

Selected Recent eDiscovery Court Decisions: Cooperation & Proportionality

Kenneth J. Withers, ed. (Oct. 2019)

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I. Introduction

Every year, at both the Midyear and Annual Meetings of The Sedona Conference's Working Group 1 on Electronic Document Retention and Production (WG1), we have presented updates on decisions from state and federal courts involving the discovery of electronically stored information (ESI) in civil litigation. These presentations used to be accompanied by a more-or-less comprehensive annotated bibliography, covering the prior year's decisions. This is no longer possible, as the number of "eDiscovery" decisions has exploded from one or two being reported each week to one or two being reported each day, and it is difficult to neatly categorize decisions resolving discovery disputes as eDiscovery decisions, distinct from decisions about discovery of recorded information in any other medium. Over the years, we have been required to be more and more selective in the decisions we present in the live program and include in the accompanying annotated bibliography.

For the 2019 Annual Meeting, we have taken this one step further and split the Case Law Update into two sessions, one dealing exclusively with sanctions for the spoliation of discoverable ESI, and another addressing court decisions involving cooperation, proportionality in requests and responses, discovery from non-parties, privilege issues, and cross-border discovery. This paper accompanies the latter

¹ The Editor wishes to thank the following Working Group 1 members for case suggestions, summaries, and insights: Kelly Atherton, Rebekah L. Bailey, Lisa N. DeBord, Philip Favro, Ronald J. Hedges, and Jennifer W. Sprengel. Any errors or omissions, however, are entirely the responsibility of the Editor.

session, to the great relief of the Editor, who is relying on the participants in the former session to carry the bulk of the case law load.

While the number of eDiscovery court decisions has increased, the influence of The Sedona Conference on this growing body of jurisprudence has stayed strong. So far in 2019, 21 reported court decisions cite to Sedona Conference publications. While the bulk of these still come from federal courts, state courts are citing to The Sedona Conference in increasing numbers, and at appellate and Supreme Court levels. But arguably more important is the number of reported citations to Sedona Conference Working Group publications in secondary sources such as law review articles and treatises – 352 times this year, according to Westlaw – and in briefs submitted to federal circuit and state appellate courts. These are seldom reported but represent the tip of the iceberg in terms of influence in legal culture. The Sedona Conference – and its reputation for using dialogue to establish consensus-based Principle and Best Practices has even seeped into culture beyond the eDiscovery and even legal profession. Several reported opinions from the District of New Mexico this year lament that The Sedona Conference has not published a Commentary on forensic evidence, and earlier this month, a Columbia University librarian tweeted out a call for the formation of a “sedona conference,” lower case, for academic historians and archivists. We took this as a tribute, however, and didn’t consider enforcing our trademark rights.

The following annotated bibliography presents a sampling of court decisions under seven broad headings: Discovery Protocols, Proportionality, Rule 34 Responses, Non-Party Discovery, Privilege, Cross-Border Discovery, and eDiscovery in Criminal Cases. Of the 200+ decisions collected so far in 2019, the Editor has selected only a handful under each category, emphasizing those decisions that may have the greatest impact; those citing The Sedona Conference; and those illustrating common, recurring issues. Our apologies go out to those who don’t find their “favorite” case from 2019 here, but we hope that this paper presents a useful overview of the current state of eDiscovery jurisprudence.

II. eDiscovery Protocols

The most fundamental lesson of eDiscovery – applicable to conventional discovery as well as – has been the value of early communication and cooperation between adversaries to develop an overall discovery plan, under the Court’s supervision. We take that concept for granted today, but 20 years ago it was a radical notion, antithetical to a legal culture that viewed discovery as a weapon or game. Since then, the *Sedona Principles*; Federal Rule of Civil Procedure 26(f); the *Cooperation Proclamation*; and a growing number of local rules, standing orders, and “model” eDiscovery protocols have changed legal culture significantly. Informal letters

between counsel, the “meet-and-confer,” and comprehensive discovery Case Management Orders are now common in both state and federal civil litigation.

But busy practicing litigators still rely on forms, checklists, and pattern clauses or entire pattern agreements to help them through this process. This often results in stipulations that are inappropriate in the particular case or inappropriately scaled. There is no “one size fits all” Case Management Order, even in categories of similar litigation, such as employment discrimination or patent enforcement.

Nuvasive, Inc. v. Alphatec Holdings, Inc.² illustrates this point. In a patent action, the parties informally agreed to follow the Model Order Governing Discovery of Electronically Stored Information in Patent Cases appended to Patent Local Rules of the Court, which was, in turn, based on a Model Order promoted nationally by the former Chief Judge of the Federal Circuit. The Model Order limits eDiscovery requests to ESI from five custodians, identified by five search terms per custodian. The court noted that the parties never formalized their agreement to abide by the Model Order, which has no force of law, and which the court indicated it would not endorse if it were proposed, as the arbitrary provisions of the Model Order are not grounded in the concepts of relevance and proportionality. The Court informed the parties that they are to follow Rule 34 of the Federal Rules of Civil Procedure and the concepts behind Sedona Principles 1, 3, and 6 in formulating their discovery requests and responses.

Preservation and confidentiality are important issues to be resolved at the start of discovery, through communication and cooperation. But it is still common for counsel to file “knee jerk” motions at the start of discovery, which courts routinely reject. **Scarborough v. Virginia College, LLC**³ was a Fair Labor Standards Act case in which the plaintiff moved for an order requiring the defendant to preserve employment records and email related to her claims, citing the precarious financial state of the defendant resulting in the closing of campuses and the layoff of most employees. The court declined to enter a preservation order, as “courts rarely find such orders necessary because several laws impose the same preservation duties that a court order would impose.” The court pointed specifically to the Federal Rules of Civil Procedure, which sanction a litigant for the loss of discoverable information, and to federal regulations requiring the retention of the very records that the plaintiff was most concerned about.

In **Strough v. General Motors**,⁴ a product liability action claiming several design defects in the Impala model, the Court found that the defendant was entitled to a protective order in discovery covering technical documents, but the burden remained

² No. 18-cv-0347, 2019 WL 4934477 (S.D. Cal. Oct. 7, 2019).

³ No. 2:18-CV-00738, 2019 WL 121277 (N.D. Ala. Jan. 7, 2019).

⁴ No. 18-cv-03303, 2019 WL 2357306 (D. Colo. June 4, 2019).

on the defendant to establish the confidentiality designation of any particular document if challenged, any documents that evidence a public danger may be reported to appropriate authorities (after notice to the defendant), and any documents to be entered into evidence at trial would be presumptively public. The plaintiffs' stated intention to share the fruits of discovery with counsel in future actions was not a valid interest to counter the defendant's "good cause" showing for the protective order, and if there are parties in parallel or future actions who need access to the discovery in this case, they are free to request the Court for such access at that time.

III. Proportionality

Proportionality is one of the fundamental strategies for achieving timely, cost-effective eDiscovery, as expressed in the 2015 amendments to Rule 26 of the Federal Rules of Civil Procedure and the rules of several states that have followed suit. But the concept of proportionality – that discovery requests and responses be grounded in relevance to the claims and defenses at issue – has been with us for decades, both in the rules and in a judges' authority to tailor discovery if the parties bring the issue before the court.

Federal Rule of Civil Procedure 26(b)(1) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" considering the following factors:

- the importance of the issues at stake in the action
- the amount in controversy
- the parties' relative access to relevant information
- the parties' resources
- the importance of the discovery in resolving the issues
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

In addition, FRCP 26(b)(2)(B) restricts discovery from any source of ESI that is deemed "not reasonably accessible because of undue burden or cost."

The Committee Note to the 2015 amendments expressly declined to assign burdens of going forward or of proof for any of these elements, as it depends on the circumstances. Generally speaking, however, requesting parties need to be prepared to demonstrate that their requests are relevant and material, and the information sought is likely to be in the "possession, custody, or control" of the responding party. Responding parties, if objecting, need to be prepared to demonstrate that the requested ESI is not sufficiently relevant, not in its "possession, custody, or control," or unduly burdensome to produce.

If its part, when courts are called on to decide a Motion to Compel or a Motion for a Protective Order, it needs to go through each of the requests and responses and evaluate the arguments of each side. This can result in lengthy, detailed, and highly fact-specific decisions of limited applicability to future cases. For example, in **Seaside Inland Transp. v. Coastal Carriers LLC**,⁵ after detailed analysis of each topic in the plaintiff's Rule 30(b)(6) deposition notice, the court found that 7 of the 62 topics were "unduly burdensome and not proportional to the needs of the case," and thus beyond the scope of discovery under Rule 26(b)(1). Similarly, in **SPS Technologies LLC v. The Boeing Co.**,⁶ the plaintiff in a trade secret misappropriation action issued a subpoena to nonparty Boeing. Applying proportionality factors and analyzing the plaintiff's proposed search terms and limitations, the court granted most of the plaintiff's discovery requests, but limited the production of documents over which Boeing claimed privilege.

If there is one general lesson to be derived from these decisions, it is that parties must be able to support their assertions with evidence and focused legal argument, and not rely on generalizations. In **Moser v. Health Insurance Innovations, Inc.**,⁷ a putative class action under the Telephone Communications Privacy Act (TCPA), the plaintiff objected to requests to produce ESI from his "disaster recovery backup data," which he claimed was "not reasonably accessible." Relying extensively on *The Sedona Principles*, 3d edition, the court rejected the notion that backup media are *per se* "not reasonably accessible," and that the plaintiff's actual objection was that he was not technically sophisticated enough to retrieve ESI without assistance. However, the court was not provided with enough information on the relevance of the defendant's request, the likelihood that responsive ESI could be found, and the costs of retrieval to make a determination of whether the objection could be sustained.

The form in which ESI is requested can implicate the proportionality analysis, especially if the requesting party insists on a form of production that will result in much broader disclosure than Rule 26 would otherwise allow. The most common such request is for a forensic examination of computer servers or devices. In **Par Pharmaceutical, Inc. v. QuVa Pharma, Inc.**, a trade secrets action,⁸ the plaintiff requested forensic imaging of the corporate defendant's server and several other devices associated with individual defendants. Relying on Principles 5 and 8 of *The Sedona Principles* and their accompanying commentary, the court found the plaintiff's request to be overbroad:

⁵ No. 2:17-cv-00143, 2019 WL 507485 (E.D. Wash. Feb. 8, 2019).

⁶ No. 19 C 3365, 2019 WL 2409601 (N.D. Ill. June 7, 2019).

⁷ No. 17-cv-1127, 2019 WL 2271804 (S.D. Cal. May 28, 2019).

⁸ No. 17-6115, 2019 WL 959700 (D.N.J. Feb. 27, 2019).

Par has not requested a targeted collection of data, has not suggested a protocol or any other protective measures to avoid copying ESI that is not relevant, has not offered a method to avoid copying irrelevant, potentially competitively or personally sensitive information that may be contained on the target devices, or, alternatively, has not explained why these may not be viable options. Given the breadth of the request and the seemingly narrow categories of information sought from the vast amount of information at issue, the Court finds that the forensic imaging Par seeks is not warranted at this stage of discovery. The Court will deny Par's motion as to Par's requests seeking to compel forensic imaging from the QuVa Defendants and Rhoades without prejudice to Par renewing its requests later in discovery if such imaging is warranted under the circumstances at that time.

A similar result was obtained in **Hardy v. UPS Ground Freight, Inc.**⁹, and employment discrimination case, in which the defendant was denied forensic imaging of the plaintiff's cellular phone. But the court in **List Indus. Inc. v. Umina**,¹⁰ another trade secret theft case, held that the plaintiff employer was allowed to make forensic images of a former employee's computers to prove he breached the confidentiality agreement in his employment contract and misused trade secrets.

Students of eDiscovery and proportionality may want to review some of these additional 2019 decisions:

Chen-Oster v. Goldman, Sach & Co., No. 1:10-cv-06950, 2019 WL 3294145 (S.D.N.Y. June 7, 2019). In a sex discrimination class action, the female plaintiffs are entitled to discovery of personal files of 32 male peers, a scope that might not be considered relevant or proportional in a single-plaintiff action.

Dahmer v. W. Ky. Univ., et al., No. 1:18-CV-00124, 2019 WL 1781770 (W.D. Ky. Apr. 23, 2019). In a gender discrimination case, the defendant was ordered produce information it had sought to withhold, arguing that the federal Family Educational Rights and Privacy Act prevented it from disclosing "education records" under the law, and that other requested information wasn't within the scope of discovery. The court reasoned that while the law protects from unauthorized disclosure documents maintained by an educational agency or institution that contain information related directly to a student, the law does not shield all education-related university records.

Edwards v. Scripps Media, Inc., No. 18-10735, 2019 WL 1647803 (E.D. Mich. Apr. 16, 2019). In an employment action, the court was tasked with addressing a motion for protective order to prevent a party from taking a 30(b)(6) deposition at the end of discovery on 19 different topics, each with up to ten sub-parts. The court allowed the

⁹ No. 3:17-cv-30162, 2019 WL 3290346 (D. Mass. July 22, 2019).

¹⁰ No. 3:18-cv-199, 2019 WL 1933970 (D. Ohio May 1, 2019).

deposition to go forward on four topics, but issued a protective order preventing the deposition from being taken on the other 15. Specifically, the court rejected the requesting party's request to conduct “discovery about discovery,” including inquiries into the responding party's legal hold or predictive coding processes.

Equal Emp't Opportunity Comm'n v. Centura Health, No. 18-01188, 2019 WL 3801376 (10th Cir. June 28, 2019). In a disability discrimination suit, the Circuit Court held that the defendant must produce records of employees other than the 11 employees who filed claims, as such discovery would be relevant to the “pattern or practice” elements of the claims. The court noted that the relevance standard in an EEOC investigation is broader than in a civil lawsuit.

Flynn v. FCA US, LLC, No. 15-cv-855, 2019 WL 1746266 (S.D. Ill. Apr. 18, 2019). In a class action brought by vehicle owners based on alleged defects in the “Uconnect” infotainment system in Jeep, Dodge, and Chrysler models, the plaintiffs requested results of simulated hacks designed to expose cybersecurity weakness. The court limited the request, holding that the “whole vehicle penetration test” sought by the plaintiffs went well beyond the system in question.

In re Kuraray America, Inc., No. 2018-62973-7 (Tex. Dist. Ct. May 13, 2019). In litigation stemming from an industrial chemical fire that injured 21 people, the plaintiffs obtained discovery of control room employees' mobile phone records to support claim that plant control workers were distracted at the time of the accident, contrary to company policy on phone use.

Kannan v. Apple, Inc., No. 17-cv-07305, 2019 WL 3037591 (N.D. Cal. July 11, 2019). In employment discrimination suit, the plaintiff will be allowed to seek limited discovery, under a protective order, of other employees' personnel records.

Langley v. Int'l Bus. Mach. Corp., No. 1:18-cv-00443, 2019 WL 1559146 (W.D. Tex. Apr. 10, 2019). In an age discrimination action, a former employee of the defendant obtained “leaked” internal company documents that allegedly supported his claims. The defendant requested the identity of the “leaker,” which the plaintiff refused to provide. The court declined the defendant's motion to compel, stating that while the defendant's desire to “plug the leak” was understandable, the identity of the leaker was not relevant to the claims being litigated.

Life After Hate, Inc. v. Free Radicals Project, Inc., No. 18 C 6967 (N.D. Ill Jan. 10, 2019). At the preliminary injunction stage of litigation, discovery is limited to claims that are part of the plaintiffs' motion for a preliminary injunction.

Locke v. Swift Transportation Co., No. 5:18-CV-00119, 2019 WL 430930 (W.D. Ky. Feb. 4, 2019). In a personal injury case, the court allowed defendants to obtain information from plaintiff's social media accounts but limited such production to

matters relating to the accident at issue, plaintiff's emotional state and injuries, and level of activities prior to the accident.

Robinson v. MGM Grand Detroit, LLC, No. 17-CV-13128, 2019 WL 244787 (E.D. Mich. Jan. 17, 2019); ***motion for reconsideration of costs granted***, 2019 WL 425234 (Feb. 4, 2019). In a Family Medical Leave Act (FMLA) case, the defendant employer relied on gym records which suggested that the plaintiff was working out while on FMLA leave to justify a seeking discovery of the plaintiff's Facebook, Google Photo, and Google location data for the time period that plaintiff alleged he was unable to work. The Magistrate Judge granted the defendant's motion to compel discovery, and the District Judge overruled objections to the order, holding that the "[d]efendant has demonstrated that the limited social media posts to be produced are relevant and proportional to the needs of the case insofar as they relate to Plaintiff's activities while out of work."

Santana v. MKA2 Enterprises, Inc., No. 18-2094, 2019 WL 130286 (D. Kan. Jan. 8, 2019). In an employment discrimination case, the court denied the defendant's motion to compel production of "all cellular telephones used by you from the date your employment with Defendant started to the present for purposes of inspection and copying," holding that such a request was "unduly burdensome and invasive and ... not proportional to the needs of this case."

Shir Law Group, P.A. v. Carnevale, No. 3D19-351, 2019 WL 1781119 (Fla. Dist. Ct. App. Apr. 24, 2019). In a legal malpractice action, the District Court of Appeal of Florida quashed an order allowing forensic examination of a law firm's computers based on overbroad search terms and remanded with directions to limit the search terms to protect against the disclosure of privileged or irrelevant information.

IV. Rule 34 Responses

The flip side of Rule 26's requirement that discovery requests be relevant and proportional to the claims and defenses alleged in the action is Rule 34's requirement that objections to discovery requests must be specific: "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." This represents a sharp departure from the common practice in the past of interposing broad, general, "boilerplate" objections and vague promises to produce something responsive at an undetermined future date. It is safe to say that judges hated that practice, because if a motion to compel or a motion for a protective order came before the court, there was little or nothing in the record on which to make a determination.

For instance, in **Michael Kors, L.L.C. v. Su Yan Ye**,¹¹ a trademark dispute, the court found that the defendant's requests that asked for "all documents" in several subject-matter categories were overbroad. However, the court—citing The Sedona Conference, *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests* – also found the plaintiff's responses were "boilerplate and its description of the documents it would produce vague," in violation of Rule 34. The court's ruling encapsulates the bench's frustrations with boilerplate requests and responses:

It is not this Court's responsibility to fashion document requests and responses for the parties. Rather, the Court's role is to resolve genuine discovery disputes that the parties cannot resolve on their own after a good faith meet and confer process. This Court could strike all of Defendant's requests for being impermissibly broad. It could find that Plaintiff waived its objections because it failed to explain them as required under the rules. However, this Court will do neither. Instead, in light of the fact that both parties indicated areas for compromise on the call with this Court, the Court will give the parties another chance.

Some litigants have taken the position that responses to discovery requests are not warranted if they believe the case, or the particular claim the request relates to, is without merit. However, that is a question for the judge and jury to decide later in the action; not a unilateral determination by a responding party during discovery. In **Wentz v. Project Veritas**,¹² the plaintiff alleged that the defendants broadcast illegally obtained videotapes. The defendants raised an Anti-SLAPP defense and sought communications between the plaintiff and other others involved in lawsuits against the defendants. The plaintiff argued the information sought was not relevant or proportionate because the Anti-SLAPP statute was inapplicable to the lawsuit. The magistrate judge granted the defendants' motion to compel and ordered sanctions in the form of attorneys' fees, holding that the information was relevant and proportionate, irrespective of plaintiff's arguments on the merits of the claims. Further, the court noted that the plaintiff lacked candor in an earlier representation that no such documents existed.

Rule 34 also spells out the procedure by which requesting parties may request ESI in a particular form or forms, and the responding party may object and propose a preferred form of production. But the bottom line is that the form of production must be "reasonably useable" for the purposes of litigation. In **Jordan v. Mirra**,¹³ an action relating to a separation and distribution agreement, the plaintiff moved to compel

¹¹ No. 1:18-CV-2684, 2019 WL 1517552 (S.D.N.Y. Apr. 8, 2019).

¹² No. 6:17-cv-1164, 2019 WL 910099 (M.D. Fla. Feb. 22, 2019).

¹³ No. 1:14-CV-01485, 2019 WL 2127788 (D. Del. Feb. 27, 2019).

raw accounting records in Peachtree/Sage 50 format, arguing TIFF and .xcl productions were insufficient because they did not give the plaintiff the “same ability” to access, search, and display as the defendant. The defendant opposed the discovery, arguing that the production format was appropriate and that production in the requested format was “not feasible.” The Special Master recommended denying the motion, finding the format of production appropriate, as TIFF is a common way to produce ESI and the plaintiff did not demonstrate a need for the ESI in native format. The Special Master also noted that The Sedona Conference eliminated the “same ability” language from Principal 12 in the 3d edition of *The Sedona Principles*. Finally, defendant stated that older data no longer existed in the system.

Students of eDiscovery and Rule 34 may want to review some of these additional 2019 decisions:

Carter v. Franklin Fire District No. 1, A-2726-16T1, 2019 WL 1224623 (N.J. Super. Ct. Mar. 15, 2019). In an action under New Jersey’s Open Public Records Act, the petitioner was not entitled to a fire department’s emails or other ESI in native format when no format was specified, but the fire department was under an obligation to include relevant metadata, such as ‘cc and ‘bcc identification, in the static PDF format in which the requested material was produced. The court cited *The Sedona Conference Glossary: E-Discovery & Digital Information Management* to define “native format.”

Gabiola v. Mugshots.com LLC, No. 16 C 2076, 2019 WL 426143 (N.D. Ill. Feb. 4, 2019). In a lawsuit involving a website that published police “mug shots,” and charged people to take their names and photos down, the court chastised both parties for using boilerplate language in discovery requests and motions, failing to relate requests to Rule 26 proportionality factors, interposing general objections in violation of Rule 34, and then asking the court to rule on myriad discovery disputes. “The Court should not have to divine arguments not made by either party. As the Seventh Circuit has remarked in the summary judgment context: ‘Judges are not like pigs, hunting for truffles buried in briefs’ (or, as applicable here, buried in Plaintiffs’ discovery requests and Defendants’ objections and responses to them).”

Hunters Run Gun Club, LLC v. Baker, No. 17-176, 2019 WL 507479 (M.D. La. Feb. 7, 2019). The plaintiffs sought text messages from the defendant, who claimed he was no longer in possession of them, as he had changed phones and service providers. While the defendant did not object to plaintiffs’ subpoenaing his former service provider for the records, he refused to provide written authorization allowing the service provider to release his records. The court noted that the defendant did not claim that the text messages were privileged or not relevant, and the fact that his authorization was needed for their release demonstrated that he still exercised

“control” over them. The court ordered the defendant to either provide an executed release to the plaintiffs or obtain and produce the relevant text messages himself.

RightCHOICE Managed Care, Inc. v. Hospital Partners, Inc., No. 5:18-cv-06037, 2019 WL 418117 (W.D. Mo. Feb. 1, 2019). In a medical services billing dispute, the court held that defendants cannot raise 5th Amendment objections to civil discovery.

Sanchez Y Martin v. Dos Amigos, No. 17-cv-1943, 2019 WL 581715 (S.D. Cal. Feb. 13, 2019). In an action on a promissory note, the court held that the “family” method of email production was required, and ordered the responding party to reproduce emails with attachments included in sequential Bates ranges.

Thomas v. Bannan Place, Inc., No. 4:17-cv-13492, 2019 WL 462513 (E.D. Mich. Feb. 6, 2019). In a wrongful death action, the court ruled that the defendant waived objections to discovery requests by failing to file responses in a timely manner, failing to provide a privilege log, and failing to make objections “with specificity.”

V. Rule 45 Non-Party eDiscovery

eDiscovery often involves non-parties who are in “possession, custody, or control” of ESI relevant to civil litigation, as most parties do not have possession or control over servers, digital storage, or applications that generate data. Discovery of such non-parties is governed by Federal Rule of Civil Procedure 45 and its state equivalents, and under that rule and the jurisprudence that has grown up over the years, non-parties are treated with more deference by the courts. Unfortunately, many of the tools available to parties to manage discovery are not explicitly available in the Rule 45 context, requiring more direct judicial intervention. For instance, in **Casun Invest, A.G. v. Ponder**,¹⁴ a real estate sales dispute, the court quashed overbroad and incorrectly-served Rule 45 subpoenas and imposed sanctions on the subpoenaing party, and in **Lotus Industries v. Archer**,¹⁵ the court shifted costs to the requesting party under Rule 45. In **Shamrock-Shamrock v. Remark**,¹⁶ Florida’s Third District Court of Appeals held that Florida law does not “impose a duty on nonparties to litigation to preserve evidence based solely on the foreseeability of litigation,” a more lenient standard than that applied to parties.

However, non-parties may find themselves subject to protocols and procedures imposed on the parties. In **Plexxikon Inc. v. Novartis Pharmaceuticals Corp.**,¹⁷ a non-party competitor of the plaintiff unilaterally redacted documents to remove allegedly

¹⁴ No. 2:16-cv-2925, 2019 WL 2358390 (D. Nev. June 4, 2019).

¹⁵ No. 2:17-cv-13482, 2019 WL 2247793 (E.D. Mich. May 24, 2019).

¹⁶ No. 5D18-1987, 2019 WL 1868175 (Fla. 3d DCA Apr. 26, 2019).

¹⁷ No. 17-cv-04405 (N.D. Cal. Feb. 1, 2019).

irrelevant and competitively sensitive information before turning them over to the plaintiff. The plaintiff objected, arguing that the non-party had previously agreed to produce its documents without any relevance redactions, and instead use the parties' stipulated protective order to designate sensitive documents as "Highly Confidential – Attorneys' Eyes Only". In resolving the dispute, Magistrate Judge Laporte noted that it is "common practice within [the Northern District of California] to prohibit redactions for relevance." Judge Laporte stated that while there may be circumstances in which redactions are appropriate for non-parties, this was not one of those circumstances, as the non-party was covered by the parties' stipulated protective order.

In **Eagle Air Med Corp. v. Sentinel Air Medical Alliance**,¹⁸ a defamation case between two airlines, the magistrate judge ruled that the plaintiff could not compel additional depositions of a third party on the ground that the proposed discovery was "not relevant and proportional" to the litigation. The plaintiff appealed to the district judge, stating that the proposed discovery was related to an essential element of their claim and there were no other sources for the information. The district judge overturned the magistrate judge's order as "clearly erroneous" and allowed the depositions to proceed.

VI. Privilege

Privilege claims arise in nearly all civil discovery, but they are amplified in eDiscovery by the sheer volume of ESI that requires review, the multiplicity of sources, and the informality of communication in today's digital environment. This has resulted in the development of special procedures for privilege review and logging, including the adoption of Federal Rule of Evidence 502, which governs the admissibility of privileged documents produced – inadvertently or intentionally – in the course of discovery. However, the use of newly-evolving procedures for privilege review and assertion do not obviate the obligation of counsel to protect their clients' confidences, nor do they give license to producing parties to offload the cost of privilege review on requesting parties.

In **Arconic Inc. v. Novelis Inc.**,¹⁹ a "hotly contested" trade secrets action, the plaintiff sought to claw back privileged documents pursuant to a Federal Rule of Evidence 502(d) protective order. Special Master Judge Faith Hochberg (ret.) found that the plaintiff was entitled to the protections of Rule 502(d) with respect to existing productions but recommended that the court impose a "reasonableness" standard akin Rule 502(b) for all future productions. Senior District Judge Joy Conti noted that

¹⁸ No. 2:18-CV-680, 2019 WL 2028511 (D. Nev. May 7, 2019).

¹⁹ No. 17-1434, 2019 WL 911417 (W.D. Pa. Feb. 25, 2019).

the use of a Rule 502(d) order does not allow parties to engage in a “data dump” to shift the burden of determining whether privileged documents exist to the requesting party.

In **Bellamy v. Wal-Mart Stores, Texas, LLC**,²⁰ a slip-and-fall action, the defendant mistakenly produced a file of attorney-client privileged documents to plaintiff. As the parties neglected to seek a non-waiver order pursuant to Federal Rule of Evidence 502(d), the court analyzed the issues under Federal Rule of Evidence 502(b). Under Rule 502(b), defendant established that its production of privileged documents was inadvertent, and the court accordingly held there was no privilege waiver. However, the contents of the privileged documents revealed that the defendant had failed to preserve relevant video footage and neglected to disclose that fact to plaintiff. In response, the court issued a curative measure under FRCP 37(e)(1) that was, in effect, a preclusion sanction as it prevented the defendant from asserting that the plaintiff was contributorily negligent.

In the relatively rare instances in which the court grants a forensic inspection of a party’s ESI sources, protecting privilege is a primary concern. The trial court in **Crosmun v. Trustees of Fayetteville Technical Community College**,²¹ a whistleblower retaliation action, entered an order compelling a forensic examination of the defendant’s servers. Relying extensively on The Sedona Principles, 3d Edition, the appellate court reversed, holding that provisions of the discovery order allowing employees’ expert to conduct forensic examination of all data in employer’s computer systems violated employer’s attorney-client and work-product privileges, and that the privilege screen provisions of discovery order were inadequate to protect employer’s attorney-client and work-product privileges.

Finally, in **Universal Standard Inc. v. Target**,²² the plaintiff in a trademark action was not entitled to withhold emails between its attorneys and a public relations firms, as the public relations firm was retained for business purposes, not litigation, and the emails were therefore not protected as attorney work product.

VII. Cross-border discovery

In today’s global digital economy, discovery in civil litigation will often involve ESI that is held outside of the United States. If it is not in the “possession, custody, or control” of the parties, it is outside the reach of discovery, unless it can be obtained from a non-party. Even if the ESI is within the “possession, custody, or control” of a party (or non-party), disclosure and discovery may be restricted or prohibited by the privacy and data protection laws of the jurisdiction in which it is found. Traditionally,

²⁰ No. SA-18-cv-60-XR, 2019 WL 3936992 (W.D. Tex. Aug. 19, 2019).

²¹ No. COA18-1054, 2019 WL 3558764 (N.C. Ct. App. Aug. 6, 2019).

²² 331 F.R.D. 80 (S.D.N.Y. May 6, 2019).

U.S. courts have not viewed such restrictions favorably, and have often ordered parties to produce ESI in violation of such laws, placing multinational parties in the position of having to choose which nation's laws to violate.

But the first inquiry is whether the party has sufficient "possession, custody, or control" over the ESI to render it subject to discovery. In **J.S.T. Corporation v. Robert Bosch LLC**,²³ a complex trade secrets action, the court determined that under the 6th Circuit's "legal right" standard to determine whether a party exercises sufficient possession, custody, or control over particular sources of ESI to be legally responsible for answering discovery requests, the defendant failed to provide any evidence that plaintiff J.S.T. had the legal right to obtain and produce ESI maintained overseas by JST Mfg. Co., JST GmbH, or JST Korea.

Courts are quick to discern sham arrangements designed to place ESI outside the reach of discovery. In **Brooks Sports, Inc. v. Anta (China) Co., Ltd.**,²⁴ the defendant refused to produce its Chinese-based employees' WeChat discussions, arguing that "Chinese privacy law" forbade the company from turning over messages from employees who refused to consent to their production. The court imposed terminating sanctions against the defendant, observing disapprovingly that it failed to demonstrate an official communication system within the enterprise, instead allowing its employees and executives to use WeChat and their personal mobile devices to circumvent regulatory and discovery obligations.

We are seeing an uptick in applications from parties for discovery in assistance of foreign actions. These applications are governed by 28 U.S.C. §1782, which allows a U.S. federal court to supervise discovery, under the Federal Rules of Civil Procedure, if:

- the applicant is an "interested person" in a foreign proceeding
- the proceeding is before a foreign "tribunal," and
- the person from whom evidence is sought is in the district of the court before which the application has been filed.

In addition to these statutory requirements, courts have applied discretionary factors, following the U.S. Supreme Court's decision in **Intel Corp. v. Advanced Micro Devices**:²⁵

- whether the person from whom discovery is sought is participating in the foreign proceeding

²³ No. 15-13842, 2019 WL 2354631 (E.D. Mich. June 3, 2019).

²⁴ No. 1:17-cv-1458, 2018 WL 7488924 (E.D. Va. Nov. 30, 2018); *report and recommendation adopted*, 2019 WL 969572 (Jan. 11, 2019); *judgment modified*, 2019 WL 969569 (Feb. 5, 2019).

²⁵ 542 U.S. 241 (2004).

- the nature of the foreign tribunal and its receptiveness to U.S. judicial assistance
- whether the request conceals an attempt to circumvent foreign proof-gathering restrictions, and
- whether the request is unduly intrusive or burdensome.²⁶

Most of these applications are routinely granted, with little instructive analysis in the reported decisions. Occasionally, however, the court declines. In **In re Application of Hulley Enterprises, Ltd.**,²⁷ the court held that the Magistrate Judge did not abuse discretion by denying an application for discovery under 28 U.S.C. §1782 involving documents in possession of United States law firm solely because of its representation of the Russian Federation in foreign proceeding, finding that the lack of clarity in Russian privilege and confidentiality law counseled against granting application.

A recent Second Circuit decision may raise the specter of foreign litigants, prevented from obtaining discovery in their own countries by privacy and data protection laws, seeking discovery in the United States instead. In **In Re: Application of Antonio Del Valle Ruiz**,²⁸ the Appellate court found that the District Court acted within its discretion when permitting discovery of documents from a Spanish bank purchaser's New York affiliate, pertaining to the bank's financial status, for use in foreign proceedings arising from the government-forced sale of the bank. The affiliate was not party to any of the foreign proceedings, no argument was made that bank investors were attempting to procure the discovery in contravention of restrictions in foreign proceedings, and neither the purchaser nor affiliate showed that production of the documents would be unduly intrusive or burdensome. The court stated that a federal court is not categorically barred from allowing discovery of evidence located abroad under 28 U.S.C. §1782.

VIII. ESI in Criminal Cases

Normally these semi-annual updates of eDiscovery court decisions do not include criminal cases, as the discovery rules are very different. But eDiscovery in criminal cases is now common, and these cases implicate constitutional questions that are not present in civil litigation. In particular, 4th Amendment guarantees of privacy, and 5th Amendment prohibitions against self-incrimination, are often raised in criminal defense when the seizure of digital devices and the search of digital files are central to the investigation and conviction. And we must always keep in mind that state constitutions have similar provisions, which are often stronger than the federal protections.

²⁶ *Id.* at 264-65.

²⁷ 18 Misc. 435, 2019 WL 4562378 (S.D.N.Y. Sept. 5, 2019).

²⁸ Nos. 18-3226, 18-3474, 18-3629, 2019 WL 4924395 (2d Cir. Oct. 7, 2019).

In **Arizona v. Mixton**,²⁹ an Arizona appellate court found a “reasonable expectation of privacy” in subscriber information provided to and Internet Service Provider under the Arizona constitution, requiring the state to obtain a search warrant, issued by a judicial officer on a showing of “probable cause.” Federal law would only require a letter from law enforcement stating that the information sought is related to an ongoing criminal investigation.

In **Pollard v. State**,³⁰ Florida investigators sought to compel a suspect in an armed robbery to disclose the passcode to his iPhone, seized pursuant to a warrant, stating generally that there was “reason the believe” the defendant had used the iPhone to communicate with a co-defendant. The trial court granted the motion but was reversed on appeal. The appellate court held that the proper inquiry is “whether the state is seeking to compel a suspect to provide a password that would allow access to information the state knows is on the suspect’s cellphone and has described with reasonable particularity”.

²⁹ No. 2 CA-CR 2017-0217, 2019 WL 3406661 (Ariz. App. July 29, 2019).

³⁰ No. 1D18-4572, 2019 WL 2528776 (Fla. 1st Dist. Ct. App. June 20, 2019).