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SedonaConference



The Sedona Conference

The Sedona Conference Working Group 1
Electronic Document Retention & Production
2023 Midyear Meeting

The Benson – Portland, OR

#SedonaConference

ANNOTATED AGENDA

Wednesday, April 26, 2023

5:30 — 7:30 Evening Welcome Reception

Thursday, April 27, 2023

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

8:30 — 8:45 Welcome & Announcements
(Craig Weinlein, Claudia Morgan)

8:45 — 10:15 [Session 1] ESI Case Law in 2023: Key Trends and Developments
(Phil Favro*, Hon. Noelle Collins, Michelle Newcomer, Anthony Petruzzi)

Discovery case law is challenging lawyers to more effectively handle basic and advanced ESI issues for their clients. With insightful decisions on preservation, structured data, privilege logging, the reasonableness of searches conducted through Microsoft 365, and other hot-button issues, this session will provide practitioners with an understanding of the top eDiscovery court decisions from the past six months and discuss how they may affect discovery practice going forward in 2023.

Required Material

1.1 Selected eDiscovery and ESI Case Law from 2022-23

10:15 — 10:45 Morning Break

10:45 — 11:30 [Session 2] Federal Rules Update with Hon. Robin L. Rosenberg, Chair, Advisory Committee on Civil Rules
(David Burman, Ross Gotler*, Hon. Robin L. Rosenberg)

The Honorable Robin L. Rosenberg of the Southern District of Florida, Chair of the Advisory Committee on Civil Rules, will join our panelists to provide an update on the latest developments in federal civil rulemaking, to review the status of potential amendments, including those relating to MDLs and privilege logs, and to discuss potential impact of these amendments on discovery practice.

Recommended Material

2.1 Agenda Book: Meeting of the Advisory Committee on Civil Rules, March 28, 2023

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- 11:30 — 12:30 [Session 3] What's the Verdict: Updating The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control"**
(Vince Carnevale, Ashley Picker Dubin, Jessica Hasen, Tessa Jacob*, Jon Polenberg)

It has been six years since WG1 published its Commentary on possession, custody, or control, discussing the three standards that developed in the various circuits to determine whether a responding party has possession, custody, or control of ESI—the Legal Right standard, the Legal Right Plus Notification standard, and the Practical Ability standard. That Commentary analyzed how each of the federal jurisdictions handled this issue and ultimately recommended the Legal Right test as the most reasoned standard. Since 2016, numerous cases have addressed this issue, and many have cited to the Commentary. Beginning in 2023, a brainstorming group will determine whether Sedona should update this Commentary. This panel will discuss the Brainstorming Group's findings and recommendations to date.

Required Material

- 3.1 The Sedona Conference WG1 Possession, Custody or Control Brainstorming Group Outline

Recommended Material

- 3.2 The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control" (2016)

12:30 — 1:30 Lunch (provided)

- 1:30 — 2:30 [Session 4] Recovering the Costs of eDiscovery: Time to Bring the Interpretation of Section 1920 into the 21st century?**
(Hon. Maria Audero, Tracy Greer, Paul McVoy, Meghan Podolny*, Jennifer Scullion)

A prevailing party has the right to recover certain costs associated with litigation pursuant to 28 U.S.C. § 1920, as well as statutory cost-shifting provisions. Prevailing parties may seek to recoup costs attendant to eDiscovery, given the expense associated with collecting, processing, and producing electronically stored information ("ESI"). However, most federal courts confronting the issue under various standards often have determined that eDiscovery costs are recoverable only in very limited circumstances. The analysis tends to ask whether the costs—either literally or by analogy—are akin to "making a copy," although how that is defined may vary by court and Circuit. Join us for a session exploring the varied approaches to recovery of costs, including in the settlement context, and a conversation about whether this conceptual framework makes sense in 2023.

Recommended Materials

- 4.1 Recovering eDiscovery Costs as a Prevailing Party: Planning Today to Improve Your Chance of Returns Tomorrow
4.2 The Award of E-Discovery Costs to the Prevailing Party: An Analog Solution in a Digital World
4.3 *Rimini Street Inc., v. Oracle USA, Inc.*, 139 S.Ct. 873 (2019)

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2:30 — 3:30 [Session 5] Mobile Device Discovery: Challenges and Guidance

(Shauna Itri, Dennis Kiker*, Warren Kruse, Robin Perkins, Deric Yoakley)

Gone are the days when the contents of mobile devices, specifically phones and tablets, could be presumed to be outside of the scope of discovery obligations. Discovery of mobile device data affects all parties (and often non-parties) in litigation and investigations, whatever their role or size of organization. Yet, there are few sources of practical guidance on the topic. This panel will explore (i) when mobile device data (including third-party chat or messaging applications) may or should be collected; (ii) the implications of BYOD and other company policies and procedures around possession, custody, or control of mobile device data; (iii) privacy issues that arise when personal mobile devices are collected; and (iv) practical guidance on collecting mobile device data, including considerations for collecting data from third-party chat or messaging applications.

Required Material

- 5.1 The Sedona Conference WG1 Discovery of Mobile Device Data Brainstorming Group Outline

Recommended Materials

- 5.2 The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations
- 5.3 The Sedona Conference Commentary on Ephemeral Messaging
- 5.4 The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”
- 5.5 Additional Resource List for Mobile Device Discovery

3:30 — 4:00 Afternoon Break**4:00 — 5:00 [Session 6] Cybernetic Eyes May Be the Mirror of Our Soul: What Artificial Intelligence Can Teach Us about Human Biases**

(Aron Ahmadia, Kelly Atherton, Kimberly Duplechain*, Tara Emory, Hon. Lauren King)

As Paulo Coelho noted, “[t]he eyes are the mirror of the soul and reflect everything that seems to be hidden; and like a mirror, they also reflect the person looking into them.” Similarly, humans and AI software make decisions based on information about a world built, measured, perceived, and described by humans. In this way, both humans and AI models incorporate existing conscious and unconscious biases, group exclusions, and systemic inequities. Unlike inputs and analysis in human thinking, inputs and analysis in AI are more identifiable and therefore serve as useful representation of how human biases proliferate and impact decisions—and in a more transparent fashion. This panel will use AI examples to discuss how everyone can identify and confront bias in our own human mental models, and take steps to be more equitable and inclusive.

Required Material

- 6.1 Sentiment Analysis: Relativity’s Approach to Developing Responsible AI Solutions for eDiscovery and Investigation

Recommended Materials

- 6.2 Artificial Intelligence as Evidence

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- 6.3 An Algorithmic Assessment of Parole Decisions
- 6.4 Bias in data-driven artificial intelligence systems—An introductory survey
- 6.5 Additional Resource List for What Artificial Intelligence Can Teach Us about Human Biases

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

Friday, April 28, 2023

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

8:30 — 10:00 [Session 7] Voices from the Bench: The Judicial Perspective for 2023 and Beyond
(Hon. Maria Audero, Hon. Noelle Collins, Hon. Young Kim, Hon. Lauren King, Sandra Metallo-Barragan*, Hon. Robin L. Rosenberg)

This session will present a wide range of judicial perspectives on eDiscovery trends, critical issues, and best practices. The judges will consider the impact of emerging eDiscovery case law and provide guidance on preventing eDiscovery pitfalls and strategies to get out of them.

Recommended Material

7.1 The Sedona Principles, Third Edition

10:00 — 10:30 Break

10:30 — 11:15 [Session 8] Working Group 1 Works in Progress: Updates from Ongoing Drafting Team Projects
(Claire Hass*)

This session will provide short status updates from the following drafting teams that are otherwise not presenting at the Midyear Meeting and allow for dialogue about any pending issues on the various projects: Privilege Logs, Multidistrict Litigation Best Practices, Database Principles, Discovery Sanctions, and eDiscovery Implications of the Internet of Things.

Recommended Materials

8.1 The Sedona Conference Draft Commentary on Privilege Logs

11:15 — 12:00 [Session 9] ESI Protocols in 2023: What Works, What Does Not, How to Move Forward, and Should Sedona Have a Voice?
(Rebekah Bailey*, Hon. Young Kim, Scott Milner, Kyle Pozan, Robb Snow)

This panel will evaluate current ESI protocol trends, with emphasis on when ESI protocols are appropriate, technical components, and both common and creative provisions. The panel will discuss lessons learned from pointed case law and engage in a solutions-driven dialogue on how best to make ESI protocols work for all parties and the court when warranted.

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Required Material

- 9.1 ESI Protocols in 2023: What Works, What Does Not, How to Move Forward, and Should Sedona Have a Voice?

12:00 — 1:00 [Session 10] Ethical Obligations in ESI Disclosure and Negotiation
(Jeannine Kenney, Daniel Lim, LeeAnne Mancari, Maria Salacuse*)

This panel will explore the ethical obligations for requesting and responding parties with respect to ESI requests, disclosures, and negotiations. The panel will consider hypotheticals and discuss the interplay between zealous advocacy and candor in the context of drafting requests, discovery conferences, responding to written discovery, the particulars of search methodology, and validation. The panel will address applicable Professional Rules of Responsibility, Federal Rules, related case law, and applicable Sedona principles.

Required Material

- 10.1 Ethical Obligations in ESI Disclosure and Negotiation

1:00 — 1:15 Closing Remarks
(Craig Weinlein)

1:15 Adjournment & Grab & Go Lunch (provided)