

Wednesday, October 23, 2019

5:30 — 7:30 Evening Welcome Reception

Thursday, October 24, 2019

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

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

8:45 — 9:45 [Session 1] Case Law Review, Part 1: Cooperation and Proportionality: Is civil discovery any more “just, speedy, and inexpensive” since the 2015 amendments to the Federal Rules of Civil Procedure?
([Judge Fleissig](#), [K. Withers*](#))

The 2015 amendments to the Federal Rules of Civil Procedure were intended to reduce the costs and burdens associated with pre-trial discovery, while protecting litigants’ rights to relevant information needed to effectively assert their claims and defenses. Rule 1’s language on cooperation, Rule 26’s articulation of proportionality factors, Rule 34’s requirements for specificity in responses – have these amendments made a difference? Have they had unintended consequences? Have they changed day-to-day practice in federal (or state) litigation? The moderator has selected recent representative cases in each of these three areas, to be presented by your fellow Working Group members, for dialogue on these questions.

Recommended Material:

- 1.1 Kenneth J. Withers, ed., *Selected Recent eDiscovery Court Decisions: Cooperation & Proportionality* (Oct. 2019)

9:45 — 10:45 [Session 2] Is There a Need for Guidance and Uniformity in Filing ESI Under Seal?
([Judge Conti](#), [R. Hedges](#), [H. Kolasinsky](#), [T. Opsitnick*](#), [A. Petruzzi](#))

The Federal District Courts find sealing authority from varying Federal Rules of Civil Procedure, with no national uniformity as to which rule applies. Moreover, sealing requirements and procedures vary widely from one court to the next, with some courts imposing expensive, complex, and burdensome requirements to file under seal. What recommended best practices for practitioners are needed for sealing electronically stored information (ESI) and the process for doing so? What approach to filing ESI and documents under seal balances the interests of the public and the interests and obligations of litigants, particularly those responsible for protecting the privacy or security of third-party information? A Brainstorming Group is considering these issues

ANNOTATED AGENDA

and whether WG1 should prepare a Commentary on the subject. This panel will discuss the status of that effort and obtain the input of the membership.

Required Materials:

- 2.1 The Sedona Conference WG1 Brainstorming Group Draft Outline on the Need for Guidance and Uniformity in Filing ESI Under Seal (Oct. 2019)
- 2.2 The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (2007 Summary Handout)

10:45 — 11:00 Morning Break

11:00 — 12:15 [Session 3] Hot Button Issues in Negotiating ESI Protocols ([B. Clark*](#), [R. Keeling](#), [J. Kenney](#), [C. Morgan](#), [Judge Smith](#))

Electronically stored information (ESI) protocols negotiated among the parties and entered as a court order are increasingly common in litigation. What topics are important to consider including, and what are the implications of doing so? Which topics cause parties the most difficulty in reaching an agreement?

Required Material:

- 3.1 The Sedona Conference WG1 Brainstorming Group, ESI Protocol Potential Topics (Oct. 2019)

Recommended Materials:

- 3.2 ESI Checklist & Model Protocols
- 3.3 Filed ESI Protocols

12:15 — 1:15 Lunch (provided)

1:15 — 2:15 [Session 4] Effective Use of Orders Under Federal Rule of Evidence 502(d) ([A. DiSenso](#), [N. Giddings](#), [L. Mancari*](#), [Judge Parker](#), [C. Traylor](#))

Federal Rule of Evidence 502(d) was designed to insulate litigants from motion practice over whether production of attorney-client privileged information or attorney work product waived the privilege. Despite its success in accomplishing this objective, problems still exist that prevent the fulfillment of Rule 502(d)'s promise. The Rule 502(d) brainstorming group is considering practical recommendations for addressing the issues. Please join this session as we dialogue regarding 502(d) practice challenges, standard provisions for 502(d) orders, and additional guidance and best practices to better ensure the most effective use of 502(d) orders.

Required Material:

- 4.1 The Sedona Conference WG1 Brainstorming Group Outline re: Effective Use of Non-Waiver Orders Under Federal Rule of Evidence 502(d) (Oct. 2019)

ANNOTATED AGENDA

2:15 — 3:30 [Session 5] Practical Advice for Managing eDiscovery in Small Cases

([Judge Driscoll](#), [G. Kohn](#), [T. Patton*](#), [M. Scimone](#), [J. Voss](#))

Even “small cases” can give rise to big eDiscovery headaches and size definitely matters when it comes to proportionality under Rule 26(b)(1). The “Small Cases” drafting team is continuing to incorporate input received to date and will update the WG1 membership on the latest changes to the draft on this topic. This panel will also share and discuss tips, tricks, and practical advice for responsibly and cost-effectively handling eDiscovery challenges presented by those cases filed in state and federal courts that constitute a “small case.”

Recommended Materials:

- 5.1 Hon. Timothy S. Driscoll, Greg M. Kohn, Trena M. Patton, Michael J. Scimone & Julia M. Voss, eds., *Practical Advice for Managing eDiscovery in Small Cases* (Sept. 2019)
- 5.2 Sherry B. Harris & Ronald J. Hedges, *Small Stakes Claims Can Mean Big ESI Headaches* (BNA 2013)

3:30 — 3:45 Afternoon Break**3:45 — 5:00 [Session 6] Should We Build A Better Mousetrap? Privilege Logs—Part I**

([K. Brady*](#), [D. Greenwald](#), [Judge Parker](#), [A. Tadler](#), [P. Weiner](#))

In today’s digital world, the review and preparation of privilege logs in litigation can consume hundreds of thousands of dollars or more. Yet, today’s privilege logs rarely achieve the goals of enabling other parties to assess a claim of privilege or reducing the need for *in camera* examination of the documents. In short, the process used for protecting privileged ESI from production is broken. In part 1 of this 2-part series, representatives of different constituencies will lead the dialogue to identify what is working and what is not working. They will also explore where we might go from here in a “reasoned and just way” to ensure procedures regarding privilege are aligned with Federal Rule of Civil Procedure 1’s mandate to “secure the just, speedy, and inexpensive determination” of every case. This series will culminate with a “discussion” at the 2020 WG1 Midyear Meeting regarding possible options to “move the law forward” in addressing privilege issues in discovery.

Recommended Material:

- 6.1 The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95 (2016). Focus specifically on **pages 154–167** of the *Commentary*, beginning with Section IV (Principle 4) and ending at Subsection IV.A. (Use of Search and Retrieval Technologies Generally).

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

ANNOTATED AGENDA

Friday, October 25, 2019

7:30 — 8:30 Buffet Breakfast & Sign-In**8:30 — 9:30 [Session 7] Case Law Review, Part 2: Sanctions for Spoliation and Discovery Misconduct: Have the 2015 amendments to the Federal Rules of Civil Procedure changed the sanctions landscape?****([R. Bailey](#), [Judge Collins](#), [P. Favro*](#), [D. Kessler](#))**

The 2015 amendments to Federal Rule of Civil Procedure 37(e) were designed to provide a uniform national standard regarding the issuance of severe sanctions to address spoliation of electronically stored information (ESI). They also introduced a new framework for determining whether sanctions of any nature should be imposed for ESI preservation shortcomings. With nearly four years having transpired since their enactment, it is worth exploring how effective the Rule 37(e) changes have been in addressing the issues. Please join this session as we dialogue about case law trends regarding the sanctions' framework, the "intent to deprive" requirement, and other motion practice flash points under the rule.

Recommended Materials:

- 7.1 Philip J. Favro, *Selected Recent Court Decisions Regarding Federal Rule of Civil Procedure 37(e)* (Oct. 2019)
- 7.2 Thomas Y. Allman, *Amended Rule 37(e): How Rule 37(e) Has Refocused ESI Spoliation Measures* (Aug. 12, 2019)
- 7.3 Kevin F. Brady, *Oscar-Worthy Roles for Mobile Phones in Civil and Criminal Cases*, The Journal of the Delaware State Bar Association (Sept. 2019)

9:30 — 11:00 [Session 8] The Verdict on Change: Judging the Effectiveness of the 2015 Amendments to the Federal Rules of Civil Procedure**([Judge Collins](#), [Judge Conti](#), [Judge Driscoll](#), [Judge Fleissig](#), [Judge Parker](#), [Judge Peck \(ret.\)](#), [Judge Porcelli](#), [Judge Smith](#), [M. Tully*](#))**

The earlier two "Case Law Review" panels discussed whether the objectives of the 2015 amendments to the Federal Rules of Civil Procedure have been achieved, especially when it comes to cooperation, proportionality, spoliation, and sanctions. But the last word on these and related eDiscovery topics often comes from the bench. A highlight of every WG1 meeting, please join this panel of distinguished jurists as they share their own experiences and perspectives on the effectiveness of the 2015 amendments, how the presentment and resolution of eDiscovery disputes has evolved, how lawyers can satisfy their ethical obligations when it comes to eDiscovery, and what else might be done to make civil discovery more "just, speedy, and inexpensive."

Recommended Materials:

- 8.1 The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1 (2018)
- 8.2 The Sedona Conference, *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for*

ANNOTATED AGENDA

- Responding to Discovery Requests*, 19 Sedona Conf. J. 447 (2018)
8.3 The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019)

11:00 — 11:15 Morning Break

11:15 — 11:45 [Session 9] State of Sedona Working Group Series
([D. Backhouse](#), [K. Brady*](#), [M. Tully](#))

This session will review recently released publications as well as papers currently in progress from WG1, WG6, and WG11. Our dialogue leaders will also seek input regarding WG1's future publishing and thought-leadership efforts, and whether opportunities for collaboration among Working Groups exist.

11:45 — 12:45 [Session 10] Ephemeral Messaging: Here Today . . . Gone in Minutes???
([D. Backhouse](#), [A. D'Ambra*](#), [L. Hunt](#), [Judge Porcelli](#))

As data volumes continue to grow exponentially, organizations are increasingly seeking ways to reduce the amount of information that has no business value. While ephemeral messaging applications have in the past been associated with nefarious activities, they offer a simple method for managing non-substantive communications. This panel will analyze the risks and benefits of ephemeral messaging and discuss solutions for addressing legal preservation obligations.

Recommended Materials:

- 10.1 Philip Favro, *Ephemeral Messaging: Balancing the Benefits and Risks* (Practical Law June/July 2019)
- 10.2 U.S. Department of Justice, Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (updated March 2019)
- 10.3 Philip Favro & Keith Call, *A New Frontier in eDiscovery Ethics: Self-Destructing Messaging Applications*, 31 Utah B. J. 40 (Mar/Apr 2018)

12:45 — 1:00 Wrap-up

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