Aviation* No. CL 61040, 2012, WL 1419848 (Va. Cir. Apr. 16, 2012).

9.6.6.3. Order Approving the Use of Predictive Coding for Discovery, *Global Aerospace Inc., et al. v. Landow*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Apr. 23, 2012).

9.6.6.4. *See* The Sedona Conference *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, supra* Part IV.9.6.1.

9.7. A "coda" on the use of advanced technologies to search large volumes of ESI

9.7.1. This short essay, unique to the format of these *Resources*, is intended to raise questions with regard to the use of "computer-assisted review" or "technology-assisted review" or "predictive coding" in civil litigation. The essay supplements the "Issues presented" and "Suggested judicial management strategies" set forth above.

The first question that a judge should ask when presented with a proposal to use advanced technology (whatever it may be called) to collect, search, and produce ESI is whether the parties agree to use it. If so—and absent some countervailing case management concern such as delay—there would not appear to be any reason for the judge to discourage or disallow the use of advanced technology. Of course, as will be explained below, the "results" of that use may be of great concern to the judge should a dispute arise.

Related to the first question is whether (as noted above in Issue presented 9.2.1) the judge should—or even has the authority to—compel a *responding* party to meet-and-confer with the *requesting* party about *how* the responding party should respond to a request for production of discoverable and nonprivileged ESI. No rule requires this. However, there is at least one decision in which the presiding judge required a producing party to disclose search terms and custodians to "aid *** [the requesting party] in uncovering the sufficiency of *** [the producing party's] production and serves greater purposes of transparency in discovery." *Apple Inc. v. Samsung Elec. Co., 2013 WL 1942163 (N.D. Ca. May 9, 2013). See S2 Automation LLC v. Micron Tech., Inc.,* No. 11-0884, 2012 WL 3656454 (D.N.M. Aug. 9, 2012), where the court, relying on Rule 26(g)(1), required a producing party to disclose its search methodology. This tension between allowing a party to simply respond to a request to produce and conferring with the requesting party as to how it will do so is reflected in *Gordon v. Kaleida Health*, cited above in 9.5.2.

9.7.2. Second, assuming that a judge is inclined to order the use of some type of advanced technology, the Representative Decisions cited above reflect some "lessons" that might be drawn. These are:

9.7.2.1. The judge only approved the "threshold" use of an automated technology. The "results" of any such use might be subject to challenge that would require evidentiary hearings, expert testimony, and rulings.

9.7.2.2. As another threshold matter, there was a recognized superiority of advanced technology over manual review or a

"simpler" technology, such as the use of search terms, etc., used in the decisions cited in 9.4 above, given the volume of ESI in issue and attorney review costs.

9.7.2.3. The party seeking to use advanced technology should offer some degree of "transparency" of process, although there is no consensus as to whether that transparency should extend to the disclosure of information that might be subject to work product protection, such as the selection of the initial "seed set" of ESI submitted to "train" an advanced technology.

9.7.2.4. "Reasonableness" of the advanced technology selected appears to be central to judicial acceptance of the use of that technology.

9.7.2.5. Speculation by the producing party is insufficient to defeat threshold judicial approval.

9.7.3. Third, there have been few *contested* challenges to either *process* or *results* that any court has been required to rule on. However, in the event that there is such a challenge, here are some issues for the judge to consider:

9.7.3.1. Who will bear the burden of proof? Should it be the party that used (or imposed) the advanced technology or the opposing party?

9.7.3.2. What proofs should the court expect or require? Are representations by attorneys sufficient? What might the consequences of misrepresentations be? See *S2 Automation LLC v. Micron Tech., Inc.* above. Will lay testimony by attorneys or consultants be required? If expert testimony is required (and presumably it would be to at least some degree), do Federal Rule of Evidence 702 and *Daubert* or their state equivalents apply?

9.7.3.3. If the appropriate standard is "reasonableness, what is a sufficient degree of "reasonableness"? For example, if a particular set of ESI to be searched consists of 1,000,000 pages, and the advanced technology subject to judicial approval is predicted to identify 80% of the responsive ESI, is 80% "good enough"? Should 90% be deemed to be reasonable? If it will cost significantly more to capture 95% of the responsive ESI, is the additional cost "reasonable?"

9.7.3.3.1. We do have one example of what might be deemed a "reasonable" approach to the use of advanced

technologies: In *Dornoch Holdings Internat'l, LLC v. Conagra Foods Lamb Weston, Inc.*[8], a special master used search terms to develop a privilege log of over 40,000 documents out of a set of 1.3 million. In response to the defendants' objections to the log, the special master conducted an *in camera* review of a "statistically significant number" of randomly selected documents on the log and, among other things, recommended that, "the selection of a 59%, or greater correlation of search term precision [be deemed sufficient] for a document to remain withheld as privileged." The special master noted that the selection of that percentage, "will result in a known release of some privileged documents," but that a clawback agreement and Federal Rule of Evidence 502(b)(3) would protect against waiver. The presiding district judge adopted the recommendations, but dismissed the action because of misrepresentations made by the plaintiffs.

9.7.3.3.2. Leaving aside other recommendations made by the special master, which would have allowed the defendants to challenge any document "above" the 59% threshold or would have allowed the defendants to argue that a document "below" the threshold was in fact privileged, is a 59% figure a reasonable one?

[8] No. 1:10–CV–00135–TJH, 2013 WL 2384103 (D. Idaho May 24, 2013).

10. Form or forms of production

10.1. ESI exists, and can be produced, in various forms. Form of production can be a particularly contentious issue in eDiscovery. Parties can dispute whether ESI should be produced in, for example, paper, PDF, TIFF, or native form.[9] This section addresses form of production and why a particular form or forms may be appropriate for the needs of a particular action.

10.2. Issues presented

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

10.2.2. Under Rule 34, the requesting party may designate the form or forms in which it wants ESI produced. The designation is intended to "facilitate the orderly, efficient, and cost-effective discovery of electronically stored information." Committee Note to the 2006 amendments, Federal Rule of Civil Procedure 34(b). "If a request does not specify a form, … the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." Federal Rule of Civil Procedure 34(b)(2)(E). If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must confer under Rule 37(a)(2)(B) in an effort to resolve the dispute. If a court is forced to resolve the dispute, "the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in [the] rule. . . ." Committee Note, 2006 Amendment, Federal Rule of Civil Procedure 34(b).

10.2.3. Rule34(b)(2)(E)(i) directs that a "party must produce documents as they are kept in the *usual course of business* or must organize and label them to correspond with the categories in the request . . . " (emphasis added). However, Rule 34(a)(1)(A) also permits the discovery of "any documents or electronically stored information . . . after translation by the responding party into a *reasonably usable form* . . ." (emphasis added). Thus, the default form of production should be the form in which the ESI is kept in the "usual course of business" or, alternatively, in a "reasonably usable form."

[9] The Sedona Conference Glossary: *E-Discovery & Digital Information Managemen*t, *supra* note 2.

10.2.4. A second and more contentious issue arises from requests that seek a form that incorporates "metadata." Metadata refers to ESI that is not apparent from the face of a given electronic "document" and may disclose, for example:

- date of creation, edits, comments
- file size and location
- deletion dates and times
- access and distribution
- authorship or the username associated with those tasks[10]

10.2.5. Metadata also provides a means by which a party can conduct a meaningful and relatively inexpensive search of an adversary's ESI. While the metadata itself may not be relevant to any claim or defense in a particular action, some types of metadata serve a useful purpose in helping the parties access and review relevant ESI.

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

10.2.7. A responding party may produce ESI in a form that is not in a "reasonably useable form" as required by the rule. This may be because the ESI has been produced in an unusual or proprietary format requiring specialized software to be searched or read, or in a jumbled and disorganized fashion, or in such large volume as to frustrate any effective review. This may be the result of the parties failing to meet-and-confer on the appropriate format prior to production, a failure of the requesting party to understand the consequences of its request, or an intentional effort by the responding party to hide the ball.

10.3. Suggested judicial management strategies

10.3.1. Direct the parties to describe the manner in which they maintain ESI so that the parties can discuss the appropriate form or forms of production. Emphasize to the parties that an informal discussion may minimize or eliminate cost and undue delay.

10.3.2. In an action pending in state court that does not have an equivalent to Rule 34(b), direct the parties to follow the procedure set forth in that rule.

[10] The Sedona Conference Glossary: *E-Discovery & Digital Information Management*, *supra* note 2.

10.3.3. Apply Sedona Principle 12, which provides that, in the absence of agreement or an order, production should be made in either the form or forms in which the information is ordinarily maintained or in a reasonably usable form, "taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."

10.3.4. Require the requesting party to demonstrate why production of ESI should be in a particular form or forms and require a producing party to demonstrate why production of ESI in a particular form or forms does not unreasonably diminish its usability.

10.4. Sample orders

10.4.1. *National Day Laborer Org. Network v. US ICE,* No. 10 Civ. 3488(SAS), 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (identifying sources and meta fields for future production of ESI), *opinion and order withdrawn,* June 17, 2011.

10.4.2. Order Governing Discovery of Electronically Stored Information from FDIC-R, *W. Holding Co. v. Chartis Ins. Co.,* No. 11-2271(GAG/BJM), 2013 WL 1352562 (D.P.R. Apr. 3, 2013).

10.4.3. Stipulation and Order Regarding the production of Documents and Electronically Stored Information, *In re Urethane Antitrust Litig*., 251 F.R.D. 629 (D. Kan. Nov. 25, 2008).

10.5. Representative decisions

10.5.1. *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008).

10.5.2. *Jannx Med. Sys., Inc. v. Methodist Hosps., Inc.*, 2:08-CV-286-PRC, 2010 WL 4789275 (N.D. Ind. Nov. 17, 2010).

10.6. Further reading

10.6.1. *See* The Sedona Principles*: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, supra* Part II.2.2.

10.6.2. G*uidelines for Cases Involving Electronically Stored Information [ESI] in the United States District Court for the District of Kansas*, Guideline 4 *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited Jan. 21, 2014).

10.6.3. *Suggested Protocol for the Discovery of Electronically Stored Information in the United States District Court for the District of Maryland,* Conference of Parties and Report, *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Jan. 06, 2014).

11. Confidentiality and public access

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

11.2. Issues presented

11.2.1. First, a judge should be skeptical about a party's request for a confidentiality order that governs ESI. For example, has the ESI been *published* on the Internet or another medium?

11.2.2. Second, there is a fundamental distinction between the burden imposed on a party to secure a confidentiality order and the burden imposed on a party to secure a *filing* under seal. The latter implicates First Amendment and common law based rights of access. This fundamental distinction requires a judge to: (a) appreciate the distinction and (b) apply a much more stringent test when *filing under seal* is sought.

11.2.3. Beyond protecting privilege and work product, parties often seek to protect information that might, for example, constitute a trade secret or reveal highly personal matters. If exchanged without some type of restriction of use or dissemination, that information may become known to the public at large. Protective orders issued pursuant to Rule 26(c) or its state equivalents must be looked to for protection here.

11.3. Suggested judicial management strategies

11.4. Sample orders

11.4.1. Discovery Order, In the United States District Court for the District of Maryland, Honorable Paul W. Grimm, (D. Md. April 9, 2013), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/grimm_discovery_order.pdf.

11.4.2. The Sedona Conference *International Principles on Discovery, Disclosure & Data Protection,* App. B: Model Protected Data Protective Order, https://thesedonaconference.org/publication/International_Litigation_Principles.

11.5. Representative decisions

11.5.1. *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012).

11.5.2. *Rocky Mt. Bank v. Google, Inc*., 428 Fed. Appx. 690 (9th Cir. 2011).

11.6. Further reading

11.6.1. *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases, Mar. 2007 Post-Public Comment Version*, 8 SEDONA CONF. J. 141 (Fall 2007).

12. Protection of attorney-client privilege and work product

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

12.2. Issues presented

12.2.1. Responding parties that withhold relevant documents on privilege or work product grounds are almost universally required to provide a privilege log identifying the withheld documents and stating why the documents were withheld. *See, e.g.,* Rule 26(b)(5)(A).

12.2.2. Rule 26(b)(5)(B) establishes a default procedure for asserting claims of privilege after production of information in discovery. If privilege or work product is asserted over produced information, the producing party must timely notify the receiving party, who is obligated to "promptly return, sequester, or destroy the specified information and any copies it has. …" The information should then be identified on a privilege log, subject to judicial resolution if challenged. "The producing party must preserve the information until the claim is resolved."

12.2.3. Rule FED. R. CIV. P. 26 (b)(5)(B) is a procedural rule and does not afford any substantive protection for attorney-client communications or work product material produced during discovery. While the *procedure* is designed to reduce cost and delay associated with disputes over inadvertently produced privileged documents and ESI during discovery, production itself may give raise to a waiver in many state courts. Until recently, this was also true in many federal courts, and the scope of waiver may have extended to all information regarding the same subject matter as the inadvertently-produced information.

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

12.2.5. Rule 502 of the Federal Rules of Evidence was enacted in the fall of 2008 to address these concerns. Several states have adopted equivalents of FED. R. EVID. 502.

12.2.6. Federal Rule of Evidence 502(a) limits the risk of subject matter waiver to instances in which the waiver was intentional. Federal Rule of Evidence 502(b) establishes *somewhat* uniform standards throughout the federal courts to resolve claims of waiver by inadvertent production, adopting a three-part test to determine if an inadvertent production constitutes a waiver. Federal Rule of Evidence 502(e) allows parties to enter into nonwaiver agreements which are binding only as to those parties. Federal Rule of Evidence 502(d) has the greatest potential for cost-savings and efficiencies. It provides for *nonwaiver* confidentiality orders under which parties can disclose ESI and other information in discovery without waiving attorney-client privilege or work product protection. Such an order is binding in any other federal and state proceeding. Federal Rule of Evidence 502 was intended to reduce the cost and risks associated with the production of large-scale collections of information, particularly ESI.

12.3. Suggested judicial management strategies

12.3.1. Ensure that the parties meet-and-confer on privilege and confidentiality issues before discovery begins and before presenting any disputes to the court.

12.3.2. Direct the parties to attempt to agree on issues of waiver and protection of confidential information, and that any resulting agreements be presented to the court at the initial case management conference and incorporated in the court's Rule 16 scheduling order.

12.3.3. Consider entering a nonwaiver confidentiality order with or without the parties' agreement under Federal Rule of Evidence 502(d), after providing the parties with an opportunity to express any concerns about such an order.

12.3.4. Establish a procedure by which challenges to privilege or confidentiality assertions can be addressed in the most timely and efficient manner, ideally before disputed documents appear in depositions or as attachments to motions.

12.3.5. In the event that the privilege or confidentiality designations of a large volume of documents are challenged, direct the parties to attempt agreement on *categorizing* disputed information so that a ruling on samples will apply to each category.

12.3.6. Suggest that the parties engage (or order the appointment of) a neutral to rule on challenges to privilege or confidentiality designations.

12.4. Sample orders

12.4.1. Stipulation and Order Under Federal Rule of Evidence 502(d), *Franco v. Connecticut Gen. Life Ins. Co.*, 818 F. Supp. 2d 792 (D.N.J. Oct. 28, 2011).

12.4.2. Protective Order Containing Clawback Provisions, *Rajala v. McGuire Woods, LLP,* No. 08-2638-CM-DJW, 2010 WL2949582 (D. Kan. December 22, 2010) (discussing whether to issue an order entering a clawback provision to govern the inadvertent disclosure of "privileged or otherwise protected" documents and information under Federal Rule of Evidence 502(d)).

12.5. Representative decisions

12.5.1. *Brookfield Asset Mgmt. v. AIG Fin. Prod. Corp.,* No. 09 Civ. 8285(PGG)(FM), 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013).

12.5.2. *Datel Holdings Ltd. v. Microsoft Corp.*, No. C–09–05535 EDL, 2011 WL 866993 (N.D. Cal. Mar. 11, 2011).

12.5.3. *Jeanes-Kemp, LLC v. Johnson Controls, Inc.*, No. C–09–05535 EDL, 2010 WL 3522028 (S.D. Miss. Sept. 1, 2010).

12.5.4. *Thorncreek Apartments III, LLC v. Vill. of Park Forest*, Nos. 08 C 1225, 08–C–0869 and 08–C–4303, 2011 WL 3489828 (N.D. Ill. Aug. 9, 2011).

12.5.5. *Stengart v. Loving Care Agency,* 990 A. 2d 650 (N.J. 2010).

12.5.6. *Woodard v. Victory Records, Inc.,* No. 11 CV 7594, 2013 WL 4501455 (N.D. Ill. Aug. 22, 2013).

12.5.7. *Surfcast, Inc. v. Microsoft Corp.,* No. 2:12-cv-333-JAW, 2013 WL 4039413 (D. Me. Aug. 7, 2013).

12.5.8. *Lund v. Myers,* 232 Ariz. 309, 305 P.3d 374 (2013).

12.6. Further reading

12.6.1. Martin R. Lueck, Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 SEDONA CONF. J. 229 (2009).

12.6.2. Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 (2009).

12.6.3. Maura R. Grossman and Ronald J. Hedges, *Do the FRCPs Provide for 'Clawless' Clawbacks?* 9 DIGITAL DISCOVERY & E-EVIDENCE (BNA) 285 (Sept. 1, 2009).

12.6.4. Paul W. Grimm, Lisa Yurwit Bergstrom, Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?* 17 RICH. J.L. & TECH. 8 (2011) *available at* http://jolt.richmond.edu/v17i3/article8.pdf.

12.6.5. *See* The Sedona Principles*: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, supra* Part II. 2.2.

13. The privilege log

13.1.1. As noted in Section IV.11.2., Rule 26 (b)(5)(A) prescribes the preparation of a timely privilege log and, in general, describes its contents. The form or content of privilege logs may also be supplemented by local rules.

13.1.2. Privilege logs are essential to judicial resolution of disputes between parties about withheld information. Nevertheless, especially with ESI, privilege logs can be voluminous, a major source of satellite litigation, and a substantial drain on judicial resources.

13.2. Issues presented

13.2.1. The parties must be clear on the level of detail a privilege log must contain. Rule 26(b)(5)(A)(2) requires that a party "describe the nature of the documents … and do so in a manner that … will enable other parties to assess the claim." This does not offer concrete guidance about what form the log should take. Absent party agreement, the court must prescribe the form. For example, should logged email include such metadata fields as "to," "from," "cc," "bcc" or the like? Should other metadata fields be included? Judges should be wary of automatically-generated privilege "logs" based on arbitrary criteria, for example, the simple phrase "attorney-client privilege" or the name of an attorney appearing in a document.

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

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

13.2.4. Fourth, what about message strings? Message strings (or "threads") consist of related email communications over time, initiated by a "parent" message. The parent message may be an attorney-client communication or work product, the status of which may not be obvious later in the string. How should strings be described on a log? Should only privileged messages on a string be logged? Is it sufficient to log only the "latest" message? Should non-privileged communications within the string be logged?

13.3. Suggested judicial management strategies

13.3.1. Encourage the parties, at the initial meet-and-confer, to agree on the definition of privileged communications and work product as a precursor to any discussion of privilege logs.

13.3.2. Require the parties to address the form and content of privilege logs at the initial meet-and-confer.

13.3.3. Require the parties to attempt to agree at the initial meet-and-confer on a reasonable time to produce a privilege log, which may be more than the time otherwise allowed by local rule or practice if voluminous ESI must be logged.

13.3.4. Address the form and date of production of the log at the initial case management conference or as soon thereafter as practicable.

13.3.5. Encourage the parties to identify presumptively-privileged documents that may be segregated and excluded from production based on some agreed methodology, for example, communications with outside counsel after the filing of a complaint or answer.

13.3.6. Encourage the parties to agree that otherwise voluminous logs be prepared more economically, for example, by category of items rather than individual listing of each document.

13.3.7. Encourage the parties to agree on how message strings should be logged.

13.3.8. Require the "designating" party to submit an affidavit or affidavits that, for example, identify all persons named on a log and describe in greater detail why a particular document or documents are privileged.

13.3.9. If necessary, conduct an *in camera* review or refer disputes about logs to a special master.

13.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

13.5. Representative Decisions

13.5.1. *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007) (document retention notice).

13.5.2. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238 (E.D. Pa. 2008).

13.5.3. *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) *aff'd,* 580 F.3d 485 (7th Cir. 2009) ("strings").

13.5.4. *Chevron Corp. v. Weinberg Grp.,* 286 F.R.D. 95 (D.D.C. 2012).

13.6. Further reading

13.6.1. Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola· Redgrave Framework*, 4 FED. CTS. L. REV.. 19 (2010) *available at* http://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf.

13.6.2. Jeane A. Thomas, David D. Cross, and Courtney Ingraffia Barton, *Reducing the Costs of Privilege Reviews and Logs*, NAT'L L. J. (Mar. 23, 2009) *available at* http://www.crowell.com/documents/Reducing-the-costs-of-privilege-reviews-and-logs.pdf.

14. Allocation of costs during litigation

14.1.1. Cost-shifting came to eDiscovery with the iconic *Zubulake*[11] decisions in the context of production of ESI from "inaccessible" sources. Cost-shifting and cost-sharing are implicit in Rule 26(b)(2)(B), under which "[t]he court may specify conditions for the discovery" of ESI from not reasonably accessible sources. Many judges have relied on the Proportionality Rule to require cost-shifting or cost-sharing in lieu of "limit[ing] the frequency or extent" of discovery. Rule 26(b)(2)(C). Other judges have limited cost-shifting or cost-sharing to production of ESI from not reasonably accessible sources.

14.1.2. Cost-shifting or cost-sharing in discovery is inconsistent with the presumption, stated by the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), that each party bears its own litigation costs. The party seeking cost-shifting or cost–sharing bears the burden of overcoming that presumption.

14.2. Issues presented

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

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

14.2.3. The Federal Rules of Civil Procedure do not set forth factors for a cost-shifting or cost-sharing analysis. What factors might be used? Factors suggested in the Committee Note to the 2006 amendments to Rule 26(b)(2)(B), concerning "good cause" for production of ESI from not reasonably accessible sources may be informative. *Zubulake* set forth a related, but slightly different, set of factors specifically for cost-

[11] *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D.N.Y.) *and* 220 F.R.D. 422 (S.D.N.Y.) *and* 216 F.R.D. 280 (S.D.N.Y) *and* 217 F.R.D. 309 (S.D.N.Y).

shifting. Likewise, there is no uniformity among the state courts that have addressed this issue in the ESI context.

14.3. Suggested judicial management strategies

14.3.1. Limit production of ESI to reasonably accessible information, the costs of which are presumably borne by the producing party.

14.3.2. Address cost-shifting or cost-sharing only after all relevant reasonably accessible information has been produced and reviewed by the requesting party.

14.3.3. Require the party seeking to shift costs to describe, in a detailed affidavit, the cost and burden it expects to incur in producing ESI from sources it deems *not reasonably accessible*.

14.3.4. Require sampling of ESI that a party has been requested to produce from sources it deems *not reasonably accessible*, thus enabling the judge to ascertain the extent to which relevant information resides within the ESI and the cost of retrieval of the entire data set.

14.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

14.5. Representative decisions

14.5.1. *Boeynaems v. LA Fitness Internat'l,* 285 F.R.D. 331 (E.D. Pa. 2012).

14.5.2. *Fleischer v. Phoenix Life Ins. Co.,* No. 11 Civ. 8405(CM)(JCF), 2012 WL 6732905 (S.D.N.Y. Dec. 27, 2012).

14.5.3. *Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. 2007).

14.5.4. Mia Mazza, Emmalena K. Quesada, Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH J.L. & TECH. 11 (2007) *available at* http://jolt.richmond.edu/v13i3/article11.pdf.

14.5.5. *Couch v. Wan*, No. 1:08cv1621 LJO DLB, 2011 WL 2551546 (E.D. Cal. June 24, 2011) *recons. denied*, No. CV F 08–1621 LJO DLB, 2011 WL 2971118 (E.D. Cal. December 20, 2011).

14.5.6. *SPM Resorts, Inc. v. Diamond Resorts Mgmt., Inc.*, 65 So. 3d 146 (Fla. Dist. Ct. App. 2011) (*per curiam*).

14.5.7. *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D.3d 58, 939 N.Y.S.2d 395 (2012).

14.6. Further reading

14.6.1. *See* The Sedona Conference *Commentary on Proportionality*, (Jan. 2013), *supra* Part IV.7.6.1.

14.6.2. *See* The Sedona Conference *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, *supra* Part IV.8.6.1.

15. Discovery from non-parties

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

15.2. Issues presented

15.2.1. Promoting cooperation with respect to nonparty subpoena practice can be both simpler and more difficult than elsewhere in eDiscovery. On the one hand, Rule 45 specifically provides that requesting parties and attorneys "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." That rule also requires the court to protect nonparties from undue burden and expense, which may include an award of attorney's fees, on parties or attorneys who fail to make reasonable efforts to avoid undue burden and expense. Rule 45(c)(1).

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

15.3. Suggested judicial management strategies

15.3.1. Encourage the parties in their initial Rule 26 meet-and-confer to address any intent to secure information from nonparties and to include such intent in their discovery plan.

15.3.2. Direct the parties to present any dispute *between themselves* as to nonparty discovery to the court at the initial scheduling conference or as soon thereafter as possible.

15.3.3. Once a subpoena is served, request the issuing party and the subpoenaed nonparty to meet-and-confer in an attempt to resolve any of the latter's objections to the subpoena without formal motion practice.

15.3.4. Encourage the parties and the subpoenaed nonparty to stipulate to an extension of time for the latter to object to the subpoena. The limited time period for objection under Rule 45(c)(2)(B) may frustrate any effort to resolve disputes amicably and without judicial involvement.

15.3.5. In the event that another judge has jurisdiction over the subpoena, *with the knowledge of the parties,* coordinate with that judge as to who will be responsible for ruling on any dispute.

15.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

15.5. Representative decisions

15.5.1. *Auto Club Family Ins. v. Ahner,* Civil Action No. 05-5723, 2007 WL 2480322 (E.D. La. Aug. 29, 2007).

15.5.2. *Ervine v. S.B., R.Z.W., and E.A.B.,* No. 11 C 1187, 2011 WL 867336 (N.D. Ill. Mar. 10, 2011).

15.5.3. *Mick Haig Productions, e.K. v. Does*, Civil Action No. 3:10–CV–1900–N, 2011 WL 5104095 (N.D. Tex. Sept. 9, 2011) *aff'd sub nom. Mick Haig Productions e.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012).

15.5.4. *Mount Hope Church v. Bash Back!,* 705 F.3d 418 (9th Cir. 2012).

15.5.5. *Legal Voice v. Storman's Inc.,* 738 F.3d 1178 (9th Cir. 2013).

15.5.6. *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 (2011).

15.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

16. Discovery motion practice

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

16.1.2. Rule 26(c)(1) and Rule 37(a)(1) require a moving party to certify that it has, in "good faith," conferred or attempted to confer with the other affected parties in an attempt to resolve the dispute. The United States District Court for the District of New Jersey requires parties to bring any discovery dispute before a magistrate judge by conference call or letter prior to filing any formal motion. District of New Jersey, Local Civil Rule 37.1(a)(1). Going one step further, the United States District Court for the Eastern District of Texas maintains a *Discovery Hotline* so that parties can "get a hearing on the record and ruling on the discovery … " by a judge on discovery disputes. Eastern District of Texas, Local Rule CV 26(e). These rules demonstrate an attempt to reduce formal motion practice in the federal courts and many state courts have followed suit.

16.2. Issues presented

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

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

16.2.3. Third, judges should be aware that expert reports submitted in support of, or in opposition to, discovery motions *may* be required to comply with Federal Rule of Evidence 702 and *Daubert* or their state counterparts. Such compliance may multiply the costs to the parties and the complexity of discovery motion practice. This question might also arise in motions related to Technology Assisted Review. *See generally* Section 9.

16.3. Suggested judicial management strategies

16.3.1. Consider holding regular discovery conferences in complex civil actions to provide informal guidance to parties on emerging discovery disputes so as to avoid motion practice.

16.3.2. Advise the parties, at the initial case management conference, that formal motion practice on discovery disputes is disfavored; and that the court expects parties to make good faith efforts to resolve disputes on their own.

16.3.3. Be available to resolve disputes informally and promptly should disputes arise or make arrangements for a colleague to be available in a particular instance.

16.3.4. Require the parties to submit their dispute as a joint letter to the court requesting resolution.

16.3.5. Meet with the parties on an informal basis to attempt to resolve the dispute prior to the filing of any motion.

16.3.6. Ensure that the parties confer pursuant to Rule 26(c)(1) or Rule 37(a)(1) or their state equivalents in an attempt to resolve any dispute.

16.3.7. Insist that any formal motion include sufficient detail, including affidavits from competent persons if needed, which describe the nature of the dispute and the reason for the relief sought as well as, if appropriate, a detailed description of costs.

16.3.8. Similarly, insist that the responding party describe why the discovery sought cannot or should not be allowed and, if appropriate, a detailed description of costs.

16.3.9. Consistent with Issue Presented 15.2.3 above, address compliance with *Daubert* and Federal Rule of Evidence 702 or the equivalent state counterpart with the parties, if warranted.

16.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

16.5. Representative decisions

16.5.1. *Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc,.* No. 12 Civ. 1579(HB)(J0F), 2012 WL 5927379 (S.D.N.Y. Nov. 21, 2012).

16.6. Further reading

16.6.1. D.J. Waxse, *Experts on Computer-Assisted Review: Why Federal Rule of Evidence 702 Should Apply to Their Use*, 52 WASHBURN L.J. 207 (2013).

17. Evidential foundations

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

17.2. Issues presented

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

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

17.3. Suggested judicial management strategies

17.3.1. Parties may preserve and collect ESI before a civil action has commenced or service of process effected. At this pre-litigation stage, the Federal Rules of Civil Procedure do not provide guidance that might assist the parties or the court in making decisions about methods of preservation and collection of ESI which will have a direct bearing on admissibility later. Perhaps the best that can be done by judges is to educate the bench and bar on these questions.

17.3.2. Remind the parties at the initial case management conference that, as the parties collect, produce, and review ESI, admissibility should be taken into account. This is especially important when ESI is produced by a nonparty in response to a subpoena.

17.3.3. Direct the parties, before any dispositive motion or final pretrial conference, to stipulate to the admissibility of relevant ESI or to identify, by specific exhibit, what objections to admissibility are expected to be raised.

17.4. Sample orders

Pretrial Order No. 22 Relating to the United States' Preservation of Documents and Electronically Stored Information, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,* MDL No. 2179 (E.D. La. Jan. 4, 2011).

17.5. Representative decisions

17.5.1. *Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534 (D. Md. 2007).

17.5.2. *United States v. Fluker,* 698 F.3d 988 (7th Cir. 2012).

17.5.3. *Rodriguez v. State*, 273 P.3d 845 (Nev. Sup. Ct. 2012).

17.5.4. *Gulley v. State,* ---S.W.3d---, 2012 Ark. 368 (Ark. 2012).

17.5.5. *Swanson v. Davis,* 69 A.3d 372 (Del. 2013) (unpublished table decision).

17.5.6. *Parker v. State,* No. 38, 2013, 2014 WL 621289 (Del. Sup. Ct. Feb. 5, 2014) (post on defendant's social media page sufficiently authenticated through circumstantial evidence and victim testimony).

17.6. Further reading

17.6.1. The Sedona Conference *Commentary on ESI Evidence & Admissibility*, 9 SEDONA CONF. J. 217 (Fall 2008), https://thesedonaconference.org/download-pub/70.

17.6.2. GEORGE L. PAUL, FOUNDATIONS OF DIGITAL EVIDENCE (ABA Publ'g 2008).

17.6.3. Paul W. Grimm, L. Y. Bergstrom, and MM. O'Toole-Loureiro, *Authentication of Social Media Evidence*,, 36 AM. J. TRIAL ADVOC. 433 (2013).

18. Electronic trials

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

18.2. Issues presented

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

18.2.2. Second, opposing counsel may have different levels of skill in the preparation of electronic presentations or in the use of electronic evidence presentation systems. Counsel must have adequate technical support. The court must be on guard against the possibility that a jury will be confused or unduly influenced by the quality of the presentation and lose focus on the evidence being presented.

18.3. Suggested judicial management strategies

18.3.1. Require the parties to exchange information, not later than the final pretrial conference, about what evidence they intend to introduce in electronic form.

18.3.2. Urge the parties to use a common evidence presentation system.

18.3.3. Require the parties to perform *dry runs* of their electronic evidence to avoid any technical problems.

18.3.4. Require the parties to have knowledgeable operators of the evidence presentation system or systems present at trial.

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

18.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

18.5. Representative decisions

If you would like to contribute a representative decision that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org. or Ronald J. Hedges at r_hedges@live.com.

18.6. Further reading

18.6.1. DEANNE C. SIEMER ET AL., EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE'S GUIDE TO PRETRIAL AND TRIAL (Fed. Jud. Ctr. & Nat'l Inst. for Trial Advoc. 2001), *available at* https://public.resource.org/scribd/8763731.pdf.

19. Jury issues

19.1. We live in the *Age of the Internet*. Electronic information is available at our fingertips, as is the opportunity to share our opinions and thoughts among *friends*. At the same time, our legal system recognizes that, although a declining percentage of civil actions are resolved on the merits at trial, the jury is a fundamental part of that resolution. Attorneys and parties have always attempted to learn about members of a jury venire, perhaps to select sympathetic or, at least, unbiased jurors. How do those attempts by attorneys and parties fare on the Internet? To address this question, Chapter 19 focuses on two distinct aspects of the jury system:

(a) Investigation of the members of a jury venire before the selection of jurors; and

(b) Possible influences on the jury after it has been selected and before verdict

19.2. Issues presented

19.2.1. It is not uncommon, especially when there are high *stakes* in a particular civil action, for an attorney or his agents to learn more about a venireperson that the minimum information that may be gleaned for a court's list. What ethical restraints exist—or should exist—on the ability of attorneys or parties to learn about the lifestyle or opinions of a member of a jury venire?

19.2.2. One of the basic principles of our civil justice system is that the finder of fact (here, a jury) should resolve disputed issues of fact *only* on the basis of competent evidence admitted during trial. To vindicate that principle, judges have, among other things, instructed jurors not to deliberate until all the evidence has been admitted and the jury has been charged and not to conduct independent research into the facts. On the other hand, opportunities to exchange views with fellow jurors, friends, and others have increased exponentially with the advent of the Internet. What might a judge say to the members of a jury to impress on them the need to *not* conduct independent investigations into the facts? What remedies are available when that instruction is ignored?

19.3. Suggested judicial management strategies

19.3.1. At the beginning of the petit jury selection process, when the entire venire is selected and seated together, include in any discussion of jury service the admonition that, if selected as a petit juror, the juror must refrain from any discussion of the trial for which the juror is

selected to serve and must obey the instructions of the presiding judge.

19.3.2. Encourage the members of a petit jury not to bring cell phones or any other electronic communications device into the jury room.

19.3.3. Admonish the members of a petit jury on repeated occasions during their service not to discuss any aspect of the trial with anyone, including their fellow jurors, expect when directed to do so by the presiding judge.

19.3.4. Give to the members of a petit jury, at the commencement of the trial and after the close of evidence, the Proposed Model Jury Instructions prepared by the Judicial Conference Committee on Court Administration and Case Management (June 2012).

19.3.5. Should credible allegations of juror misconduct be made, conduct a prompt and thorough investigation.

19.4. Sample orders

19.4.1. *Proposed Model Jury Instructions, The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, Jud. Conf. Comm. on Court Administration and Case Mgmt. (CACM) (June 2012) *available at* www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

19.4.2. *Amendments to the Florida Rules of Judicial Administration – Rule 2.451 ("Use of Electronic Devices")*, No. SC12-764 (Fl. Sup. Ct. December 3, 2013) *available at* http://www.floridasupremecourt.org/decisions/2013/sc13-1915.pdf.

19.5. Representative decisions

19.5.1. *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), *as amended* (Sept. 15, 2011).

19.5.2. *Juror No. One v. Supreme Court,* 142 Cal. Rptr.3d 151 (Cal. Ct. App. 2012).

19.5.3. *Sluss v. Commonwealth,* 381 S.W.3d 215 (Ky. Ct. App. 2012).

19.5.4. *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (2011).

19.6. Further reading

19.6.1. MEGHAN DUNN, FED. JUDICIAL CTR., JURORS' USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS, A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (FJC Nov. 22, 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf.

19.6.2. Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621 (2011).

19.6.3 National Center for State Courts, *Social Media and the Courts State Links*, http://www.ncsc.org/topics/media/social-media-and-the-courts/state-links.aspx?cat=judicial%20ethics%20advisory%20opinions%20on%20social%20media (last visited Jan. 22, 2014).

20. Sanctions

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

20.1.2. Parties may view any adverse discovery decision by a judge to be a *sanction*, no matter how routine or minor. A sanction, however, is a "penalty or coercive measure that results from failure to comply with a law, rule, or order … [e.g.] a sanction for discovery abuse."[12] A true sanction should be distinguished from a case management order that may result from actions or failures in discovery, such as an order to limit or compel discovery, to extend the discovery period, or require a witness to be re-deposed with the shifting of costs. True sanctions must be based on findings by the court; for example, that a party or counsel engaged in culpable conduct, without substantial justification, that led to a violation of a court order, prejudice to the opposing party, or interference with the administration of justice. The power to sanction may be based on statute, rule, or the inherent authority of the court.

20.2. Issues presented

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

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

20.2.3. The timing of a sanctions motion can be troublesome for a judge. *When* should such a motion be made, assuming that a judge has discretion to permit filing at a specific time? Should the judge require that other discovery (or perhaps *all* discovery) be completed before any motion is made?

[12] *Black's Law Dictionary* (9th Edition, 2004), p. 1368.

20.2.4. "Piecemeal" motion practice can lead to excessive cost to the parties, delay in resolution of an action, and stress on already-strained court resources.

20.3. Suggested judicial management strategies

20.3.1. Inquire, whenever the word "sanction" arises, about the nature of the dispute. Ascertain *exactly* what relief is sought and why.

20.3.2. Conduct an informal proceeding in the first instance. Determine whether a party is using the word "sanction" to request an extension of some deadline.

20.3.3. In lieu of allowing a formal motion, consider whether other discovery may be conducted that could eliminate, or at least reduce, the need for the motion.

20.3.4. Consider whether to postpone any ruling on the imposition of sanctions or the amount of sanctions pending a resolution of the action on its merits.

20.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

20.5. Representative Decisions

20.5.1. *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).

20.5.2. *Coquina Investments v. Rothstein,* No. 10–60786–Civ., 2012 WL 3202273 (S.D. Fl. Aug. 3, 2012).

20.5.3. *Ellis v. Toshiba America Info. Sys.,* 160 Cal.Rptr.3d 557, 2 (Ca. Ct. App. Aug. 7, 2013)(as modified Aug. 14, 2013).

20.5.4. *Flagg v. City of Detroit,* 715 F.3d 257 (6th Cir. 2013).

20.5.5. *Gatto v. United Air Lines,* No. 10–cv–1090–ES–SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

20.5.6. *Green v. Blitz U.S.A., Inc.*, Civil Action No. 2:07–CV–372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).

20.5.7. *Omogbehin v. Cino*, 485 Fed.Appx. 606 (3d Cir. 2012).

20.5.8. *Qualcomm Inc. v. Broadcom Corp.*, 05CV1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010).

20.5.9. *United Cent. Bank v. Kanan Fashions, Inc.*, No. 10 CV 331, 2011 WL 4396912 (N.D. Ill. Mar. 31, 2011) *report accepted in part, rejected in part,* No. 10 C 331, 2011 WL 4396856 (N.D. Ill. Sept. 21, 2011).

20.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

21. Post-judgment costs

21.1.1. A word to the reader: This stage of litigation looks to the award of costs after a party secures a final judgment in its favor. It does not address cost-sharing or -shifting during discovery. (That is addressed in Section IV.13).

21.1.2. Under the Federal Rules of Civil Procedure a prevailing party "should be allowed" its costs. In the first instance, costs are taxed by the Clerk of the District Court in which a judgment is entered. Rule 54(d)(1). Awardable costs are defined in 28 U.S.C. Sec. 1920, and include costs associated with, "[f]ees for … electronically reported transcripts necessarily obtained for use in the case," 28 U.S.C. Sec. 1920(2), and "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case. … " 28 U.S.C. Sec. 1920(4). Applications have been made and, in some instances granted, for awards based on expenses incurred in, for example, creating litigation databases, although "[t]axing litigation databases is a new area of law where courts have diverged in their approaches." *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608 (E.D. Pa. 2011). Applications for ESI-related costs are rare but, when allowed, may impose significant costs on the losing parties. Judges should be aware of the varying approaches to the award of such costs. *We are unaware of any state decisions that have addressed post-judgment awards of ESI-related costs.*

21.2. Issues presented

21.2.1. First, how should a statute or rule that allows an award of costs be interpreted? Such statutes and rules often appear to be based on the common law. Taking *exemplification* and *copies* and construing these to include, for example, making available TIFF images with load files may be problematic.

21.2.2. Second, assuming that ESI-related costs *may* be taxed under a statute or rule, what challenges can be raised to the application by a losing party? The necessity and reasonableness of, for example, the cost of creation of a database is not simply arithmetic and may require expert opinion. How does that *fit* into an award of costs by a clerk?

21.2.3. Third, look at, for example, Rule 68(a). This addresses offers of judgment, which include "costs then accrued." As a matter of policy, should judges encourage offers which include ESI-related costs? Is the offeror not being given an unfair advantage?

21.2.4. Note that a circuit split exists.

21.3. Suggested judicial management strategies

If you would like to contribute any judicial management strategies that illustrate post-judgment costs, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com

21.4. Sample orders

If you would like to contribute a sample order that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

21.5. Representative decisions

21.5.1. *In re Ricoh Co., Ltd. Patent Litig.*, 661 F.3d 1361 (Fed. Cir. 2011). (determining that making ESI available through a database constituted "electronic production").

21.5.2. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp*., 674 F.3d 158 (3d Cir. 2012)(allowing taxation of costs for scanning, conversion of native files to TIFF images, and transferring VHS recordings to DVD format, but denying taxation of costs for data collection, preservation, and culling).

21.5.3. *Country Vintner v. E. & J. Gallo Winery, Inc.,* 718 F.3d 249 (4th Cir. 2013) (adopting *Race Tires'* narrow interpretation of Sec. 1920).

21.5.4. *Cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012) (holding that the cost of document translation is not taxable).

21.6. Further reading

If you would like to contribute anything else that illustrates the strategies above, please contact Kenneth J. Withers at kjw@sedonaconference.org or Ronald J. Hedges at r_hedges@live.com.

V. ESI-Related Ethics for Judges

1. This chapter is not intended to offer strategies for judges when they use the Internet. Rather, the Chapter *is* intended to highlight questions that judges might wish to consider when they do so.

2. Here are some basic questions:

   2.1. Should a judge participate in a social networking site such as Facebook?

   2.2. Should a judge "friend" attorneys or parties or allow himself to be "friended?"

   2.3. Should an attorney or a party appear before a judge who is a "friend" or should the judge recuse himself?

   2.4. Should a judge engage in Internet-based factual or legal research related to an action before him?

   2.5. To what extent should a judge engage on research of contested facts on the Internet?

3. There are a number of judicial ethics opinions that address at least some of the questions above. The ethics opinions are:

   3.1. ABA Comm. on Ethics & Prof' Responsibility, Formal Op. 462 (2013) ("Judge's Use of Electronic Social Networking Media"), http://www.americanbar.org/content/dam/aba/publications/YourABA/462.authcheckdam.pdf.

   3.2. California Judges Ass'n, Judicial Ethics Comm. Op. 66 (2010), http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf, ("Online Social Networking").

   3.3. Judicial Ethics Advisory Committee Opinion Number: 2009-20 (Fl. Sup. Ct, 2008), Florida Supreme Court, Judicial Ethics Advisory Committee Opinion Number: 2009-20 (Nov. 17, 2008) ("Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.").

   3.4. Administrative Office of the Courts, Ethics Comm. of the Kentucky Judiciary, Formal Ethics Op. JE-119 (Jan. 20, 2010) ("Judges' Membership on Internet-Based Social Networking Sites").

   3.5. Maryland Jud. Ethics Comm., Opinion Request No.: 2012-07 (June 12, 2012), http://www.courts.state.md.us/ethics/pdfs/2012-07.pdf ("Judge Must Consider Limitations on Use of Social Networking Sites").

3.6. Massachusetts Supreme Judicial Court, CJE Opinion No. 2011-6 (Dec. 28, 2011) ("Facebook: using social networking web site").

3.7. New York Advisory Committee on Judicial Ethics, Advisory Opinion 08-176 (Jan. 29, 2009) ("Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. ***.").

3.8. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (Dec. 3, 2010) ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge. ***.").

3.9. State of Oklahoma, Judicial Ethics Opinion 2011-3, 2011 OK JUD ETH 3 (December 6, 2011) ("May a judge who hold an internet social account, such as Facebook, Twitter, or Linkedin without violating the Code of Judicial Conduct?" and "May a Judge who owns an internet based social media account add court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as 'friends' on the account?"

3.10. South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion No. 17-2009 (Oct. 2009) ("Propriety of a magistrate judge being a member of a social networking site such as Facebook.").

3.11. Tennessee Administrative Office of the Courts, Judicial Ethics Comm. Adv. Op. No. 12-01 (Oct. 23, 2012).

4. There is one disciplinary opinion of which we are aware that addressed a judge "friending" an attorney who appeared before him and conducting Internet-based fact research during a civil proceeding: *Public Reprimand B. Carlton Terry, Jr., District Court Judge, Judicial District 22*[13]. For a disciplinary opinion tangentially related to the subject of this Chapter inasmuch as it involved a judge's use of unauthorized technology (video recording and live broadcasting) of a civil proceeding, *see In re Complaint Against District Judge Joe Billy McDade,* No. 07-09-90083 (Judicial Council of the Seventh Circuit Sept. 28, 2009).

5. There are a handful of reported decisions that addresses judicial participation on the Internet. Absent definitive guidance from the highest court of a judge's jurisdiction, it would appear prudent to give serious consider to participating in social media and, if so, to what extent.

[13] State of North Carolina Judicial Standards Commission, Inquiry No. 08-234 *(*2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

5.1. *Domville v. State,* 103 So.3d 184 (Fla . 4th Dist. Ct. App. 2012) (*per curiam*) (granting a criminal defendant's motion to dismiss because the judge was Facebook friends with the prosecutor).

5.2. *Chace v. Loisel,* Case No. 5D13-4449, 014 WL 258620 (Fla. 5th DCA 2014) (questioning *Domville* and holding that, to warrant recusal, party must allege facts sufficient to "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial").

5.3. *Youkers v. State,* 400 S.W.3d 200 (Tex. App. May 15, 2013)(declining to find bias where the trial judge was a "friend" of the victim's father on a social networking site).

6. Further Reading

6.1. Peter Geraghty, *Summary on Judges' Use of Electronic Social Networking Media*, *YOUR ABA, available at* http://www.americanbar.org (last visited 4/30/13).

6.2. *Formal Opinion 462: Judge's Use of Electronic Social Networking Media*, ABA STANDING COMM. ON ETHICS AND PROF. RESP., Feb. 21, 2013, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf (last visited Feb. 4, 2014).

6.3. National Center for State Courts, *Social Media and the Courts State Links*, http://www.ncsc.org/topics/media/social-media-and-the-courts/state-links.aspx?cat=judicial%20ethics%20advisory %20opinions %20on%20social%20media (last visited Jan. 22, 2014).

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ADDENDUM
Including Supplemental Materials

PREFACE

This Addendum is a stand-alone document that includes various articles authored by attorneys. Unlike scholarly articles referenced in the *Resources*, the articles here have not been peer reviewed and may reflect partisan views.

I. INTRODUCTION

Letter to the Editor: J.G. Carr, *From the Bench: Fixing Discovery: The Judge's Job,* Vol. 38, No. 4, LITIGATION 6 (2013) and S.J. Miller, *Response to "Fixing Discovery: The Judge's Job,"* 39 LITIGATION 7 (2013).

S.B. Harris & R.J. Hedges, *Small Stakes Claims Can Mean Big Headaches*, 13 DIGITAL DISCOVERY & E-EVIDENCE (BNA) 96 (Feb. 28, 2013).

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14. Allocation of costs during litigation

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16. Discovery motion practice

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