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The Sedona Conference® Points the Way Toward Control of the Costs and Burden of E-Discovery

The Sedona Conference® is a nationally recognized nonpartisan research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The institute works toward the "just, speedy, and inexpensive" resolution of litigation, a goal espoused by Rule 1 of the Federal Rules of Civil Procedure. To further that goal, the institute recently issued *The Sedona Conference Cooperation Proclamation* after rigorous dialogue among its members and participants, including federal and state judges, litigators, in-house corporate and government counsel, and consultants. The Proclamation, which can be found at www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf, calls on trial lawyers, in-house counsel, and judges to rethink the contentious practices that have grown up around civil discovery and to refocus litigation toward the substantive resolution of legal disputes, particularly disputes that revolve around electronically stored information (ESI).

The Sedona Conference has developed a three-step process—known by the acronym ACT—by which this change in attitudes and behavior can come about. ACT starts with developing *awareness* of the need for cooperation (that is, the Proclamation itself); making a *commitment* to a detailed understanding of conflicting interests and motivations (the "Case for Cooperation" found at www.thesedonaconference.org/content/tsc_cooperation_proclamation/caseforcooperation.pdf); and creating *tools* to help train and support lawyers and judges in the practical techniques of cooperation when it comes to discovery. This article focuses on two tools: *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* and *The Sedona Conference Cooperation Proclamation: Guidance for Litigators and In-House Counsel*. But, before turning to these publications, a look at the Proclamation itself provides an essential background. Much of the following language is taken directly from the Proclamation itself.

Why the Proclamation?

The costs associated with adversarial conduct in pretrial discovery have become a serious burden to the American judicial system. This burden rises significantly when it involves discovery of ESI. When parties treat the discovery process in an adversarial manner courts have seen an increase in monetary costs, motion practice, over-reaching, obstruction, and extensive but unproductive discovery disputes, which, in some cases, preclude adjudication on the merits altogether. Neither law nor logic compels these outcomes. With the Proclamation, the Sedona Conference launched a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, and transparent discovery. The Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation and Zealous Advocacy

Lawyers have twin duties of loyalty. They are retained to be zealous advocates for their clients, but they are also officers of the court who have a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost and with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict. Lawyers preparing cases for trial need to focus on the full cost of their efforts—temporal, monetary, and human. Indeed, all stakeholders in the system—judges, lawyers, clients, and the general public—have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes; doing so only strains the legal system as a result of "gamesmanship" or "hiding the ball" and has no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not a utopian vision but an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts in a case and arguing the appropriate application of law.

Cooperation in Litigation

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative rule-based, party-driven process designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules of Civil Procedure specifically focused on the discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange and avoid costly and unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond these issues, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith. Courts see these rules as a mandate for counsel to act cooperatively. Ways to accomplish this cooperation may include the following:

- using internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
- exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;
- jointly developing automated search and retrieval methodologies to cull relevant information;
- promoting early identification of form or forms of production;
- developing case-long discovery budgets based on proportionality principles; and
- considering the use of court-appointed experts, volunteer mediators, or formal alternative dispute resolution programs to resolve discovery disputes.

The Judicial Resources

The Sedona Conference Cooperation Proclamation: Resources for the Judiciary, which can be found at www.thesedonaconference.org/dltForm?did=Judicial_Resources.pdf, begins with the recognition of different judicial case management philosophies, namely "active case management" and "discovery management." The first is intended to be proactive and the latter reactive, although both recognize that discovery in the United States is party-driven, rather than judge-driven. These judicial resources urge the judges to adopt an active management philosophy, even though the Sedona Conference recognizes that the choice of management philosophy is driven by, among other things, available resources, the structural design of courts, and judges' individual attitudes. Whatever the philosophy an individual judge chooses, the recommended judicial resources are intended to assist judges in furthering the goals of Rule 1 and its state equivalents.

The Stages of Litigation from a Judge's Perspective

In making general recommendations for judges about how to manage ESI in litigation, the Sedona Conference's judicial resources identify "stages" of the progress of a civil action from beginning to end. At each stage, the judicial resources identify issues that might be presented, suggest judicial management strategies to address disputes between parties and further the goals of Rule 1, and present forms of orders. The stages of litigation that are identified include the following:

- preservation,
- parties' early case assessment,
- initial scheduling order,
- meet-and-confer session to formulate a discovery plan,
- initial case management order,
- definition of the scope of e-discovery,
- proportionality,
- identification of "not reasonably accessible" sources of ESI,
- agreement on search and collection methodologies,
- protection of attorney-client privilege and confidentiality,
- privilege log,
- allocation of costs,
- discovery from nonparties,
- evidentiary foundations,
- electronic trials,
- discovery motion practice, and
- sanctions.

The Guidance

The *Sedona Conference Cooperation Proclamation: Guidance for Litigators and In-House Counsel*, which can be found at www.thesedonaconference.org/dltForm?did=Cooperation_Guidance_for_Litigators_and_In_House_Counsel.pdf, identifies opportunities for constructive and mutually beneficial cooperation with opposing counsel and provides pointers on how to take advantage of those opportunities. In addition to discussing the benefits of cooperation, the Sedona Conference's guidance highlights some of the possible consequences of noncooperation, including increased costs, judicial intervention, and sanctions. There may be times when a party elects to stonewall, intimidate, and seek capitulation through "hardball" discovery tactics. Even though such tactics may produce an isolated (and probably one-time-only) favorable result, they are much more likely to engender reciprocal intransigence and increased costs and risks

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to parties and their attorneys.

Given that most judicial analyses of discovery disputes, including those involving ESI, focus on concepts of "reasonableness" and "good faith," both requesting and responding parties have strong incentives to act in a way that is consistent with those concepts. Doing so will help achieve mutually beneficial cooperation within the context of the adversary system. The guidance is intended to further the functioning of the adversary system and cooperation through "Cooperation Points," which can assist litigators and in-house counsel during the discovery process.

Cooperation Points from a Litigator's Perspective

Just as the Sedona Conference's recommended judicial resources identify stages of litigation as seen through the eyes of a judge, the institute's guidance identifies "points" within the discovery process when litigators can make decisions that affect the cost and burden—and volume—of producing electronically stored information. These points include the following:

- identification of material factual issues in dispute and potentially relevant data,
- identification of data sources and preservation,
- collection,
- data processing, hosting, and production,
- form of production,
- structured data,
- identification and removal of duplicative data,
- processing and production, and
- responsiveness and privilege review.

Cooperation Points from In-House Counsel's Perspective

Of course, no litigation can proceed without the assistance and cooperation of in-house counsel. Indeed, the seminal *Zubulake* decisions proceeded to address preservation of information as a shared responsibility. Moreover, the role of in-house counsel is magnified by the obligation to address potential litigation even before outside counsel may be retained. Accordingly, the Sedona Conference's guidance recognizes the pivotal role of in-house counsel and identifies "cooperation points" similar to those of outside counsel:

- identification of the material facts in dispute and potentially relevant data,
- scope of preservation,
- sources of ESI that are not reasonably accessible,
- receipt and response to preservation demand letters,
- drafting of a preservation demand letter,
- response to a preservation demand letter,
- resolution of preservation issues without motion practice,
- collection,
- processing,
- production,
- review, and
- development of a review plan.

Conclusion

Both the *Sedona Conference Cooperation Proclamation: Resources for the Judiciary* and *Sedona Conference Cooperation Proclamation: Guidance for Litigators and In-House Counsel* are living documents that are available from the Sedona Conference's website at no charge. Public comment is encouraged and will be considered by the editors for anticipated editions. These publications have already become the essential textbooks in educational programs for judges and legal practitioners. Even though, at first blush, the *Sedona Conference Cooperation Proclamation* may appear to be utopian, these two companion publications are helping make the goal of cooperation between adversaries to achieve the "just, speedy, and inexpensive" administration of justice a practical reality. **TFL**

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