

The 10th Annual Sedona Conference Institute Program on eDiscovery: *Staying Ahead of the eDiscovery Curve: Retooling Your Practice Under the New Federal Rules*

The Rancho Bernardo Inn,
San Diego, California

DAY ONE: Thursday, March 17, 2016

6:30 — 8:30 **Breakfast & Registration**

8:30 — 8:45 **Welcome and Overview**

(Bays, Jenson, Withers)

Materials:

- [1] Kenneth J. Withers, ed., *The 10th Annual Sedona Conference Institute: Recommended Advance Reading* (Mar. 2016)

8:45 — 9:45 **The 2015 Amendments to the Federal Rules of Civil Procedure: History and Overview**

(Allman, Mandel*, Shaffer (J), Tadler)

After five years of discussion, debate, dueling proposals, and a record volume of public comments, on December 1, 2015, the Federal Rules of Civil Procedure addressing discovery changed significantly. In this high-level overview, a panel of rulemaking veterans will review the process, the key provisions, and the practical consequences.

Materials:

- [2] Thomas Y. Allman, *Applying the 2015 Civil Rules Amendments* (Feb. 2016)
- [3] Ariana J. Tadler, *APB to Requesting Parties: Prepare for Proportionality* (Dec. 2015/Jan. 2016)
- [4] Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees* (Summer 2015)
- [5] David G. Campbell, *New Rules, New Opportunities* (2015)
- [6] Hon. John D. Bates, *Memorandum: Transmittal of Proposed Amendments to the Federal Rules of Civil Procedure* (Sept. 2014)

9:45 — 10:45 **The Scope of Discovery: What, If Anything, Has Changed?**

(Brady*, Canty, Crews, Jones, Laporte (J), Owen)

“Reasonably calculated to lead to the discovery of admissible evidence” was long interpreted to allow broad discovery. That language is now gone from the new Rule 26(b)(1). So is the phrase “subject matter.” These have been replaced with detailed language regarding proportionality, which—together with relevance to the claims or defenses—defines the new scope of discovery. Will these, along with other minor changes make a significant difference in practice, either for requesting or producing parties? A distinguished judge and experienced lawyers on both sides of the “v” weigh in.

Materials:

- [7] Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26* (2015)

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- [8] The Duke Law Judicial Studies Center, *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality* (Winter 2015)
- [9] Hon. Paul Grimm, *Techniques Used by Judges to Achieve Proportionality* (2015)

10:45 — 11:00 Morning Break

11:00 — 12:00 The New Jumpstart Outline

(Brady, Gronborg, Jenson, Tadler*)

Designed to assist parties to prepare for a productive Rule 26(f) “Meet and Confer,” the first *Jumpstart Outline* was introduced at the second annual Sedona Conference Institute Program in 2008. It has since become the most popular eDiscovery practice aide in The Sedona Conference library. It has now been updated to accommodate changes in the rules in 2015, advances in technologies, and the practical lessons learned from years of experience. This panel, which includes the editors of the 2016 edition of the *Jumpstart Outline*, will discuss how the *Outline* can be used effectively by all parties at the start of litigation to avoid some of the most common eDiscovery pitfalls.

Materials:

- [10] Kevin F. Brady, Karin Scholz Jenson, and Ariana J. Tadler, *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. 2016)

12:00 — 1:15 Lunch

1:15 — 2:15 Getting Specific: Formulating and Responding to Rule 34 Requests in the New Age

(Bays, Grossman*, Jones, Owen, Shaffer (J), Warner)

“I’m just an RFP...” Schoolhouse Rock may need to write new lyrics to help us understand the discovery process, but we’ll take a discovery request for ESI from inception, to preliminary delivery under new Rule 26(d)(2), to the negotiation process leading up to the Rule 26(f) conference, to the response and objection under the new Rules 34(b)(2)(B) and (C), to testing the adequacy of the response and validity of the objection, and finally to resolution.

Materials:

- [11] Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality* (Fall 2015)
- [12] Lea Malani Bays, LeMar Moore & Kelly M. Warner, *Getting Specific: Formulating and Responding to Rule 34 Requests in the New Age* (Feb. 2016)

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2:15 — 3:15

How Confident are You in Your Competence?

(Canty, Dembin (J), Ellis, Hedges, Warner)*

Many observers have stated that the key to communication, cooperation, and cost-reduction is attorney competence. The ABA now incorporates technological competence in the Model Rules of Professional Responsibility, and states are following suit. This past year, the California State Bar issued a major opinion on technological competence. The problem is defining the responsibility of competence in a way that is applicable to the entire bar, especially if technological competence is dependent, at least in part, on access to technological resources.

Materials:

- [13] The State of California Standing Committee on Professional Responsibility and Conduct, Opinion No. 2015-193 (2015)
- [14] The State of California Standing Committee on Professional Responsibility and Conduct, Opinion 2010-179 (2010)
- [15] *The Sedona Conference Commentary on Protection of Privileged ESI* (Dec. 2015)
- [16] *The Sedona Conference Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers* (Nov. 2015)
- [17] Ronald Hedges and Amy Walker Wagner, *Competence With Electronically Stored Information: What Does It Mean In the Context of Litigation and How Can Attorneys Achieve It?* (Apr. 2015)

3:15 — 3:30

Afternoon Break

3:30 — 4:30

Using Technology to Achieve Proportionality

(Bekier, Gronborg, Grossman, Hoffman, Lynn)*

The Committee Note to the new Rule 26 says that “computer-based methods for searching [ESI] continue to develop... courts and parties should be willing to consider the opportunities for reducing burden or expense of discovery as reliable means of searching [ESI] become available.” What technologies are available, reliable, and appropriate for your cases, and when should you consider them?

Materials:

- [18] Maura Grossman & Gordon V. Cormack, *A Tour of Technology-Assisted Review* (2016)
- [19] *The Sedona Conference Glossary: E-Discovery and Digital Information Management* (Fourth Edition, April 2014 Version)
- [20] Lea Malani Bays, et al., *TAR Case Law Primer* (Feb. 2016)

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4:30 — 5:30

The New Rule 37(e): A Roadmap

(Allman*, English, Mandel, Scheindlin (J), Tadler)

New Rule 37(e) is entirely different from the old Rule 37(e) in addressing the loss of ESI that should have been preserved in the anticipation of litigation. The new Rule 37(e) raises many questions we will explore in this panel, including: What are reasonable steps? What does it mean to restore or replace and at what cost? Who bears the burden of proof on prejudice and intent to deprive? What are the range of remedies available upon a showing of prejudice?

Materials:

- [21] Thomas Y. Allman, *Amended Rule 37(e): Rationalizing the Spoliation Doctrine* (Mar. 2016)
- [22] Thomas Y. Allman, *A Second Look at “Reasonable Steps”: A New Role for a Familiar eDiscovery Concept* (Aug. 2015)
- [23] Gregory P. Joseph & Joseph Hage, *Rule 37(e): The New Law of Electronic Spoliation* (2015)
- [24] Mark A. Berman and John M. Curran, *‘Pegasus’, Adverse Inference Charges and the FRCP* (Jan. 2016)
- [25] Ariana J. Tadler and Henry J. Kelston, *What You Need to Know About the New Rule 37(e)* (Jan. 2016)
- [26] Eric P. Mandel, *FRCP 37(e) Decision Tree* (2015)

5:30 — 7:00

Reception

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DAY TWO: Friday, March 18, 2016

6:30 — 8:45 Breakfast & Registration

8:45 — 9:00 Welcome and Announcements
(Bays, Jenson, Withers)

9:00 — 10:15 The Annual TSCI eDiscovery Case Law Update
(Withers)

The ink was barely dry on the changes to the Rules when decisions started coming out applying them. There already is a growing body of law interpreting the Rules. In this fast-paced interactive session, eDiscovery case law expert Ken Withers will select 12 significant court opinions and enlist members of the faculty and audience to help explain their practical significance.

Materials:

- [27] Kenneth J. Withers, ed., *2015 eDiscovery Case Law*
- [28] Kenneth J. Withers, ed., *2016 eDiscovery Case Law, Through February 15, 2016*

10:15 — 10:30 Morning Break

10:30 — 11:45 In-House Litigation Counsel Roundtable: Will the New Rules Really Help?
(Crews, Ellis, English, Hoffman, Jenson, Lynn)*

Letter after letter to the Advisory Committee on Civil Rules detailed the high costs of preservation, processing, and production—particularly preservation. Do in-house counsel believe that the 2015 Amendments will help, and if so, how? What should outside counsel be doing to best effectuate the potential savings on cost and burden? Will the relationship between in-house and outside counsel change as a result of the 2015 Amendments?

Materials:

- [29] WG6 *Practical In-House Approaches for Cross-Border Discovery & Data Protection* (Sept. 2015, public comment version)
- [30] Karin Scholz Jenson, et al., *Your First Five Questions: A Practical Guide to the Amended Federal Rules of Civil Procedure—Proportionality* (Nov. 2015)

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11:45 — 1:00 The TSCI Judicial Roundtable: Managing Judicial Case Management
(Bays, Dembin (J), Hedges, Laporte (J), Scheindlin (J), Shaffer (J))*

A hallmark of the 2015 Amendments to the Federal Rules is the emphasis on judicial case management. There are explicit provisions to encourage active judicial supervision of discovery, and there are other provisions that implicitly require judicial attention to what has traditionally been a party-driven process. Do judges believe this is going to work? Will their colleagues take up the challenge? Do they have the resources? What can practitioners do to help the judges play a more active role? What has been the experience with ESI liaisons, discovery special masters, and discovery dispute mediation? What can you do if the judge in your case doesn't step up?

Materials:

- [7] Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26 (2015)
- [11] Hon. Craig B. Shaffer, The "Burdens" of Applying Proportionality (Fall 2015)
- [17] Ronald Hedges and Amy Walker Wagner, Competence With Electronically Stored Information: What Does It Mean In the Context of Litigation and How Can Attorneys Achieve It? (Apr. 2015)

1:00 — 1:05 Closing Statements
(Weinlein)

1:05 — 2:00 Grab and Go Lunch (provided)