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A Return to a Balance of Cost and Reason in e-Discovery? Two New Sedona Commentaries Offer Hope

For the past decade, courts have sternly warned of the perils of and imposed harsh sanctions for spoliating electronic information; requesting parties have sought discovery of every possible form of data, and producing parties have complained that the excessive cost of electronic discovery far exceeds reasonable defense expectations. To date, the courts have struggled with the emerging concept, producing inconsistent and sometimes irreconcilable or even unfathomable decisions, and practical guidance has been hard to find. With the recent publication of two new Commentaries from The Sedona Conference, there is new promise that the balance of cost and reason—and more predictable decision-making—may be restored to the discovery process.

The first publication—*Commentary on Legal Holds: The Trigger & The Process*[1]—seeks to explain the duty to preserve, when it is triggered, and how a responding party may reasonably scope its preservation efforts. The second—*Commentary on Proportionality in Electronic Discovery*[2]—marshals the rules and developing case law supporting the principle that all discovery should be measured in proportion to the case to avoid waste or duplication.

Both commentaries build on significant court decisions, as well as secondary authority—including The Sedona Principles—that are well known to most practitioners. But what is new in each commentary is a perspective that places those cases, and earlier commentary, in the longer term context of court procedures. For example, the duty to preserve is traced to the common law duty to avoid spoliation of evidence for use at trial, as determined by cases in 1991 and 2001. Even though the use of a "litigation hold" gained momentum with the 2003 *Zubulake* decisions beginning in 2003, and the rules now require early discussion of electronic discovery issues, the rules remain silent on when and how broadly a hold should be issued. The Hold Commentary contains a number of illustrations of the general principles.

Similarly, the concept of proportionality was implicit as of 1938 in Federal Rule 1 (which states that the rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding), and explicitly in rules amendments in 1983, 1993 and 2006. But, as the Commentary on Proportionality observes, courts have not always applied this principle when it was warranted, and, even when courts have applied it, they have not labeled it as such.

[1] 11 Sedona Conf. J. 265 (2010) (hereinafter "Hold Commentary").
[2] 11 Sedona Conf. J. 289 (2010) (hereinafter "Commentary on Proportionality").

The new Hold Commentary seeks to provide pragmatic suggestions to carry out preservation obligations, including:

- A duty to preserve is triggered when an organization or individual is on notice of a credible probability that it will become involved in litigation, seriously contemplates commencing litigation, or takes specific action to commence litigation (p. 277 & ff.)

- A vague rumor or indefinite threat of litigation does not trigger the duty to preserve, nor does a threat of litigation that is not credible or not made in good faith (p. 277)

- Determining whether litigation is reasonably anticipated should be based on a good faith evaluation of the facts and circumstances, including:

  - The nature and specificity of the complaint or threat;
  - The party making the claim;
  - Whether the threat is direct;
  - The business relationship between the accused and accusing parties;
  - Whether the party making the threat has a reputation for being litigious;
  - The strength, scope or value of the claim;
  - The experience of the industry, and
  - Reputable media coverage of the issue (p. 276).

- Once the duty to preserve is triggered, appropriate steps must be taken to preserve relevant information, but a written hold notice is not required in all cases (pp. 267, 283, 284 Illustration iii)

- Determining what should be preserved requires informed judgment, and may require trained people (internal or external to the organization), processes and technology (p. 277-278)

- Every shred of conceivably relevant information need not be preserved, and there is no automatic need to preserve backup media, especially if it only stores duplicative information (pp. 281); the principal criteria are reasonable, and good faith efforts are taken as soon as practicable to identify likely sources of relevant information (p. 279-280)

- For larger matters, having a planned and scalable process is useful, but ad hoc manual processes are often appropriate for matters involving relatively few custodians; in short, there should be no one-size-fits-all solution to issuing a legal hold (pp. 277-278)

- Efforts undertaken for key custodians may be different from those undertaken for other custodians (p. 277, n. 36)

The Hold Commentary also underscores the relevance of proportionality (pp. 15-16, citing the recent *Rimkus* decision), and cooperation (p. 18) in addressing preservation issues. Finally, as several courts have ruled, the grounds for an organization's preservation decisions should be evaluated in light of the facts and circumstances reasonably known at the time of the decision (p. 14). Thus, the commentary places a premium on well-documented, consistent processes.

The Commentary on Proportionality constitutes a good companion, or bookend, to the Hold Commentary. It too urges that principles of proportionality—and in particular the burdens and costs of preservation—be considered and weighed when determining the scope of preservation. It also counsels that discovery should be obtained from the most convenient and least burdensome sources, allowing for the staging of discovery in different phases (pp. 8-9). The commentary also notes the several rules and Advisory Committee Notes that have warned against duplicative and burdensome discovery—including Federal Rules 26(b)(1); 26(b)(2); 26(c) and 26(g)—and the factors to be considered in assessing proportionality, including non-monetary considerations such as societal benefits (pp. 12-13). Like the Hold Commentary, the Commentary on Proportionality places a premium on counsel's exercise of informed judgment:

> [P]arties who demonstrate that they acted thoughtfully, reasonably and in good faith in preserving or attempting to preserve information prior to litigation should generally be entitled to a presumption of adequate preservation (p. 8).

Finally, the Commentary on Proportionality suggests technologies may be applied to reduce costs and burdens (pp. 13-14).

In combination, these new commentaries confirm that simply collecting all possible data is not the answer to a successful discovery process. In addition to early action, they urge the exercise of a greater level of both professional knowledge and judgment. Counsel need to understand more broadly—either through self-education or associating relevant expertise—where information may be stored and what discovery efforts are reasonable to the particular circumstances. At least for larger cases, organizations should develop strong defensible processes that can be repeated, documented and used on a variety of legal matters. Moreover, because technology platforms change constantly, organizations should ensure their procedures and personnel can adapt over time to meet evolving needs and demands. Finally, the Commentaries provide enterprises with a reasoned basis for resisting overly costly preservation and collections, and conducting e-discovery in more measured yet defensible ways.