

The Sedona Conference WG1 Evolution of Documents Brainstorming Group Outline

Brainstorming Group Members

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Summary of the Work of the Evolution of Documents Brainstorming Group

I. Brainstorming Group Charter

Evolving technologies have caused legal practitioners to reconsider traditional notions of what constitutes a “document” for the purpose of conducting eDiscovery. Electronically Stored Information (ESI) and electronic communications increasingly bear little resemblance to digital representations of their paper ancestors. Instead, modern electronic communications and collaborative channels and platforms defy existing definitions of “document,” “record,” “attachment,” or “unitization.” No longer readily identifiable as familiar containers of information, they more resemble snapshots in time of a confluence of data flows that often originate from and live in multiple places. These next-generation forms of communication and collaboration are evolutionary branching events that may present significant challenges for the conduct of the discovery lifecycle, particularly identification, preservation & collection, search & retrieval, production, and presentation.

A brainstorming group (BG) was created to (i) explore the technological nuances of modern electronic communications and collaborative platforms; (ii) assess the unique challenges they present for conducting eDiscovery; and (iii) evaluate whether WG1 can, and should, add to the conversation and move the law forward in a reasoned and just way regarding how these cutting-edge issues should be addressed consistent with best practices.

II. Request for Feedback

The Brainstorming Group requests feedback from WG1 membership on III.A. and III.B below:

- Are there any features outside of those defined in III.A that the BG should consider?
- Are there any challenges the membership has faced outside of those identified in III.B?
- Are there any relevant cases the BG should consider outside of those included in Appendix A?

At the moment, the BG is leaning towards recommending that WG1 form a drafting team for a paper on this topic. What should the scope of that paper be?

- Should it be limited to communications platforms (e.g., “new email attachments/links, apps, chats, collaboration platforms) or be broader?
 - If broader, what else should it include?
 - How should the group handle overlap with other Sedona papers?

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- Should document families be included in the scope of this paper?
- Should the paper aim to define a document or simply comment on the nuances of today's technologies?
- Should the paper be limited to collaboration platforms?

III. Work of the Brainstorming Group

The BG held 9 meetings over 3 months to respond to the BG Charter. Initially, the group focused on existing challenges and current case law (see Appendix A – Case Law). It became immediately apparent that the group would face 2 challenges (See Section III):

- 1) Due to the nebulous nature of the topic, defining a scope would be a challenge especially considering overlap with other Sedona groups.
- 2) Because collaboration platforms are an emerging technology, many of their nuances and challenges have not yet been addressed in current case law and therefore the BG would need to consider potential challenges / nuances as opposed to existing ones.

Based on the panel description for the annual meeting held on October 27 in Philadelphia, the BG decided to focus on the nuances and challenges specifically for collaboration platforms and to solicit feedback on the scope of the BG during the meeting. In an effort to stay current, the BG determined to consider nuances by feature and remain tool-agnostic. The BG believes this approach will allow its work to remain relevant in the face of evolving technologies.

The BG discussed the following categories of modern electronic communications and collaborative platforms:

- a. Communication
 - i. Static Messages: Text, Graphic, Video, Audio, Reactions, Comments
 - ii. Encounters: Voice, Video, VR / AR, Ephemeral
- b. File Collaboration
 - i. Live files
 - ii. Knowledge Management platforms
- c. Tools and Workflow Enablement
 - i. Automated Workflows
 - ii. Scheduling and Calendars
 - iii. Workflow Management
 - iv. Industry Specific Tools (Medical Records, Design Drawings, etc.)
- d. Published Content (IoT, Blogs, Social Media, etc.)

After identifying these sources, the BG next examined the following features of such sources:

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- Custodian vs. Collaborator
- Linked Documents
- Versioning of Live Files
- Continuous Data Streams
- Format of Productions

These features are explored further below.

A. What are some technological nuances of modern electronic communications and collaborative platforms that may distinguish them from more traditional notions of what constitutes a document and may lead to challenges for conducting eDiscovery?

- Custodian vs. Collaborator** - Within collaboration platforms, documents are able to be viewed and updated by more than one person at a time with varying permissions.
- Linked Documents** - Linked documents contain hyperlinks to “live” data via other documents within an organization’s infrastructure or published data on the internet. The BG understands that this topic is more relevant to defining a document family as opposed to an individual document, but nonetheless believes it to be an important feature of collaboration platforms worth exploring.
- Versioning of Live Files** - File versioning relates to the management of multiple versions of the same file, including changes made, users involved, and versions saved.
- Continuous data streams**: continuous data streams such as chat channels present hurdles with collection/parsing into individual documents for consumption.
- Native vs. Non-native** - When working with data reviewed from collaboration platforms, data may only be visible in native format. Conversely, requesting party may need special software to view the native data. Our BG acknowledges that Sedona has already addressed the issue of Native vs. Non-Native in Sedona Principle No. 12 and in Comments 12.a-12.b.ii.

B. What challenges do modern electronic communications and collaborative platforms present as part of conducting eDiscovery?

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1. **“Custodian-based” paradigm:** where document has multiple collaborators, it may be considered to have many “custodians” and sources of preservation, collection, and production. The following questions may arise:
 - i. Should every user who has permission to edit or view a document be determined to be a custodian for ESI collection/review? Treating every document to which a custodian has access could lead to a proliferation of unnecessary documents being collected, reviewed and produced.
 - ii. Additionally, is metadata available to track when collaborators have access to the data?
 - iii. Would a traditional custodian + key word search capture all the versions of a document?
 - iv. Locations may be domestic or foreign, raising cross border issues or access.
 - v. Does it make more sense to examine at the concept vs. custodian/collaborator perspective?
2. **Preservation:** developing a plan may be complicated with multiple collaborators, locations of documents, multiple versions, and other non-custodian based locations.
3. **Collection**
 - i. Would a traditional custodian + key word search capture all the versions of a document?
 - ii. Would metadata note collaborators and versions?
 - iii. Collaborative documents often times contain links to other documents, which raise issues with collection. The following questions may arise:
 1. Is a document that is linked from an email part of a document family with the email?
 2. What version of the linked document can be pulled – the version that exists at the time the email/chat was sent or the version that exists today, or both?
 3. What is the burden/time associated with analyzing the metadata in order to find the correct version?
 4. What is the impact on depositions, motions or trial of not having the linked document, or using only the “current” version of the document if it is used with the email?
 5. What about documents linked within other documents (vs emails/chats)?
 6. What is the burden of collecting linked documents?
 7. Multiple collaborators may lead to difficult issues of privilege where some participants are legal counsel.

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- iv. Licensing issues could control the ability to collect streaming communications -- this presents proportionality issues, both from the perspective of collection at the time of litigation, and from the purchasing perspective (i.e., intentionally limiting the scope of access by downgraded licensing)

4. Processing:

- i. Documents may be saved in different forms and locations
- ii. Processing data so it can be logically reviewed

5. Review

- i. Communication streams may need to be stitched together to understand the full conversation.
- ii. Whether reviewer has access to Linked documents, may impact ability to comprehend communication
- iii. Privilege: multiple collaborators may lead to issues of privilege where some of the participants are legal counsel. Further, the breadth of certain collaborative documents, such as communication streams over an extended period of time, may lead to multiple versions of documents and inconsistent privilege designations.
- iv. TAR may be more difficult depending on the technology.

6. Production:

- i. What is the best way to produce this type of data?

7. ESI protocols:

- i. Such protocols may not account for the nuances in the technology, especially at the outset of the case.
- ii. What should parties consider and include in their ESI protocols related to these issues?