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FEDERAL E-DISCOVERY

Guidance on Non-Party Discovery And ESI Evidence, Admissibility



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Since publishing *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, Public Comment Version* in 2003, The Sedona Conference has been the go-to resource for guidance on legal issues relating to the discovery of electronically stored information (ESI). Sedona publications have been cited hundreds of times by courts on issues ranging from data preservation and legal holds to the use of technology-assisted review. Sedona's Working Group 1 on Electronic Document Retention and Production (WG1) is an active think-tank of jurists, attorneys, academics, consultants, and experts that regularly publishes commentaries on "tipping point" e-discovery topics. Most recently, WG1 published its updated guidance on two e-discovery topics



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that have challenged judges and practitioners alike: non-party discovery under Rule 45 of the Federal Rules of Civil Procedure and the admissibility of ESI evidence.

Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition

The impact of e-discovery on non-parties has been a particularly challenging issue in discovery practice. For example, as seen in a key early decision on this topic, *In re Fannie Mae Sec. Litig.*, 552 F.3d

814 (2009), the court sanctioned a non-party federal agency for discovery actions that were "not only legally insufficient, but too little, too late," *id.* at 818, notwithstanding that the agency spent close to 9% of its annual budget on document review and production. This case demonstrates how non-parties held to the same standards that govern parties under the Federal Rules of Civil Procedure can find themselves subject to significant burdens and expenses even in proceedings in which they have no

stake or interest in the outcome. And, especially considering the major shift toward technology outsourcing in the past decade, non-party discovery obligations could have a major impact on many companies, including those offering Cloud-based services.

The Sedona Conference initially provided guidance on non-party discovery in its April 2008 publication on the subject, which focused on the impact of the 2006 amendments to the Federal Rules of Civil Procedure. Since then, significant changes in the Federal Rules—along with varying decisions by courts on the topic and the rise of outsourcing—underscored the need for updated guidance on non-party discovery. After a multi-year drafting and public comment process, on Oct. 5, 2020, The Sedona Conference released its updated *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 Sedona Conf. J. 1 (forthcoming 2021). This commentary, in addition to providing guidance to courts, litigants, and non-parties, may help shield non-parties from unreasonable and onerous discovery burdens, especially those related to implementation of legal holds. Following up and greatly expanding on the first edition, the updated commentary:

- Discusses the direct and indirect impact that the 2013 and 2015 amendments to the Federal Rules of Civil Procedure—and the enactment of Federal Rule of Evidence 502—had on Rule 45 and non-party

discovery. The often overlooked 2013 amendments, in particular, significantly revised Rule 45.

- Recommends a new approach to handling situations in which a non-party may have possession or custody of discoverable ESI, but the party itself still exercises control. In such situations, as where a company outsources its information technology systems, The Sedona Conference suggests that requesting parties should be obligated to utilize Rule 34 to obtain the ESI directly from the party rather

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than employing Rule 45 subpoenas directed at non-parties. Such an approach could offer significant relief to non-parties faced with potentially significant costs of responding to document requests.

- Provides a framework for assessing a non-party's preservation and production obligations, stating that "a non-party has no obligation to preserve documents prior to receipt of a subpoena or after complying with a subpoena, absent a

special relationship to a party to the litigation." *Id.* at 33. This framework reconsiders—and rejects—the notion that a non-party's receipt of a subpoena or a request to preserve evidence requires it to implement a formal legal hold, offering potential relief to companies facing substantial related burdens and expenses.

- Discusses and analyzes existing case law on the topics of cost shifting, sanctions, and quashing or limiting the scope of subpoenas under Rule 45.
- Offers a set of eighteen "Practice Pointers" to guide parties and non-parties, including that "[t]he party issuing a subpoena should consider and incorporate the concept of proportionality" and that "[t]his *Commentary* encourages a non-party to provide a specific date after which it will no longer retain the documents or ESI that it objects to producing." *Id.* at 79, 81.

Commentary on ESI Evidence & Admissibility, Second Edition

In 2006, the Federal Rules of Civil Procedure were significantly amended for the first time to account for ESI. Shortly thereafter, in his seminal decision on ESI admissibility, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (2007), then Chief Magistrate Judge Paul Grimm highlighted that "[v]ery little has been written, however, about what is required to

insure that ESI obtained during discovery is admissible into evidence at trial, or whether it constitutes ‘such facts as would be admissible in evidence’ for use in summary judgment practice This is unfortunate, because considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted. The process is complicated by the fact that ESI comes in multiple evidentiary ‘flavors,’ including e-mail, website ESI, Internet postings, digital photographs, and computer-generated documents and data files.” *Id.* at 537-38.

In March 2008, Sedona sought to remedy this guidance gap with its initial publication on the subject, which outlined a framework for authenticating and admitting ESI for use during motion practice or at trial. During the past decade, with the proliferation of new data sources containing potentially discoverable and admissible ESI, this guidance was in need of an update. As such, The Sedona Conference updated its original commentary, announcing on Oct. 12, 2020 the release of its *Commentary on ESI Evidence & Admissibility, Second Edition*, 22 Sedona Conf. J. 83 (forthcoming 2021). This new edition:

- Addresses the impact of the 2017 and 2019 amendments to the Federal Rules of Evidence, particularly Rules 803(16), 807, and 902(13) and (14), in the context of emerging technology and information management with a focus on ESI.
- Discusses authentication of ESI and corresponding evidentiary rules and case law.
- Analyzes current challenges relating to modern digital evidence derived from sources, such as, for example, artificial intelligence, social media, ephemeral messages, blockchain, collaboration tools,

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- emojis, and cloud computing.
- Summarizes Federal Rules of Evidence 901 and 902 in the context of methods of authenticating various sources of electronic evidence (including emails, text messages, mobile devices, and social media) and corresponding case law for each data source type.
- Offers practical guidance on the use of ESI in the context of court proceedings, such as “[i]n assessing whether to self-collect or to outsource data collection entirely, a key

consideration is how much cost and risk the organization is willing to bear in collecting the data” and “[n]o matter the method of collection, an essential step is to document the chronology of the ESI, including details about its custody, control, transfer, and disposition, in a chain of custody that can be used to authenticate the evidence later in the case.” *Id.* at 174.

Conclusion

With its *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition* and *Commentary on ESI Evidence & Admissibility, Second Edition*, The Sedona Conference has offered updated and useful resources that address the realities of modern e-discovery practice. Courts, organizations, individuals, and counsel doubtless will find these commentaries helpful as they are faced with new challenges created over the past decade with respect to ESI and discovery.