"Transparency," "Discovery-on-Discovery" Type Disclosures, and Party-Opponent Validation in eDiscovery

By Paul Weiner and Denise Backhouse

Introduction

The Special Master's "Order Regarding Search Methodology for Electronically Stored Information" ("Protocol") in the Northern Illinois District Court's January 2018 decision in *In re: Broiler Chicken Antitrust Litigation* has received significant attention in eDiscovery circles. This is not surprising because "[d]isclosure of seed, training, or validation sets – including irrelevant documents and the responding party's coding decisions – has become one of the most contentious issues related to the use of [Technology Assisted Review]." *The Sedona Conference® TAR Case Law Primer*, 18 Sedona Conf. J. 5, 30 (2017).

While parties may *voluntarily agree* to an eDiscovery protocol with such provisions, the level of process transparency, compelled disclosures about search efforts – often referred to as "discovery-on-discovery" – and party-opponent validation contained in the *Broiler Chicken* Protocol is not *required* by civil procedure rules or industry guidance – nor is it a best practice. Thus, the Protocol should not be used for the proposition that a litigant is *required* to follow its provisions. *See, e.g., Rio Tinto Plc v. Vale S.A.*, (S.D.N.Y. March 2015) (Court's approval of eDiscovery protocol that "is the result of the parties agreement … does 'not mean … that the exact ESI protocol approved here will be appropriate in all [or any] future cases that utilize [Technology Assisted Review].'").

For balance, parties should include provisions addressing *requesting*-party obligations that acknowledge the two-way nature of eDiscovery when negotiating such eDiscovery Protocols.

Broiler Chicken is no run-of-the-mill lawsuit. It is a complex, high-stakes antitrust case about the U.S. "Broilers" market, allegedly worth over $30 billion in annual revenue. The docket exceeds 246 pages with over 1,200 entries and multiple, voluminous complaints.

Pleadings show that many of the Protocols in the case were heavily negotiated. For example, when denying Plaintiffs' "Motion to Compel and Modify the ESI Protocol" the Court stated "the ESI Protocol represents a negotiated compromise of the parties' opposing positions. … The process to which the parties agreed in the

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ESI Protocol is not perfect, but, as with any compromise, it is good enough." *See* Dkt. #1081, pp. 2 – 3 (July 18, 2018). This is the context in which the Protocol must be viewed.

While this article uses aspects of the Protocol as a springboard, nothing should be taken as a criticism of the Protocol, the parties or the positions they asserted, or the Special Master.

There is No Requirement to be "Transparent" in Discovery

Paragraph one of the Protocol states:

> Transparency: With the goal of permitting requesting Parties an appropriate level of transparency into a producing Party's electronic search process, without micromanaging how the producing Party meets its discovery obligations and without requiring the disclosure of attorney work product or other privileged information, the Parties will endeavor to be reasonably transparent regarding the universe of documents subject to targeted collections or culling via search terms and/or TAR/CAL.

While the parties may have determined it was in their best interest to incorporate a "transparency" provision, neither the rules of civil procedure nor industry guidance require "transparency into a producing Party's electronic search process."

The word "transparency" does not appear in the Federal Rules. Instead, discovery is self-executing and a party need not defend or disclose its processes or "prove" the reasonableness of its efforts. The Federal Rules contain specific disclosure and conferral obligations:

- Rule 26(a)(1) requires litigants to disclose witnesses, damages computations, insurance policies, and a "description … of all documents … [and] electronically stored information" that it "may use to support its claims or defenses …."
- Rule 26(f)(2) requires parties to discuss preservation and develop a discovery plan including timing, subjects, privilege and clawback, and "any issues about disclosure, discovery, or preservation of electronically stored information, including the forms in which it should be produced."
- Rule 26(g) requires attorneys or parties to sign discovery responses, certifying that after "reasonable inquiry," a response is consistent with the rules and warranted by existing law or a nonfrivolous argument for changing the law.
- Under Rule 37 a party can:
  - be compelled to provide disclosure or discovery responses;
  - sanctioned for failing to comply with a court order, failing to disclose or to supplement a discovery response, or to admit under Rule 36; or
  - suffer curative measures for failing to preserve ESI.

Notably, nothing in these Rules requires "transparency into a producing Party's electronic search process."

So where does the notion of discovery "transparency" come from? It stems from the concept of "cooperation." At the urging of The Sedona Conference® the word cooperation was recently added to the Committee Notes – not the rule itself – of Rule 1:

> Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.
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> This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

That Note language was essentially taken from the Sedona Conference Cooperation Proclamation (July 2008), available at: https://thesedonaconference.org/publication/The_Sedona_Conference_Cooperation_Proclamation. The Sedona Conference consistently advocates for cooperation in discovery – a laudable goal. But for a full understanding of what "cooperation" means, it is instructive to look to Sedona's own *Case for Cooperation, The Sedona Conference's Cooperation Proclamation*, 10 Sedona Conf. J. 331 (Fall Supp. 2009), which defines "cooperation" as a two-tiered concept (emphases supplied):

> Cooperation in this context is best understood as a **two-tiered concept**. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices.
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> Then, there is the **second level of cooperation**. **While not required, this enhanced cooperative level offers advantages to the parties.** At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI.

> The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable.

The voluntary nature of cooperation is reinforced in Sedona's flagship *Principles* (emphases supplied):

- ***"[C]ooperation is fundamentally a voluntary endeavor*** that requires the development and maintenance of trust between two or more parties, and a relatively equal and balanced exchange of non-protected information. If both requesting and responding parties ***voluntarily cooperate*** to evaluate the appropriate procedures, methodologies, and technologies to be employed in a case, both may potentially achieve significant monetary savings and non-monetary efficiencies." *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Volume 19 (2018), Principle 3, Comment 3.b., p. 78.
- "If both requesting and responding parties ***voluntarily elect to cooperatively evaluate and agree upon*** the appropriate procedures, methodologies, and technologies to be employed in the case, both may potentially achieve significant monetary savings and non-monetary efficiencies." *See id.*, Principle 6, Comment 6.b., p. 125.

While there are precisely defined disclosure and conferral obligations in the Federal Rules, and parties ***may voluntarily choose through cooperation*** to go beyond the Rules to achieve mutual benefits, there is nothing in the Rules that requires "transparency into a producing Party's electronic search process."

Courts reinforce this. For example, in the Northern Indiana District Court's August 2013 decision in *In re Biomet,* the plaintiff demanded to work jointly with defendants to train a predictive coding tool, and sought to compel defendant to identify "seed" documents. The court held the Federal Rules did not require such "transparency":

> The [plaintiff] wants the whole seed set [defendant] used for the algorithm's initial training. That request reaches well beyond the scope of any permissible discovery by seeking irrelevant or privileged documents used to tell the algorithm what not to find. That [plaintiff] has no right to discover irrelevant or privileged documents seems self-evident.
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> The only authority the [plaintiff] cites is a report of the Sedona Conference that has had a significant, salutary, and persuasive impact on federal discovery practice in the age of electronically stored information. Sedona Conference Cooperation Proclamation, 10 Sedona Conf. J. 331 (Fall Supp. 2009). [Defendant], the [plaintiff] says, isn't proceeding in the cooperative spirit endorsed by the Sedona Conference …. But … the Sedona Conference [does not] expand a federal district court's powers, so [plaintiff] can't provide me with authority to compel discovery of information not made discoverable by the Federal Rules.

Likewise, in Hyles v. City of New York (S.D.N.Y. August 2016), the Court instructed:

> [Plaintiff] is correct that parties should cooperate in discovery. I am a signatory to and strong supporter of the Sedona Conference Cooperation Proclamation, and I believe that parties should cooperate in discovery. The December 1, 2015 Advisory Committee Notes to amended Fed. R. Civ. P. 1 emphasized the need for cooperation. Cooperation principles, however, do not give the requesting party, or the Court, the power to force cooperation ….

There is No Obligation to Disclose Highly Detailed Information about Discovery Procedures – Often Referred to as "Discovery-On-Discovery" – Before Specific Deficiencies are Identified

Grounded upon its foundational "transparency" mandate, the Protocol goes on to require the producing party to disclose highly-detailed information about its search methodologies. With respect to technology assisted review (TAR) it states:

> A producing party that elects to use TAR/CAL will disclose the following information regarding its use of a TAR/CAL process: (a) the name of the TAR/CAL software and vendor, (b) a general description of how the producing Party's TAR/CAL process will work, including how it will train the algorithm, such as using exemplar, keyword search strings, or some other method, (c) a general description of the categories or sources of the documents included or

excluded from the TAR/CAL process, and (d) what quality control measures will be taken.

See Protocol, Dkt. #586, p 3.

With respect to search terms, the Protocol requires that the producing party:

- first provide "Search Software Disclosures" including what stop words were excluded, diacritics resolution, whether proximity-limited search terms are subject to an evaluation order, and whether the tool offers synonym searching;
- then follow a "First Phase Search Term Proposal" procedure, whereby it:
  - discloses its substantive search terms and explain "semantic synonyms and common spellings of the keywords proposed," and "contextual examples" of false positives or "noise hits" it seeks to exclude;
  - within 12 days, the requesting party gets to provide revisions to the search terms;
  - within 8 days of receiving any such revisions, the producing party must provide information to support any objections; and
  - any disputes concerning the sufficiency of information in support of objections and/or the use of specific search terms are resolved by a Special Master.
- then, under a "Second Phase Search Term Proposal" procedure, the requesting party can:
  - propose yet additional search terms;
  - to which the producing party must provide information to support any objections to the new terms;
  - within 15 days the parties must meet and confer to discuss disputes and counter-proposals regarding the new search terms; and
  - any unresolved disputes are submitted to a Special Master.

See Protocol, Dkt. #586, pp. 3 – 6.

These provisions reverse the normal discovery process. Under the Rules, only after a showing of a deficient production or search process has been made – an exceptional circumstance – is such disclosure appropriate. The Protocol provisions essentially mandate discovery-on-discovery before any type of deficiency in a party's process or production can arise. While the parties in *Broiler Chicken* may have wanted an inverse process, there are strong reasons why discovery-on-discovery does not make sense, from a practical or financial standpoint, in the vast majority of cases.

Sedona Principle 6 – which has been cited by Federal Courts with approval – provides: "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Volume 19 (2018), Principle 6, Comment 6.b., p. 118.

The "Introduction" to Principle 6 explains:

> Principle 6 recognizes that a responding party is best situated to preserve, search, and produce its own ESI. Principle 6 is grounded in reason, common sense, procedural rules, and common law, and is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing "discovery on discovery," unless a specific deficiency is shown in a party's production.

Comment 6(b) goes on to underscore that "[r]esponding parties should be permitted to fulfill their [ ] discovery obligations without preemptive restraint," analogizing to the First Amendment precept of no "'prior restraint,' *i.e.*, just as speech cannot normally be restrained in advance, a requesting party should not normally be able to restrain the responding party's discovery process to prevent an anticipated, but uncertain, future harm."

Comment 6(b) further provides:

> [T]here should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere "speculation") of a material failure by the responding party to meet its discovery obligations. A requesting party has the burden of proving a specific discovery deficiency in the responding party's production. *See* Principle 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."). *See also* discussion *infra* regarding potential benefits of cooperation.
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> A responding party's obligations under Rule 26(f) to meet and confer in good faith does not trump its right to evaluate unilaterally and select the procedures, methodologies and technologies appropriate for preserving and producing its own ESI. Those rights should be challenged only where a

requesting party demonstrates to the court a specific discovery deficiency in the responding party's discovery productions.

Strong reasons ground Principle 6:

- Under the American system, discovery is self-executing, and takes place with each party fulfilling its obligations without direction from the court or opposing counsel.
- Attorneys, as officers of the Court, are expected to comply with Rules 26 and 34 in connection with their search, collection, review and production efforts, and face consequences for failing to do so.
- The type of disclosures sought through notions of "cooperation" and "transparency" often reveal work product, litigation tactics, or trial strategy. *See, e.g.*, *Safeguarding the Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 Fed. Cts. L. Rev. 1 (2015) (Facciola, J.); *Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery*, 161 U. Pa. L. Rev. 2063 (2013). Protecting these well-settled privileges is essential to maintaining a just and functional legal system. *See, e.g., Hickman v. Taylor*, US Supreme Court, 1947 (establishing the work product doctrine and explaining: "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. … Were [work product] materials open to opposing counsel … [a]n attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.").
- Because under the American system, the producing party pays for its own discovery, it is entitled and best positioned to make decisions that implicate those costs to comply with its obligation to conduct a reasonable search and to facilitate proportional discovery. To put such decisions in the hands of the opposing party could incentivize wasteful and costly discovery, either through a misunderstanding of the producing party's specific IT systems, policies and practices, or a lack of sufficient technical competence about unique enterprise systems, or worse, as a litigation tactic.
- Companies make significant investments in structuring their information technology systems and information governance policies. Based on its knowledge of its systems, a producing party is better equipped than an adversary or the court to identify the best process for producing its own ESI, consistent with its obligations under the Rules. Some companies also have entire portfolios of litigation and should not be forced to do something in one case that could adversely impact others.
- Perfection in discovery is not the standard; rather, a producing party must take reasonable steps to identify, preserve, search for and produce relevant ESI. *See, e.g.,* Fed. R. Civ. P. 26(g) (providing for "reasonably inquiry" certification of discovery responses); Fed. R. Civ. P. 37, 2015 Committee Note ("This rule recognizes that 'reasonable steps' to preserve suffice: it does not call for perfection."). Setting the bar at "perfection" is also inconsistent with Rule 26(b)(1)'s limitation on discovery to that which is "proportional to the needs of the case," and could exponentially increase discovery costs without a corresponding value (proportional or otherwise), thereby frustrating the mandates of Rule 1.
- If a responding party gets it wrong, it will suffer the consequences, such as compelled disclosures or more severe penalties for truly egregious misconduct. A responding party should get to choose how it takes on that risk.

The Southern District Court of New York's November 2017 case of *Winfield vs. City of New York*, is instructive on these issues:

> In keeping with these principles, this Court is of the view that there is nothing so exceptional about ESI production that should cause courts to insert themselves as the super-managers of the parties' internal review processes, including training of TAR software, or to permit discovery about such processes, in the absence of evidence of good cause such as a showing of gross negligence in the review and production process, the failure to produce relevant specific documents known to exist or that are likely to exist, or other malfeasance.

The *Winfield* Court also denied the Plaintiff's request for information about the Defendant's TAR tool "ranking system" (namely, the cut-off used, and how many documents were deemed responsive and unresponsive at each ranking), reasoning:

> It is also unclear how this information is even potentially relevant to the claims and defenses in this litigation as required under Federal Rule of Civil Procedure 26.

Likewise, in the Utah District Court's October, 2018 case of *Entrata, Inc. v. Yardi Systems Inc.*, , the Court denied a plaintiff's "Motion to Compel Production of TAR Information" which sought to compel the defendant "to produce the complete methodology and results of [its] TAR process," reasoning:

> [Plaintiff] has not provided any specific examples of deficiencies in [Defendant's] document production or any specific reason why it questions the adequacy of [Defendant's] document collection and review. Without more detailed reasons why production of [defendant's] TAR information is needed, the court is unwilling to order [defendant] to produce such information.

From a practical standpoint, the type of "discovery-on-discovery" outlined in the Protocol can often lead to expensive, process-oriented disputes that drive up the cost of litigation not only for parties, but also for courts. *See e.g., Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age*, Law Technology News, Feb. 2013, pp. 27 – 28 (Francis, J.) ("[T]he collateral proceedings required to obtain a judicial determination on a technical matter can be substantial. In one recent case, a judge devoted two full days of hearings to a dispute over a search methodology, at the end of which she encouraged the parties to reach agreement, which they did after numerous additional conferences with the court. That the parties were required to devote substantial resources to this dispute is not surprising. The judge had to be educated about the technologies at issue, and courts rightly demand expert testimony in such cases rather than relying upon the representations of counsel.")

Party-Opponent Validation is not a Federal Rule Requirement

The *Broiler Chicken* Protocol contains a highly detailed "Validation Protocol" requiring the producing party to:

- Partition documents into Subcollections;
- Draw samples from each Subcollection;
- Combine Subcollection samples into a Validation Sample;
- Conduct a "blind" review by a litigation subject matter expert ("SME");
- Prepare a Table listing for each Validation Sample document: Bates number; Subcollection; SME responsiveness and privilege coding;
- Produce to the requesting party and a Special Master:
  - the Table;
  - responsive, non-privileged Validation Sample documents not previously produced; and
  - statistical calculations using "Method of Recall Estimation" formulas which are different for a "Process Involving TAR" and a "Review Process Involving Manual Review."

The Protocol continues:

- After requesting party review, the parties determine whether they "agree that the recall estimate, and the quantity and nature of the responsive documents identified through the sampling process, indicate that the review is substantially complete" – *in other words, your adversary determines when your review is complete*;
- If calculations indicate that Subcollections 2 and 3 "still contain a substantial number of non-marginal, non-duplicative responsive documents as compared to Subcollection 1," the process is repeated; and
- If the parties cannot agree, disputes are submitted to a Special Master.

See Protocol, Dkt. #586, pp. 6 – 9, and Appendix A (emphasis in original).

Rule 26(g) requires litigants to certify that after "reasonable inquiry," their response is complete, correct and consistent with the Rules. Nothing in the Federal Rules requires *party-opponent validation* of a production. As discussed previously, a responding party's right to select appropriate preservation and production methodologies for its own ESI should not be challenged unless a requesting party demonstrates a deficiency. Likewise, the EDRM at Duke Law Proposed TAR Guidelines specifically state:

> The Federal Rules of Civil Procedure do not specifically require parties to use statistical estimates to satisfy any discovery obligations.

Unlocking the e-Discovery TAR Black Box, Proposed EDRM at Duke TAR Guidelines, Judicature, Volume 102, No. 2, p. 67, n.7 (Summer 2018).

From a practical standpoint, protracted discovery disputes have been cited as a major cause of the dramatic decline in jury trials. *See, Jury Trial Decline Wreaks Havoc On Profession, Judges Say*, Law360.com, April 16, 2019 ("Since 2000, the annual number of federal civil and

criminal jury trials has dropped by more than 53%, while the number of new civil and criminal cases filed annually has increased 7.7%.") Mandating any type of party-opponent "validation" in run-of-the-mill case will only acerbate this problem.

And such procedures – that are not required by the Rules – should never be foisted on a litigant. *Accord, Hyles v. New York City*, (S.D.N.Y. August 2016) ("The key issue in whether at plaintiff Hyles' request, the defendant City (i.e., the responding party) can be forced to use TAR (technology assisted review, aka predictive coding) when the City prefers to use keyword searching. The short answer is a decisive "NO." … Hyles' counsel candidly admitted at the conference that they have no authority to support their request to force the City to use TAR. The City can use the search method of its choice. If Hyles later demonstrates deficiencies in the City's production, the City may have to re-do its search. But that is not a basis for Court intervention at this stage of the case.

Ensuring Balance in eDiscovery Protocols and Avoiding Weaponizing eDiscovery Under the Guise of "Cooperation"

The voluntary nature of "cooperation" makes logical sense, as by definition "cooperation" is not unilateral and involves *mutual* effort to achieve a *common benefit*. *See* Black's Law Dictionary (6th ed. 1994) ("*Cooperate*. To act jointly or concurrently toward a common end."); Webster's Ninth New Collegiate Dictionary ("*Co-op-er-ate* 1: To act or work with another or others: act together; 2: to associate with another or others for mutual benefit.").

Conversely, eDiscovery can be improperly weaponized through one-sided demands premised on notions of "transparency" or "cooperation" not grounded in the Rules or Sedona's definition of "cooperation," especially where the playing field is not level:

> While parties may be "better served by informally exchanging information regarding custodians, databases and other sources of information . . . transparency should not be morphed into an opportunity for unending questions and fishing expeditions[.]"

See Hon. Elizabeth D. Laporte & Jonathon M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 19, 64 (2015). *Accord Gordon v. Kaleida Health* (W.D.N.Y. May, 2013) (refusing to compel predictive coding protocol where motion was premised on argument that "cooperation" *required* "a negotiated ESI protocol").

Moreover, such tactics undermine Rule 1's goal of securing a case's just, speedy, and inexpensive determination. *Accord*, Heyward D. Bonyata and Jarrett O. Coco, *To TAR or Not to TAR*, Legaltech News (Aug. 20, 2015) ("[I]t may become more difficult to reach a consensus on TAR disclosures, processes, or metrics…. not only among adverse parties, but [also] among co-defendants and co-plaintiffs as well, who may have diverging interests, varying discovery budgets, unique IT systems, and business processes…. It may be that efforts expended to achieve alignment among the parties (*e.g.*, motions, hearings, expert testimony) could outweigh any potential benefits …."); Philip Favro, *Predictive Coding Protocol Comes Under Fire as Judge Peck Appoints Special Master in Rio Tinto*, Recommind.com (July 20, 2015) ("While the benefits to disclosure seem attractive, the *Rio Tinto* experience makes them more illusory than alluring….full disclosure by the parties … through the Predictive Coding Protocol is now leading to protracted motion practice. While unfortunate, such a result is often predictable … Against the backdrop of potentially lower discovery costs loom several drawbacks with stipulated use protocols. The first and most obvious risk is the potential for excessive input from and wrangling with opposing counsel and the court over the process for searching, reviewing, and producing documents. […] which can offset the cost and time savings otherwise offered by predictive coding.)

To avoid such issues, when negotiating eDiscovery protocols, the focus must be on both parties' obligations, especially in asymmetrical cases. This balanced approach puts parties on equal footing, which Sedona recognizes is critical for "both [to] potentially achieve significant monetary savings and non-monetary efficiencies" through cooperation.

"Second-level-of-cooperation" provisions that provide balance could include the following:

> <u>Agreement to Requests for Production (RFPs) Specificity Subject to Protocol:</u>
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> a. Requesting party RFPs will comply with the "reasonable particularity" mandates of Rule 34 and local rules (including the number allowed and timing).
> b. Within 10 days of receipt, without waiving objections, the producing party provides pro-

posed revisions, including regarding reasonable particularity and proportionality (Rules 34, 26(b)(1) and 26(c)).

c. Within 8 days of receipt, the requesting party provides information to support objections to proposed revisions;
d. Parties meet and confer within 10 days to resolve disputes;
e. If disputes cannot be resolved, parties will jointly seek the court's resolution. The producing party need not respond until the court rules.

Motions Precluded by this Protocol: The parties agree that a requesting party is precluded from moving to compel or for curative measures or sanctions based upon the producing parties' adherence to the Protocol.

Provisions Apply to all Parties: This Protocol applies to all parties (i.e., responding plaintiff(s) and defendant(s) are "Producing Party").

Conclusion

While litigants may achieve benefits when they voluntarily engage in what Sedona defines as a "second-level-of-cooperation" to negotiate an eDiscovery protocol, because transparency, "discovery-on-discovery" type disclosures, and party-opponent validation are not required by the Rules or industry guidance, they should not be forced on any party under the guise of "cooperation."

Moreover, to achieve the full benefits of cooperation, negotiated eDiscovery protocols should always include balanced provisions, including those that address requesting-party obligations.