E-DISCOVERY:
COOPERATION v. ZEALOUS ADVOCACY
A CASE FOR BOTH FROM ALL INVOLVED

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I. PARTIES AND STATUS

Plaintiff Marjorie Webster ("Webster") is a twenty-two year old senior at Transylvania University. She lives in Kentucky. The defendant is Roadrunner Inc., which owns and operates a bar by that name in Lexington.

Webster sued Roadrunner on June 30, 2014, in the 22d Judicial Circuit. Webster sought assignment of a civil jury trial date pursuant to Rule 14A of the Rules of Practice of the Fayette Circuit Criminal and Civil Courts. Various discovery disputes are being presented to the judge at the conference today.

II. ALLEGATIONS

Webster alleges that on September 1, 2013, she and five friends were celebrating the start of their senior year at the Roadrunner. Webster and her friends were encouraged by bartenders and a hostess to climb on the bar and dance. The bar was wet and extremely slippery. Webster, urged on by the employees, climbed on the bar so she could be photographed by her friends. She slipped and fell, sustaining serious neck and back injuries which required several surgeries and caused her to miss what should have been her senior year. Webster seeks compensatory and punitive damages from Roadrunner. Roadrunner denied liability and asserted an affirmative defense based on Webster's comparative negligence.

III. DISCOVERY DISPUTES

Rather than file motions under Rule 15, the parties presented these disputes to the judge:

A. Disagreement as to when the parties' duties to preserve arose: Webster contends that Roadrunner's duty began on the day she was injured. Roadrunner contends that its duty began when it received a demand letter from Webster's attorney on April 30, 2014. By that date, all of the employees who allegedly urged Webster to climb on the bar had left Roadrunner's employment, and any video captured on surveillance cameras had been deleted.

B. Roadrunners' contention is that Webster's duty arose on the date of her injuries. Webster argues that her duty arose only after she met with her attorney and he filed the Complaint.

C. Disagreement about the degree of discovery that Roadrunner wants: Roadrunner wants Webster to stipulate to the production of any images or statements from her Facebook account. Webster argues that: (a) the content of her account is not within her control; (b) the Stored
Communications Act bars production; and (c) the request is overbroad and an invasion of her privacy.

D. Disagreement about discovery that Webster wants: Webster wants Roadrunner to depose a Roadrunner representative to determine: (a) what Roadrunner posts on its web site and its Facebook page, as well as YouTube, about women who dance on the bar; (b) how Roadrunner manages its Internet presence; (c) how Roadrunner manages images sent to it by patrons; and (d) what records retention schedules, if any, apply to images on Roadrunner’s Facebook account, on YouTube, and on its web site. Roadrunner says that this information is irrelevant.

IV. WHAT SHOULD THE JUDGE DO?
A group of firefighters’ motion to compel a city insurance administrator to participate in a Rule 30(b)(6) deposition on the manner and methods used to store and maintain electronically stored information is denied because the motion is premature in light of the plaintiffs’ failing to date to request any substantive information, the U.S. District Court for the District of Arizona held April 15 (Miller v. York Risk Servs. Grp., No. 2:13-cv-1419-JWS, 2014 WL 1456349 (D. Ariz. Apr. 15, 2014)).

Plaintiff Laurie Miller and the other firefighters sued defendant York Risk Services Group, alleging the insurance administrator violated the Racketeer Influenced and Corrupt Organizations Act, as well as Arizona state law. The firefighters then moved to require York Risk Services Group to participate in a Rule 30(b)(6) deposition, arguing a deposition would allow them to tailor future discovery requests to avoid disputes.

The court instructed the firefighters to begin the discovery process by seeking substantive information. If the insurance administrator then asserted that retrieving ESI would be unduly burdensome, a deposition may be appropriate, the court said.

eDiscovery Experts Weigh In on 'Luddite' Approach.

The ruling has attracted attention from eDiscovery experts and practitioners, who have labeled the holding as a "Luddite" approach to handling digital discovery. In a legal world in which technology is rapidly developing and ESI is becoming a commonplace target of discovery, many view the decision to deny an early deposition as contrary to the court’s role as a case manager and facilitator of open discussions about ESI.

"This all could have been avoided," Bloomberg BNA Digital Discovery and eEvidence Advisory Board Chair and former U.S. Magistrate Judge Ronald J. Hedges told Bloomberg BNA May 19. "This should have been talked about at the 26(f) stage or it should have been brought to the attention of the presiding Magistrate in the discovery plan."

According to Hedges, in the world of ESI, litigators and parties are constantly exhorted to be more specific, "so it would make sense to take the depositions."

Hedges called the sequence of events a failure of case management on the judge’s part, specifically in light of the recent Civil Rules amendment proposals in which judges are urged to be active case managers.
The Sedona Conference®'s Deputy Executive Director Kenneth Withers also spoke with Bloomberg BNA about the decision, taking a slightly different approach to the judge's denial of the 30(b)(6) deposition request.

"Before the 2006 eDiscovery amendments (and still today in some state courts), an initial 30(b)(6) deposition of a party's IT representative was considered a useful tool to plan for further discovery," Withers told Bloomberg BNA May 20. "However, this has been supplanted by the less costly – and often more productive – informal, non-binding interview, usually as part of the meet-and-confer process . . . . Why the parties didn't opt for this in the first place isn't discussed in the short opinion, but I think the judge – by asking the requesting party to issue their discovery request – is setting the stage for that to occur."

Withers explained to Bloomberg BNA that one of the proposed amendments would allow parties to submit 'proposed' or 'draft' discovery requests in advance of a Rule 26(f) meet-and-confer.

"The time to reply wouldn't start until the parties actually met, so there would be no prejudice to the requesting party in that regard, but it is felt that having a draft request going into the meeting would speed up the process and assist in cooperation," Withers said. "My only concern about the judge's order here is that the responding party be given similar latitude, and allow the time to respond to be extended slightly to allow for such a meeting."

Judge John W. Sedwick wrote the order.

Doyle Raizner LLP in Phoenix represented the fire-fighters.


BY TERA E. BROSTOFF

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The Sedona Conference® issued its Cooperation Proclamation in 2008, launching "a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a just, speedy, and inexpensive determination of every action." The intent is "to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes."

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

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

* The full text of this document is available free for personal use from The Sedona Conference® www.thesedonaconference.org/download-pub/465.
This authoritative 55-page Fourth Edition of the Glossary defines more than 700 eDiscovery terms, and is an outgrowth of The Sedona Conference Working Group 1 on Electronic Document Retention and Production. The Glossary represents the work of WG1’s RFP+ eDiscovery Vendor Panel. Additionally, there has been significant input to the Glossary from the public since the First Edition of the Glossary was published in 2005.

The RFP+ Group has two components: a small panel of users of electronic discovery products and services from corporate law departments and defense and plaintiff firms, and a larger group of electronic discovery product and service providers who have joined as members to support this effort in response to an open invitation available on The Sedona Conference website.

The intent of the Glossary is to provide a common language resource to the bench and bar to facilitate the process of communication between all constituents in the eDiscovery process: clients, counsel, eDiscovery product and service providers, and the judiciary. We hope that it will serve as a useful resource throughout the eDiscovery process, such as when discussing and negotiating the scope and conduct of eDiscovery in the spirit of cooperation.

The Glossary has been cited in law review articles and by state and federal courts in eDiscovery decisions. The Fourth Edition of the Glossary adds new terms, deletes outdated terms, and edits the definition of some terms to recognize the rapidly-evolving case law. There are additional citations for terms that have been relied upon by the judiciary in published opinions.

* The full text of The Sedona Conference Glossary is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/download-pub/3757.
Cost-shifting and its treatment by both the federal and state court systems, the Federal Rules of Civil Procedure, and international legal systems were discussed in the "Shifting and Sharing the Costs of Preservation and Discovery: How, When and Why" webinar hosted by Bloomberg BNA November 18th. Digital Discovery and E-Evidence Report Advisory Board Chair Ronald J. Hedges, of Ronald J. Hedges LLC, moderated the panel's discussion of why cost-sharing has and continues to be a hot topic. The faculty was rounded out by Advisory Board member Jeane A. Thomas of Crowell & Moring, Annika K. Martin of Lieff Cabraser Heimann & Bernstein LLP, the Honorable Craig B. Shaffer, of the U.S. District Court in Denver, Colorado, and Kenneth J. Withers of The Sedona Conference.

Focus on Cost-Sharing Heats Up

Martin explained that in 1998, the Advisory Committee on Civil Rules proposed the adoption of an amendment to the Rule 34(b) to make explicit the court's authority to condition document production on payment by the party seeking the discovery. This authority was made implicit in the 1983 adoption of Rule 26(b)(2). Nonetheless, the amendment was not adopted, Martin said, as many Committee members believed Rule 26(b)(2) was sufficient. However, in the wake of discussions regarding the amendment on costs, some federal courts undertook to create a test for when shifting costs would be appropriate. Judge John Facciola of the District of Columbia led the way with the marginal utility test he announced in McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001).

Courts Develop Tests, Pilot Programs

According to the faculty, Judge Shira Scheindlin brought cost-shifting in eDiscovery home when she presided over the landmark Zubulake cases. Thomas explained that Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (Zubulake I) dealt with the discovery of inaccessible electronically stored information and who should be responsible for paying for its production. In Zubulake I, certain relevant emails were deleted by UBS from its active servers and were only available on archived backup discs. UBS said it would be unduly burdensome to produce those emails, costing the company $175,000 to restore, review and produce. UBS requested that in the event that they were required to produce the emails, the plaintiff should bear some or all of the costs.

In Zubulake II, Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y. 2003), Judge Shira Scheindlin distilled a number of principles about cost-shifting into one seven-factor test. She began by explaining that while a presumption exists that the
responding party is responsible for bearing the expenses of complying with discovery requests there are certainly circumstances where courts have the authority to order cost-shifting.

In Scheindlin's seven-factor test, the first two factors are comprised of Judge Facciola's marginal utility test. Courts must first determine whether the request is specifically tailored to discover the relevant information and whether the information is available from other sources. Scheindlin made clear that those two factors should predominate in the analysis of who pays, Thomas said.

Hedges noted that Zubulake I seems to hold that cost-shifting is only available for information that is not "reasonably accessible."

"But as I've understood it, judges have always had the inherent power to cost-shift at any time," Hedges said.

Withers agreed, stating that courts have not "equally applied" the Zubulake I decision.

Withers also noted that several circuits and courts around the country have engaged in Pilot Programs to encourage discussions about cost-sharing as an effort to avoid the court's involvement. Withers highlighted the 7th Circuit Pilot Project, Principle 2.06, which encourages parties to discuss the idea of cost-sharing, particularly for tasks that both sides will be doing anyway, such as conversion of paper documents to optical character recognition (OCR).

**Patent and Trademark Litigation**

The faculty also discussed how cost-shifting has played out in the specific area of patent and trademark litigation. Withers explained that under 35 U.S.C. § 285, "the court in exceptional cases may award reasonable attorney fees to the prevailing party." According to Withers, prior to April, the leading case on the statute was Brooks Furniture Mfg. Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378 (2005), which stated exceptional cases involve "some material inappropriate conduct," "brought in subjective bad faith," and "objectively baseless."

However, the Supreme Court overruled the test in Octane Fitness LLC v. ICON Health & Fitness Inc., 134 S.Ct. 1749 (2014). The Supreme Court held that an "exceptional case" is simply one that stands out from others with respect to the substantive strength of a party's litigation position or the unreasonable manner in which the case was litigated.

"But we are still unsettled as to what the new standard it," Withers warned. "There have been fifty cases since Octane Fitness but no comprehensive set of exceptions yet."

**Non-Party Obligations to Bear Costs**

Judge Shaffer addressed Rule 45's role in cost-shifting for non-parties. Rule 45(d)(1) states that a court must impose sanctions where a party or attorney fails to take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena. Judge Shaffer explained that the Rule requires a court to impose a sanction, but cost-shifting is not required merely because the subpoenaed party comes forward and says it has been subjected to some discovery obligation.
"Rule 45(d) vests in the court significant discretion," Judge Shaffer observed.

In an attempt to avoid cost-sharing conflicts, the non-party should reach out to the requesting party to resolve issues such as form of production and to narrow down requests, Withers explained. Non-parties that constantly receive these types of subpoenas should also have a clear handle on what their costs are.

"If they can establish that they have procedures for handling request and know what their costs are, the Rule 45 subpoena may look like a FOIA request," Withers explained. "These institutions may be able to say 'here are our set schedules of costs based on our experience.'"

**Cost-sharing Abroad and at Home**

Withers also discussed the way that the Canadian and English Judicial systems have incorporated cost-sharing and cost-shifting into their jurisprudence and statutory layout. According to Withers, Canadian parties bear their own interim discovery costs, but costs may be recovered by the prevailing party at the end of the litigation. Ontario courts have tended to use a Zubulake-like analysis to determine when cost-shifting should take place.

"Courts in Canada don't simply blindly sign off on the final bill," Withers said. "They scrutinize rather carefully, and while a party can probably get between 40 and 70 percent of their costs, they are not going to get 100 percent."

In Ontario, litigation about costs has become a satellite industry, Withers added.

However, in England, prevailing parties are far more likely to recover nearly all of their costs. Withers cited Lord Justice Jackson's "Big Bang" Reforms of April 2013, which requires parties to develop and exchange discovery budgets. The budgets are non-binding, but they do serve as a presumptive basis for post-judgment cost awards.

"If you vary from the budget, you have to demonstrate that the additional costs were reasonable and proportionate," Withers said.

And as for law-making in the United States, Judge Shaffer, who currently sits on the Advisory Committee on Rules of Civil Procedure, stated that the Committee will likely be asked to revisit the issue of cost-sharing in the coming months as the topic remains a "hot button" issue.

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"JUMPSTART OUTLINE":¹ QUESTIONS TO ASK YOUR CLIENT & YOUR ADVERSARY TO PREPARE FOR PRESERVATION, RULE 26 OBLIGATIONS, COURT CONFERENCES & REQUESTS FOR PRODUCTION

The Sedona Conference®
The Sedona Conference® Working Group Series℠
A Project of The Sedona Conference® Working Group on Electronic Document Retention & Production (WG1)
MARCH 2011 VERSION


Introduction

This outline sets forth, by way of example only, a series of topics and questions to ask your client and your adversary as you prepare for meeting obligations related to preservation, requests for production, court conferences, and Fed. R. Civ. P. 26. The answers to these questions will guide you in (i) instructing your client about his or her preservation and production obligations, (ii) understanding your adversary's systems and

¹ The Sedona Conference® “Jumpstart Outline”

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

Author: The Sedona Conference®; Editor-in-Chief: Ariana J. Tadler; March 2011 Version

This outline was initially prepared by Ariana Tadler for The Sedona Conference® Institute’s℠ program entitled “Getting Ahead of the eDiscovery Curve: Strategies to Reduced Costs & Meet Judicial Expectations” held March 13-14, 2008, at the Westin Horton Plaza San Diego, San Diego, CA, as an example of a tool to assist counsel in dealing with electronic discovery issues. It was updated recently.

The opinions expressed in this publication, unless otherwise attributed, represent consensus views of the members of The Sedona Conference® Working Group on Electronic Document Retention & Production. They do not necessarily represent the views of any of the individual participants or their employers, clients, or any other organizations to which any of the participants belong, nor do they necessarily represent official positions of The Sedona Conference®.

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preservation efforts to date, and (iii) structuring and tailoring your discovery requests addressed to your adversary. This is a simplified outline to assist, in particular, those people who have had only limited experience in dealing with electronic discovery. As those with extensive experience in this arena know, the process of questioning—and even the questions themselves—are iterative in scope. With each answer you elicit, inevitably additional questions must be asked. Hopefully, having an outline like this within easy reach will serve as a "jumpstart" to encourage transparency and dialogue in the discovery process, as contemplated by the Rules and The Sedona Conference® Cooperation Proclamation.

1. **Document Retention Policy**

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

   1.1.1 If yes, when was the policy implemented?

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

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

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

2. **Key Custodians of Potentially Relevant Information**

2.1 Given the facts of the case, who are the key custodians of potentially relevant information?

   Who is responsible for maintaining/administering the company's electronic systems?

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

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

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

2.3 Disclosure of identities of key custodians

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

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

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

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

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

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

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

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

3. Network Servers

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

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

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

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

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

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

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

3.3 Can specific files contained on network backups be selectively restored?
3.3.1 How? By what means?

3.3.2 Have you ever done this before?

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

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

3.4.1 If so, under what circumstances?

3.4.2 If so, what is the rotation period?

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

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

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

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

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

4. **Email Servers**

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

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

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

4.2.1 Are the systems the same/different from those identified in Question 4.1 above? Discuss any differences.
4.3 Are end-user emails that appear in any of the following folders stored on: (i) the end-user's hard drive, (ii) an email server, or (iii) a server of a third party application service provider:

4.3.1 "Inbox"?

4.3.2 "Sent items"?

4.3.3 "Delete" or "trash" folder?

4.3.4 End user stored mail folders?

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

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

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

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

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

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

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

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

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

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

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

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

4.7.1 Does the company have or maintain an index or mapping resource that would serve as a reference to identify which employees' email is stored on particular backups?
4.8 As a matter of firm policy, do you overwrite, reformat, erase, or otherwise destroy the content of the backups of your email servers on a periodic basis?

4.8.1 If so, what is the rotation period?

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

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

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

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

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

5. **Hard Drives**

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

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

5.1.1 If so, under what circumstances?

5.1.2 If so, how long are such backups retained?

5.1.3 Please describe the backup system.

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

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

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

5.4.1 Is it possible for employees to override such impediments?
5.5 To what extent has a search been done to determine the extent to which any of the key custodians in this litigation did in fact save files, emails, or other data to their desktop or laptop hard drives? Flash drives?

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

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

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

6. Non-Company Computers

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

6.1.1 If so, what is that policy?

6.2. Is there any technical impediment to employees using computers not owned or controlled by the firm to create, receive, store, or send work-related documents or communications?
"DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED & JUST WAY."

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

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

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

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

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

(Opening Note to the Reader: This article expands on an earlier and shorter one co-authored by one of the authors that appeared in the July 2013 issue of the FMJA Bulletin titled, "Small Stakes Claims Can Mean Big ESI Headaches.")

I. INTRODUCTION

This article, authored by two sitting United States Magistrate Judges, a former United States Magistrate Judge, and a trial judge from the State of Florida, focuses on the management of electronically stored information ("ESI") in what might be defined as "small" or "small stakes" (hereinafter "small") civil actions. The volume and complexity of ESI in various forms and from various sources is constantly expanding. That volume and complexity is making its way into discovery- and evidentiary-related disputes in federal and state courts. At the same time, state and federal judicial resources are being strained by limited court budgets (for example, resulting from "sequestration" at the federal level).

This article explores possible techniques that judges might use to manage the pretrial process in civil actions when the cost and burdens associated with ESI may exceed reasonable monetary recoveries and imperil the "just, speedy, and inexpensive" resolution of civil actions on the merits.

II. WHAT IS A SMALL CIVIL ACTION?

As with many words and phrases used throughout civil litigation, neither "small" nor "small stakes" have precise definitions. Perhaps small actions in federal courts could be defined as those that appear to barely exceed the $75,000 amount-in-controversy pleading requirement for diversity jurisdiction under 28 U.S.C. §1332(a), but which, once past the pleading stage, have demonstratively less value. Or, perhaps, a small action might be one based on the existence of a federal question and the likely recovery is, at best, minimal.

Civil actions filed in state courts, such as those filed in the Florida circuit court where one of us sits, presents an entirely broader meaning of what might be small. State courts, subject to legislative minimum or maximum jurisdictional amounts, run the gamut from traditional small claims to landlord-tenant disputes to foreclosure actions, etc.

We should avoid any attempt at formal definitions. Additionally, we should step away from any discussion of "large" civil actions where monetary recoveries may be enormous, and litigation costs, at least to the uninitiated in the ways of civil litigation, appear obscene. For the purposes of this article, small actions should simply be those in which, unless the presiding judge and the parties are careful, the race may not be worth the prize.
III. THE ACTIVE CASE MANAGEMENT MODEL

Broadly speaking, there are two case management models in state and federal courts: "active case management" and, for lack of a better phrase, "discovery management." These models are driven by, among other things, the manner in which civil actions are assigned (either to one judge throughout the life cycle of the action or to multiple judges at different stages of that life cycle), the volume of actions that might be filed in a particular court and the judicial resources available to that court, as well as the culture and history of a judicial system. For a more detailed discussion of these concepts, see The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary 1-2 (Oct. 2012 ed.), available at https://thesedonaconference.org/judicial_resources.

In essence, active case management departs from the traditional notion that courts should "sit on the sidelines" while parties have the exclusive responsibility to engage in discovery and prepare for trial. In the federal judicial system, active case management is apparent in Rule 26, Fed. R. Civ. P. 26, which has evolved to recognize the essential role of the judge in managing the pretrial stages of civil litigation and promoting the objectives of Rule 1, "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

This article proposes that active case management of ESI-related issues is essential to ESI in small actions. Active case management should be the norm in federal courts given that civil actions are generally assigned to one district judge and one magistrate judge. Active case management may prove more difficult in state courts, which often use discovery management as the model. Nevertheless, any judge, federal or state, can take steps to control costs and delay.

Indeed, small actions might be ideally suited for active case management. Solutions to ESI-related disputes might be simpler than in large, "bet the business," actions in which exotic sources and volumes of ESI are more likely to be in issue. Such solutions should enable judges to minimize costs and avoid unnecessary delay in small actions.

IV. WHAT A JUDGE CAN DO

Judges are, in a sense, "reactive." After all, discovery is party-driven, not judge-driven. Judges can only learn about disputes when parties choose to bring these to a judge's attention, either informally or by formal motion.

Nevertheless, judges and parties are both responsible for the efficient management of civil actions.

There are opportunities for judges to control ESI-related cost and delay.

These opportunities are most available when judges engage in active case management at the earliest stages of litigation. Therefore, to enable parties and judges to conserve their available resources, active case management should, ideally, begin before the parties have begun to engage in discovery or soon thereafter.
Here are some active case management techniques:

1. Encourage the parties to prepare litigation budgets for examination at the initial or an early case management conference. (There is a caveat to this technique: Depending on the nature of the action, it may not be realistic to expect parties to develop litigation budgets at the earliest stages of litigation).

2. At the initial or at an early case management conference, set an early and firm trial date that will focus the parties on what discovery is truly needed in a limited time span and that might prevent or at least discourage the parties from seeking discovery of "marginal" ESI.

3. At the initial or at an early case management conference, engage the parties in a discussion of the anticipated "value" of the action and do so in the context of the parties' own estimates of litigation costs. (Referring back to #1 above, this might or might not be done in the context of budgeting).

4. At the initial or at an early case management conference, encourage the parties to address the volume and sources of ESI that might be discoverable, taking into account what might be asymmetrical volumes and sources of ESI, including social media accounts, and also encourage the parties to limit the scope of preservation of ESI.

5. At the initial or at an early case management conference, encourage the parties to consider their obligation to engage in "proportionate" discovery. In states that do not have a formal proportionality rule, encourage the parties, in the interest of conserving their own resources and avoiding discovery of marginal ESI, to engage in proportionate discovery.

6. Assuming the parties are unwilling or unable to agree on proportionate discovery, take active measures to impose proportionality in discovery. Such measures might include, among other things, restricting discovery of ESI to a limited number of custodians in the first instance, or restricting ESI discovery to active and readily accessible sources of ESI within a party's control rather than allowing parties to serve subpoenas on nonparties or to seek discovery of ESI from sources that are not reasonably accessible.

7. Encourage (and, if possible, require) staged or phased discovery including, for example, the completion of "written" discovery before allowing any depositions or the bifurcation of fact and expert discovery.

8. Encourage (and, if possible, require) parties to present discovery disputes in an informal manner such as submitting short letters or arranging telephone conferences in lieu of often expensive and protracted motion practice.

9. Encourage the parties to enter into an agreement (and/or, if reasonable and appropriate, execute an order), that protects the parties from waiver
of the attorney-client privilege or work product protection. See Fed. R. Evid. 502(d)-(e).

10. Encourage the parties, if a small action proceeds to trial, to stipulate to the admissibility of ESI.

Perhaps above all else, a judge should demand "ESI competence" from attorneys. This should not be a forlorn hope. After all, the Model Rules of Professional Conduct were amended by the ABA House of Delegates in August 2012 to reflect the role of ESI in the practice of law. But what should competence mean in the context of the small action? Competence might, for example, mean:

1. Expecting an attorney to be able to explain, after consultation with the client, what ESI the client has.

2. Expecting an attorney to be able to explain, after a meaningful discussion with adversary counsel, why certain ESI should be subject to discovery.

3. Expecting an attorney to be able to explain, after a meaningful discussion with adversary counsel, why, certain ESI demanded by the adversary would be difficult or costly to produce.

There is one area of attorney competence that is discomforting. In preparation for this article, one of us asked a number of attorneys how they "deal" with ESI in small actions. Several attorneys (whose identities shall assuredly remain anonymous) responded along the lines that they did not understand ESI, did not want to deal with ESI, and agreed with their adversaries to "avoid" ESI. Willful ignorance regarding ESI cannot – and should not – be deemed the hallmark for competent counsel.

V. CONCLUSION

ESI can – and should – be managed by judges in small civil actions. There are many opportunities to do so.

Hopefully, this article will encourage judges, federal and state, to take steps to limit the cost and delay that is often associated with the discovery and use of ESI in small actions and to move small actions to resolution, either by settlement or trial.


For a detailed discussion of ESI-related case management from the beginning to the end of civil litigation at the trial level in state or federal courts, see generally The Sedona Conference Cooperation Proclamation: Resources for the Judiciary (Oct. 2012 ed.), available at https://thesedonaconference.org/judicial_resources.
THE SEDONA CONFERENCE COOPERATION PROCLAMATION
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The Sedona Conference launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests – it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Overly-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

Effort to change the culture of discovery from adversarial conduct to cooperation is not utopian. It is, instead, an exercise in economy and logic. Establishing a culture of

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1 See John Bace, Gartner RAS Core Research Note G00148170, Cost of eDiscovery Threatens to Skew Justice System, 3 (Apr. 20, 2007), available at http://www.knowledgestrategiesolutions.
Cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively. Methods to accomplish this cooperation may include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets based on proportionality principles; and

(While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "takeaways" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to e-discovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.").

See, e.g., Board of Regents of Univ. of Nebraska v. BASF Corp., No. 4:04-CV-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted]. If counsel fail in this responsibility – willfully or not – these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.").
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held "hide the ball" mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if "playing fair" is worth it.

The Sedona Conference Cooperation Proclamation

This "Cooperation Proclamation" calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference views this as a three-part process to be undertaken by The Sedona Conference Working Group on Electronic Document Retention and Production (WG1):

Part I: Awareness – Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference Cooperation Proclamation.

Part II: Commitment – Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a "Case for Cooperation" which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools – Developing and distributing practical "toolkits" to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.
Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.