




 @TSCSedona

 SedonaConference

 The Sedona Conference

The Sedona Conference Working Group 1  
Electronic Document Retention & Production  
2019 Midyear Meeting

The Ballantyne Hotel – Charlotte, NC

#SedonaConference

ANNOTATED AGENDA

Wednesday, May 1, 2019

5:30 — 7:30 Evening Welcome Reception

Thursday, May 2, 2019

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

8:30 — 8:45 Welcome and Announcements  
(K. Brady, C. Weinlein)

8:45 — 10:15 [Session 1] eDiscovery Case Law Update  
(D. Horn, L. Mancari, K. Withers\*)

More info: 2018 generated more than 400 reported state and federal court decisions on eDiscovery, addressing such important topics as preservation, proportionality, privilege, privacy, form of production, cost-sharing and cost-shifting, cross-border discovery, and sanctions. 2019 is shaping up to be as busy a year, or more. This session will analyze the top dozen court decisions from the past year with which all eDiscovery practitioners must be familiar.

**Required Material:**

- [1.1] Kenneth J. Withers, ed., *Selected eDiscovery Court Decisions, October 1, 2018 – March 31, 2019* (April 2019)
- [1.2] PowerPoint, *Selected eDiscovery Court Decisions*

10:15 — 10:30 Morning Break

10:30 — 11:45 [Session 2] Managing eDiscovery in Small Cases  
(Judge Abrams, K. Clark, G. Kohn\*, T. Patton, M. Scimone)

More info: Practitioners and jurists alike have expressed a longing for more pragmatic, day-to-day eDiscovery advice for the majority of cases that are modest in scope and often litigated in state courts. The eDiscovery for Small Cases drafting team has answered the call! This session is dedicated to adapting many of the best practices memorialized in various WG1 publications to more routine and smaller-scale matters. This session will also address various low or no cost tools, tips, and tricks that practitioners can utilize to achieve best practices while staying true to principles of proportionality.

**Required Materials:**

- [2.1] WG1 Drafting Team, *The Sedona Conference Commentary on Managing eDiscovery in Small Cases*,

## ANNOTATED AGENDA

*Member Draft (April 2019)*

[2.2] PowerPoint, *Managing eDiscovery in Small Cases*

### 11:45 — 12:45 [Session 3] Explore the Fear and Rising Prominence of Artificial Intelligence and Its Use in Litigation

(A. Crews, N. Economou, T. Emory, Judge Parker, A. Sellars\*)

More info: Artificial intelligence is not all about document review. The panel will explain the evolving concept of artificial intelligence and discuss its benefits and risks in the legal profession. Moreover, the panel will discuss how some prominent law firms and companies are using artificial intelligence tools in their litigation practices today. Lastly, the panel will explore the ethical challenges related to the use of artificial intelligence by litigators, with particular attention to the relevant provisions of the Model Rules of Professional Conduct: Rule 1.1, Comment 8 (“Maintaining Competence”) and Rule 5.3 (“Responsibilities Regarding Nonlawyer Assistance”).

#### Required Materials:

- [3.1] Eileen M. Lach & Nicolas Economou, *Insight: Four Principles for the Trustworthy Adoption of AI in Legal Systems*, Bloomberg Law (March 29, 2019)
- [3.2] The IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, *Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems*, Law Chapter, First Edition (IEEE 2019)

#### Background Materials:

- [3.3] David Danks & Alex John London, *Algorithmic Bias in Autonomous Systems*, Proceedings of the Twenty-Sixth International Joint Conference on Artificial Intelligence (2017)
- [3.4] Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303 (2018)
- [3.5] *Additional Resource List for Artificial Intelligence and Its Use in Litigation*

### 12:45 — 1:45 Lunch (provided)

### 1:45 — 2:45 [Session 4] ESI Evidence & Admissibility

(K. Brady\*, E. Kolde, Judge Vanaskie (ret.), K. Walinski, M. Wolf)

More info: The 2008 Sedona Conference *Commentary on ESI Evidence & Admissibility* has been updated in a new member draft with discussions about new approaches to admissibility and new tools for handling today’s forms of electronically stored information (ESI), like Blockchain, Internet of Things, Ephemeral or Self-Destructing Data, and group collaboration tools, and their impact on authentication and admissibility. This panel will also review instructive state court cases addressing new data sources as well as additional practical tips for encryption, forensics, authentication, and admissibility. Member feedback on the updated member comment version of the *Commentary* will be actively solicited.

#### Required Material:

- [4.1] WG1 Drafting Team, *The Sedona Conference Commentary on ESI Evidence & Admissibility, Second Edition, Member Draft* (April 2019)

ANNOTATED AGENDA

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**Background Material:**

[4.2] The Sedona Conference, *Commentary on ESI Evidence & Admissibility*, 9 Sedona Conf. J. 217 (2008)

**2:45 — 3:45 [Session 5] Moving Data Overseas: Update on Cross-border Transfer Mechanisms**  
(D. Backhouse, T. Hoffman, D. Shonka, J. Thomas\*)

More info: The transmittal of data across international borders is now a routine part of eDiscovery and an absolutely essential consideration in any Information Governance program, even for organizations that don't consider themselves to be "global." The privacy and data security implications for any type of cross-border data transfer, whether in response to a legal obligation or a routine business need, are enormous and complex. In the past several months, the efficacy of established mechanisms for data transfer into the U.S. – court orders, letters rogatory, Model Contract Clauses, Binding Corporate Rules, Privacy Shield, and others – has come under question by regulators, courts, and campaigners around the world. On the flip side, overseas parties seeking discovery in the U.S. under 28 U.S.C. §1782 are finding out that it isn't as easy as they may have thought. This session will summarize the current state of play, including significant developments with the passage of the CLOUD Act in the U.S. and the continuing *Schrems* litigation in the EU.

**Required Material:**

[5.1] European Data Protection Board (EDPB), Guidelines 2/2018 on Derogations of Article 49 Under Regulation 2016/679

**Background Materials:**

[5.2] The Clarifying Lawful Overseas Use of Data Act (CLOUD Act) (H.R. 4943)

[5.3] The Sedona Conference, *International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)* (Jan. 2017)

See also Cross-Border Discovery Section on Material [1.1] *Selected eDiscovery Court Decisions*

**3:45 — 4:00 Afternoon Break**

**4:00 — 5:00 [Session 6] Crafting eDiscovery Requests with Specificity**  
(R. Bailey, A. Heinze, H. Kelston, D. Myers, L. Schwartzreich\*)

More info: Despite Fed. R. Civ. P. 34(b)'s "reasonable particularity" language, and the other rules and caselaw that underscore the mandate for specificity, vague and overbroad discovery requests have continued, clogging the courts and increasing litigation costs. When vague discovery requests are challenged, the requesting party often is simply provided a "do-over" opportunity to refine the original requests or propound new requests, leaving little incentive to follow the mandates of Rule 34. Join this new brainstorming group as we dialogue about: (i) how parties should approach drafting and propounding requests pursuant to Rules 34(a) and (b); (ii) how discovery can benefit from requests for relevant and proportional information that describe with reasonable particularity the information being sought; (iii) what "reasonable particularity" means and how to employ it; and (iv) how courts enforce the scope and "reasonable particularity" requirements of Rules 34(a) and (b), and the proper remedies for failing to serve specific discovery requests.

ANNOTATED AGENDA

**Required Material:**

[6.1] WG1 Brainstorming Group, *Crafting eDiscovery Requests with Reasonable Particularity, Draft Outline* (April 2019 – Rev. 4.24.19)

5:00 — 5:10 **Presentation of The William P. Butterfield Award for Excellence in eDiscovery Writing**

5:10 — 7:00 **Reception (Guests Invited)**

**Friday, May 3, 2019**

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

8:30 — 10:00 **[Session 7] Judicial Roundtable: Explore the Judicial Perspective for 2019 and Beyond**  
(Judge Abrams, Judge Johnston, T. Opsitnick\*, Judge Parker, Judge Peck (ret.), Judge Roby, Judge Vanaskie (ret.))

More info: This panel of judges will examine the impact of case law, Sedona Conference WG1 Commentaries, and other significant developments in eDiscovery in federal and state jurisdictions. The panel will provide insight from a wide variety of perspectives from the bench, representing federal and state court systems in different regions.

Topics will include: Are litigants struggling with admissibility issues for new technologies and social media? • How proactive are lawyers and judges on ESI issues in judicial conferences? • What do judges think about privilege logs and their usefulness? • How can lawyers facilitate a court's in camera review of documents withheld for privilege? • Have lawyers figured out the evidentiary requirements for a burden argument? • Do you see more frequent proportionality arguments from litigants? • Discovery requests, objections, and responses: are litigants improving after the recent FRCP Amendments? • Are Rule 45 Subpoenas issued before making a request of the parties? • Has the definition of relevancy changed? • Does document review require some sort of quasi-scientific method? • Does requiring a conference before a motion make a difference? • What elements of Rule 37(e), if any, are "facts" that should go to the jury for determination of the appropriate sanction, or are the Rule 37(e) factors entirely a matter for the judge?

**Required Materials:**

- [7.1] The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1 (2018)
- [7.2] The Sedona Conference, *Federal Rules of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 Sedona Conf. J. 447 (2018)
- [7.3] Thomas Y. Allman, *Dealing With Prejudice and More: How Rule 37(e) Has Refocused ESI Spoliation Measures* (April 2019)

10:00 — 10:15 **Updates from the All-Sedona Diversity Committee**

10:15 — 10:30 **Morning Break**

## ANNOTATED AGENDA

### 10:30 — 11:30 [Session 8] Diversity Awareness and Its Unique Benefits to eDiscovery

(K. Atherton, T. Greer, C. Lee, N. Ray\*, Judge Roby)

More info: eDiscovery and Information Governance are legal sub-specialties that uniquely benefit from diversity. While we live in an integrated digital world, different populations use information and communications technologies in different ways, with some groups preferring particular media or applications, others using particular language or symbols, and still others inventing new technologies altogether. Effective eDiscovery requires teams that represent diversity of age, gender, race, language, geographic and social background, and other attributes—the sort of mix that is often lacking in today’s law firm, legal department, and litigation support environments. The Sedona Conference Working Group Series has a special mission to foster the diversity that leads to eDiscovery and Information Governance excellence. Join us to dialogue over some of the ways in which we can carry out that mission, including: use of mentorship/leadership strategies; development of intercultural communication skills for a global workforce; and addressing systemic issues such as unconscious bias and implicit privilege.

#### Required Materials:

- [8.1] Report of the New York State Bar Association, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR* (Nov. 2017)
- [8.2] Eric Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227 (2018)
- [8.3] Marguerite Rigoglioso, *Stanford linguist says prejudice toward African American dialect can result in unfair rulings*, Stanford Univ. News Service (Dec. 2, 2014)
- [8.4] Dan DeCoursey, *Indigenous Languages and the Courts*, The ATA Chronicle (May 2015)
- [8.5] Press Release, Linguistic Society of America, *Black language matters: A linguistic analysis* (Dec. 20, 2016)
- [8.6] John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and Other Vernacular Speakers) in the Courtroom and Beyond*, Language, Volume 92, Number 4 (Linguistic Society of America 2013)

#### Background Materials:

- [8.7] Frank J. Cavico et al, *Language diversity and discrimination in the American workplace*, 7 Journal of Int’l Business and Cultural Studies 1 (Feb. 2013)
- [8.8] *Additional Resource List for Diversity Awareness and Its Unique Benefits to eDiscovery*

### 11:30 — 12:45 [Session 9] Privilege Review and Logging

(A. Grounds, T. Hiser, Judge Johnston, C. Kenney, T. Presnell\*)

More info: Traditional privilege review and logging has become increasingly complex and difficult in cases involving high volumes of electronically stored information. This session will analyze those challenges and emerging approaches for addressing the issues including through the use of categorical privilege logs, metadata logs, and technology-assisted review. This session will also address the roles of proportionality and cooperation, the need for non-waiver orders under Federal Rule of Evidence 502(d), and how courts can better recognize and address the challenges of protecting privilege in modern discovery.

## ANNOTATED AGENDA

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**Required Materials:**

- [9.1] The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95 (2016)
- [9.2] Colleen M. Kenney & Matthew Jackson, *Revisiting Alternatives to Traditional Privilege Logs: A Practical Review* (2019)

**Background Materials:**

- [9.3] *Additional Resource List for Privilege Review and Logging*

12:45 — 1:00 **Wrap-up**

1:00 **Adjournment and Grab-&-Go Lunch (provided)**