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**DOCUMENT  
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GROUP**

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# Recent Developments in E-Discovery

# Topics for Discussion

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- Amendments to the ARCP Re ESI
- Sedona Principles, Third Ed.: Best Practices, Recommendations & Principles for Addressing Electronic Document Production
- Sedona Conference FRCP Rule 43(b)(2) Primer
- 4<sup>th</sup> Annual Federal Survey of Judges: State of E-Discovery Law & Practice

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# Amendments to the ARCP Re ESI

# Summary of Recent Amendments to ARCP

Effective July 1, 2018

## **CASE MANAGEMENT REFORMS**

- Differentiated Case Management
- The “Early Meeting”
- Changes to Rule 37
- Expedited Discovery Dispute Resolution
- Disallowed Defenses
- Changes to Rule 11

## **DISCOVERY REFORMS**

- Changes to ESI Discovery and Preservation
- Changes to Subpoena Powers and Third Party Objections
- Revised Expert Opinion Disclosure Requirements

# ESI – Duty to Preserve

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(From Rules Effective January 1, 2017)

- Rule 37(g)(1)(A) – Defines the duty to preserve:
  - Duty - take **reasonable steps** to preserve electronically stored information
  - Who – a party or person reasonably expected to become a party
  - What – ESI **relevant** to an action
  - When – Whichever of these occurs first
    - once party **commences** the action,
    - once party or person **learns** that it is a party to the action
    - once party or person **reasonably anticipates** the action's commencement
    - court order or statute also may impose a duty to preserve certain information

# ESI – Duty to Preserve (con't)

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(From Rules Effective January 1, 2017)

- Rule 37(g)(1)(B) – Defines Reasonable Anticipation:
  - When a person
    - knows or reasonably should know that it is likely to be a defendant in a specific action; or
    - seriously contemplates commencing an action or takes specific steps to do so.
- Rule 37(g)(1)(C) – Defines Reasonable Steps to Preserve:
  - Reasonable steps to
    - prevent the routine operation of an electronic information system or
    - application of a document retention policy from destroying information that should be preserved.



# ESI – Duty to Preserve (con't)

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(From Rules Effective January 1, 2017)

- Rule 37(g)(1)(C) – Defines Reasonable Steps to Preserve:
  - Factors a court should consider in determining whether a party took reasonable steps to preserve relevant ESI:
    - the nature of the issues raised in the action or anticipated action,
    - the information's probative value,
    - the accessibility of the information.
    - the difficulty in preserving the information,
    - whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy,
    - the timeliness of the party's actions,
    - the relative burdens and costs of a preservation effort in light of the importance of the issues at stake,
    - the parties' resources and technical sophistication, and
    - and the amount in controversy

# ESI – Preservation Request Resolution

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- Rule 45.2 – governs the resolution of disputes concerning the scope of a party’s or non-party’s duty to preserve ESI.
  - Allows parties and non-parties to obtain advance rulings on the reasonableness of preservation requests directed at ESI
- Rule 26(c)(1) – a person receiving a request to preserve ESI may move for a protective order in the court in the county where the action is pending as provided in Rule 45.2(d)(2)
- Rule 45.2(b) - Definitions
  - Preservation request
  - Nonparty
  - Requestor
  - Petitioner
  - Respondent

# ESI – Preservation Request Resolution

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- Rule 45.2(c) – Objections
  - Party or non-party receiving request may object in writing
  - Grounds for objection include
    - No duty to preserve ESI under Rule 37(g)(1)
    - Requested preservation would impose an undue burden or expense
  - Failure to object
    - Does not waive an objection
    - BUT dispute resolution provisions under subdivision (d) and (e) only apply if a written objection is served

# ESI – Preservation Request Resolution

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- Rule 45.2(d) – Pending Action
  - Party who are unable to resolve must proceed under Rule 26(d)'s expedited procedure
    - Unless otherwise permitted by court
      - ❖ 3 pages (1 ½ each)
      - ❖ Good faith consultation under Rule 7.1(h)
      - ❖ No exhibits
  - Nonparty who is unable to resolve may move under Rule 26(c) for a protective order
    - Must be accompanied by a Rule 7.1(h) good faith consultation certificate
      - ❖ Rule 26(d)(1) provides that the expedited procedures of Rule 26(d) apply to motions for protective order

# ESI – Preservation Request Resolution

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- Rule 45.2(e) – No Pending Action
  - May file a “Verified Rule 45.2 Petition” to determine the existence or scope of any duty to preserve ESI
    - Accompanied by a Rule 7.1(h) good faith consultation certificate
    - Each issue could not reach agreement on and the Petitioners position on each
    - If contend an undue burden or expense describe the burden or expense and estimate of the expense likely to be incurred
    - The specific relief requested
  - Service under Rule 4, 4.1 or 4.2
    - include notice under Rule 84 Form 7

# ESI – Preservation Request Resolution

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- Rule 45.2(e) – No Pending Action
  - Response
    - 20 days (30 outside Arizona),
    - Must be in the form of a memorandum
    - Page limits under Rule 7.1(a)(3)
  - Reply
    - May file a reply memorandum
    - 5 days
    - Page limits under Rule 7.1(a)(3)

# ESI – Preservation Request Resolution

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- Rule 45.2(e) – No Pending Action
  - Decided under Rule 7.1 procedures governing motions
  - No discovery permitted (unless otherwise permitted by court for good cause)
  - Court must hold a hearing on the relief the petition seeks (unless stipulated otherwise)

# ESI – Preservation Request Resolution

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- Rule 45.2(f) –Determination
  - Court may limit a party or nonparty’s preservation obligation based on
    - Rule 26(b)(1) factors
      - ❖ Non-privileged
      - ❖ Relevant
      - ❖ Proportional
        - Importance of issues at stake
        - Amount in controversy
        - Parties’ relative access to relevant information
        - Parties’ resources
        - Importance of the discovery in resolving the issues
        - Burden or expense outweighs the likely benefit



# ESI – Preservation Request Resolution

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- Rule 45.2(f) – Determination
  - Rule 37(g)
    - ❖ the nature of the issues raised in the action or anticipated action,
    - ❖ the information's probative value,
    - ❖ the accessibility of the information.
    - ❖ the difficulty in preserving the information,
    - ❖ whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy,
    - ❖ the timeliness of the party's actions,
    - ❖ the relative burdens and costs of a preservation effort in light of the importance of the issues at stake,
    - ❖ the parties' resources and technical sophistication, and
    - ❖ the amount in controversy

# ESI – Preservation Request Resolution

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- Rule 45.2(g) – Safe Harbor
  - A party or nonparty who complies with a preservation order obtained under this rule is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g).
- Rule 45.2(h) – No Waiver or Prejudice
  - Election not to take action under Rule 45.2
    - No waiver or prejudice
    - Not deemed to be a failure to take reasonable steps to preserve ESI

# ESI – Preservation Request Resolution

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- Rule 45.2(f) – Determination
  - If court finds preservation would impose and undue burden or expense, preservation only ordered on conditions that are just
    - May require requestor to pay some or all of the reasonable costs of preservation
  - Reasonable expenses including attorney's fees may be awarded as allowed by Rule 37(a)(5)
    - Only after hearing
    - Party or person conduct necessitated the motion
    - Against party, attorney, or both
    - Cannot award fees if
      - ❖ No good faith attempt to resolve
      - ❖ Position substantially justified
      - ❖ Other circumstances make unjust

# ESI – Failure to Preserve (Spoliation)

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- Rule 37(g)(2) – Remedies and Sanctions:
  - ESI
    - should have been preserved
    - is lost
    - before or after the action's commencement
    - because a party failed to take reasonable steps to preserve the ESI
  - Court may
    - order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2)(B)(i) (from sources the party shows are not reasonably accessible because of undue burden or expense)

# ESI – Failure to Preserve (Spoliation)

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- Rule 37(g)(2) – Remedies and Sanctions:
  - If the ESI cannot be restored or replaced
    - ❖ Upon showing of prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or
    - ❖ Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may
      - presume that the lost information was unfavorable to the party;
      - instruct the jury that it may or must presume the information was unfavorable to the party; or
      - upon also finding prejudice to another party, dismiss the action or enter a default judgment

# ESI Conference

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- Rule 16 (b) – Early Meeting (30 days after responsive filing or 120 days after action commences)
  - Must discuss issues already known regarding ESI (16B)(2)(A))
- Rule 26.1(c)
  - Must promptly confer and attempt to agree on matters relating to ESI when ESI is disclosed or discovered
  - 26(b)(1) and (2) limitations apply
  - Each party must bring person reasonably familiar with the party's systems containing ESI (can be counsel)
  - Disputes under 26(d)

# ESI Conference

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- Topics
  - the location and types of systems reasonably likely to contain ESI
  - whether ESI discovery should be phased, and if so what is included in the first phase
  - Sources of ESI that are less likely to contain discoverable information and from which the parties will postpone or avoid discovery
  - Search protocols or methods to identify discoverable information and filter out non-discoverable information
  - Form in which the ESI will be produced
  - Agreements on ESI preservation and
  - Whether the parties will enter into a stipulation under Rule 502(d) or otherwise enter into a stipulation regarding inadvertent disclosure

# ESI Conference

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- Production of ESI
  - 40 days to produce ESI after initial disclosure statement under Rule 26.1(a)()and (9) (unless otherwise agree)
  - No need to produce the same ESI in more than one form (unless good cause exists)
  - In the form requested by the receiving party (unless otherwise agreed or ordered by the court)
  - If form not specified, may produce the ESI in native form or on another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party
- Rule 26(b)(2) applies to ESI



# Limitations on ESI

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- Rule 26(b)(2)(B) – Limits on ESI
  - General Limit –
    - Parties need not produce ESI that is “not reasonably accessible because of undue burden or expense.” Includes not reasonably accessible because of the
      - ❖ good faith operation of an ESI system
      - ❖ good faith and consistent application of a document retention policy
    - But court may order disclosure or discovery if the requesting party shows good cause
      - ❖ Court may specify conditions for disclosure or discovery

# Limitations on ESI

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- Rule 26(e) (1) – Factors court uses to determine whether ESI is reasonably accessible
  - Whether the information sought is within the permissible scope of discovery;
  - Whether the objecting party has shown undue burden or expense;
  - And if so, whether good cause is shown for the requested information.
- Rule 26(e)(2) – Affidavit on burden or expense
  - A party or person contending that ESI should be disallowed or limited based on burden and expenses must provide affidavit with the joint statement under Rule 26(d)(2) or motion for protective order under Rule 26(c) describing the burden and estimating the expense.

# Limitations on ESI

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- Rule 26(e) (3) – Factors determining burden or expense
  - Factors in Rule 26(b)(1)
  - Estimated expense
  - Disruption to the responding party
  - Effort required to obtain data in the custody of another
  - Difficulty and expense of privilege / confidentiality review
  - Whether the difficulty is attributable to the good-faith operation of ESI/Doc retention policy before the duty to preserve arose under Rule 37(g)(1)
  - Whether the difficult or expense accessing the requested ESI is attributable to any violation of Rule 37(g) or to other purposeful action to shield the ESI from discovery
  - The respondent's interest in the action

# Limitations on ESI

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- Rule 26(e) (4) – Factors determining good faith
  - Factors in 26(b)(1)
  - The likelihood of finding relevant information that cannot be obtained from other more accessible sources
  - Extent to which the request narrowly tailored
  - The importance of the information to a fair resolution on the merits
- Rule 24(e)(5) Specifying Conditions
  - Court may impose conditions on the discovery or disclosure including
    - Any appropriate order under Rule 26(c)
    - Cost shifting on requesting party including charges by counsel, consultants, and vendors
    - Reimbursement for disruption to the normal business operations to the extent the cost is quantifiable and warranted by the facts and circumstances

# Limitations on ESI

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- Rule 26(b)(2)(B) – Limits on ESI
  - Specific Limit – Party is not entitled to
    - ESI that is sought for purposes unrelated to the case
    - Image or inspect an opposing party’s data sources or data storage devices, or to discover ESI that would require restoration of data through forensic means, unless
      - ❖ the information is relevant to a claim of fraud or other intentional misconduct, or
      - ❖ restoration is required to address spoliation, or
      - ❖ the court finds other good cause.

# Privilege Logs

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- Rule 26 (b)(6) – Claims of Privilege
  - If withhold privileged information, including ESI, must prepare a privilege log that enables the other parties to access the claim of privilege
  - Parties may stipulate or court may order alternate requirements to reduce burden and expense such as by
    - Identification by category
    - Excluding certain categories of documents
  - Must meet and confer in an attempt to reach agreement about alternative privilege logs

# New Subpoena Procedures

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## Protecting Third Parties

Unless otherwise ordered, the party seeking discovery must pay the reasonable expenses of the subpoenaed person.

A subpoena may not seek production of materials that have already been produced

If the subpoenaed person makes a claim of privilege, the requesting party must pay the expense to create that log.

## ESI Rules Apply

- The safe harbor and good faith provisions apply as referenced.

## Dispute Resolution

- The consultation, meet and confer and Rule 7.1 affidavit obligations must be met before filing a motion regarding compliance with a subpoena.

## Notice to Other Parties

- If a subpoena seeks documents or ESI, a notice and copy of the subpoena must be served on other parties at least 2 days before it is served.

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# Sedona Principles, Third Ed.: Best Practices, Recommendations & Principles for Addressing Electronic Document Production(2018)

Available at <https://thesedonaconference.org>



# Sedona Principles (3<sup>rd</sup> Ed.)

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1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.
3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.
4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

# Sedona Principles (3<sup>rd</sup> Ed.)

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6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.
8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.
10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.

# Sedona Principles (3<sup>rd</sup> Ed.)

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11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.
12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.
13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party
14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 2
  - The Principle has been simplified to emphasize the fundamental purpose and import of proportionality.
  - The Comments have been modified to emphasize proportionality and that proportionality should apply to all steps in the discovery process, including preservation.
- Principle 3
  - The Principle itself has been shortened, but is not to be interpreted as indicating any substantive change in the meaning or objectives of the Principle regarding cooperation
  - New Comment 3.b. contains the most significant change to Principle 3 from the Second Edition to the Third Edition, reflecting the impact of the 2008 Sedona Cooperation Proclamation.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 5
  - The Principle has been revised in several important but non-controversial respects.
    - First, the Principle emphasizes that the preservation duty should focus on information relevant to the claims and defenses in the matter.
    - Second, the revised Principle reflects that the duty to preserve is triggered when a claim is reasonably anticipated or litigation is pending.
    - Third, the Principle seeks to clarify that proportionality applies to preservation and that it is unreasonable to preserve each instance of relevant ESI.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 5
  - New comments have been added to address preservation by non-parties in response to a Rule 45 subpoena, and the special preservation issues that may arise with social media sources and other newer information-generating technologies.
- Principle 6
  - Comments have been revised
    - to explain the reasoning behind the Principle, i.e., why responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information
    - new guidance that responding parties should be permitted to proceed in fulfilling their obligations on their own, with meaningful cooperation in discovery

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 8
  - The Principle and its Commentary establish a new process for addressing the preservation and production of ESI,
    - start with the primary and most readily available sources, and only moving down the continuum to secondary and less readily available sources, as necessary, until it is no longer reasonable or proportionate to the needs of the case.
    - The Principle thus shifts the focus from what is or is not "reasonably accessible" ESI to the primary and most readily accessible sources of relevant ESI.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 10
  - The Principle has been updated in three important respects:
    - First, the Principle is directed to "parties" (rather than simply "responding parties") because all parties—including parties who receive information in discovery—have obligations with respect to privileged and protected information.
    - Second, the Principle has been modified to refer specifically to privacy obligations because of the increasing importance of privacy in the United States and abroad.
    - Third, "other legally enforceable restrictions" have been added to account for ESI that may be subject to contractual non-disclosure agreements or other restrictions.



# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 10 (con't)
  - The Comments have been rewritten to
    - provide guidance with respect to Federal Rule of Evidence 502 (enacted in 2008), and the broad protections available under its subsection (d),
    - cautions that Rule 502 only applies to attorney-client privilege and work product protections, and should not be mistaken as a panacea for other protected or restricted information,
    - warns that direct access to ESI or systems should be allowed sparingly and only upon a showing of good cause,
    - risks associated with "clawback" or "quick peek" agreements, notes that a Rule 502(d) order does not eliminate all risks associated with "quick peek" agreements, and cautions that a "quick peek" agreement should only be entered in limited circumstances and after assessing pertinent risks,

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 10 (con't)
  - provide guidance on how newer technologies (including technology assisted review (TAR)) may be used to facilitate privilege reviews,
  - urge parties to attempt to reach agreement on procedures for logging privileged or protected work product information in a manner that meets the needs of the case,
  - address counsel's ethical duties to protect confidential and privileged information, which, as manifested by the 2012 amendments to the ABA Model Rules of Professional Conduct, have become more acute with the evolution and explosion of ESI,
  - encourage parties to be aware of, and identify, ESI that is subject to personal privacy, trade secret, and confidentiality obligations.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 12
  - Principle 12 has been revised to provide that ESI should be produced "in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the ESI and the proportional needs of the case." This change reflects the emphasis placed on proportionality, and recognizes that some ESI relevant to a matter may reside in an enormously complex system, of which only some ESI and some metadata is relevant to the case or needed to render the ESI produced reasonably usable.
  - The Commentary has been revised to reflect that the proper functioning of many search, retrieval, and review platforms developed since 2007 depend on various metadata fields being available, and the tactical disparity that can exist if a requesting party is deprived of metadata necessary to use sophisticated technologies in handling and reviewing large ESI productions.

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 13
  - Principle simplified to recognize that the costs of "preserving and producing" (rather than "retrieving and reviewing") "relevant and proportionate" ESI should be borne by the responding party.
  - Comments
    - the term "cost allocation" is used, rather than "cost shifting"
      - ❖ updated to reflect the treatment of cost allocation and its interplay with the proportionality analysis
    - explain that cost allocation may apply to preservation, but only in extraordinary circumstances.
    - urge that cost allocation not be used as an excuse to permit discovery beyond that permitted under Rules

# Sedona Principles (3<sup>rd</sup> Ed.)

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## Summary of Most Significant Changes

- Principle 14
  - Principle revised to reflect and state that remedial measures, sanctions, or both may be awarded for a breach of a duty to preserve relevant ESI—depending on the degree of prejudice and whether the spoliating party acted with intent to deprive another party of the use of relevant ESI.
  - Comments amended to reflect the change in focus from degrees of culpability to the conditions for the imposition of either remedial measures or sanctions.

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# Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests (2018)

Available at <https://thesedonaconference.org>

# Rule 34 Primer

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- 2015 Changes to Rule 34 intended to address
  - Overly broad, non-particularized discovery requests;
  - Overuse of boilerplate objections;
  - Responses to discovery requests that failed to clarify whether responsive documents were being withheld on the basis of the objections; and
  - Responses that stated requested documents would be produced without providing a timeframe for production followed by long delays in production
  - Primer sets out practices for propounding and responding to Rule 34 requests;

# Rule 34 Primer

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- General guidance on production requests:
  - Definitions and Instructions
    - ❖ Minimize
    - ❖ Use the definitions and instructions in the Rules
    - ❖ Avoid overbroad definitions and instructions
    - ❖ Use instructions that minimize across-the-board objections (i.e, not seeking privileged or confidential information, be careful of across-the-board date ranges)



# Rule 34 Primer

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- General guidance on production requests:
  - ESI requests must be limited to ESI that are relevant to the claims and defenses;
  - Be target and specific;
  - Narrowly tailor requests;
  - Be careful of using “any and all documents” and “refer or relate” – instead use “reflecting, containing, or describing.”
  - Request:
    - ❖ Specific Documents
    - ❖ “Sufficient to show” the topic
    - ❖ Examples of types of documents
    - ❖ Factual contentions to define the request

# Rule 34 Primer

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- General guidance on Responses
  - Minimize general objections to only those that apply to all documents requests
  - Avoid boilerplate objections
  - Avoid objections that state “to the extent that”
  - Avoid “reserving a right” objections (the right either exists or it does not)
  - Do object to instructions or definitions that exceed what is required by the Rules

# Rule 34 Primer

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- General guidance on Responses
  - Without waiving the objection, party will produce
    - ❖ Is something being withheld?
    - ❖ If so, what and why?
    - ❖ Either
      - Describe what is being withheld and why or
      - Describe the scope of the production that the party is willing to make, which could include parameters of the search for documents, custodians, sources, date ranges, search terms, etc.
  - Set forth the timeline for production or estimate
- In sum
  - Be specific and targeted
  - Explain objections and responses

# 4th Annual Federal Survey of Judges: State of E-Discovery Law & Practice (2018)

EDRM Duke Law, Exterro, BDO

Available at <https://www.exterro.com/judges-survey-18>

# 4th Annual Federal Survey of Judges

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- 30 Federal Judges Surveyed
- 8 Federal Judges Analysis
- Three Areas of Survey –
  1. E-Discovery Proficiency
  2. Improving E-Discovery Activities
  3. The Rules of E-Discovery

# 4th Annual Federal Survey of Judges

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- E-Discovery Proficiency –
- Attorney Proficiency –

“The typical attorney possesses the legal and technical subject matter knowledge required to effectively counsel clients on e-discovery matters.”

- 0% Strongly Disagree
- 47% Somewhat Disagree
- 30% Neutral
- 20 % Somewhat Agree
- 3% Strongly Agree

# 4th Annual Federal Survey of Judges

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- E-Discovery Proficiency
- Judges Proficiency –
  - Overall Proficiency
    - 23% Strong
    - 40% Good
    - 33% Ok
    - 3% Poor
    - 0% Very Poor
  - 77% felt judges hold parties accountable for e-discovery mistakes
  - 76% felt judges skills had increased in the last 5 years

# 4th Annual Federal Survey of Judges

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- E-Discovery Proficiency Mistakes
  - Causes –
    - 60% Poor Cooperation
    - 10% Lack of Defensible Policies
    - 10% Lack of E-Discovery Education
    - 3% Unequal E-Discovery Skills Between Parties
    - 17% Other
  - Stage –
    - 30% Identification
    - 7% Preservation
    - 30% Collection
    - 0% Processing
    - 17% Analysis
    - 10% Review
    - 7% Production



# 4th Annual Federal Survey of Judges

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- E-Discovery Proficiency Mistakes
  - Cures –
    - 73% CLE
    - 23% Academic Research
    - 23% Case Law and the Rules
    - 20% Technical Learning
    - 10% Law School Requirements
  - 46% Mandatory CLE on E-Discovery

# 4th Annual Federal Survey of Judges

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- Improving E-Discovery Activities
  - Preferred Means of Improvement
    - 44% Cooperation
    - 33% Active Participation at 26(F) Conferences
    - 15% Effectively Applying Proportionality
    - 0% ESI Preparation Practices
    - 0% Document Review Effectiveness
    - 7% Other
  - Judges Believe Judges should
    - 48% Be Active In Case Management
    - 48% Enforce Meet and Confer Requirements
    - 30% Promote Early Conversations About ESI – Include IT

# 4th Annual Federal Survey of Judges

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- Improving E-Discovery Activities
  - Proportionality
    - Significant Increase in Proportionality Claim
    - Areas for Improvement
      - ❖ Suggest Alternative Remedies to the Court – 59%
      - ❖ Use Metrics to Support Arguments – 53%
      - ❖ More Cooperation Before Coming to Court – 41 %
      - ❖ Cost Is Not the Sole Factor in Proportionality – 19%
      - ❖ All of the Above – 10%
    - Alternative Remedies
      - ❖ IT Personnel In Meet and Confer
      - ❖ Phased Collections
      - ❖ Additional In-Person Conferences
      - ❖ Cost-sharing

# 4th Annual Federal Survey of Judges

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- Improving E-Discovery Activities
  - Taking Reasonable Steps to Preserve ESI
    - 0% Strongly Agree
    - 15% Somewhat Agree
    - 70% Neutral
    - 15% Somewhat Agree
    - 0% Strongly Agree
  - Reasonable Steps include
    - Tracking All Activities in the Preservation Process- 67%
    - Sending Legal Holds – 63 %
    - Collecting Data from Key Custodians – 44%
    - Show that a Defined, Repeatable Preservation Process – 41%
    - Suspending Document Retention Policies – 37%

# 4th Annual Federal Survey of Judges

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- Improving E-Discovery Activities
  - New Data Types Requiring Improvement In Preservation
    - Social Media – 44%
    - Instant Messages – 33%
    - Mobile Data – 30%
    - Text Messages – 30%
    - IoT Data – 7%
    - New Apps – 7%
    - Wearables – 3%
  - Duty to Preserve the Same for Data Types
    - Varies Case to Case – 26%
    - Somewhat Changes – 30%
    - Mostly the Same – 26%
    - Applied the Same – 18%

# 4th Annual Federal Survey of Judges

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- Improving E-Discovery Activities
  - Improvements for Counsel
    - 37% – Better Understand Clients IT System, ESI Policies
    - 19% – Implement Cohesive Internal ESI Policies
    - 15% – Find Ways to Limit Scope of Discovery
    - 15% – Increased Collaboration with Opposing Counsel
    - 14% – Other
  - Use of Technology
    - Documents Review Software – 23%
    - Legal Project Management Software – 11%
    - Predicative Coding Software – 8%
    - Collection Software – 8%
    - Legal Hold Software – 4%
    - Processing Software – 0%
    - Do Not Know – 46%

# 4th Annual Federal Survey of Judges

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- Rules of E-Discovery
  - Changes to the FRCP helped solve many problems in e-discovery
    - 73% Yes
    - 19% Neutral
    - 8% No
  - Rule providing biggest impact
    - 26(b)(1) – 38%
    - 37(e) – 27%
    - Rule 1 – 19%
    - 26(f)(3) – 12%
    - 16(b)(3)(B) – 4%
  - Most Judges Agree (61%) that the changes did not take away discretion from the Judge

# 4th Annual Federal Survey of Judges

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- Rules of E-Discovery
  - Attorneys' Preparedness for Conferences And Cooperation
    - Rule 16 Conference
      - ❖ Average Score of 52 (Scale of 1 – 100)
    - Rule 26 Exchange of Information
      - ❖ Average Score of 45 (Scale of 1 – 100)
  - Rule 502(d)
    - Does failure to Obtain a 502(d) Order constitute malpractice?
      - ❖ 37.5% Yes
      - ❖ 37.5% No
      - ❖ 25% Don't Know



# Conclusions

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All of these recent changes and survey make clear

1. Proportionality
2. Cooperation
3. Meet and Confer
4. Good Faith

# Questions