



Panel 3: Protecting Privilege and Confidentiality in Civil Litigation, Part 2

The 13th Annual Sedona Conference Institute:
Protecting Privacy, Confidentiality, and Privilege in Civil Litigation
March 7–8, 2019
The Ballantyne Hotel & Lodge, Charlotte, NC

Dialogue leaders

❖ Ronald J. Hedges

❖ Dentons US LLP, New York, NY

❖ Mark S. Hegedus

❖ Federal Trade Commission, Washington, DC

❖ Martin T. Tully

❖ Actuate Law LLC, Chicago, IL

❖ Hon. Thomas I. Vanaskie (ret.)

❖ U.S. Court of Appeals for the Third Circuit,
Philadelphia, PA



Materials

❖ “Required” reading

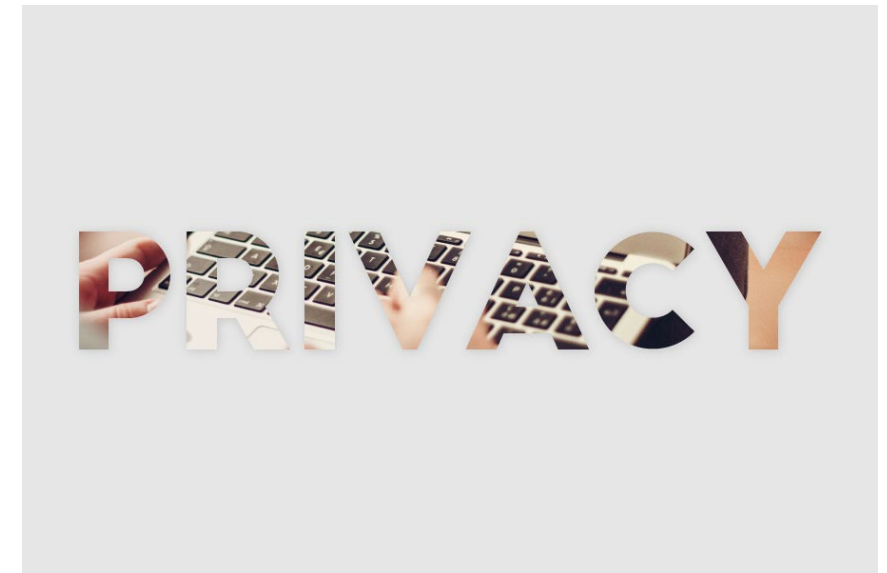
- ❖ *The Sedona Conference Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, Vol. 17, The Sedona Conference Journal (2016).

❖ Supplemental resources

- ❖ David J. Kessler, Jami Mills Vibbert and Alex Altman, “Protective Orders in the Age of Hacking,” *New York Law Journal*, March 16, 2015.
- ❖ Ronald J. Hedges, “Confidentiality Order Standards,” *Federal Magistrate Judges Ass’n*.
- ❖ *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, Vol. 8, The Sedona Conference Journal (2007).

The Tension Between Privacy and Discovery's Search for the Truth

- ❖ Right of Privacy vs. Public Access to discovery materials
 - ❖ Unquestionable expectation of privacy in the digital age
 - ❖ No right of access to discovery materials merely exchanged between private litigants
 - ❖ But documents and information produced in litigation are not inherently accorded any protection from disclosure



Rise of Data Security and Privacy Issues in Civil Discovery

- ❖ What are the challenges?
 - ❖ Discovery process concentrates valuable data in one place
 - ❖ Discovery process can move sensitive and protected data to a less secure environment
 - ❖ Receiving party may be less able and motivated to protect sensitive data
 - ❖ Volumes, forms, and ease of access to and transmission of data



Rise of Data Security and Privacy Issues in Civil Discovery

- ❖ Why are these concerns more prominent now?
 - ❖ Law firms have become attractive targets for hackers
 - ❖ Extensive use of third-party litigation support providers
 - ❖ Expanding framework of data privacy and security laws and regulations
 - ❖ Ethical and best practices obligations of lawyers to protect sensitive information from unauthorized disclosure



Protective Orders May Not Sufficiently Address Data Security/Privacy Concerns

- ❖ No inherent prohibition on disclosing discovery materials
- ❖ FRCP 26(c) requirements for protective orders
- ❖ Confidentiality does not solve for data breaches
- ❖ Importance of addressing security/privacy concerns early and often



Beyond Opposing Counsel: Experts and Service providers

- ❖ Discovery materials are often two-steps removed
- ❖ Obligation to conduct some due diligence
- ❖ Service agreement terms should address security/privacy
- ❖ Reasonable oversight and supervision

Challenges of Filing Sensitive Information Under Seal

- ❖ Current framework for filing discovery materials with the court under seal
- ❖ Public access to filings under seal
- ❖ Presumption that anything filed with a court is publicly available?
- ❖ Impact of FOIA



The Walking Dead: Proper Data Disposition Following Case Termination

- ❖ Ongoing need to protect confidential, sensitive, or protected information exchanged in discovery or filed with the court
- ❖ Protective orders should specifically address data disposition
- ❖ Discovery order protocols should address post-termination data disposition



Questions and Comments?

