



**The 13th Annual Sedona Conference Institute:
Protecting Privacy, Confidentiality, and Privilege in Civil Litigation**

**The Ballantyne Hotel & Lodge, Charlotte, NC
March 7–8, 2019**

AGENDA

Wednesday, March 6, 2019

6:00 — 8:00 Welcome Reception

Thursday, March 7, 2019

7:30 — 8:30 Breakfast & Registration

8:30 — 8:45 Welcome & Announcements

(D'Ambra, Peck, Weinlein)

8:45 — 9:15 Keynote: Litigating in a World of Stricter Privacy and Data Security Demands and Expectations

(D'Ambra, Peck*)*

In this brief “keynote” session, our program co-chairs introduce us to the constellation of issues emerging as a primary driver of eDiscovery case law, rules, practice, and technology developments: The increasing threats to personal privacy and confidential business data. Discovery procedures that were considered routine ten years ago are no longer acceptable in a digitally networked world in which bad actors, or simple negligence, can trigger “incidents” that have enormous personal and economic consequences. On top of that, states and foreign countries have implemented new laws and regulations to protect privacy and mandate data security, affecting the free flow of information that we had become accustomed to in U.S. civil discovery. Our job is to understand this new environment, identify the potential dangers, and implement tools and procedures to comply with new regulations and protect litigants and non-parties alike.

9:15 — 10:30 [Panel 1] eDiscovery Case Law Update

(Duplechain, Favro, Withers)*

Although our theme this year is privacy and data security, we start each TSCI eDiscovery program with a round-up of the most significant court decisions of the past year—state, federal, and occasionally foreign—that every eDiscovery litigator needs to know. This panel will highlight recent cases addressing preservation, cooperation, proportionality, requests and responses, privilege, costs, and sanctions. We will draw the necessary lessons these cases teach us and lay the groundwork for the more specific topical dialogue to follow.

Required

[01] Kenneth J. Withers, ed., *Selected 2018 eDiscovery Court Decisions* - FORTHCOMING

10:30 — 10:45 Morning Break

Thursday, March 7, 2019 (Cont.)

10:45 — 11:45 **[Panel 2] Protecting Privilege and Confidentiality in Civil Litigation, Part 1**

(*Lee, Peck*, Prewitt, Redgrave, Wettre*)

Long before the public became concerned with data breaches, lawyers were under an obligation to maintain client confidences, in particular the attorney-client privilege and work product protections. Defining the scope of these privileges and protections, and establishing reasonable practices to maintain their confidentiality, was never simple or straightforward. These problems have been exacerbated by the proliferation of cheap, simple, and almost instantaneous methods of digital communication, and the explosion in the sheer volume of information that must be identified and sequestered to protect its privileged status. Federal Rule of Evidence 502 and new technologies offer some assistance but cannot be the complete answer to the problem. This panel will look at recent developments in privilege law and practice that digital technology has necessitated and provide practical guidance for protecting privileges.

Required

[02] The Sedona Conference, *Commentary on the Protection of Privileged ESI* (December 2015)

Recommended

[02a] Hon John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework* (2009)

[02b] Hon. Andrew J. Peck, *Model Rule 502(d) Order*

11:45 — 12:45 **[Panel 3] Protecting Privilege and Confidentiality in Civil Litigation, Part 2**

(*Hedges, Hegedus, Tully*, Vanaskie*)

The previous panel focused on protecting privilege and work product but concerns for privacy and confidentiality in civil litigation go beyond these well-recognized legal categories and encompass personal privacy, the protection of minors, trade secrets, business confidences, and more. Protective orders, which have been a common feature in civil discovery, have evolved to address new and more acute privacy and confidentiality interests. But when discovery is filed with the court or entered into evidence, discovery protective orders do not alter the constitutional and common-law presumption of public access. This panel explores that tension and provides strategies for minimizing the potential negative impact of public access to the courts in the digital age while respecting long-standing rules and traditions.

Thursday, March 7, 2019 (Cont.)

Required

[03] The Sedona Conference, *Commentary on Privacy and Information Security* (November 2015)

Recommended)

[03a] David J. Kessler, Jami Mills Vibbert, and Alex Altman, *Protective Orders in the Age of Hacking* (March 2015)

[03b] Ronald J. Hedges, *Confidentiality Order Standards*

[03c] The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (March 2007)

[03d] Ronald J. Hedges, *Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases: Representative Cases* (January 2019)

12:45 — 2:00 **Lunch**

2:00 — 3:00 **[Panel 4] Addressing Privacy Issues in Social Media Discovery**

(Childs, Duplechain, Favro*, Keeling)

Social media, text messaging, and other informal means of digital communication are of increasing importance in eDiscovery. The old model of “asymmetrical discovery” has given way to an environment in which an individual party now faces as much eDiscovery exposure, relatively speaking, as a major corporation. For the individual, social media discovery involves large volumes of electronically stored information (ESI) over which the party has little practical understanding or control, highly personal information with little or no relevance to the claims and defenses in the action, and plenty of non-party information woven throughout. Courts have by-and-large concluded that the rules of discovery apply equally to social media as any other ESI, but that the mechanics of preservation, review, and production require special attention by the parties, and occasionally intervention by the Court, to protect legitimate party and non-party privacy interests.

Required

[04] The Sedona Conference, *Primer on Social Media, Second Edition* (February 2019)

Recommended

[04a] Robert Keeling, Tami Weerasingha-Cote & John Paul Schnapper-Casteras, *Neither Friend Nor Follower: Ethical Boundaries on the Lawyer’s Use of Social Media* (2014)

[04b] Philip Favro & Keith Call, *A New Frontier In eDiscovery Ethics: Self-Destructing Messaging Applications* (Mar/Apr 2018)

Thursday, March 7, 2019 (Cont.)

3:00 — 4:00 [Panel 5] Addressing Privacy Issues in Non-Party Discovery

(Keeling, Landrum, Podolny, Prewitt, Smith)*

Federal Rule of Civil Procedure 45 and its state rule equivalents provide a mechanism to obtain discovery from non-parties. This is particularly important in eDiscovery, as it is common for relevant electronically stored information (ESI) to be held by non-parties. Although the Rule has been amended several times and is generally interpreted and applied in harmony with the broader rules of discovery, it is not as explicit in terms of negotiation and cooperation as Rules 26 and 34. This means that parties and non-parties must work with the Court on a case-by-case basis to address issues of scope, proportionality, form of production, burdens, and cost shifting. And because this method of discovery involves non-parties who often have little or no stake in the outcome, their privacy and security concerns are at the forefront. What options are available to requesting parties, responding non-parties, and the Court to protect a non-party's heightened privacy and confidentiality interests when served with a Rule 45 subpoena?

Required

[05] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas (April 2008)

Recommended

[05a] Robert D. Keeling and Ray Mangum, *The Burden of Privacy in Discovery* (February 2019) - FORTHCOMING

[05b] The Sedona Conference *Data Privacy Primer* (January 2018)

[05c] The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control" (August 2016)

4:00 — 4:15 **Afternoon Break**

4:15 — 5:30 [Panel 6] Effective eDiscovery in "Small" Cases

(Hedges, Pepiton, Tully, Vance)*

When eDiscovery first emerged twenty years ago as a distinct sub-specialty in civil practice, it was assumed, incorrectly, that it was only an issue in "big" cases involving sophisticated parties and vast amounts of data. But closer analysis, even back then, revealed that eDiscovery issues were regularly appearing in single-plaintiff employment matters, divorce cases, and personal injury actions. Unfortunately, most of the practices, procedures, and technological tools that have been developed over the years have been based on the "big case" or "big firm" model. It has been difficult to scale these down for the 95% of cases that involve smaller dollar amounts, are handled by small firms or sole practitioners, and are litigated in state or administrative courts. But times are changing, and this panel explores the budget-friendly options opening up for conducting effective eDiscovery in "small" cases, which are never small to the parties!



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Required

- [06] 7th Circuit Council on eDiscovery and Digital Management, *Small Case Guidelines* (DRAFT dated Dec. 6, 2018)

Recommended

- [06a] Ronald J. Hedges and Amy Walker Warren, *Competence With Electronically Stored Information: What Does It Currently Mean In the Context of Litigation and How Can Attorneys Achieve It?* (2016)
- [06b] Sherry B. Harris and Ronald J. Hedges, *Small Stakes Claims Can Mean Big ESI Headaches* (2013)
- [06c] Hon. Gill S. Freeman, et al., *Active Management of ESI in “Small” Civil Actions*

5:30 — 7:30 Reception

Friday, March 8, 2019

7:30 — 8:45 Breakfast & Registration

8:45 — 9:00 Welcome & Announcements

(D'Ambra, Peck, Weinlein)

9:00 — 10:15 [Panel 7] Privacy and Data Security for Law Firms and Legal Support Organizations

(Dennis, Hegedus, Pepiton, Vance)*

Law firms—large and small—are prime targets for hackers and data thieves. But many lawyers, law firms, and litigation support personnel lack the training, systems, and technologies needed to effectively fulfill their obligations under ABA Model Rule 1.6(c) to maintain client confidences, under Rule 4.4(b) to properly handle non-client information, or under Rules 5.2 and 5.3 to effectively supervise associates and assistants. This panel discusses the professional responsibility obligations regarding privacy and data security, the practical measures that law firms can and should undertake, and the issue of security when exchanging information in discovery.

Required

[07] The Sedona Conference, *Commentary on Privacy and Information Security* (November 2015)

Recommended

[07a] The Sedona Conference, *Data Privacy Primer* (January 2018)

[07b] The Sedona Conference, *Incident Response Guide, Public Comment Version* (March 2018)

[07c] Perkins Coie, *Security Breach Notification Chart* (June 2018)

[07d] Geoffrey Vance, *When Redactions Don't Redact* (January 2019)

[07e] National Security Agency, *Redaction of PDF Files Using Adobe Acrobat Professional X*

[07f] Kenneth J. Withers, ed., *Selected North Carolina Rules of Professional Conduct*

[07g] Links to official versions of the General Data Protection Regulation and California Consumer Privacy Act

[07h] American Bar Association, *Selected Model Rules of Professional Conduct*

[07i] Federal Trade Commission, *Data Breach Incident Response: A Guide for Business*

[07j] Federal Trade Commission, *Protecting Personal Information: A Guide for Business*

10:15 — 11:30 [Panel 8] Technological Tools for Protecting Privacy and Data Security in Litigation

(Brown, D'Ambra, Dennis, Knouff, Schwarz)*

Technology has created or exacerbated threats to personal privacy and confidentiality; can technology help us solve these problems in the context of civil litigation? Our panel of experienced litigators and legal technologists explore the range of options available to litigators, especially at the discovery stage, for avoiding privacy and data breaches, from simple protocols for the secure exchange of information, to advanced technologies for flagging, redacting, and anonymizing data to protect privacy while fulfilling disclosure and discovery obligations.

Friday, March 8, 2019 (Cont.)

Required

[08] The Sedona Conference, *Practical In-House Approaches for Cross-Border Discovery and Data Protection* (June 2016)

Recommended

[08a] Eric Schwarz, *Practical Considerations for Cross-Border Discovery Under the General Data Protection Regulation* (GDPR)

[08b] Ann Cavoukian, *Privacy By Design: The Seven Foundational Principles*

11:30 — 11:45 Morning Break

11:45 — 1:00 [Panel 9] Judicial Roundtable: Protecting Privacy and Confidentiality in Open Courts
(Childs, Peck, Smith, Vanaskie, Wettre, Withers*)

Civil litigation often involves matters of a sensitive private nature, or business confidences, trade secrets, and other information that present problems or lose value if made public. Conversely, we have a long constitutional and common-law tradition of open courts: Court filings are public records, and court proceedings are public activities. How do we square the need for full disclosure of the facts necessary for adjudication with concerns for privacy and data security, especially in a digital age, when public documents are freely available online? Our panel of judges, aided by seasoned litigators, explore the various mechanisms, from protective agreements to sealing orders, available to litigants and the courts to address this tension.

Required

[09] *The Sedona Principles*, Third Edition (October 2017)

1:00 — 2:00 Closing Announcements, followed by Grab & Go Lunch