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Applying *Sedona Principles*, U.S. District Court Says Metadata Must Be Produced

Under emerging standards of electronic discovery, a court order directing a party to produce electronic spreadsheets as they are kept in the ordinary course of business requires the producing party to produce those documents with the metadata intact. Magistrate Judge David J. Waxse's opinion in *Williams v. Sprint/United Management Company*, 2005 WL 2401626, D. Kan. (September 29, 2005), a provisionally certified employment action, is noteworthy not only for its holding on producing metadata, but for the "emerging standards" he relied on to reach it.

Long Procedural History

Because the litigation has been "highly contentious," the Magistrate Judge has conducted discovery conferences twice a month since March 2005 to resolve discovery issues identified by the parties. One of the ongoing discovery disputes concerned the defendant's production of spreadsheets that relate to the Reductions in Force (RIFs) that feature prominently in the underlying action: the plaintiff, on behalf of herself and others similarly situated, asserts that her age was a determining factor in including her in a RIF.

The spreadsheets deal with candidate selections and other decisions made by the defendant's Human Resources Department, and according to the plaintiff, constitute the "essential materials" regarding the termination. They were requested initially in November 2003 (the case was filed the preceding April), and again in December 2004. The plaintiff claims that to date, the defendant has produced "only a few improperly redacted versions relating to some plaintiffs and initial opt-in plaintiffs." On April 12, 2005, defendant's counsel agreed to begin producing the documents.

No documents were produced by the next discovery hearing on April 21, but counsel acknowledged that he had nine boxes of such documents in his possession and again stated that their production would be forthcoming. On May 5, plaintiff sought a court order requiring production, and an agreed order requiring production by June 1 was entered.

At the May 19 discovery conference, plaintiff requested that the defendant produce "the actual electronic 'active file' version of all the Excel RIF spreadsheets" to enable the plaintiff to "perform statistical or manipulative things without taking the spreadsheets and going through the laborious process of keying in all that data again." The defendant reported it was producing TIFF images per a prior agreement, and would prefer to continue to do so, and subsequently assess the electronic content of those files.

After some argument, during which the court opined that the only necessary review of the files would be for privilege, the Show Cause Order was renewed, setting a production date of June 24 for (a) electronic versions of Excel and other spreadsheets, (b) other documents (other than Minutes) relating to the RIF meetings, and (c) e-mails accompanying the spreadsheets.

On June 23, defendant tendered to plaintiff's counsel 3083 Excel spreadsheets in electronic form and indicated that it had identified 983 additional spreadsheets that had not been fully processed that would be produced no later than June 27.

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At the July 7 discovery conference, plaintiff's counsel advised the court that defendant had scrubbed the Excel spreadsheets to remove the metadata prior to production. Accordingly, file names, dates, and authors had been deleted, along with recipients, printout dates, changes and modification dates, and other information. Defendant provided no log of the information that had been scrubbed, and had locked certain cells and data, making access impossible.

The defendant admitted scrubbing and locking the data, arguing that metadata from spreadsheets is irrelevant and privileged. Moreover, it continued, plaintiff never requested that metadata be included in the production, nor discussed it at any of the many discovery conferences. A Show Cause Order ensued, resulting in the Memorandum and Order under consideration.

Defining Metadata

Judge Waxse sets the stage for his decision with a general discussion of metadata and its implications for electronic document production. He looks to both the Advisory Committee note to Proposed Federal Rule of Civil Procedure 26(f) and *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* for working definitions of the term. The Advisory Committee Note (see http://ddee.pf.com and click on the second entry under "Proposed & Enacted Rules") defines metadata as "information describing the history, tracking, or management of an electronic document." Appendix F to *The Sedona Guidelines* (see http://www.thesedonaconference.org/contents/miscFiles/TSG9_05.pdf, page 102) defines it as "information about a particular data set which describes how, when and by who it was collected, created, accessed or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).

Technical Appendix E to *The Guidelines* expands upon that definition by specifying that metadata includes "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records." It also provides examples and describes some of the problems metadata presents (*e.g.* it can be altered either intentionally or inadvertently, extracted during native file conversion, and may be inaccurate).

Finally, it makes the following observation about the importance of metadata:

> Certain metadata is critical in information management and for ensuring effective retrieval and accountability in record-keeping. Metadata can assist in proving the authenticity of the content of electronic documents, as well as establish the context of the content. Metadata can also identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts. Metadata allows organizations to track the many layers of rights and reproduction information that exist for records and their multiple versions. Metadata may also document other legal or security requirements that have been imposed on records; for example, privacy concerns, privileged communications or work product, or proprietary interests.

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Judge Waxse cites The Microsoft Office Online website (http://office.microsoft.com/en-us/assistance/HA010776461033.apx) for examples of metadata that may be stored in Microsoft Excel spreadsheets, like the ones at issue: "name or initials, company or organization name, identification of computer or network server or hard disk, where document is saved, names of previous document authors, document revisions and versions, hidden text or cells, template information, other file properties and summary information, non-visible portions or embedded objects, personalized views, and comments."

General Observations

Judge Waxse attaches significance to the way metadata varies depending on application, observing that "the more interactive the application, the more important the metadata is to understanding the application's output." The two ends of the spectrum, he claims, are word processing applications, where the metadata is usually not critical to understanding the content of the document, and database applications, where the databases comprise completely undifferentiated masses of tables of data. For the latter, metadata is the key to demonstrating the relationships among the data.

From this perspective, spreadsheets fall somewhere in the middle: if the formulae used to calculate the values displayed in the cells are considered metadata, then metadata may be integral to understanding the spreadsheets.

One problem associated with metadata, Judge Waxse continues, is the potential it creates, because it is hidden (or not readily visible), for inadvertently disclosing confidential or privileged information. This is the reason most frequently cited for using software that removes metadata from electronic documents before producing them, or "scrubbing" them. He explains, "In a litigation setting, the issue arises whether this can be done without either the agreement of the parties or the producing party providing notice through an objection or motion for protective order."

The Emerging Standards

Judge Waxse surveys the available sources for guidance on the following two issues:

1. Whether a court order directing a party to produce documents as they are maintained in the ordinary course of business require the producing party to produce those documents with the data intact; and
2. Which party has the initial burden with regard to the disclosure of metadata: is it the requesting party, who must specifically request the metadata and demonstrate its relevance; or is it the producing party, unless that party makes a timely objection to the production of metadata?

The Federal Rules, Current Case Law, Secondary Sources

Finding the current version of Fed. R. Civ. P. 34 minimally helpful with regard to the production of electronic documents, Judge Waxse turns to the proposed amendments to Rules 34(a) and 34(b), focusing on their requirement that in the absence of a request for a specific format, electronically stored information must be produced "in the form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable." The proposed amendment, however, provides no additional guidance regarding the production of metadata. Case law is similarly deficient.

By contrast, though it is only "persuasive authority," *The Sedona Principles for Electronic Document Production* (see page 16 for information on ordering the *2005 Annotated Version*, published by Pike & Fischer) specifically addresses metadata in at least two sections.

The Sedona Principles, Cmt. 9.a. addresses the scope of document discovery under the Federal Rules. In addressing the definition of "document," the comment cautions that data "hidden and never revealed to the user in the ordinary course of business should not be presumptively treated as a part of the 'document,' *although there are circumstances in which the data may be relevant and should be preserved and produced*" (emphasis added). Judge Waxse concludes that the most salient point made by this comment is that the evaluation of the need for and relevance of metadata should be separately analyzed on a case-by-case basis.

Judge Waxse turns next to *The Sedona Principles*, Cmt. 12.a, which specifically discusses metadata in depth. The comment states: "[a]lthough there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata," and that the occasions on which metadata must be produced are likely to remain the "exceptional situation[s]." The drafters of the comment aver "that most of metadata has no evidentiary value, and any time (and money) spent reviewing it is a waste of resources." They advocate that unless the producing party is aware or should be reasonably aware that particular metadata is relevant, the producing party should have the option of producing all, some, or none of the metadata.

The Instant Case

Relying chiefly on *The Sedona Principles*, Principle 12, Cmt. 12.a, Judge Waxse holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, or as an active file, or in their native format, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order. This ob-

viously places the initial burden with regard to the disclosure of the metadata on the party to whom the request or order to produce is directed. Judge Waxse explains that doing so recognizes that the producing party already has access to the metadata and is in the best position to determine whether producing it is objectionable. Moreover, removing metadata ordinarily requires an affirmative act by the producing party.

The defendant argued that the metadata it scrubbed was irrelevant to the case in chief. Judge Waxse counters that some of the metadata is in fact relevant and likely to lead to the discovery of admissible evidence, and provides the following, not exhaustive, list of spreadsheet metadata that might be relevant: metadata associated with any changes to the spreadsheets, the dates of any changes, the identification of the individuals who made the changes, and other metadata from which plaintiffs could determine the differences between the final and draft versions of the spreadsheets.

Moreover, he points out that the appropriate response of a party ordered to produce evidence it feels is irrelevant is not to destroy it, but to assert a relevancy objection. Similar conduct would have been appropriate for dealing with arguably inaccurate metadata and privileged metadata, i.e., objecting ad providing a privilege log.

Judge Waxse acknowledges that the plaintiffs never specifically requested the metadata and its production was not specified in the court's order. However, returning to *The Sedona Principles*, Principle 12, Cmt. 12.a., and in light of the reason the spreadsheets were sought, the court concludes that the defendant should have reasonably known that the metadata was relevant to the dispute and should have either produced it or filed an appropriate objection or motion.

The defendant clearly acted contrary to the spirit if not the letter of the controlling order in this instance, yet Judge Waxse is not inclined to sanction its behavior, given its prior history of good-faith compliance with discovery orders. He recognizes that "the production of metadata is a new and largely undeveloped area of the law" and that his prior rulings contained some "arguable ambiguity." He concludes that sanctions are accordingly not appropriate.

— C. Eoannou

Editor's Note

Judge Waxse joined **Daniel L. Regard II**, managing director at LECG, LLC, frequent contributor to *Digital Discovery & e-Evidence*, and participant in the Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production and **Craig T. Ball**, Certified Computer Forensic Examiner, Attorney, and Technologist, in a 90-minute audio conference discussion of metadata, broadcast by Pike & Fischer on November 2. To order a CD of the event, entitled "Beyond Data About Data," e-mail your request to customercare@pf.com.

COURTS & PROCEDURE

The Current Legal Landscape for Native File Production

By Courtney Ingraffia Barton, Esq.

There is a lot of talk in the electronic discovery industry about "native file review," "native file format," and "native file production." Many electronic discovery providers are scrambling to assure their clients that they support so-called native file capabilities.

The claim is that native file review and production is required by courts, government agencies and by the proposed amendments to the Federal Rules of Civil Procedure. But is this really true? Is native file production required under the law?

First, it is important to distinguish between native file review and native file production. Review is the process by which counsel reviews documents provided by its client, pre-production. Much has been written about the pros and cons of native file review from a technical standpoint. In the end, it appears that because of the lack of functionality such as the inability to redact, Bates number, search across different programs, and remove duplicate documents, native file review is a less than desirable option in the vast majority of situations.

No one has control over how a party reviews its own documents. Thus, no one can require native file review. The issue, then, is whether native file production—the form in which a party produces documents to its adversary—is required by courts, government agencies and the federal rules. Rumor has it, this is the trend. But is this true? Is it really required? While it may be true that some individual attorneys may, in a specific case, request native file production (and then sometimes only with respect to certain types of files) there is no widespread movement toward native file production as a legal standard.

Agencies

Not one government agency has promulgated any formal rule requiring native file production for litigation or government inquiry. Instead, form of production appears to

be on a case-by-case basis with some agencies suggesting preferred formats. For example, the SEC has indicated that it prefers production of electronic documents in formats compatible with Concordance or Summation, which require up-front processing. This processing, by definition, eliminates the possibility of native file production.

No other agency has issued any type of edict requiring native file production. And for good reason—the same problems that exist for reviewing documents natively also exist for the party who receives the documents. For example, true native file review eliminates the possibility of creating even the most primitive of discovery tools: an index.

Amendments to the Federal Rules

Likewise, the recent proposed amendments to the Federal Rules of Civil Procedure do not mandate native file production. The proposed changes would require that parties to civil litigation try and reach an agreement on how documents will be produced. *See* Proposed Amendment to Rule 26(f), found at http://ddee.pf.com under "Proposed & Enacted Rules". If an agreement cannot be reached, the documents must be produced either in the form in which they are ordinarily maintained or in a form that is reasonably usable. *See* Proposed Amendment to Rule 34.

Although some may think that the "form in which is it ordinarily maintained" means "native format," the comments to the proposed amendments, published on July 25, 2005, explicitly note the disadvantages of native file production, such as "the inability to redact, leading to privilege problems, an inability to Bates-stamp the 'documents' for purposes of litigation management and control, which is not an insignificant consideration, particularly in complex multi-party litigation." *See* Comments to Proposed Rule 34. Even if the courts ultimately decide that this language is synonymous with native file production (*see e.g. Williams v. Sprint/United Management Co*., 2005 U.S. Dist. LEXIS 21966 (September 29, 2005), discussed *infra* (where Excel spreadsheets ordered produced in the form in which they were ordinarily maintained was synonymous with native format)), a party will also have the option to produce electronic documents in a reasonably usable format, which would most likely include widely used applications such as PDF.

In fact, the federal courts initiative known as the Case Management/Electronic Case Files project (CM/ECF) encourages litigants to file case documents electronically, and the only file format allowed is PDF. The CM/ECF project was initiated in 2001 and is being implemented in federal district and appellate courts nationwide. *See* www.uscourts.gov/cmecf/cmef_about.html..

Case Law

There also does not appear to be any trend in the courts requiring native production. Only one unpublished and one published case have required native file production. *See In Re VeriSign, Inc. Securities Litig.* No. C 02-02270 JW, 2004 U.S. LEXIS 22467 (N.D. Cal 2004) (not for publication) (court held that magistrates' ruling that documents had to be produced to plaintiffs in native format was not clearly erroneous); *Medtronic Sofamar Danek, Inc. v. Michaelson*, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. 2003) (court required party to produce documents in native format). One other court allowed the parties to choose the production format. *See United States v. First Data & Concord EFS, Inc.*, 287 F. Supp. 2d 69, 2003 U.S. Dist. LEXIS 23458 (D. D.C. 2003) (the court ordered parties to produce electronic documents in native electronic format or a mutually agreeable format).

The most recent case discussing native file production is *Williams v. Sprint/United Management Co*., 2005 U.S. Dist. LEXIS 21966 (September 29, 2005). In this employment discrimination case, plaintiff requested that defendant be required to produce the "actual file" version of all Excel spreadsheets containing candidate selection and termination data. Plaintiffs requested the spreadsheets in this form so it could "perform 'statistical or manipulative things without taking the spreadsheets and going through the laborious process of keying in all that data again.'" *Id.* at *6.

Defendant had previously provided the Excel spreadsheets in TIFF images as agreed by the parties. However, Excel spreadsheets are different than most file types in that when they are converted to an imaged format, the formulas used to create the spreadsheets—the metadata—cannot be reviewed without looking at the original file.

In this case, the plaintiff noticed that some of the columns on the spreadsheets cut off mid-sentence, revealing that there was more information contained in the spreadsheet than it had received. Any additional data—such as additional columns—would be revealed by looking at the metadata. Because the metadata was deemed relevant in this case, the court ordered the spreadsheets produced in their electronic form as they are ordinarily maintained—with the metadata intact.

The court noted, however, that agreements between the parties as to form of production are generally accepted by the courts. Moreover, the narrow issue in *Williams* was not that the spreadsheets be produced in their native format but that *when* documents are ordered to be produced that way, absent any objection, a party must produce the metadata associated with those files. Here, the court ordered that the documents be produced as they are maintained in their ordinary course precisely so that that plaintiff could see the metadata. It only made sense that the metadata be produced along with the documents in this case. Thus, it is unclear what effect the *Williams* case will have on the production of electronic documents other than Excel spreadsheets because most other file formats—including imaged formats such as PDF—can include the metadata without reverting to the native file.

On the other hand, because *Williams* held that metadata

can be discoverable, parties should be wary of true native file *review* as a holistic electronic discovery solution—even for a native production. True native file review does not allow reviewers to see all of the metadata (e.g. a "bcc" field in an email can only be viewed as part of the sender's email, and would not appear on recipients' versions of the same message), and requires that reviewers understand how to view the metadata in different programs. Even the *Williams* court noted these limitations: "some metadata, such as file dates and sizes can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept." *Id.* at *18 (citing Appendix E to *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*). And while the court noted that some metadata may be lost when a document is converted to an image file, this is not the case with the way some electronic discovery service providers can convert documents to PDFs that capture all of the metadata of the original file.

The biggest risk of true native file review, however, is that when a document is reviewed in its native format, the metadata can be automatically changed. While a copy of the document can be made before review, the act of making the copy itself may change the metadata (e.g. making a copy without taking necessary precautions can change the "date modified" field in some common programs). If a copy is not made, reviewers looking at original data run a real risk of spoliation. Any party using true native file review may be at risk in certifying to a court that the documents are in their true, original form, which can leave parties and their attorneys open to tremendous liability.

Because most e-discovery applications allow certain file types, such as Excel spreadsheets, to be reviewed natively when it makes sense, parties can take advantage of the functionality of an imaged format solution while providing the native file if required.

Conclusion

There is no evidence that courts or government agencies are requiring native file production with any regularity. However, in the rare case a party requests it, any top tier vendor can produce data in its native format upon request, even if it has been first converted to PDF or another imaged format for ease and efficiency during the review process. Because conversion to a uniform viewing format does not cost more than any other processed data, and carries with it tremendous advantages, best practices would dictate that counsel first review the documents in the most efficient and effective manner, and then handle documents in native file format only if required at the time of production. Chances are, given the paucity of cases requiring native file production, the dearth of directives on the issue from agencies, and the movement of the Federal Rules towards agreed-upon forms of production, there will rarely be such a requirement.

Courtney Ingraffia Barton, Esq. is the Vice President of Industry Relations at LexisNexis Applied Discovery and was formerly a trial attorney with the United States Department of Justice. Prior to that she was a senior associate with Arnold & Porter in Washington, D.C.

CASES

Internet Archive Wins Dismissal of Complaint

The owner of a Web site that sued the Internet Archive for preserving sensitive pages, in spite of coding meant to repel cataloging, saw much of its complaint dismissed when a district court ruled that the site owner failed to plead essential elements to over a half-dozen claims (*Healthcare Advocates Inc. v. Harding,* E.D. Pa., No. 05-3524, October 4, 2005).

The order dismissed a host of state causes of action by Healthcare Advocates Inc. against Internet Archive and a law firm that used the Archive's repository to uncover sensitive information that hurt Healthcare in another lawsuit.

Healthcare alleged, in various state causes of action, that the Internet Archive's "Wayback Machine" ought not to have preserved its pages once Healthcare made a software fix to its site based on instructions provided on the Internet Archive Web site.

Judge Robert Kelly's order dismissed without prejudice the claims of: civil conspiracy, breach of fiduciary duty, breach of contract, intrusion upon seclusion, promissory estoppel, and negligent dispossession.

The ruling does not end the case, as several other claims remain, including claims of copyright infringement and an alleged violation of the Digital Millennium Copyright Act. Those claims only pertain to the law firm and other defendants and not the Internet Archive.

Still, the dismissed claims are likely to return. The order, issued without an opinion, did grant leave for Healthcare Advocates to amend its complaint, citing specific elements the plaintiff would need to plead in order to proceed with the claims.

Internet Archive was represented by Hara Jacobs of Ballard Spahr Andrews & Ingersoll LLP, Philadelphia.

Healthcare Advocates Inc. was represented by Peter Boyer of McCarter & English LLP, Philadelphia.

Delaware High Court Adopts Tough Standard For Revealing Identity of Anonymous Blogger

A public figure in a defamation lawsuit against an anonymous speaker must plead facts sufficient to defeat a motion for summary judgment before the court may issue a subpoena to divulge the speaker's identity, according to a Supreme Court of Delaware ruling (*Doe No. 1 v. Cahill,* 2005 WL 2455266, October 5, 2005).

In addition, the plaintiff must comply with certain notification requirements, including posting a notice on the same Web site as the allegedly defamatory post, and providing the speaker a reasonable amount of time to respond before taking further action, the court said.

The lawsuit erupted over anonymous comments made against Patrick Cahill, a city councilman in Smyrna, Delaware. Patrick and Julia Cahill sued Doe, who anonymously posted his comments on a blog sponsored by the Delaware State News. Those remarks criticized Patrick Cahill's performance, accusing him of:

> devot[ing] all of his energy to being a divisive impediment to any kind of cooperative development. Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration.

Lower Court Follows *In re Subpoena to AOL*

The superior court found that the Cahills had a "good faith" belief in their defamation claim, and issued a subpoena for the site's Internet service provider to disclose the identity of the anonymous poster. Doe filed an interlocutory appeal.

The supreme court rejected the lower court's "good faith" standard, adopted from *In re Duces Tecum to America Online Inc.*, No. 40570, 2000 Va. Cir. LEXIS 220 (Va. Cir. Ct. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001). That standard permits a court to order a non-party Internet service provider to disclose the identity of an anonymous subscriber where the court determines that the plaintiff has a legitimate, good faith basis to complain.

But the high court found that standard to be inadequate. "In our view, this 'good faith' standard is too easily satisfied to protect sufficiently a defendant's right to speak anonymously," the court observed.

Even the more stringent "motion to dismiss" standard does not go far enough, the court concluded. Because a motion to dismiss requires that every reasonable factual inference be drawn in favor of the plaintiff, "silly" or "trivial" libel claims can easily clear the hurdle.

"[S]ubstantial harm may come from allowing a plaintiff to compel the disclosure of an anonymous defendant's identity by simply showing that his complaint can survive a motion to dismiss or that it was filed in good faith," said Chief Justice Myron T. Steele. "[S]etting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously."

Supreme Court Adopts Modified *Dendrite* Test

The court adopted a "summary judgment" standard instead, drawing inspiration from *Dendrite Int'l Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

"[B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion," the court held.

The court explained its rationale for requiring a higher hurdle as follows:

> Applying a summary judgment standard to a public figure defamation plaintiff's discovery request to obtain an anonymous defendant's identity will more appropriately protect against the chilling effect on anonymous First Amendment internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or to unmask their critics.

In addition to meeting the summary judgment standard, the plaintiff must also comply with certain notification requirements, including:

- notifying the poster that he/she is subject to a subpoena or application for an order of disclosure by posting a message of notification on the same message board as the allegedly defamatory post; and
- providing the poster a reasonable opportunity to file and serve an opposition to the discovery request before taking further action.

The court reasoned that the other two factors of the *Dendrite* test, identifying the defamatory statements and balancing First Amendment concerns, would naturally be addressed in the summary judgment inquiry.

Applying its newly fashioned standard, the court reviewed the lower court ruling *de novo* and found the statements incapable of defamatory meaning. It reversed the judgment below and remanded with instructions to dismiss the complaint with prejudice.

David Finger of Finger & Slanina LLC, Wilmington, Del. represented Doe. Robert Katzenstein of Smith, Katzenstein & Furlow LLP, Wilmington, Del. represented the Cahills.

Full text of decision is available at http://ddee.pf.com.

Scope of E-discovery in Florida Cases Examined

An administrative discovery order requiring a teacher to allow a school board expert to access all computers in his home must be quashed, because it fails to protect his privacy or allow the teacher to assert privileges, a Florida court has ruled (*Menke v. Broward County Sch. Bd.,* Fla. Dist. Ct. App., 2005 WL 2373923, decided September 28, 2005).

The teacher, David Menke, is challenging a disciplinary action based on his alleged improper communication with minors.

In the absence of evidence of data destruction or attempts to thwart discovery, a party seeking access to information contained in computer files must first allow the opposing party the opportunity to review the files, determine the relevancy of particular files, and assert any privileges or privacy protection basis for withholding files, Judge Martha C. Warner wrote.

The administrative law judge's attempt to provide a measure of protection to Menke by requiring the school board's expert not to retain or disclose to board attorneys the existence of "any communications which might be deemed privileged," and notify the judge so the court might conduct an in-camera inspection is insufficient, because the teacher must be allowed to protect his privacy and assert privileges before any disclosure, the court concluded.

Teacher Charged with Sending Explicit E-mail

Menke is a Broward County, Florida high school teacher. The school board sought to terminate Menke for allegedly exchanging sexually explicit e-mails and/or instant messages with minor students.

Menke requested a formal hearing to challenge the misconduct charges. The board retained a computer expert and filed a discovery request seeking access to all of the computers in Menke's home.

Menke objected that blanket access to the hard drives of his computers violated his right to privacy, Fifth Amendment protection from self-incrimination, and might reveal privileged communications with his wife, accountants, clergy, or doctors.

The ALJ overruled Menke's objections and ordered Menke to allow the school board expert to access his computers, but added the restrictions that the expert not pass on any privileged information except to the ALJ.

Menke filed a petition for certiorari to the appeals court, seeking to quash the discovery order.

Less Intrusive Discovery Required

The appeals court said that in what it cited as the only previous Florida appeals court ruling discussing electronic discovery, *Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996), the court ruled that the state rules of civil procedure are broad enough to cover computer data.

The appeals court emphasized, however, that the court in *Strasser* made clear that discovery access to computer data should be allowed "only in limited and strictly controlled circumstances," because unlimited access would constitute irreparable harm to a computer owner forced to reveal confidential and privileged information.

The rules of procedure are grounded in the concept that a person receiving a discovery request be the first one to review documents, including information on computer files, to determine relevancy and make any objections to production, the appeals court said.

In addition, the party requesting production should seek alternative, less intrusive means of gaining information before seeking blanket access to computer-stored information, the court said. All the cases found by the court in other jurisdictions across the country that have allowed access to a party's computer have involved "situations where evidence of intentional deletion of data was present," the court said.

In the present case, there was no evidence that the school board sought a less intrusive means of securing the information, or even that they framed a discovery request limited to relevant information, the court wrote. There was also no evidence that Menke acted to delete data from his computers or otherwise thwart discovery efforts, the court said. Therefore, the court ruled, the current discovery order would do irreparable harm to Menke and had to be quashed.

"We do not deny the Board the right to request that the petitioner produce relevant, non-privileged, information; we simply deny it unfettered access to the petitioner's computers in the first instance," the court said.

Chief Judge W. Mathew Stevenson and Judge Mark E. Polen concurred in the opinion.

Karen C. Amlong, of Amlong and Amlong, Fort Lauderdale, Fla., represented Menke. Mark A. Emanuele and Marcy E. Abitz, of Panza, Maurer & Maynard, Fort Lauderdale, represented the school district.

The full text of the opinion is available at http://ddee.pf.com.

Attorneys, academics, and producers and vendors of litigation support products and services are invited to submit for publication articles addressing the discovery, production, and presentation of evidence in the digital age. Prospective authors may contact Carol L. Eoannou by telephone at (301) 562-1530 ext. 269, by fax at (301) 562-1542, or via the Internet at ceoannou@pf.com.

Ginsburg Denies Emergency Plea to Vacate Stay of Order Lifting PATRIOT Act Gag Order

U.S. Supreme Court Justice Ruth Bader Ginsburg has refused to vacate a stay of a federal court order that had lifted a gag order preventing an unnamed recipient of a National Security Letter (NSL), issued under the USA PATRIOT Act, from publicly discussing the matter (*Doe v. Gonzales,* U.S., No. 05A295, *in chambers opinion of Justice Ginsburg* October 7, 2005).

Ginsburg, the justice with responsibility for hearing emergency requests originating from the U.S. Court of Appeals for the Second Circuit, said the situation was not so extraordinary as to overturn the Second Circuit's decision to stay a lower court order lifting the gag order while the appeals court considered the matter on expedited appeal.

"The decision to leave the gag in place comes at an unfortunate time as Congress is poised to reauthorize and extend these secretive Patriot Act powers this month," said ACLU Senior Legislative Counsel Lisa Graves, whose organization is representing the NSL recipient.

"It is particularly disappointing for our Congressional representatives to be denied an opportunity to hear from individuals who have been directly affected by these powers that need to be reformed," Graves said in an October 7 press release.

The underlying case involves a Federal Bureau of Investigation demand for records issued under the NSL provisions of the Electronic Communications Privacy Act (18 U.S.C. §2709), as modified by Section 505 of the PATRIOT Act. Under Section 505, the FBI may issue an NSL, without court approval, when the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The law prohibits NSL recipients from disclosing that they were asked to turn over information.

According to documents filed in court by both sides, the recipient of the letter is a member of the American Library Association. The ALA, along with other library and bookseller groups, filed a friend of the court brief urging Ginsburg to vacate the stay.

The government maintains that revealing Doe's identity could pose a national security risk. A federal district court disagreed and found the gag order provision unconstitutional as applied in the case filed (*ACLU v. Gonzales*, D. Conn., 3:05-cv-1256 (JCH), *preliminary injunction* September 9, 2005).

The judge granted a motion allowing the NSL recipient to disclose his or her identity. However, the court also stayed the decision pending an appeal.

The Justice Department filed an expedited appeal with the Second Circuit, challenging the lifting of the gag order. The appeals court stayed the operation of the district court order during the expedited appeals process. The ACLU then filed with Ginsburg the emergency request to lift the stay.

Absent evidence of an extraordinary need, the Supreme Court should not intervene "in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding," Ginsburg said.

Briefs for both sides have been filed with the Second Circuit, Ginsburg noted, and according to the ACLU, a hearing in the case has been scheduled for November 2.

Interfering in an interim order of the court of appeals cannot be justified solely because a reviewing Supreme Court justice "disagrees about the harm a party may suffer," Ginsburg said citing the in chambers decision of former Justice Louis Powell Jr. in *Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327 (1980).

Ginsburg noted that the Second Circuit is considering a challenge to the facial constitutionality of the law—that is, not just whether the PATRIOT Act NSL provision as applied in a particular case is unconstitutional, but whether the law as written is unconstitutional in all circumstances.

In September 2004, a federal court in New York granted an injunction against enforcement of a NSL issued to an Internet service provider, *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004). In that case, the court found that the NSL mechanism violated the Fourth Amendment's bar against unreasonable searches. At the request of the Justice Department, the court's injunction was stayed pending the government's appeal of the ruling. DOJ recently asked the appeals court to delay ruling on the appeal until after Congress considered PATRIOT Act reauthorization, including provisions directly related to the NSL lawsuit.

The full text of Ginsburg's opinion is available at http://ddee.pf.com.

— Special from BNA by Donald G. Aplin

TALKING TECH

Automated Document Review Proves Its Reliability

By Anne Kershaw

Pushed by cost, time, regulatory and ethical considerations to embrace change sooner rather than later, law firms and clients are increasingly experiencing the impact of electronic discovery technologies. Staying ahead of the curve on these offerings is key to the effective management of discovery, providing the most reliable and cost effective case management for clients. While we have not yet reached the brave new world of completely automated document review, independent evidence suggests that automated techniques can do a significantly more accurate and faster job of reviewing large volumes of electronic data for relevance, and at lower cost, than can a team of contract attorneys and paralegals.

We discuss below a substantial study that we conducted, comparing automatic relevancy assessment to relevance assessments made by people. It demonstrated that using an electronic relevance assessment application and process reduced the chances of missing relevant documents by more than 90 percent.

Changing Landscape

Traditional methods of document review are typified by manual review using contract attorneys, entry level lawyers or paralegals. The individuals who are part of the review team are increasingly challenged by the sheer volume of data typically generated and stored by almost every organization that uses computer technology. Indeed, in some cases, it is simply not humanly possible to read all of the potentially relevant e-mail and documents within the time parameters set by the court.

Recent technological developments in the area of automated document review for relevance assessment are solving these problems, paving the way for profound and fundamental changes in the way discovery is conducted. In addition, technology can further level the playing field for smaller firms, by providing the ability to conduct large scale review with far fewer resources. While in the past lawyers may have been slow to embrace new technologies, all counsel would be well served to take early notice of the area of electronic document assessment.

Driving Change – Better Results for Less Cost, in Less Time

While law firms ultimately will derive many benefits from advanced document analysis technologies, large data producers such as universities, corporations, and government, are generally the leading proponents of their adoption. These data producers are driven in large measure by the enormous costs associated with conducting manual discovery in large document cases, which can easily encompass tens of millions of electronic documents. Some companies are already starting to mandate that law firms use specific advanced technologies, even paying consultants to help make this transition successful; courts handling large cases may soon follow suit. In the future, more companies will, as a matter of course, tell counsel not only that they have to use technology, but identify which vendor they are required to retain. Law firms, large and small, would be well served to embrace these technologies before they are sent scrambling to do so by clients and courts.

Cost is certainly a principal driver in this shift. Automated document assessment solutions are cheaper, in most cases, than paying for an equivalent manual review capacity. Data collections often run into many gigabytes or even terabytes of data. Considering that one terabyte is generally estimated to contain 75 million pages, a one-terabyte case could amount to 18,750,000 documents, assuming an average of 4 pages per document. Further assuming that a lawyer or paralegal can review 50 documents per hour (a very fast review rate), it would take 375,000 hours to complete the review. In other words, it would take more than 185 reviewers working 2,000 hours each per year to complete the review within a year. Assuming each reviewer is paid $50 per hour (a bargain), the cost could be more than $18,750,000.

Electronic document review and assessment applications can now reliably identify the relevant documents first, and sort them according to subject matter. This dramatically reduces the volume of data requiring review by professionals for privilege and confidentiality and makes that review process substantially more efficient and cost effective.

"It is quite usual to see cases where we reduce the amount of data to be reviewed by 80 to 90 percent," reports Jonathan Nystrom, Vice President of Sales with Cataphora, a vendor of advanced electronic discovery services. "Only the time and cost savings possible using the latest electronic discovery tools make it even possible to undertake such a project," he adds.

A recent study that appeared in *Digital Discovery & e-Evidence* showed that, for a smaller case with 30 gigabytes of data, manual review could cost $3.3 million. The study described how a more advanced electronic approach could reduce that cost by 89 percent, to less than $360,000. (See "Document Analytics Allow Attorneys to be Attorneys,"

Chris Paskach and Vince Walden, *DDEE*, August 2005, page 10.)

Moreover, further cost savings can be realized by using the same technology, and often many of the same findings, across multiple cases over time. For example, a pharmaceutical company, for which litigation is a way of life, will often be required to produce very similar evidence in case after case. "Automation can measurably reduce these costs of doing business," comments Nicolas Economou, from electronic discovery services company H5 Technologies.

For large data producers, the consistent and repeatable processes provided by advanced review technologies are important, in addition to their accuracy, speed, and cost advantages.

Finally, the ability to see the fact pattern in the case earlier, thanks to the speed of automated review and the advent of electronic document analytics, provides better insight as to when early settlement might be appropriate, eliminating the costs of prolonging the matter unnecessarily. Such analysis also helps attorneys assess the benefits and trade-offs of producing documents in native format versus tiff images with fielded text.

Electronic Discovery's Old Guard

Many different types of tools have been developed over the years that provided limited support for electronic discovery. For example, a common approach has been to put imaged data (e.g. tiff files) and text into a database where the information can be examined using keyword searches.

Unfortunately, keyword searches are limited in their effectiveness. Not all documents of importance necessarily contain a candidate keyword and, at the same time, any chosen keyword will likely occur in many documents that are not of interest. As a result, documents of interest constitute a small minority of those located. The problem then remains, how to find the desired documents among the many that have been returned. Attempts to refine keyword searches by, for example, adding Boolean constraints (i.e., some combination of "ANDs" and "ORs"), do not usually provide much significant improvement.

The most advanced tools available today offer vastly improved capabilities. Legal teams can use such tools to locate relevant documents much more efficiently than ever before. And this evidence can be found much earlier in the proceedings. Getting more relevant information early in the process puts attorneys in a much better position to determine case strategy and gives them a much stronger basis from which to negotiate with the opposing side.

The State of the Art

Many vendors today provide the capability to use statistical techniques to determine which documents are "similar" according to specified criteria or exemplars and to group them together. This can help reviewers focus their efforts and provides huge time and cost savings over the course of a review. However, it is important to validate the accuracy of such automated categorization vis-à-vis the responsive specifications.

In many instances two documents may objectively be very similar to one another, yet one may be responsive and the other not. For example, in a particular matter, a document discussing the sale of a particular product may be responsive only if the sale in question occurred in the United States. Yet documents that relate to sales in the U.S. may be very similar to documents relating to sales abroad. In this example, it is very easy to see how two virtually identical documents, which would be grouped together by this technology, could fall on opposite sides of the responsiveness line.

Another approach is the use of what some vendors call "ontologies" or "word communities." They capture information about the words and phrases that model a particular area of knowledge. For example, in a case relating to alleged insurance fraud, an ontology might address particular industry practices that are potentially relevant to an investigation, or certain insurance-specific vocabulary that could be indicative of a responsive document.

Ontologies can provide a means of very accurately pinpointing relevant information. Equally valuably, they can be used to identify irrelevant materials, including junk e-mails, which can then be removed from consideration, thereby decreasing the amount of potential evidence that has to be reviewed. Additionally, much of the information captured by ontologies can be reused from matter to matter.

Contextual review is another example of advanced electronic document assessment. This technology uses the context between different documents to help reviewers determine the importance and relevance of a piece of potential evidence.

"Traditionally, context has meant looking at context *within* a document," comments Cataphora's Nystrom. "By contrast, we now have the ability to look at context in the form of the relationships *among* documents. Seeing potential evidence in the context in which it was originally created and used makes it much easier for reviewers to make accurate assessments of its relevance and importance, and to do so very quickly."

Some of these tools also provide litigation support managers with increased control over the review. They can then ensure that the review is completed on time and within budget. To help managers do this, advanced tools can provide information about how much of the evidence has been reviewed, and how much remains. Review managers can then determine whether they have enough resources to get the job done on time and to make adjustments at the earliest possible opportunity. It is even possible to monitor the speed and effectiveness of individual reviewers, tracking how much evidence each reviewer has processed. Review

managers can also see which reviewers are finding the largest numbers of relevant documents, and how accurate their review decisions are.

Electronic Document Assessment for Relevancy Really Works

Historically, human review has been the gold standard for initial relevancy assessment. Yet it was rarely, if ever, tested for accuracy. The advent of electronic relevancy assessment processes and applications now allows for the comparison of these techniques against human review. We conducted such a study and found not only that the electronic assessment for relevancy was highly accurate, but also that people reading documents to assess relevancy missed close to half of the relevant documents.

Our study began with a set of 48,000 documents, which were to be coded for relevance to three responsive categories. The software was set up in accordance with the vendor's standard practices, which included interviewing the attorneys and reviewing documents to gain an understanding of the relevance criteria for the case and training the software accordingly. In parallel, six reviewers were trained to conduct a manual review of a stratified random sample of 43 percent of the corpus.

The software and the reviewers separately reviewed the documents and the results were compared. We assumed that where the software and the humans agreed, the determination was correct. Where there was a discrepancy (a document marked responsive by one approach and not by the other), the document was re-examined by the same reviewers to determine (in some cases with some debate and arbitration) who was correct, the software or the human reviewer.

At the end of day, after all the numbers were crunched, the human reviewers were shocked at how many documents they missed and were similarly startled at how well the software achieved the objective of locating relevant documents. Across all three codes, the software, on average, identified more than 95 percent of the relevant documents, with a high of 98.8 percent for one of the codes. The people, on the other hand, averaged 51.1 percent of the relevant documents, falling as low as 43 percent for one of the codes.

These findings makes sense considering that document review work is extremely difficult, that people have subjective views of relevancy, and people can be easily distracted from the work by fatigue or thoughts of lunch and other matters. The software process, on the hand, consistently assesses every document and never gets tired.

In sum, the results of our study demonstrated that the use of a particular software application and process reduced the risk of missing a responsive document by 90 percent. Moreover, the effectiveness of the electronic process improves as it is tweaked throughout the quality assurance process. These results may be surprising to those who have an abiding belief in the quality of traditional manual review, but they are probably an accurate — maybe even optimistic — reflection of the performance of an average review room, particularly if the case is large and complex and review is being conducted, as it so often is, against an aggressive deadline.

The legal world may not yet be ready for fully automated review, and there will long remain a role for expert human review. Nevertheless, advanced technologies can be used to focus review efforts on those documents that are most likely to contain relevant information. At the very least, such tools can be used with some confidence to root out obviously non-responsive materials, allowing review to focus on what is left. That alone can provide considerably increased efficiency, reduced costs and superior results.

What this Shift Means for Lawyers

The newest technologies open the door to successful handling of much larger volumes of electronic evidence than has ever been possible before. Faced with the advent of these tools, attorneys have the choice to either embrace them, or take the risk that competing firms will take business away from them.

Automated document review and analysis provides significant new opportunities for attorneys in law firms and in corporate legal departments. Legal review can be a more efficient, less costly, and a more proactive process that aids the legal team in managing the case.

There is every sign that the competition will become more intense. Technology can level the playing field by giving smaller firms the same review capability as larger firms, and business as usual will not be an adequate response. All law firms, large and small, must prepare for the impact of the new technologies.

Anne Kershaw is the founder of **A. Kershaw, P.C. // Attorneys & Consultants,** a nationally recognized litigation management consulting firm providing independent analysis and innovative recommendations for the management of all aspects of volume litigation challenges. Ms. Kershaw provided electronic discovery survey data and testimony before the Federal Civil Rules Advisory Committee. In addition, she is a principal author of *Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors* and a contributing editor to *The Sedona Conference Glossary For E-Discovery and Digital Information Management (May 2005 Version)*, both projects of the Sedona Conference® Working Group on Best Practices for Electronic Document Retention and Production RFP+ Group (www.thesedonaconference.org). Further information regarding Ms. Kershaw's resume, career and practice can be obtained on www.AKershaw.com.

PROFESSIONAL ANNOUNCEMENTS

Ken Withers, Former Judges Carroll and Corodemus Join The Sedona Conference®

Three individuals with ties to the bench have become formally affiliated with The Sedona Conference® ("TSC"), according to a statement issued on October 14. Former federal magistrate judge John L. Carroll and former New Jersey state court Judge Marina Corodemus are now members of the Arizona-based organization's corporate board, and Kenneth J. Withers will fill the newly-created post of managing director, effective January 1, 2006. Withers has worked at the Federal Judicial Center for the past six years, most recently as Senior Education Attorney.

These developments, according to TSC founder and executive director Richard Braman, "underscore our commitment to provide quality judicial education, and to continue and expand our efforts to develop content of immediate benefit to the bench and bar in the areas we study."

Founded in 1997, The Sedona Conference® is a nonprofit, 501(c)(3) educational and research institute "dedicated to the reasoned and just advancement of law and policy" in the areas of antitrust law, complex litigation, and intellectual property rights. It has evolved into a multifaceted think tank of ad hoc "Working Groups" made up of experienced attorneys, judges, academics, and experts. Through dialogue and consensus building, the Working Groups produce sets of basic principles or guidelines for resolving disputes in leading edge areas of the law.

The first TSC Working Group developed *The Sedona Principles Addressing Electronic Document Production*, *The Sedona Guidelines for Managing Information in the Electronic Age*, *The Sedona Conference® Glossary for E-Discovery and Digital Information* and a paper on *Navigating the Vendor Proposal Process*. The Working Groups have led to a series of "Mini-Sedonas," short seminars presented at judicial conferences around the country, featuring the dialogue format that has been the hallmark of the full-fledged Sedona Conferences held in Sedona in a restricted attendance, mini-sabbatical environment.

Withers' move to TSC from the Federal Judicial Center, the research and education agency of the federal courts, reflects TSC's goal that all of its work product be viewed as fair, balanced, and of practical value by judges. "If we can deliver that type of work product for the benefit of the bench, other participants in the legal system will follow," Braman explained, "leading to the reasoned and just advancement of law and policy."

"The Sedona Conference® Working Groups are invaluable. The work the members do as dedicated volunteers engaging in dialogue rather than debate couldn't be bought for a million dollars," said Withers.

"Our job is to make this priceless resource available at a reasonable cost to the whole legal profession through seminars and publications, and in the process, make it available for free to cash-strapped state and federal courts," he continued. This will involve innovative uses of educational technology, and new models of public-private-nonprofit partnerships, to meet the undeniable needs of the bench and bar."

Carroll will be balancing his duties on behalf of TSC with his academic leadership of Cumberland School of Law at Samford University, where he is Dean. Coredemus is an Adjunct Professor at Rutgers and head of the ADR Practice at Corodemus and Corodemus in New Jersey. Prior to his tenure at the Federal Judicial Center, Withers spent two years as Education Director of the Social Law Library of Massachusetts.

Four Prominent Attorneys Open Virtual Firm Focusing on ESI

The names "Redgrave," "Daley," "Ragan" and "Wagner" are familiar to e-discovery conference attendees and readers of commentary on civil procedure in the electronic age. Those names took on added significance on October 17, 2005, when Redgrave Daley Ragan & Wagner LLP (www.rdrw.com) opened its doors as a boutique law firm specializing in "Information and Technology Law." Corporate records compliance, e-discovery, and data privacy are among the new practice's areas of concentration.

"We took this step because we are convinced that now more than ever, businesses need practical, independent records management and e-discovery advice to navigate an expanding minefield of civil and criminal sanctions," notes James Daley, formerly Chair of the Technology Law & E-Discovery Group of Shook, Hardy & Bacon LLP. Regarding the firm's mission, Daley explained, "We want to partner with clients to reduce the risk of non-compliance, while proactively containing the costs of managing a tidal wave of electronic information."

According to Jonathan Redgrave, former partner at Jones Day in Washington, D.C., he and his new colleagues have combined their substantial legal experience in a wide vari-

ety of areas with innovative client partnering and fee structures to offer strategic legal advice to businesses on a variety of issues, including: improving the management of digital information and records, handling electronic discovery requests (both requesting and responding), and reducing the risks involved in the integration of different information systems in the aftermath of a merger or acquisition. The firm also offers information management seminars to law firms, government organizations and corporations as well as special master and expert witness services.

Charles Ragan, formerly of Pillsbury Winthrop Shaw Pittman LLP, and co-editor-in-chief of *The Sedona Guidelines for Managing Information and Records in the Digital Age*, noted that the firm is a response to "acute interest" in problems associated with electronic information in business organizations. "We know that businesses are interested because we've heard from several of them," Ragan said.

Lori Wagner, formerly of Faegre & Benson LLP, who shared chief co-editing responsibilities for *The Sedona Guidelines* with Ragan, added, "We all came from large firms and decided we wanted to do something different, both by specializing in an area we've all developed expertise in, but is often seen as purely a service in large firms — not as a separate substantive practice area — and to work with people we respected and enjoyed, no matter where they lived."

"We will be using a team approach, so clients get the benefit of our combined expertise," Redgrave said. "We use technology to bring us together as a virtual firm, which allows us substantial flexibility to meet client needs and expectations," he added.

The four met as members of the Sedona Conference Working Group on Electronic Document Retention and Production, an influential group of lawyers, judges, experts and consultants that first met in October 2002 to devise guidelines to assist lawyers and courts dealing with disputes over electronic data. (See related story on page 13.)

Redgrave is currently chair of the Working Group. Among their notable accomplishments, Redgrave and Daley pioneered the development of internet document website technology to reduce the repeated time and cost of production of millions of pages of company documents in pattern litigation, Ragan has a world-wide reputation for his expertise in international arbitration and mediation of complex corporate transactions, and records management issues, and Wagner has won acclaim for her complex litigation skills, including her award-winning role as co-counsel in the successful Exxon Valdez litigation.

The firm is headquartered in Minneapolis with satellite offices in Washington, D.C., San Francisco and Kansas City.

'b-Discovery' Networking Group Goes National

No, that's not a typo in the headline: "b-Discovery" refers to the monthly gatherings of e-discovery professionals that LECG's Dan Regard has organized in the past two years to take place at various Washington, D.C. drinking establishments. The model for this casual networking group is about to be replicated on a national scale.

"Since Washington D.C. is filled with people from other cities," Regard explained, "It came as no surprise that the individuals who founded b-Discovery were not native Washingtonians. As such, they decided to not only convene on a regular basis, but to do so in a new locale every time. So we became a group of e-discovery specialists 'discovering' different bars."

Underlying the obviously recreational aspects of b-Discovery is an unexpectedly serious purpose: to foster communication, civility, and community among often-competing e-discovery providers. Accordingly, b-Discovery is characterized by open access. The meetings, held on the second Wednesday of each month, have been credited with encouraging an emerging sense of community and collegiality within the D.C. e-discovery marketplace.

"Everyone is welcome and everyone can invite additional guests," Regard said. "There is never specific vendor or other sponsorship or advertising, and there is no corporate agenda. We feel very strongly that the collective, non-biased approach has contributed to the popularity of the meetings."

In fact, the formula has been so well received that out-of-town guests have taken it home with them, and are organizing b-Discoveries in their native cities. The new b-Discovery "chapters" and their coordinators are in:

Seattle - Art Skaran (askaran@whitmont.com),
San Francisco - Trent Livingston (tlivingston@lecg.com),
Houston- Dean Kuhlmann (dean.kuhlmann@cataphora.com),
New York- Shawn Colvard (shawn.colvard@cataphora.com),
Los Angeles -C. McCormack (cmccormack@lextranet.com),
Chicago- Bruce Malter (bmalter@projectleadership.net).

An additional chapter will be formed after January 1 in Phoenix, headed by Ken Withers. Dan Regard (dregard@lecg.com) will continue to coordinate the program in D.C.

To accommodate and coordinate all this expansion, a b-Discovery listserve has been established at b-discovery@yahoogroups.com; it will be c-moderated by Regard and Jonathan Nystrom of Cataphora.

b-Discovery meetings will also be included on the *Digital Discovery & e-Evidence* calendar of upcoming events, in both the newsletter and on the web site (http://ddee.pf.com under "Upcoming Events").

CALENDAR

NOVEMBER

3-4

The Advanced Guide to Law Technology and Management. New York City. Presented by Marcus Evans.

Contact:http://www.marcusevans.com/events/CFEventinfo.asp?EventID=9907

Litigating Employment Cases: Views from the Bench. Presented by Georgetown University Law Center.

Contact:http://www.law.georgetown.edu/cle/showEventDetail.cfm?ID=115

9

b-Discovery Meeting. Washington, D.C. A Tribute to Ken Withers beginning at at 6:00 p.m. at the home of Dan Regard, 1620 R Street N.W.

Contact: dregard@lecg.com

10-11

Twenty-sixth Annual Employment Law Conference. San Francisco, Cal. Presented by The National Employment Law Institute. Includes session on discovery in the electronic workplace. Repeated **November 17-18** in Chicago, Il. and **December 8-9** in Washington, D.C.

Contact: Telephone: 303-861-5600; web: http://www.neli.org; email neli@neli.org.

15–16

Bad Faith and Punitive Damages. Miami Beach, FL. Presented by American Conference Institute.

Contact:https://www.americanconference.com/Insurance_Reinsurance/badfaith.htm

16

b-Discovery Meeting. Chicago, IL. Coogan's Riverside Saloon, 180 N Wacker Drive, beginning at 6:00 p.m.

Contact: BruceMalter, bmalter@projectleadership.net., telephone: 312-444-1134

16

Electronic Discovery: Guidance for Corporate Counsel. New York City. Sponsored by the Practising Law Institute. Repeated **December 7** in San Francisco, Cal.

Contact: Practising Law Institute, 810 Seventh Ave., New York, NY, 10019; Tel: (800) 260-4PLI; Web: http://www.pli.edu; Fax: 800-321-0093; e-mail:info@pli.edu.

17-18

Second Annual Advanced E-discovery Institute: Practical Concerns, Pragmatic Advice, Emerging Trends. Washington, D.C. Presented by Georgetown University Law Center Continuing Legal Education.

Contact: Telephone: 202-662-9890; Fax: 202-662-9891; Web: http://georgetowncle.org; e-mail: cle@law.georgetown.edu.

DECEMBER

1-2

Electronic Discovery: The Changing Face of Litigation – A Certification Course Designed Exclusively for Litigation Support Professionals. Eden Prairie, Minn.

Contact: http://www.krollontrack.com/certification.

FEBRUARY 2006

9-11

Evidence Issues and Jury Instructions in Employment Cases. Washington, D.C. Presented by ALI-ABA at Georgetown University Law Center.

Contact: http://www.ali-aba.org

To list your organization's upcoming event in the *Digital Discovery & e-Evidence* Calendar, contact ceoannou @ pf.com.

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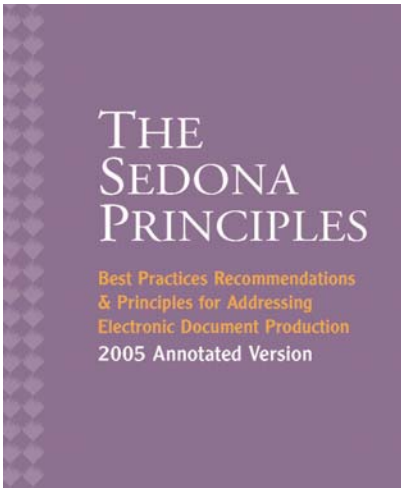

Pike & Fischer is pleased to present the 2005 annotated edition of *The Sedona Principles.* Crafted by some of the nation's finest lawyers, consultants, academics, and judges under the auspices of the highly regarded Sedona Conference®, *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* was the first formal attempt to provide a common approach for managing discovery practice as it changes with technology. The first annotated version, published in 2004, quickly became the "must-have" resource for both the bench and the bar.

E-discovery's evolution in the past year is chronicled in our new publication. The *2005 Annotated Edition* not only explains the policy underlying the 14 Principles that state and federal judges continue to rely on to resolve contested discovery disputes, it also contains citations to and analysis of their latest orders and opinions - including the obscure and hard-to-find ones, in addition to those with higher profiles.

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