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Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program

Use of the Seventh Circuit E-Discovery Principles to Improve
Your Discovery Processes

Presented by:

Technology Concepts & Design, Inc.



Panelists



Chief Judge James F. Holderman
Chief District Judge, U.S. District Court Northern District of Illinois



Hon. Nan R. Nolan
U. S. Magistrate Judge, U.S. District Court Northern District of Illinois



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7th Circuit E-Discovery Pilot Program

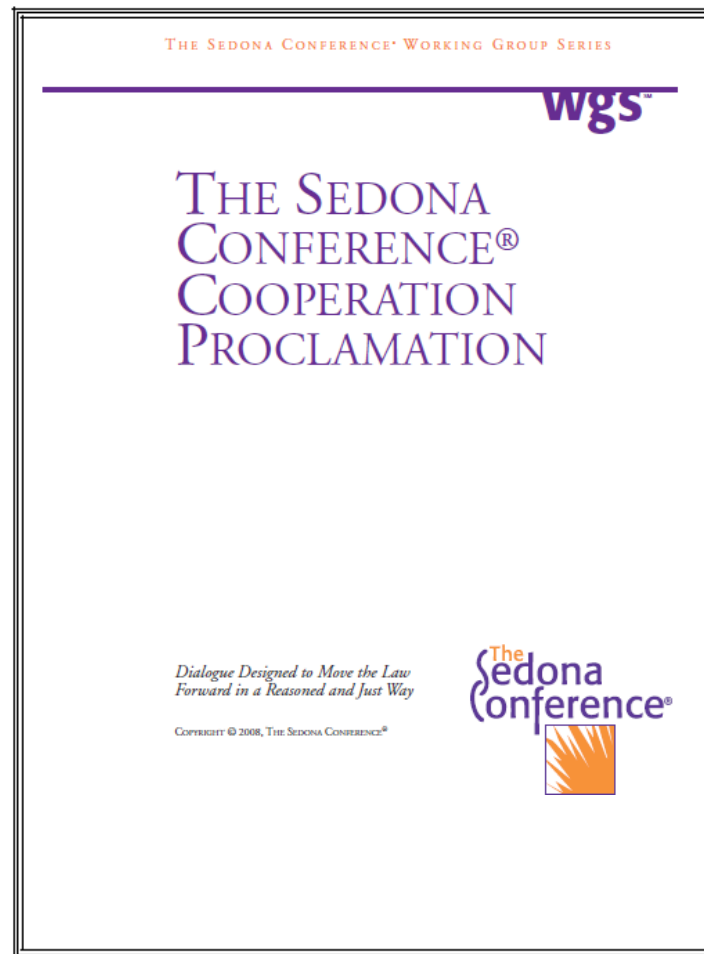
October 1, 2009

**SEVENTH CIRCUIT
ELECTRONIC DISCOVERY
PILOT PROGRAM**

**PHASE ONE
OCTOBER 1, 2009 - MAY 1, 2010**

STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES

The Sedona Proclamation





Rule 26(f) Conference of the Parties; Planning for Discovery

26(f)(2) parties must “**discuss any issues about preserving discoverable information; and develop a proposed discovery plan**”

26(f)(3)(C) discovery plan must state the parties' views and proposals on “**any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced**”

These requirements give little guidance about what “issues” to discuss concerning preservation or discovery

In practice, it is common for parties to avoid discussion at any meaningful level

The Principles:

1. Identify specific topics that should be
 - A. Investigated and understood by counsel before the Rule 16 conference; and
 - B. Addressed in the meet-and-confer process before the Rule 16 conference
2. Incentivize a more open exchange by requiring that these issues be raised promptly if there is disagreement (or the aggrieved party may not be heard later)



Principle 2.01

Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

- (a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are:
 - (1) the **identification** of relevant and discoverable ESI;
 - (2) the **scope** of discoverable ESI to be preserved by the parties;
 - (3) the **formats** for preservation and production of ESI;
 - (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and
 - (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.
-

This Principle identifies general topics, while other Principles give more specific guidance:

Principle 2.05 provides more guidance on “identification” issues

Principle 2.04 provides specific issues concerning “preservation” issues

Principle 2.06 provides more guidance on “format” issues



Principle 2.01

Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

- (b) Disputes regarding ESI that counsel for the parties are unable to resolve **shall be** presented to the Court **at the initial status** conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, **or as soon as possible thereafter**.
-

Disputes that can reasonably be identified by meaningful discussion before the initial status **MUST** be raised by the initial status

Disputes that are only identifiable later **MUST** be brought up promptly

The teeth to this is that failing to do so risks the Court refusing to hear the aggrieved party later



Principle 2.01

Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

- (c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.
-

To fulfill these requirements of the Principles counsel must actively investigate and understand their clients' information systems

Otherwise meaningful discussion is not possible



Principle 2.02 E-Discovery Liaison(s)

In most cases, the meet and confer process will be aided by participation of **an e-discovery liaison(s)** as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party's e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.



Principle 2.02

E-Discovery Liaison(s) Summary

Principle 2.02

- One or more people with knowledge of data systems, hold and collection processes
- Main point of contact for data issues for parties and bench

Benefits of the Liaison

- Encourages meaningful communication between parties
- Allows centralization of information pertaining to e-discovery
- Helps cooperation and dialogue between the “experts”
- Broad enough to allow more than one liaison depending on the circumstance
- Many corporations have this role internally already

Things to watch out for

- Need someone who is comfortable with *both* legal and IT issues
- Face of client for the court
- Need someone who is cooperative, but knows your limitations



Principle 2.04

Scope of Preservation

- (a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.
- (b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.
- (c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.



Principle 2.04

Scope of Preservation

- (d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:
 - (1) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives;
 - (2) random access memory (RAM) or other ephemeral data;
 - (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
 - (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; and
 - (5) backup data that is substantially duplicative of data that is more accessible elsewhere;
 - (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

- (e) If there is a dispute concerning the scope of a party’s preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.04

Scope of Preservation Summary

Principles intend to focus the data that must be preserved and collected

Example: Company XYZ



2.5 GB/employee



10,000 Employees on
Legal Hold

Result of a Simultaneous Collection:

- \$12 - \$16M to process for review
- 5 1/3 days per attorney to review 1GB of data working 7-hr days
- Over 33,000 days to review data (Assuming 75% culled out during processing)
- At \$250/hr, it would cost is apx. \$60M to review the data

Takeaway: Focusing holds to cut down preservation of unnecessary data is crucial



Principle 2.04 Scope of Preservation


- (b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.



Principle 2.03

Preservation Requests and Orders

- (b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:
 - (1) names of the parties;
 - (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
 - (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
 - (4) relevant time period; and
 - (5) other information that may assist the responding party in assessing what information to preserve.



Principle 2.03

Preservation Requests

- Don't make vague overreaching demands – these are “disfavored,” See Principle 2.03(a)
- However, if you have “specific and useful information” then share it
- That means providing information that will help one's opponent identify the **subset** of information that it should preserve
- Flesh out the factual and legal issues and the types of evidence you think you may want
- Identify specific employees or agents of whom you know and who you think may have relevant information that should be preserved
- Flesh out the time period you consider relevant
- Offer up any other information that you may have that will help identify what should be preserved



Principle 2.03


Preservation Responses

- (c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:
 - (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
 - (2) identifies any disagreement(s) with the request to preserve; and
 - (3) identifies any further preservation issues that were not raised.



Principle 2.03(c) Preservation Requests & Orders Summary

- Gives parties guidance to set the standard for what is reasonable
- Non-response does not equal waiver
- Encourages parties to respond in order to focus preservation effort
 - Will start dialogue with other side
 - Will help proactive parties set the terms



Principle 2.05

Identification of ESI

- (a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

- (b) Topics for discussion may include, but are not limited to, any plans to:
 - (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
 - (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
 - (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.



Principle 2.05


Goals

- Discuss each party's plan for using technology to cull the data
- De-duplication – within custodian or across dataset
- File type filters – e.g., system files, music files, etc.
- Date restrictions
- Sender/receiver restrictions
- Boolean searches
- Potential use of advanced culling technology
- Bayesian or statistical concept clustering
- Thesaurus based concept searching



Rule 34(b)(2)


- (D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.
- (E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
 - (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
 - (iii) A party need not produce the same electronically stored information in more than one form.



Principle 2.06

Production Format

- (a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.
- (c) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.
- (e) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.
- (d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.



Principle 2.06

Production Format

The Principles do not elaborate on what is a reasonably usable non-native production format 

The Principles do:

- (a) encourage requesting parties to consider using existing database reporting features rather than demanding native data
 - It can be complex to recreate a database
 - There may be complex authentication issues with reports generated by the recreated database
- (b) take the position that a party producing documents that are in a native form that is not text searchable (e.g., paper or an electronic image form) need not pay to “upgrade” to an electronically searchable form

However, the Principles do encourage cooperation and cost sharing

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STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES

What's Next?

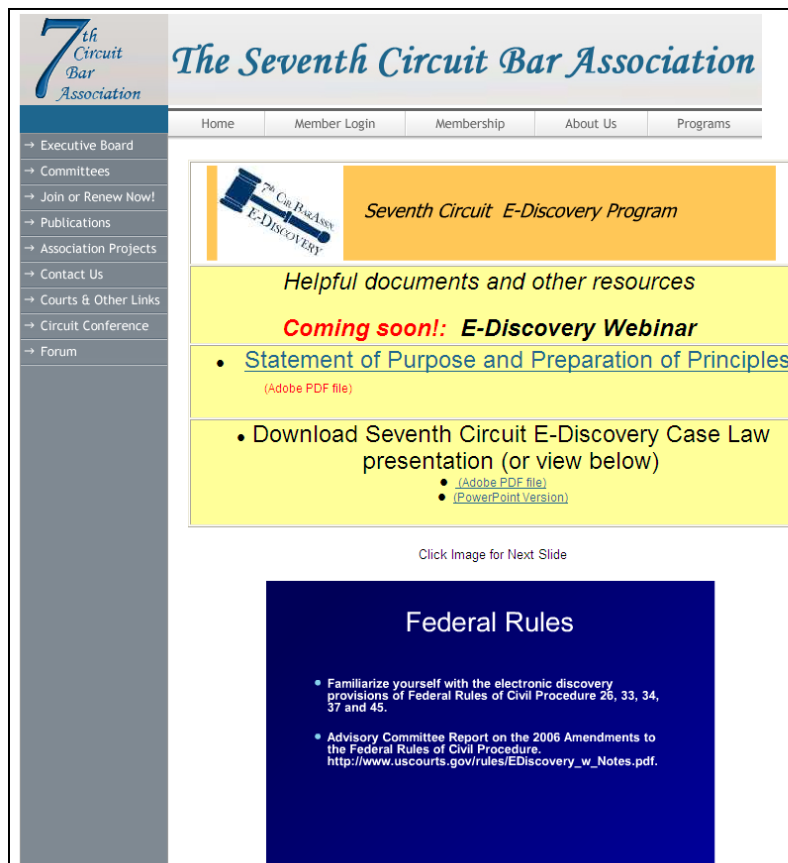
Phase 1 = Snapshot

- Survey March 3rd
- Chicago, May 2-4, 2010
- Duke University, May 10-11, 2010

Phase 2



Further Useful Links



The screenshot shows the website for The Seventh Circuit Bar Association. The header includes the logo and navigation links: Home, Member Login, Membership, About Us, and Programs. A sidebar on the left lists various sections like Executive Board, Committees, and Publications. The main content area features a banner for the "Seventh Circuit E-Discovery Program" with a gavel icon. Below the banner, there is a section titled "Helpful documents and other resources" with a "Coming soon! E-Discovery Webinar" announcement. Two bullet points list available resources: "Statement of Purpose and Preparation of Principles" (Adobe PDF file) and "Download Seventh Circuit E-Discovery Case Law presentation (or view below)" with links for Adobe PDF file and PowerPoint Version. At the bottom, a blue box titled "Federal Rules" contains two bullet points: "Familiarize yourself with the electronic discovery provisions of Federal Rules of Civil Procedure 26, 33, 34, 37 and 45." and "Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure" with a URL.

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