

SEVENTH CIRCUIT
ELECTRONIC DISCOVERY
PILOT PROGRAM

INTERIM REPORT
ON
PHASE THREE

MAY 2012 – MAY 2013

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1. EXECUTIVE SUMMARY

BY

**JAMES F. HOLDERMAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
FOUNDING CHAIR OF THE PILOT PROGRAM**

The Seventh Circuit Electronic Discovery Pilot Program Committee (“Committee”) was formed in May 2009 to conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while reducing the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure. To that end the Committee brought together the most talented experts in the Seventh Circuit from all sectors of the bar, including government lawyers, plaintiffs’ lawyers, defense lawyers, and in-house lawyers from companies with large information systems, as well as experts in relevant fields of technology. The Committee developed and promulgated “Principles Relating to the Discovery of Electronically Stored Information” (“Principles”) and a Proposed Standing Order by which participating judges could implement the Principles in the Pilot Program’s test cases.

A. Phase One

From October 2009 through March 2010, thirteen judges of the United States District Court for the Northern District of Illinois implemented the Phase One Principles in ninety-three (93) civil cases. The Phase One judges and the counsel for the parties in the Phase One cases were surveyed in April 2010. On May 1, 2010, the Committee unveiled its detailed Report on Phase One at the 2010 Seventh Circuit Bar Association Meeting and Judicial Conference in Chicago. Phase One was necessarily limited in duration to provide a basis for evaluating any needed adjustments to the Pilot Program. The Phase One Report provided an initial “snapshot” of how the Principles appeared to be working in practice. The full Phase One Report is available at www.DiscoveryPilot.com but, in summary, the participating judges overwhelmingly felt that the Principles were having a positive effect on counsels’ cooperation with opposing counsel and knowledge of procedures to address e-discovery issues. In particular, the judges felt that the involvement of e-discovery liaisons (required by Principle 2.02) contributed to a more efficient and cost-effective discovery process. Many of the participating lawyers reported little impact on their cases, presumably because of the limited duration of Phase One. But those lawyers who did see an effect from the application of the Principles in their cases overwhelmingly reported that the effect was positive in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating advocacy on behalf of their clients. As a result, apart from some minor revisions suggested by the Phase One Report, the Principles were mostly unchanged for Phase Two of the Pilot Program.

B. Phase Two

Early in Phase Two, the Committee determined that Phase Two should last two years, from May 2010 to May 2012, to allow a fuller evaluation of the Principles' application. In May 2011, the Committee issued an Interim Report (available at www.DiscoveryPilot.com) midway through the two-year period, and Chief District Judge James Holderman presented the Interim Report on May 17, 2011, at the Seventh Circuit Bar Association Meeting and Judicial Conference in Milwaukee, Wisconsin.

During Phase Two, a number of e-discovery experts from across the country joined as committee members or advisors to the Pilot Program. The Committee had about fifty (50) members and advisors by the end of Phase One, and by the end of Phase Two that number had tripled to over one hundred and fifty (150) members and advisors. The Committee included members not only from all seven federal districts in the three states of the Seventh Circuit, but also from an additional eighteen states outside the Seventh Circuit. The Pilot Program grew from the thirteen (13) initial participating judges and ninety-three (93) Pilot Program cases for a six-month period in Phase One, to forty (40) participating judges and two hundred ninety-six (296) cases in Phase Two.

During Phase Two, the Education Subcommittee produced five free educational on-line webinars and another five live seminars, all of which were attended by more than ten thousand lawyers and others seeking to further their understanding about e-discovery procedures and the technology related to electronically stored information. The Education Subcommittee also created a compilation of case law concerning electronic discovery from the Seventh Circuit, along with seminal electronic discovery cases from around the country. In furtherance of the Pilot Program's educational mission, the Committee launched its web site, www.DiscoveryPilot.com, in May 2011, where it posts information and materials for judges and practitioners seeking to stay abreast of the latest e-discovery developments.

The Preservation and Early Case Assessment Subcommittees joined together in Phase Two and revised certain Phase One Pilot Program Principles in response to the Phase One survey results. The Phase Two Principles were promulgated on August 1, 2010, and were applied by the judges and lawyers participating in Phase Two.

The Criminal Discovery Subcommittee was created during Phase Two and is comprised of representatives from the U.S. Attorney's Office and the Federal Defender Office, as well as other members of the criminal defense bar. The subcommittee is working to develop resources to educate criminal practitioners about the use of electronic discovery, with the objective of identifying and addressing common issues relating to electronic discovery in criminal cases.

The Survey Subcommittee partnered with experts at the Federal Judicial Center of the United States Courts ("FJC") and with the cooperation of each chief district judge and district court clerk in the Seventh Circuit designed an E-filer Baseline Survey. The survey was sent to over six thousand federal court electronic filing attorneys throughout the seven districts of the Seventh Circuit during August 2010 to set the stage for future Pilot Program surveys about the

effectiveness of the Principles. In March 2012, the Survey Subcommittee repeated the same E-filer Baseline Survey, adding a series of questions about the attorneys' awareness of the Pilot Program. Again, over six thousand attorneys in all seven districts of the Seventh Circuit responded. In March 2012, the Survey Subcommittee also administered the Phase Two Judge Survey and the Phase Two Attorney Survey to judges and attorneys with cases in which Phase Two Principles were applied.

The Committee's Communications and Outreach Subcommittee coordinated Committee members' presentations about the Pilot Program in over forty-five seminars and panel discussions in fifteen different states and internationally during Phase Two.

The National Outreach and Membership Subcommittees continue to respond to and coordinate the tremendous interest in the Pilot Program from judges, attorneys, and business people in the Seventh Circuit and across the country. By the end of Phase Two, individuals from twenty-one states and the District of Columbia had become Committee members or advisors to the Pilot Program.

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was formed as part of Phase Two to keep up with rapidly evolving technology and to further advance the bench's and bar's understanding and use of new technology in the electronic record retention and discovery field.

The Web Site Subcommittee, which was also formed as a part of Phase Two, is responsible for designing and managing the Pilot Program's web site, www.DiscoveryPilot.com. The web site was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The Web Site Subcommittee has continued to update, expand, and enhance www.DiscoveryPilot.com throughout Phase Two, and the initial part of Phase Three.

The results of all the surveys conducted during Phases One and Two are available at www.DiscoveryPilot.com. The Phase Two survey results, which were based on a larger population of judges (twenty-seven (27) judges responded in Phase Two compared to thirteen (13) in Phase One) and lawyers (two hundred thirty-four (234) lawyers responded in Phase Two compared to one hundred thirty-three (133) in Phase One), were similar in many respects to the results of the Phase One surveys.

For example, in both the Phase One and Phase Two Judge Surveys, one hundred percent (100%) of the responding judges who had cases involving e-discovery liaisons agreed or strongly agreed that "[t]he involvement of e-discovery liaison(s) has contributed to a more efficient discovery process." (Table J-21.)¹ All of the responding judges felt that the Principles increased or did not affect the lawyers' levels of cooperation to efficiently resolve the case (Table J-5), the lawyers' likelihood of reaching agreements on procedures to handle inadvertent disclosures (Table J-6), the lawyers' meaningful attempts to resolve discovery disputes without the court

¹ The Phase Two Judge Survey Data Results are attached to the Final Report on Phase Two as [Appendix F.2.a](#).

(Table J-7), the lawyers' promptness in bringing unresolved disputes to the court (Table J-8), and the parties' ability to obtain relevant documents (Table J-9).

Also in Phase One, ninety-six percent (96%) of the attorneys responded that the Principles had no effect or increased their ability to zealously represent their clients, and in Phase Two ninety-seven percent (97%) responded the same. (Table A-21.)² When asked if the Principles affected the fairness of e-discovery, fifty-five percent (55%) of both Phase One and Phase Two attorneys responded, "No effect." Forty-three percent (43%) of Phase One attorneys said the Principles increased or greatly increased fairness, and forty percent (40%) in Phase Two agreed. (Table A-23.)

Both the Phase One and Phase Two survey results show that in those cases in which the Principles had a perceived effect, those effects were overwhelmingly positive with respect to assisting attorneys' cooperation and enhancing their ability to resolve disputes amicably, their ability to obtain relevant documents, and their ability to zealously represent their clients, as well as providing fairness to the process. Attorneys reported that the Principles improved cooperation in thirty-six percent (36%) of the cases and decreased it in two percent (2%). (Table A-20.) Attorneys reported that the Principles increased their ability to zealously represent clients in twenty-five percent (25%) of the cases, and decreased it in three percent (3%). (Table A-21.) Attorneys reported that the Principles improved their ability to resolve disputes without court involvement in thirty-five percent (35%) of the cases, and decreased it in four percent (4%). (Table A-22.) Attorneys reported that the Principles increased the fairness of the e-discovery process in forty percent (40%) of the cases, and decreased it in five percent (5%). (Table A-23.) Attorneys reported that the Principles increased their ability to obtain relevant documents in twenty-eight percent (28%) of the cases, and decreased it in two percent (2%). (Table A-24.)

The judges agree. Of the judge respondents: seventy-eight percent (78%) reported improved cooperation (twenty-two percent (22%) greatly) and none reported decreased cooperation (Table J-5); seventy-five percent (75%) reported that the Principles increased or greatly increased the fairness of the e-discovery process (nineteen percent (19%) greatly) and none observed decreased fairness (Table J-16); sixty-six percent (66%) reported that the Principles increased ability to obtain relevant documents and none felt access was diminished (Table J-9). The bottom line is that the Principles result in more cooperation, more access to needed information, and more fairness.

C. Phase Three

On October 1, 2012, United States Magistrate Judge Sheila Finnegan became chair of the Committee when former Magistrate Judge Nan Nolan retired from the bench. Judge Nolan remains active as a member of the Committee.

² The Phase Two Attorney Survey Data Results are attached to the Final Report on Phase Two as [Appendix F.2.a.](#)

As the Committee proceeds through Phase Three, it continues to invite those interested in active involvement with the Committee’s work to join. The Committee will continue to promote discovery procedures that will resolve each civil case filed in the United States District Courts in as “just, speedy, and inexpensive” (Fed. R. Civ. P. 1) a manner as possible, with the goal of providing justice to all parties while minimizing the cost and burden of discovery.

The Committee also seeks to expand interest in improving the e-discovery process across the country and internationally. To that end, the Committee appreciates that the judges of the Northern District of Illinois adopted [Local Patent Rules for Electronically Stored Information](#) that became effective March 1, 2013, and were based primarily on the Pilot Program Principles. Education also continues to be a priority of the Pilot Program. The Committee has conducted a number of webinars during Phase Three and has a number of new webinars planned. The Committee is also considering new subcommittees to focus on specific e-discovery needs of the litigation process. Phase Three has already seen new developments in these areas and others.

For example, during the first part of Phase Three, the Mediation Subcommittee created a program to provide free mediation of e-discovery disputes when parties lack the resources to resolve the issues themselves. A panel of experienced e-discovery practitioners volunteer to mediate e-discovery disputes at no cost to the parties. Panel members have received training in mediation techniques. The Committee views the E-Mediation Program as a logical extension of the Committee’s education program. The Committee believes that its E-Mediation Program and the other Phase Three endeavors not only further the goal of Federal Rule of Civil Procedure 1, but move the pretrial litigation process in the United States toward a more cooperative cost-effective culture for the benefit of all.

2. THE PHASE THREE PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION **(Revised as Part of Phase Two on August 1, 2010.** **Under Consideration for Further Revision in Phase Three.)**

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

- (1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (*see* Principle 2.05);
- (2) the scope of discoverable ESI and documents to be preserved by the parties;
- (3) the formats for preservation and production of ESI and documents;
- (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

- (5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

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

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

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

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

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter, request, or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;

- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
- (2) identifies any disagreement(s) with the request to preserve; and
- (3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within the party's possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

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

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

- (1) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives;
- (2) random access memory (RAM) or other ephemeral data;
- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

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

Principle 2.05 (Identification of Electronically Stored Information)

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

(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian’s data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for

optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Principles

Principle 3.01 (Judicial Expectations of Counsel)

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (a) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;
- (b) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at www.USCourts.gov; and
- (c) Familiarize themselves with these Principles.

Principle 3.02 (Duty of Continuing Education)

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery³, additional materials available on web sites of the courts⁴, and of other organizations⁵ providing educational information regarding the discovery of ESI.⁶

³ [The Sedona Conference E-Discovery Publications](#)

⁴ E.g. [United States District Court for the Northern District of Illinois](#)

⁵ E.g. [Federal Judicial Center](#) (under Educational Programs and Materials)

⁶ E.g. [University of Denver - Institute for the Advancement of the American Legal System \(IAALS\)](#)

3. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE MEMBERS AS OF MAY 1, 2013

Chief District Judge

James F. Holderman
United States District Court
219 S. Dearborn St., Rm. 2548
Chicago, IL 60604
james_holderman@ilnd.uscourts.gov
Phone: 312-435-5600

Chair

Magistrate Judge Sheila Finnegan
United States District Court
219 S. Dearborn St., Rm. 2206
Chicago, IL 60604
sheila_finnegan@ilnd.uscourts.gov
Phone: 312-435-5657

Secretary

Thomas M. Staunton
Miller Shakman & Beem LLP
180 N. LaSalle St., Ste. 3600
Chicago, IL 60601
tstaunton@millershakman.com
Phone: 312-263-3700

Committee Executives

Education Subcommittee Co-Chairs

Gregory C. Schodde
McAndrews Held & Malloy Ltd.
500 W. Madison St., 34th Fl.
Chicago, IL 60661
gschodde@mcandrews-ip.com
Phone: 312-775-8117

Christina M. Zachariassen
Navigant
30 S. Wacker Dr., Ste. 3100
Chicago, IL 60606
christina.zachariassen@navigant.com
Phone: 312-583-6906

Principle Development Subcommittee Co-Chairs

Thomas A. Lidbury
Drinker Biddle & Reath LLP
191 N. Wacker Dr., Ste. 3700
Chicago, IL 60606
tom.lidbury@dbr.com
Phone: 312-569-1356

Karen Caraher Quirk
Health Care Service Corp.
300 E. Randolph St.
Chicago, IL 60601
karen_quirk@bcbsil.com
Phone: 312-653-6540

Alexandra G. Buck
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard St., Ste. 300
Chicago, IL 60654
alex.buck@bartlit-beck.com
Phone: 312-494-4400

James S. Montana, Jr.
Vedder Price PC
222 N. LaSalle St., Ste. 2600
Chicago, IL 60601
jmontana@vedderprice.com
Phone: 312-609-7820

Criminal Subcommittee Co-Chairs

Beth (Gaus) Jantz
Federal Defender Program
55 E. Monroe St., Ste. 2800
Chicago, IL 60603
Beth_Gaus@fd.org
Phone: 312-621-8342

Meghan Morrissey Stack
Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, IL 60604
meghan.stack@usdoj.gov
Phone: 312-353-4045

Manish Shah
Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, IL 60604
manish.s.shah@usdoj.gov
Phone: 312-353-0517

Survey Subcommittee Co-Chairs

Debra R. Bernard
Perkins Coie LLP
131 S. Dearborn St., Ste. 1700
Chicago, IL 60603
dbernard@perkinscoie.com
Phone: 312-324-8559

Thomas M. Staunton
Miller Shakman & Beem LLP
180 N. LaSalle St., Ste. 3600
Chicago, IL 60601
tstaunton@millershakman.com
Phone: 312-263-3700

Communications and Outreach Subcommittee Co-Chairs

Alexandra G. Buck
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard St., Ste. 300
Chicago, IL 60654
alex.buck@bartlit-beck.com
Phone: 312-494-4400

Steven W. Teppler
Kirk Pinkerton, PA
240 S. Pineapple Ave., 6th Fl.
Sarasota, FL 34236
steppler@kirkpinkerton.com
Phone: 941-964-2410

Mediation Subcommittee Co-Chairs

Christopher Q. King
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
christopher.king@dentons.com
Phone: 312-876-8224

Magistrate Judge Nan Nolan, Retired
JAMS
71 S. Wacker Dr.
Chicago, IL 60606
nanrnolan@gmail.com
Phone: 312-208-6709

Daniel R. Rizzolo
Esicon Consulting, Inc.
One N. Franklin St., Ste. 3600
Chicago, IL 60606
drizzolo@esiconconsulting.com
Phone: 847-835-1233 x3

National Outreach Subcommittee Chair

Arthur Gollwitzer III
Michael Best & Friedrich
Two Prudential Plaza, 180 N. Stetson Ave., Ste. 2000
Chicago, IL 60601
agollwitzer@michaelbest.com
Phone: 312-596-5847
and
12600 Hill Country Blvd., Ste. R-275
Austin, TX 78738
Phone: 512-329-2676

Membership Subcommittee Co-Chairs

Michael D. Gifford
Howard & Howard
211 Fulton St., Ste. 600
Peoria, IL 61602
mgifford@howardandhoward.com
Phone: 309-999-6329

Marie V. Lim
Novack and Macey LLP
100 N. Riverside Plaza
Chicago, IL 60606
mlim@novackmacey.com
Phone: 312-419-6900

Technology Subcommittee Co-Chairs

Sean Byrne
Byrne Law Group
sbyrne7@gmail.com
Phone: 312-772-2063

Tomas M. Thompson
DLA Piper
203 N. LaSalle St., Ste. 1900
Chicago, IL 60601
tom.thompson@dlapiper.com
Phone: 312-368-7944

Web Site Subcommittee Co-Chairs

Timothy J. Chorvat
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
tchorvat@jenner.com
Phone: 312-923-2994

Christopher Q. King
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
christopher.king@dentons.com
Phone: 312-876-8224

Committee Members

Sergio Acosta
Hinshaw & Culbertson
222 N. LaSalle St., Ste. 300
Chicago, IL 60601-1081
sacosta@hinshawlaw.com
Phone: 312-704-3472

Tiffany Amlot
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
tiffany.amlot@dentons.com
Phone: 312-876-2349

Molly Armour
Law Office of Molly Armour
4050 N. Lincoln Ave.
Chicago, IL 60618
mearmour@gmail.com
Phone: 773-746-4849

John M. Barkett
Shook, Hardy & Bacon L.L.P.
Miami Center, Ste. 2400
201 South Biscayne Boulevard
Miami, FL 33131-4332
jbarkett@shb.com
Phone: 305-358-5171

Kevin Behan, National Manager, Lit. Tech.
McDermott Will & Emery LLP
227 W. Monroe St.
Chicago, IL 60606
kbehan@mwe.com
Phone: 312-984-6915

George S. Bellas
Bellas & Wachowski
15 N. Northwest Highway
Park Ridge, IL 60068
george@bellas-wachowski.com
Phone: 847-823-9030

Debra R. Bernard
Perkins Coie LLP
131 S. Dearborn St., Ste. 1700
Chicago, IL 60603
dbernard@perkinscoie.com
Phone: 312-324-8559

Rebecca Biller
Krieg DeVault LLP
One Indiana Square, Ste. 2800
Indianapolis IN 46204-2079
rbiller@kdlegal.com
Phone: 317-238-6352

Matthew A. Bills
Grippio & Elden LLC
111 S. Wacker Dr.
Chicago, IL 60606
mbills@grippioelden.com
Phone: 312-704-7756

Suzanne E. Bish
Stowell & Friedman, Ltd.
321 S. Plymouth Ct., Ste. 1400
Chicago, IL 60604
sbish@sfltd.com
Phone: 312-431-0888

Michael Bolton
Baxter Healthcare Corp.
One Baxter Parkway
Deerfield, IL 60015
michael_bolton@baxter.com
Phone: 847-948-3010

Shannon Brown
P.O. Box 435
Mount Joy, PA 17552
sbrown@shannonbrownlaw.com
Phone: 717-945-9197

Alexandra G. Buck
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard St., Ste. 300
Chicago, IL 60654
alex.buck@bartlit-beck.com
Phone: 312-494-4400

Robert L. Byman
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
rbyman@jenner.com
Phone: 312-923-2679

Sean Byrne
Byrne Law Group
sbyrne7@gmail.com
Phone: 312-628-7408

Michael P. Carbone
1201 Brickyard Way, Ste. 201
Point Richmond, CA 94801-4140
mcarbone@sbcglobal.net
Phone: 510-234-6550

Scott A. Carlson
Seyfarth Shaw LLP
131 S. Dearborn St., Ste. 2400
Chicago, IL 60603
scarlson@seyfarth.com
Phone: 312-460-5946

Jason Cashio
Kean Miller LLP
400 Convention St., Ste. 700
P.O. Box 3513 (70821-3513)
Baton Rouge, LA 70802
jason.cashio@keanmiller.com
Phone: 225-389-3708

Cass Christenson
McKenna Long & Aldridge LLP
1900 K Street NW
Washington, DC 20006
christenson@mckennalong.com
Phone: 202-496-7218

Kelly Clay, Director
Information Management - Legal Dept.
GlaxoSmithKline
Five Moore Drive, P.O. Box 13398
Bide C4164.4B
Research Triangle Park, NC 27709-3398
kelly.g.clay@gsk.com
Phone: 919-483-2094

Kendric M. Cobb
Caterpillar Inc.
100 NE Adams
Peoria, IL 61629
cobb_kendric_m@cat.com
Phone: 312-494-3593

Ethan Cohen
Trial Attorney
U.S. Equal Employment Opportunity
Commission
500 W. Madison St., Ste. 2000
Chicago, IL 60661
ethan.cohen@eeoc.gov
Phone: 312-869-8104

Karen M. Coppa
Chief Assistant Corporation Counsel
Legal Information, Investigations and
Prosecutions Division
City of Chicago Department of Law
30 N. LaSalle St., Ste. 1720
Chicago, IL 60602
karen.coppa@cityofchicago.org
Phone: 312-744-0741

Alfred W. Cortese, Jr.
Cortese PLLC
113 3rd St., NE
Washington, DC 20008
awc@cortesepllc.com
Phone: 202-637-9696

Claire N. Covington
Reed Smith LLP
10 S. Wacker Dr., 40th Fl.
Chicago, IL 60606
ccovington@reedsmith.com
Phone: 312-207-1000

Magistrate Judge Susan E. Cox
United States District Court
219 S. Dearborn St., Rm. 1068
Chicago, IL 60604
susan_e_cox@ilnd.uscourts.gov
Phone: 312-435-5615

Jeffrey I. Cummings
14 W. Erie St.
Chicago, IL 60610
jcummings@lawmbg.com
Phone: 312-751-1170

Cathy DeGenova-Carter, Counsel
State Farm Automobile Ins. Company
One State Farm Plaza
Corporate Law, Litigation Section, B-3
Bloomington, IL 61710
catherine.degenova-carter.jw49
@statefarm.com
Phone: 309-766-5569

Richard L. Denney
Denney & Barrett, P.C.
870 Copperfield Dr.
Norman, OK 73072
rdenney@dennbarr.com
Phone: 405-364-8600

Moira K. Dunn, Asst. State's Atty
Will County State's Attorney's Office
121 N. Chicago St.
Joliet, IL 60431
dunnmk@yahoo.com
Phone: 312-285-6728

Timothy Edwards
Axley Brynelson, LLP
2 E. Miffin St., Ste. 200
P.O. Box 1767
Madison, WI 53701
tedwards@axley.com
Phone: 608-260-2481

Elizabeth H. Erickson
1341 W. Fullerton Ave., Ste. 102
Chicago, IL 60614
eherrickson@hotmail.com
Mobile: 773-255-5021

Brian D. Fagel
U.S. Securities and Exchange Commission
Division of Enforcement
175 W. Jackson Blvd., Ninth Fl.
Chicago, IL 60604
fagelb@sec.gov
Phone: 312-886-0843

Tiffany M. Ferguson
Pugh, Jones & Johnson, P.C.
180 N. LaSalle St., Ste. 3400
Chicago, IL 60601-2807
tferguson@pjlaw.com
Phone: 312-768-7830

Megan Ferraro
Hyatt Hotels & Resort
71 S. Wacker Dr., 14th Fl.
Chicago, IL 60606
megan.ferraro@hyatt.com
Phone: 312-780-5481

Todd H. Flaming
KrausFlaming LLC
20 South Clark Street, Ste. 2620
Chicago, IL 60603
Todd@KrausFlaming.com
Phone: 312-447-7217

Jason B. Fliegel
Abbott Laboratories
100 Abbott Park Rd.
Dept. 032G, AP6A-2
Abbott Park, IL 60064
jason.fliegel@abbott.com
Phone 847-938-3646

Adrian Fontecilla
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
afontecilla@crowell.com
Phone: 202-624-2803

Beth (Gaus) Jantz
Federal Defender Program
55 E. Monroe St., Ste. 2800
Chicago, IL 60603
Beth_Gaus@fd.org
Phone: 312-621-8342

Cynthia Giacchetti
Law Offices of Cynthia Giacchetti
53 W. Jackson Blvd., Ste. 1460
Chicago, Illinois 60604
cgiacchett@aol.com
Phone: 312-939-6440

Michael D. Gifford
Howard & Howard
211 Fulton St., Ste. 600
Peoria, IL 61602
mgifford@howardandhoward.com
Phone: 309-999-6329

David Glockner
Stroz Friedberg
150 N. Wacker Dr., Ste. 2600
Chicago, IL 60606
dglockner@strozfriedberg.com
Phone: 312-216-8103

Arthur Gollwitzer III
Michael Best & Friedrich
Two Prudential Plaza
180 N. Stetson Ave., Ste. 2000
Chicago, IL 60601
agollwitzer@michaelbest.com
Phone: 312-596-5847

and
12600 Hill Country Blvd., Ste. R-275
Austin, TX 78738
Phone: 512-329-2676

Rex Gradeless
Assistant Attorney General
Office of the Attorney General
500 South Second Street
Springfield, IL 62706
RGradeless@atg.state.il.us
Phone: 217-782-9094

Daniel T. Graham
Clark Hill PLC
150 N. Michigan Ave., Ste. 2700
Chicago, IL 60601
dgraham@clarkhill.com
Phone: 312-985-5900

Kelly B. Griffith
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd, East
P.O. Box 273
Charleston, WV 25301
kgriffith@spilmanlaw.com
Phone: 304-340-3833

Maura R. Grossman
Wachtell, Lipton, Rosen & Katz
51 W. 52nd St.
New York, NY 10019
MRGrossman@wlrk.com
Phone: 212-403-1391

Brent Gustafson
Blue Star Case Solutions, Inc.
226 S. Wabash Ave., Ste. 500
Chicago, IL 60604
bgustafson@bluestarcs.com
Phone: 312-939-3000

Marie A. Halpin
7th Circuit Bar Assn - Board of Governors
P.O. Box 316563
Chicago, IL 60631
m.a.halpin@sbcglobal.net
Phone: 847-341-2612

James E. Hanlon, Jr.
Novus Law, LLC
8770 W. Bryn Mawr Ave.
Chicago, IL 60631
jhanlon@novuslaw.com
Phone: 312-933-5685

Brandon D. Hollinder
Falcon Discovery
16 Market Square Center
1400 16th Street, Ste. 400
Denver, CO 80202
bhollinder@falcondiscovery.com
Phone: 303-946-6592

Alisa Ittner, Project Manager
DTI
Two Ravinia Dr., Ste. 850
Atlanta, GA 30346
aittner@dtiglobal.com
Phone: 704-960-7664

Jaime D. Jackson
Atlee Hall
8 N. Queen St.
P.O. Box 449
Lancaster, PA 17608
jackson@atleehall.com
Phone: 717-393-9596

Vanessa G. Jacobsen
Eimer Stahl LLP
224 S. Michigan Ave., Ste. 1100
Chicago, IL 60604
vjacobsen@eimerstahl.com
Phone: 312-660-7604

Karin Scholz Jenson
Baker Hostetler
45 Rockefeller Plaza
New York, NY 10111-0100
kjenson@bakerlaw.com
Phone: 212-589-4266

Joshua Karsh
Hughes Socol Piers Resnick Dym Ltd.
70 W. Madison St.
Chicago, IL 60602
jkarsh@hspllegal.com
Phone: 312-604-2630

Samara Kaufman
Huron Legal
550 W. Van Buren St., 5th Fl.
Chicago, IL 60607
sekaufman@huronconsultinggroup.com
Phone: 312-880-3848

Ramji Kaul
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
ramji.kaul@dentons.com
Phone: 312-876-3484

Kathryn A. Kelly
U.S. Attorney's Office
219 S. Dearborn St., Rm. 500
Chicago, IL 60604
kathryn.kelly@usdoj.gov
Phone: 312-353-1936

Colleen M. Kenney
Sidley & Austin LLP
One S. Dearborn St.
Chicago, IL 60603
ckenney@sidley.com
Phone: 312-853-4166

Brendan M. Kenny
Blackwell Burke PA
431 S. 7th Street, Ste.2500
Minneapolis, MN 55415
bkenny@blackwellburke.com
Phone: 612-343-3211

Brent E. Kidwell
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
bkidwell@jenner.com
Phone: 312-923-2794

Christopher Q. King
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
christopher.king@dentons.com
Phone: 312-876-8224

Stephen M. Kramarsky
Dewey Pegno & Kramarsky LLP
777 Third Ave.
New York, NY 10017
skramarsky@dpklaw.com
Phone: 212-943-9000, x104

Cameron Krieger
Latham & Watkins LLP
233 S. Wacker Dr., Ste. 5800
Chicago, IL 60606
cameron.krieger@lw.com
Phone: 312-876-7612

Daniel J. Kurowski
Hagens Berman Sobol Shapiro LLP
1144 W. Lake St., Ste. 400
Oak Park, IL 60301
dank@hbsslaw.com
Phone: 708-628-4963

Pauline Levy
Legal Department, McDonald's Corporation
2915 Jorie Blvd.
Oak Brook, IL 60523
pauline.levy@us.mcd.com
Phone: 630-623-5392

Thomas A. Lidbury
Drinker Biddle & Reath LLP
191 N. Wacker Dr., Ste. 3700
Chicago, IL 60606
tom.lidbury@dbr.com
Phone: 312-569-1356

Marie V. Lim
Novack and Macey LLP
100 N. Riverside Plaza
Chicago, IL 60606
mlim@novackmacey.com
Phone: 312-419-6900

Ronald L. Lipinski
Seyfarth Shaw LLP
131 S. Dearborn St., Ste. 2400
Chicago, IL 60603-5577
rlipinski@seyfarth.com
Phone: 312-460-5879

James T. McKeown
Foley & Lardner LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202-5306
jmckeown@foley.com
Phone: 414-297-5530

Christopher D. Mickus
Neal, Gerber & Eisenberg LLP
Two N. LaSalle St., Ste. 1700
Chicago, IL 60602
cmickus@ngelaw.com
Phone: 312-269-8013

James S. Montana, Jr.
Vedder Price PC
222 N. LaSalle St., Ste. 2600
Chicago, IL 60601
jmontana@vedderprice.com
Phone: 312-609-7820

Cynthia Granados Motley
Wilson Elser Moskowitz Edelman
& Dicker LLP
55 W. Monroe St., Ste. 3800
Chicago, IL 60603
Cynthia.motley@wilsonelser.com
Phone: 312-821-6132

Justin Murphy
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
Justin.Murphy@crowell.com
Phone: 202-624-2536

Adrienne B. Naumann
Law Office of Adrienne B. Naumann
8210 N. Tripp
Skokie, IL 60076
adriennebnaumann@uchicago.edu
Phone: 847-329-8185

Magistrate Judge Nan Nolan, Retired
JAMS
71 S. Wacker Dr.
Chicago, IL 60606
nannolan@gmail.com
Phone: 312-208-6709

J. Matthew Pfeiffer
Pfeiffer Law Offices, P.C
55 S. Main St., Ste. 341
Naperville, Illinois 60540
matt@pfeifferlawoffices.com
Phone: 630-517-0808

Gabriel Bankier Plotkin
Miller Shakman & Beem LLP
180 N. LaSalle St., Ste. 3600
Chicago, IL 60601
gplotkin@millershakman.com
Phone: 312-759-7239

Jonathan S. Polish
Senior Trial Counsel
U.S. Securities and Exchange Commission
175 W. Jackson Blvd., Ste. 900
Chicago, IL 60604
polishj@sec.gov
Phone: 312-353-6884

Ashish Prasad, CEO
Discovery Services LLC
30 S. Wacker Dr., Ste. 2200
Chicago, IL 60606
aprasad@discoveryservicesllc.com
Phone: 888-807-7911

Kari Prochaska
McDermott Will & Emery LLP
227 W. Monroe St.
Chicago, IL 60606
kprochaska@mwe.com
Phone: 312-984-2181

Steven Puiszis
Hinshaw & Culbertson LLP
222 N. LaSalle St. Ste. 300
Chicago, Illinois 60601-1081
spuiszis@hinshawlaw.com
Phone: 312-704-3243

Karen Caraher Quirk
Health Care Service Corp.
300 E. Randolph St.
Chicago, IL 60601
karen_quirk@bcbsil.com
Phone: 312-653-6540

Bruce A. Radke
Vedder Price PC
222 N. LaSalle St., Ste. 2600
Chicago, IL 60601
bradke@vedderprice.com
Phone: 312-609-7689

Sandra J. Rampersaud
Cravath, Swaine & Moore LLP
825 Eighth Ave.
New York, NY 10019
sjrampersaud@cravath.com
Phone: 212-474-3772

Amy Rettberg, Executive Law Clerk
United States District Court
219 S. Dearborn St., Rm. 2548
Chicago, IL 60604
amy_rettberg@ilnd.uscourts.gov
Phone: 312-435-5600

Debra G. Richards
United States Attorney's Office
10 W. Market St., Ste. 2100
Indianapolis, IN 46204
debra.richards@usdoj.gov
Phone: 317-229-2446

Mark E. (Rick) Richardson III
GlaxoSmithKline
Five Moore Drive, P.O. Box 13398
Bide C4164.4B
Research Triangle Park, NC 27709-3398
rick.e.richardson@gsk.com
Phone: 919-483-1931

Chad Riley
TransPerfect Legal Solutions
150 N. Michigan Ave., Ste. 2025
Chicago, Illinois 60601
criley@transperfect.com
Phone: 312-578-0887

Daniel R. Rizzolo
Esicon Consulting, Inc.
One N. Franklin St., Ste. 3600
Chicago, IL 60606
drizzolo@esiconconsulting.com
Phone: 847-835-1233 x3

Lisa Rosen
Rosen Technology Resources, Inc.
207 E. Ohio St., Ste. 196
Chicago, IL 60611
lisa.rosen@rosentech.net
Phone: 312-251-4440

Michael Rothmann
Law Office of Martin L. Glink
1655 N. Arlington Heights Rd., Ste. 100 E
Arlington, Heights, IL 60004
rothmannmichael@sbcglobal.net
Phone: 847-394-4900

Magistrate Judge Mary M. Rowland
United States District Court
219 S. Dearborn St., Rm. 1334
Chicago, IL 60604
mary_rowland@ilnd.uscourts.gov
Phone: 312-435-5358

Bill Ryan
Merrill Corporation
311 S. Wacker Dr., Ste. 300
Chicago, IL 60606
bill.ryan@merrillcorp.com
Phone: 312-386-2211

Karl A. Schieneman
Review Less, LLC
One Oxford Centre
301 Grant St., Ste. 4300
Pittsburgh, PA 152219
kas@reviewless.com
Phone: 412-486-8606

Gregory C. Schodde
McAndrews Held & Malloy Ltd.
500 W. Madison St., 34th Fl.
Chicago, IL 60661
gschodde@mcandrews-ip.com
Phone: 312-775-8117

Manish Shah
Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, IL 60604
manish.s.shah@usdoj.gov
Phone: 312-353-0517

Corey M. Shapiro
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
corey.shapiro@dentons.com
Phone: 312-876-3461

Mathieu Shapiro
Obermayer Rebmann Maxwell &
Hippel LLP
One Penn Center, 19th Fl.
1617 John F. Kennedy Blvd.
Philadelphia, PA 19103-1895
mathieu.shapiro@obermayer.com
Phone: 215-665-3014

Jeffrey C. Sharer
Sidley Austin LLP
One S. Dearborn St.
Chicago, IL 60603
jcsharer@sidley.com
Phone: 312-853-7028

Joseph L. Siders
Winston & Strawn, LLP
35 W. Wacker Dr.
Chicago, IL 60601
jsiders@winston.com
Phone: 312-558-8811

Howard Sklar, Sr. Counsel
Recommind
650 California St., 12th Fl.
San Francisco, CA 94108
howard.sklar@recommind.com
Phone: 917-886-0692

Tina B. Solis
Ungaretti & Harris
70 W. Madison, Ste. 3500
Chicago, IL 60602
tbsolis@uhlaw.com
Phone: 312-977-4482

Natalie J. Spears
Dentons US LLP
233 S. Wacker Dr., Ste. 7800
Chicago, IL 60606-6404
natalie.spears@dentons.com
Phone: 312-876-2556

Meghan Morrisey Stack
Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, IL 60604
meghan.stack@usdoj.gov
Phone: 312-353-4045

Thomas M. Staunton
Miller Shakman & Beem LLP
180 N. LaSalle St., Ste. 3600
Chicago, IL 60601
tstaunton@millershakman.com
Phone: 312-263-3700
Ariana J. Tadler
Milberg LLP
One Pennsylvania Plaza
New York, NY 10119
atadler@milberg.com
Phone: 212-594-5300

Steven W. Teppler
Kirk Pinkerton, PA
240 S. Pineapple Ave., 6th Fl.
Sarasota, FL 34236
steppler@kirkpinkerton.com
Phone: 941-964-2410

Daniel Thies
Senior Law Clerk
United States District Court
219 S. Dearborn St., Rm. 2548
Chicago, IL 60604
daniel_thies@ilnd.uscourts.gov
Phone: 312-435-3075

Tara Thompson
Loevy & Loevy
312 N. May St., Ste. 100
Chicago, IL 60607
tara@loevy.com
Phone: 312-243-5900

Tomas M. Thompson
DLA Piper
203 N. LaSalle St., Ste. 1900
Chicago, IL 60601
tom.thompson@dlapiper.com
Phone: 312-368-7944

Martin T. Tully
Katten Muchin Rosenman LLP
525 W. Monroe St.
Chicago, IL 60601-3693
martin.tully@kattenlaw.com
Phone: 312-902-5457

Kelly Twigger
ESI Attorneys LLC
10955 Westmoor Dr., Ste. 400
Westminster, CO 80021
ktwigger@esiattorneys.com
Phone: 303-379-3068

William C. Wagner
Taft Stettinius & Hollister LLP
One Indiana Sq., Ste. 3500
Indianapolis, IN 46204-2023
Wwagner@taftlaw.com
Phone: 317-713-3614

Allison Jane Walton
Symantec
350 Ellis Street
Mountain View, CA 94043
allison_walton@symantec.com
Phone: 650-996-8794

Kelly M. Warner
Schiff Hardin
233 S. Wacker Dr., Ste. 6600
Chicago, IL 60606
kwarner@schiffhardin.com
Phone: 312-258-5500

Angela M. White, Manager
Litigation Case Management Team
Litigation and Legal Compliance
Eli Lilly and Company
amwhite@lilly.com
Phone: 317-277-1090

Marni Willenson
Willenson Law, LLC
542 S. Dearborn St., Ste. 610
Chicago, IL 60605
marni@willensonlaw.com
Phone: 312-546-4910

Joy Woller
Rothgerber Johnson & Lyons LLP
One Tabor Center
1200 17th St., Ste. 3000
Denver, CO 80202-5855
jwoller@rothgerber.com
Phone: 303-628-9504

J. Bryan Wood
The Law Office of J. Bryan Wood
542 S. Dearborn St., Ste. 610
Chicago, IL 60605
bryan@jbryanwoodlaw.com
Phone: 312-554-8600

Judy L. Woods
Benesch Friedlander Coplan & Arnold LLP
One American Square, Ste. 2300
Indianapolis, IN 46282
jwoods@beneschlaw.com
Phone: 317-685-6116

Christina M. Zachariasen
Navigant
30 S. Wacker Dr., Ste. 3100
Chicago, IL 60606
christina.zachariasen@navigant.com
Phone: 312-583-6906

Zachary Ziliak
Mayer Brown
71 S. Wacker Drive
Chicago, IL 60606
zziliak@mayerbrown.com
Phone: 312-701-7285

Presidents of the Seventh Circuit Bar Association

(2013-2014)

Julie A. Bauer
Winston & Strawn LLP
35 W. Wacker Dr., Ste. 4200
Chicago, IL 60601
jrbauer@winston.com
Phone: 312-558-5973

(2012-2013)

Christopher Scanlon
Baker & Daniels, LLP
300 N. Meridian St., Ste. 2700
Indianapolis, IN 46204
chris.scanlon@bakerd.com
Phone: 317-237-1253

(2011-2012)

Steven F. Molo
MoloLamken LLP
540 Madison Ave.
New York, NY 10022
smolo@mololamken.com
Phone: 212-607-8160

Judicial Liaisons from the Circuit Court of Cook County

Hon. Peter Flynn
Circuit Court of Cook County,
Chancery Div.
50 W. Washington St., Rm. 2408
Chicago, IL 60602
laotze100@aol.com
Phone: 312-603-4158

Hon. Mary Anne Mason
Circuit Court of Cook County,
Chancery Div.
50 W. Washington St., Rm. 2510
Chicago, IL 60602
mason4575@comcast.net
Phone: 312-603-4704

Hon. Allen S. Goldberg
Circuit Court of Cook County, Law Div.
50 W. Washington St., Rm. 2304
Chicago, IL 60602
goldie90@sbcglobal.net
Phone: 312-603-6044

Hon. Sanjay T. Tailor
Circuit Court of Cook Country, Law Div.
50 W. Washington St., Rm. 2407
Chicago, IL 60602
sanjay1964@aol.com
Phone: 312-603-6037

Liaisons from the ISBA Civil Practice and Procedure Section Council

Timothy J. Chorvat
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
tchorvat@jenner.com
Phone: 312-923-2994

P. Shawn Wood
Seyfarth Shaw LLP
131 S. Dearborn St., Ste. 2400
Chicago, IL 60603
swood@seyfarth.com
Phone: 312-460-5657

Expert Advisors

Henry N. Butler, Executive Director
Law & Economics Center
George Mason University School of Law
3301 Fairfax Drive
Arlington, VA 22201
henrybutler@gmail.com
Phone: 224-330-0540

Meghan Dunn, Ph.D., Research Associate
Federal Judicial Center
Thurgood Marshall Federal Judiciary Bldng
One Columbus Circle, N.E., Rm. 6-438
Washington, DC 20002
mdunn@fjc.gov
Phone: 805-226-7497

James Eaglin, Division Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Bldng
One Columbus Circle, N.E., Rm. 6-431
Washington, DC 20002
jeaglin@fjc.gov
Phone: 202-502-4071

Jennifer W. Freeman, Director Technology
FTI Consulting
Chicago, IL
Jennifer.Freeman@fticonsulting.com
Phone: 312-252-9368

Linda Kelly
Association of Corporate Counsel
1025 Connecticut Ave., NW, Ste. 200
Washington, DC 20036-5425
kelly@acc.com
Phone: 202-293-4103 ext. 338

Kenneth J. Withers
Director of Judicial Education and Content
The Sedona Conference®
5150 N. 16th St., Ste. A-215
Phoenix, AZ 85016
kjlw@sedonaconference.org
Phone: 602-258-4910

Corina Gerety, Research Manager
IAALS - Institute for Advancement of
the American Legal System
University of Denver
John Moyer Hall
2060 S. Gaylord Way
Denver, CO 80208
corina.gerety@du.edu
Phone: 303-871-6608

Brittany K.T. Kauffman, Manager
Rule One Initiative
IAALS - Institute for Advancement of
the American Legal System
University of Denver - John Moyer Hall
2060 S. Gaylord Way
Denver, CO 80208
brittany.kauffman@du.edu
Phone: 303-871-6619

Rebecca Kourlis, Executive Director
IAALS - Institute for Advancement of
the American Legal System
University of Denver
John Moyer Hall
2060 S. Gaylord Way
Denver, CO 80208
rebecca.kourlis@du.edu
Phone: 303-871-6601

Andrea Krebel Ph.D., Jury Consultant
TrialGraphix
328 S. Jefferson St., Ste. 850
Chicago, IL 60661
akrebel@trialgraphix.com
Phone: 312-666-1400

Daniel Wolfe, J.D. Ph.D., Director,
TrialGraphix
328 S. Jefferson St., Ste. 850
Chicago, IL 60661
dwolfe@trialgraphix.com
Phone: 312-666-1400

Chief Technical Advisor

Gino Agnello, Clerk
United States Court of Appeals for the Seventh Circuit
United States Courthouse
219 S. Dearborn St., Rm. 2710
Chicago, IL 60604
gino@ca7.uscourts.gov
Phone: 312-435-5850

Technical Advisors

Christopher Bojar, Lit. Support Manager
Barack Ferrazzano Kirschbaum
& Nagelberg LLP
200 W. Madison St., Ste. 3900
Chicago, IL 60606
chris.bojar@bfkn.com
Phone: 312-984-3100

Constance Mockaitis, PMP
Manager, eDiscovery
AbbVie
1 N. Waukegan Rd.
North Chicago, IL 60064
constance.mockaitis@abbvie.com
Phone: 847-938-0305

Margo Eckstein, Records Compliance Mgr
Kirkland & Ellis LLP
300 N. LaSalle St.
Chicago, IL 60654
meckstein@kirkland.com
Phone: 312-862-2000

Mark A. Rossi
Senior Vice President/General Manager
Merrill Corporation
311 S. Wacker Dr., Ste. 1800
Chicago, IL 60606
mark.rossi@merrillcorp.com
Phone: 312-674-6504

Elizabeth Jaworski, Director
Legal Operations
Motorola Mobility, Inc.
600 N. U.S. Highway 45
Libertyville, IL 60048
elizabeth.jaworski@motorola.com
Phone: 847-523-3199

Victoria A. Redgrave
Redgrave LLP
601 Pennsylvania Ave, NW
Ste. 900, South Building
Washington, DC 20004
vredgrave@redgravellp.com
Phone: 202-681-2599

David D. Lewis, Ph.D.
David D. Lewis Consulting
1341 W. Fullerton Ave., Ste. 251
Chicago, IL 60614
davelewis@daviddlewis.com
Phone: 773-975-0304

John “Jack” Walker
Principal, Deloitte Discovery
Deloitte Financial Advisory Services
111 S Wacker Dr.
Chicago, IL 60606
johnwalker@deloitte.com
Phone: 312-486-3149

Elisabeth McNamara
Legal Technology Solutions Consultant
Pitney Bowes Management Services
205 N. Michigan Ave.
Chicago, IL 60601
emmcnamara@yahoo.com

Web Advisor

Justia Inc.
Justia Web Site Solutions
1380 Pear Ave., Ste. 2B
Mountain View, CA 94043
<http://marketing.justia.com>
Phone: 888-587-8421

4. BACKGROUND REGARDING PHASES ONE, TWO, AND THREE

A. Formation of the Committee

The Committee was first conceived by Chief U.S. District Judge James F. Holderman and U.S. Magistrate Judge Nan R. Nolan. Together, they appointed lawyers and non-lawyers who are experts in the field of electronically stored information (“ESI”) to serve on the Committee. The idea was to get a diverse collection of viewpoints on the fairest ways to address the issues associated with ESI in discovery. The Committee quickly expanded as word spread and interest grew among members of the Seventh Circuit legal community. The Seventh Circuit Bar Association provided support and liaisons, who became members of the Committee. Also, the Illinois State Bar Association’s Civil Practice Section and Federal Civil Practice Section are represented on the Committee. Other bar associations, including the Chicago Bar Association and the Federal Bar Association - Chicago Chapter, have lent support.

The Committee members include leading e-discovery practitioners from the full spectrum of the bar (plaintiff, defense, and government), in-house counsel at companies with large and complex electronic information systems, and experts from e-discovery vendors who routinely collect and process ESI.

B. Committee’s Goals for Phase One

At its initial meeting on May 20, 2009, the Committee identified the need for a better balance between discovery costs and efforts to reach a “just, speedy, and inexpensive” determination of cases as intended by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1.

With that primary goal in mind, the Committee focused on three related goals for Phase One: (1) develop guiding Principles for the discovery of ESI that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation; (2) implement those Principles in actual pending or filed court cases; and (3) survey the judges and lawyers involved in the cases to determine the effectiveness of the Principles, solicit opinions regarding improvements that could be made to the Principles, and assess whether the Principles fulfilled the Committee’s goals.

With the continuing support and assistance of Rebecca L. Kourlis, a former Justice of the Colorado Supreme Court and the Executive Director of the Institute for Advancement of the American Legal System at the University of Denver, and Kenneth J. Withers, the Director of Judicial Education and Content for The Sedona Conference®, the Committee moved expeditiously in pursuit of its goals and, on September 16, 2009, produced the Committee’s Principles Relating to the Discovery of Electronically Stored Information (“Principles”).

C. Action on the Goals for Phase One

The Committee members identified three major areas of emphasis and formed three corresponding subcommittees in Phase One: the Preservation Subcommittee, co-chaired by James Montana, Jr. and Thomas Lidbury; the Early Case Assessment Subcommittee, co-chaired

by Karen Quirk and Thomas Lidbury; and the Education Subcommittee, co-chaired by Mary Rowland and Kathryn Kelly. The Survey Subcommittee, co-chaired by Joanne McMahon and Natalie Spears, was also created as Phase One progressed. Each Committee member joined at least one — and often two — subcommittees. The subcommittees were tasked with developing discovery Principles and the methodology to test them in the Pilot Program. The subcommittees held dozens of meetings, and subcommittee members devoted much time to drafting the proposed Principles. In early 2010, the Communications and Outreach Subcommittee was formed to centralize the flow of information regarding the Pilot Program to the press and general public. The full Committee held three meetings after the initial meeting to review the progress of the subcommittees as well as to refine and complete the drafting of the proposed Principles and a standing order to be entered in participating Phase One cases. In the course of the Committee's discussions, Thomas M. Staunton of Miller Shakman & Beem LLP served as the recording secretary for the Committee and prepared minutes of the meetings.

The Principles adopted by the Committee on September 16, 2009, for Phase One are set forth in the May 1, 2010 Final Report on Phase One, available at www.DiscoveryPilot.com. The goal of the Principles is to incentivize early and informal information exchange between counsel on common issues of evidence preservation and discovery, both paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which are routinely followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify issues concerning the preservation and discovery of evidence in the case. As a result, counsel for the parties often fail to focus on identifying specific sources of evidence that may be problematic, unduly burdensome, or costly to preserve or produce.

Because ESI has become a source of discovery disputes, the Committee also encouraged the cooperative exchange of information on evidence preservation and discovery by developing education programs. A list of the [Education Subcommittee's Programs](#) and an up-to-date listing of e-discovery [case law](#) are available at www.DiscoveryPilot.com.

D. Developments During Phase Two

Phase Two of the Pilot Program ran from May 2010 through May 2012. During Phase Two, the Committee expanded the Pilot Program beyond litigation in the Northern District of Illinois to include litigation in the other six districts within the Seventh Circuit. The Committee also dramatically increased the number of participating judges, attorneys, and cases implementing the Principles. The Committee also worked to become more effective by adding subcommittees, developing its web site, www.DiscoveryPilot.com, and introducing an e-discovery mediation program. Additional subcommittees were formed to meet the need for a coordinated response to national interest in the Pilot Program, to provide quick adjustments in response to ever-advancing technology, and to address unique approaches to discovery in criminal, as opposed to civil, cases.

During Phase Two, the Committee added members from outside the Seventh Circuit and from segments of the bar that had less representation during Phase One, such as in-house counsel, members of the plaintiffs' bar, and lawyers practicing primarily criminal law. The Committee increased in size from about fifty (50) members and advisors by the end of Phase One to over one hundred fifty (150) members and advisors at the end of Phase Two.

Judicial participation also expanded dramatically during Phase Two throughout the Seventh Circuit. In Phase One, five (5) district court judges and eight (8) magistrate judges — all from the Northern District of Illinois — implemented the Principles in ninety-three (93) federal civil cases involving approximately two hundred eighty-five (285) lead counsel. During Phase Two, the Pilot Program included judges from other districts within the Seventh Circuit. A total of forty (40) judges, including seventeen (17) district judges, twenty-one (21) magistrate judges, and two (2) bankruptcy judges, participated in Phase Two. The number of cases in the Pilot Program more than tripled, to two hundred ninety-six (296) cases. The number of attorneys listed as lead counsel in those cases also nearly tripled, to seven hundred eighty-seven (787).

The Committee also added new subcommittees during Phase Two:

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was designed to keep up with rapidly evolving electronic record retention and discovery technology and to further advance the bench and bar's understanding of that technology.

The Web Site Subcommittee designed and manages the Pilot Program's web site, www.DiscoveryPilot.com, which was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The web site contains a host of information about the Pilot Program, the Committee, and the survey process. It also contains a number of valuable e-discovery resources, including links to each of the Committee's webinars; summaries of relevant e-discovery case law; and links to relevant rules, handbooks, and publications.

The National Outreach Subcommittee was formed to help the Committee respond to the tremendous interest the Pilot Program has generated among judges, attorneys, and business people across the country.

The Criminal Discovery Subcommittee was formed to address issues that arise during discovery in criminal cases. The Committee observed that criminal cases present e-discovery issues that are, in many ways, distinct from the issues in civil cases. The Committee also determined that criminal cases present a unique opportunity for study, both because the law in that area is three to four years behind the law governing civil cases and because of the relative lack of attention to e-discovery in criminal cases.

The Mediation Subcommittee formed an e-discovery mediation program during Phase Three. Although lawyers practicing in the Northern District of Illinois have made substantial efforts to educate themselves about electronic discovery, the fast pace of adoption of new technologies continues to create significant barriers. Even a lawyer who is highly knowledgeable in some technologies may become involved in a dispute involving unfamiliar technology. The Committee believed that a mediation program might reduce the time the judges must devote to

discovery disputes, and enable disputes to be resolved more quickly and at a lower cost to the parties.

Finally, to conclude Phase Two, the Committee, in conjunction with experts headquartered at the Federal Judicial Center of the United States Courts, conducted a second set of surveys, in February and March 2012, to gauge the effect and effectiveness of the Principles and to provide guidance for Phase Three. The Committee first conducted a Phase Two Judge Survey of the forty judges participating in Phase Two, and a Phase Two Attorney Survey of the 787 attorneys participating in Phase Two. Additionally, the Committee in March 2012 conducted a separate E-filer Baseline Survey of all attorneys registered as e-filers in the seven districts in the Seventh Circuit. This survey has provided valuable information when compared to the results of the first E-filer Baseline Survey conducted a year and a half earlier in August 2010.

E. Developments During Phase Three

The Committee, through various subcommittees, presented several free webinars and live educational programs in the beginning stages of Phase Three to assist both lawyers and judges with staying abreast of the fast-moving advancements in e-discovery law and technology. Among the programs, the Criminal Discovery Subcommittee presented two e-discovery programs live at the Dirksen U.S. Courthouse in Chicago on June 8, 2012, and February 13, 2013, regarding the advances of e-discovery for criminal law practitioners. The Technology Subcommittee also presented a live program at the Dirksen U.S. Courthouse on June 14, 2012, on computer-assisted review. On March 21, 2013, Chief Judge Holderman, on behalf of the Committee, presented a live program at the Kent College of Law regarding “Judicial Perspectives on E-Discovery.” On April 5, 2013, the Education Subcommittee presented a webinar with Seyfarth Shaw on social media discovery and a second webinar on April 15, 2013, with the Illinois State Bar Association titled “Managing E-Discovery When Resources are Limited.” On April 12, 2013, several Pilot Program committee members presented programs on preservation, spoliation, minimizing costs, at the Illinois State Bar Association’s Allerton Conference. On April 24, 2013, the Mediation Subcommittee conducted a training program for e-discovery mediators. A judge-only program on predictive coding is planned for May 23, 2013 as Phase Three continues.

Many of these programs, along with updated e-discovery case law and articles, are available for on-demand viewing at www.DiscoveryPilot.com.

Beyond fulfilling the Committee’s continuing commitment to quality, free educational programs for the bench and bar, and serving as a resource for information on e-discovery, the Committee, through its Principle Development Subcommittee, has created model case management orders to enhance the pretrial process.

The Survey Subcommittee continues to track, gather, and evaluate data from Pilot Program cases and judges.

The Communications and Outreach Subcommittee continues to raise awareness across the country and internationally of the Committee’s efforts.

Both the Membership Subcommittee and National Outreach Subcommittee continue to expand the Committee's ranks and involvement.

The Mediation Subcommittee is poised to become an active participant in resolving e-discovery issues and disputes without the necessity of judicial assistance.

The Web Site Subcommittee continues to oversee the Committee's electronic window to the world and presents the Committee's message on-demand to all who seek to learn about electronic discovery issues.

5. SUBCOMMITTEES

The Committee continues to maintain several subcommittees which take the lead on specific projects. The ten Phase Three Subcommittees are:

- A. Education,
- B. Principle Development (formerly Preservation and Early Case Assessment),
- C. Criminal Discovery,
- D. Survey,
- E. Communications and Outreach,
- F. Mediation,
- G. National Outreach,
- H. Membership,
- I. Technology, and
- J. Web Site.

The subcommittees have been busy furthering the mission of the Pilot Program and implementing Phase Three.

A. Education Subcommittee

(1.) Members

Gregory C. Schodde (Co-Chair)	
Christina M. Zachariassen (Co-Chair)	
Michael Bolton	Adrienne B. Naumann
Sean Byrne	Sandra J. Rampersaud
Timothy J. Chorvat	Chad Riley
Brian D. Fagel	Michael Rothmann
Tiffany M. Ferguson	Hon. Mary M. Rowland
Megan Ferraro	Jeffrey C. Sharer
Todd H. Flaming	Howard Sklar
Jason B. Fliegel	Tina B. Solis
Maura R. Grossman	Natalie J. Spears
Brandon D. Hollinder	Tomas M. Thompson
Kathryn A. Kelly	Martin T. Tully
Colleen M. Kenney	Kelly Twigger
Christopher Q. King	Kelly M. Warner
Cameron Krieger	P. Shawn Wood
James T. McKeown	Zachary Ziliak
Cinthia Granados Motley	

(2.) Subcommittee’s Charge and Continuing Role

The Education Subcommittee is the first of the initial three subcommittees formed during the full Committee’s first meeting in May 2009. This subcommittee was created because many of the problems that arise in connection with electronic discovery stem from a lack of technical knowledge by many lawyers. While this lack of knowledge is understandable, lawyers and judges, to keep pace in today’s technological environment, must advance their level of knowledge because most discovery of stored information is now of the electronic variety. The Education Subcommittee’s function has been to conceive and draft the educational Principles that are now being put to the test in the Pilot Program (Principles 3.01 and 3.02). This subcommittee also organizes educational programs, often in coordination with the Communications and Outreach Subcommittee.

In Phase Two the Education Subcommittee remained committed to providing free education to the bar and the judiciary about the technology and legal principles that will help lawyers effectively handle electronic discovery in their practices. Past examples of educational offerings have included a free webinar entitled “What Everyone Should Know About the Mechanics of E-Discovery” which was presented on April 6, 2011, by the Education Subcommittee in conjunction with Merrill Corporation. Through the cooperation of chief federal district judges in Illinois, Wisconsin, and Indiana, ECF users in all three states were invited to attend and over three thousand people registered for the webinar. To accommodate registrants who could not attend, Merrill Corporation rebroadcast the webinar. Also, on January 22, 2011, the Education Subcommittee, in conjunction with attorney Jonathan Redgrave, an expert and prominent thought-leader in the field of electronic discovery, presented a free in-person seminar titled “The 4 P’s of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy.” With a standing-room-only audience of over three hundred attorneys in the Dirksen U.S. Courthouse in

Chicago, Mr. Redgrave spoke about the concepts of preservation, proportionality, privilege, and privacy in the context of the Pilot Program Principles and recent case law. As a service to the bar and the bench, the Education Subcommittee will continue to provide free seminars and webinars such as these.

In addition to CLE opportunities, the Education Subcommittee works diligently to develop and maintain a compilation of the case law on electronic discovery issues from the Seventh Circuit, along with the seminal electronic discovery cases from around the country. This valuable compilation is available to practitioners free of charge on the Committee’s web site. The Education Subcommittee updates this compilation quarterly in an effort to keep it current.

During the initial year of Phase Three, the Education Subcommittee conceived, organized, and produced several additional educational opportunities, including two (2) free webinars, which will become available on demand at www.DiscoveryPilot.com, and one (1) live seminar which is viewable at www.DiscoveryPilot.com.

(a.) Webinars

(1.) April 5, 2013: “Discovery of Social Media”

On April 5, 2013, the Seventh Circuit Electronic Discovery Committee, with Seyfarth Shaw LLP, presented, “Discovery of Social Media.” This webinar was intended to prepare counsel to meet the specific e-discovery challenges posed by social media. Topics discussed included the discoverability of social media, the preservation duty as it applies to this data, methods of and limitations of discovery of social media, and an overview of technical tools that assist with the preservation and collection of social media.

(2.) April 15, 2013: “Managing E-Discovery When Resources are Limited”

On April 15, 2013, the ISBA Federal Civil Practice Section with co-sponsorship from the Seventh Circuit Electronic Discovery Pilot Program, presented, “Managing E-Discovery When Resources Are Limited.” This webinar addressed litigation involving parties of very disparate sizes, which can result in a difference between the amount of electronically-stored data in each of their possessions—and an even greater difference in their resources to obtain e-discovery. The costs and logistics of e-discovery can present special problems in cases where the parties are small and operating on a more limited budget. This pre-recorded webinar offered tips and advice for these types of situations, as well as a discussion on how to find, preserve, and produce electronically-stored data.

(b.) Live Seminars

(1.) June 14, 2012: “A Computer-Assisted Review Workshop: Mock Meet-and-Confer & Hearing and Roundtable Discussion with Industry Experts.”

On June 14, 2012, the Technology Subcommittee, in conjunction with the Education Subcommittee, Axiom Law, Symantec, and Project Leadership Associates, hosted “A Computer-Assisted Review Workshop: Mock Meet-and-Confer & Hearing and Roundtable Discussion with Industry Experts.” The program was presented in the Ceremonial Courtroom of the Dirksen U.S. Courthouse in Chicago, and it was simultaneously videotaped by Symantec. The program has been edited and is now available at www.DiscoveryPilot.com.

(c.) Other Information on www.DiscoveryPilot.com

The Pilot Program’s web site has a vast array of information including news items on e-discovery and a highly valuable up-to-date compendium of case law from judges in the Seventh Circuit and across the country. Committee member Christina M. Zachariasen of Navigant maintains this key feature of the Pilot Program’s web site. It is an outstanding resource for all attorneys, including in-house counsel, who must address e-discovery issues.

More educational opportunities are being planned for the bar and bench as Phase Three of the Pilot Program continues.

B. Principle Development Subcommittee

(1.) Members

Alexandra G. Buck (Co-Chair)	
Thomas A. Lidbury (Co-Chair)	
Karen Caraher Quirk (Co-Chair)	
James S. Montana, Jr. (Co-Chair)	
Tiffany Amlot	Joshua Karsh
George S. Bellas	Samara Kaufman
Debra R. Bernard	Christopher Q. King
Matthew A. Bills	Daniel J. Kurowski
Scott A. Carlson	Pauline Levy
Timothy J. Chorvat	Ronald L. Lipinski
Kendric M. Cobb	Christopher D. Mickus
Ethan M. Cohen	Adrienne B. Naumann
Cathy DeGenova Carter	Bruce A. Radke
Timothy Edwards	Bill Ryan
Elizabeth H. Erickson	Gregory C. Schodde
Todd H. Flaming	Corey M. Shapiro
Jennifer W. Freeman	Jeffrey C. Sharer
Arthur Gollwitzer III	Howard Sklar
Rex Gradeless	Thomas M. Staunton
Daniel T. Graham	Kelly M. Warner
Marie A. Halpin	Marni Willenson

(2.) Subcommittee's Charge and Continuing Role

The Principle Development Subcommittee (PDS) is responsible for developing the Principles and other subject matter to be tested in the Pilot Program. The PDS is the result of the merger of two of the original three subcommittees formed at the full Committee's first meeting in May 2009. The original subcommittees were called the Preservation Subcommittee and the Early Case Assessment Subcommittee. Their function was to conceive and draft the procedural Principles that are now being put to the test in the Pilot Program (Principles 1.01 through 2.06). As these two subcommittees performed their tasks it became increasingly clear that there was significant overlap between their charges and, accordingly, they were merged into one subcommittee, called the Preservation and Early Case Assessment Subcommittee. Recently, the subcommittee renamed itself to more accurately reflect its charge. The new name is the Principle Development Subcommittee or PDS.

In Phases One and Two, the PDS drafted the initial Principles, assisted with the evaluation of the survey data developed by the Survey Subcommittee, and proposed revisions to the Principles based on the survey data.

During Phase Three, the PDS has drafted two model orders and a model discovery plan. The first model order, Model Case Management Order Number 1 (CMO1), is an experimental order designed to streamline initial document discovery. CMO1 is currently being tested in a limited sample of experimental cases. The Committee will collect feedback from judges, attorneys, and litigants using CMO1 and will decide how to proceed with this order.

The Model Discovery Plan may be used in conjunction with CMO1 or on its own to help parties focus and articulate the scope of discovery, form of production, and review strategy. The Model Discovery Plan is attached to this Interim Report as Appendix A, along with introductory text from the PDS.

Model Case Management Order Number 2 (CMO2) provides a model Federal Rule of Evidence 502(d) order and a more efficient and effective privilege logging procedure. The PDS has recommended CMO2 for approval by the full Committee, and the Committee will take this up at its next full meeting presently scheduled for May 2013. CMO2 is attached to this Interim Report as Appendix B, along with introductory text from the PDS.

As Phase Three progresses, the PDS will continue to have primary responsibility for evaluating and drafting any revisions to the procedural Principles and other materials that the Committee deems appropriate.

C. Criminal Discovery Subcommittee

(1.) Members

Beth (Gaus) Jantz (Co-Chair)
Meghan Morrissey Stack (Co-Chair)
Manish Shah (Co-Chair)
Sergio Acosta
Molly Armour
Debra R. Bernard
Cynthia Giacchetti
David Glockner
Justin Murphy
Gabriel Bankier Plotkin

(2.) Subcommittee's Charge and Continuing Role

The Criminal Discovery Subcommittee was formed in Phase Two to expand the reach of the Seventh Circuit Electronic Discovery Pilot Program to the practice of criminal law. The subcommittee's first goal was to publicize the "Recommendations and Strategies for ESI Discovery," developed early in 2012 by the Joint Electronic Technology Working Group, which was composed of representatives from the Department of Justice, the Federal Defender Program, and private attorneys who accept Criminal Justice Act appointments, as well as liaisons from the courts. As part of this effort, the subcommittee hosted a CLE event on June 8, 2012, featuring as speakers national discovery coordinators from both the Department of Justice and the Federal Defender Program. This event was intended to educate criminal practitioners about these national protocols, and to help facilitate the expanding use of electronic discovery in criminal cases. As a follow-up, the Criminal Discovery Subcommittee hosted another CLE event on February 13, 2013, again featuring discovery experts from both the Department of Justice and the Federal Defender Program. This event was intended to help criminal practitioners actually apply the national protocols in their cases, as well as to identify and discuss challenges faced by both the government and the defense in dealing with the burgeoning use of electronic discovery. A video of the February 13, 2013 event will soon be available on the subcommittee's page at www.DiscoveryPilot.com. The Criminal Discovery Subcommittee's second goal was to bring together criminal practitioners from both the prosecution and defense bars, to identify frequently occurring electronic discovery issues and to work collaboratively to address those problems. These ongoing discussions take place during periodic subcommittee meetings. Any criminal practitioners who are interested in joining the subcommittee should contact one of the co-chairs. Finally, the Criminal Discovery Subcommittee also intends to develop and make available additional educational resources, to assist in making electronic discovery more efficient, secure, and less costly for criminal practitioners.

D. Survey Subcommittee

(1.) Members

Debra R. Bernard (Co-Chair)
Thomas M. Staunton (Co-Chair)
Karen Coppa
Marie A. Halpin
Tiffany M. Ferguson
Adrienne B. Naumann
Natalie J. Spears

(2.) Subcommittee's Charge and Continuing Role

Collecting feedback from the judiciary and members of the bar relating to the Principles and the other work of the Seventh Circuit Electronic Discovery Pilot Program is a critical aspect of the Pilot Program's mission. To this end, immediately following the adoption of the Principles on September 16, 2009, the Committee formed the Survey Subcommittee. The Survey Subcommittee was tasked with developing a survey to assess the initial effectiveness of the Principles and gather reactions and information from the lawyers and judges participating in Phase One of the Pilot Program.

The Pilot Program Phase One and Phase Two Reports included the results of the surveys conducted by the Survey Subcommittee of the attorneys and judges who participated in the Pilot Program. During Phase One, the subcommittee received tremendous assistance and support from the Institute for Advancement of the American Legal System at the University of Denver (IAALS), which led the development of the Phase One survey questionnaire and assisted with analysis of the survey results. The FJC administered the Phase One and Phase Two surveys, and also provided vital input during the survey questionnaire development process.

The Survey Subcommittee has conducted three types of surveys. First, during Phase One and Phase Two, the subcommittee surveyed judges and attorneys with cases in the Pilot Program. The goal of the surveys was to assess the effectiveness of the Principles and the Pilot Program by gathering opinion data through a self-report questionnaire to obtain perceptions of the procedures from the participants in the Pilot Program and assess satisfaction with the Principles and processes surrounding the Principles. During Phase One, the subcommittee developed the surveys, with valuable assistance from IAALS and the FJC. Because the Pilot Program was just getting underway, the Phase One surveys covered a shorter time frame and a smaller group of judges and attorneys. Phase Two involved more cases, more judges and attorneys, and a longer survey period. During Phase Two, the subcommittee reviewed and refined the Phase One Survey in order to develop a Phase Two Survey. During this process, the subcommittee reviewed every question on both the Phase One Attorney Survey and the Phase One Judge Survey. Upon review by the subcommittee, the vast majority of the original Phase One survey questions were left intact in order to allow for potential comparison to the Phase One 2010 Survey results, in addition to independently serving as an evaluative and information-gathering tool to assess the Pilot Program during Phase Two.

In 2010, the Survey Subcommittee also worked with the FJC to develop and administer a third survey, an E-filer Baseline Survey of electronic-filing attorneys in the district courts of the Seventh Circuit. The purpose of this survey was to assess, among other things, attorneys' views

on the level of e-discovery involved in their cases, their own experience with and general knowledge about e-discovery issues, the proportionality of costs incurred as a result of e-discovery issues, and the level of cooperation experienced with opposing counsel on such issues. This same E-filer Baseline Survey was repeated in March 2012, with an added series of questions focused on attorney awareness of the Pilot Program and of the educational and other resources provided by the Committee. In August 2010, and then again in March 2012, these surveys were sent to more than twenty-five thousand e-filers in at least one of the seven (7) districts in the Seventh Circuit.

The Final Reports on Phase One and Phase Two include significant analysis of the results of the Judge, Attorney, and Baseline Surveys. During Phase Three, the Survey Subcommittee expects surveys to once again be an important part of the process. The Committee anticipates that the Pilot Program will expand during Phase Three to include more judges, more attorneys, and more cases. The Survey Subcommittee may conduct another set of comprehensive surveys of those judges and attorneys in the Pilot Program, and of the e-filing attorneys in the district courts of the Seventh Circuit.

The Survey Subcommittee has also discussed other, more targeted ways to gather information and feedback about the Pilot Program and its initiatives. As discussed herein, the Principle Development Subcommittee is developing a series of orders and plans for use in some or all Pilot Program cases. The Mediation Subcommittee has also developed an e-discovery mediation program, and it is scheduled to begin mediating select cases within the Pilot Program during Phase Three. The Survey Subcommittee will work on developing a series of surveys designed to gather information and feedback on these initiatives, as well as the Committee's educational programs. The Survey Subcommittee has also explored the possibility of conducting a short, general survey on electronic discovery of lawyers representing clients in cases following entry of judgment or conclusion of a case. The subcommittee has also discussed how best to track cases in the Pilot Program, and possibly gather data regarding those cases, separate and apart from the surveys. The subcommittee has also discussed the possibility of providing an opportunity for ad hoc feedback on the Pilot Program's web site. As Phase Three progresses, the Survey Subcommittee will continue to work on these and other ways to collect feedback from the judiciary and members of the bar relating to the Principles and the other work of the Pilot Program, as well as regarding electronic discovery generally.

E. Communications and Outreach Subcommittee

(1.) Members

Alexandra G. Buck (Co-Chair)

Steven W. Teppler (Co-Chair)

George S. Bellas

Sean Byrne

Timothy J. Chorvat

Claire N. Covington

Moira K. Dunn

Michael D. Gifford

Brandon D. Hollinder

Vanessa G. Jacobsen

Colleen M. Kenney

Christopher Q. King

Kari Prochaska

Steven Puiszis

Karen Caraher Quirk

Chad Riley

Jeffrey C. Sharer

Tomas M. Thompson

Kelly Twigger

Allison Jane Walton

(2.) Subcommittee's Charge and Continuing Role

The Communications and Outreach Subcommittee's charge is to promote awareness of and provide education about the Pilot Program to attorneys and judges throughout the various federal district courts within the Seventh Circuit, to the Illinois state courts, and to the bench and bar of other federal and state jurisdictions. This subcommittee generates and provides a repository for presentations and other educational material in connection with the Pilot Program, and functions as the point of contact for media inquiries and speaker referrals.

Through the Communications and Outreach Subcommittee, members of the Committee have given over eighty presentations about the Pilot Program in more than fifteen states and internationally. The Pilot Program has also been the subject of over fifty articles and blogs.

Last year, the subcommittee released orientation packets for federal judges to learn about the Pilot Program and either participate in the Pilot Program or start a similar program in their own circuits. For a complete list of articles and speaking engagements about the Pilot Program, please go to the Committee's web site: www.DiscoveryPilot.com.

The Committee also expanded and spun-off a National Outreach Subcommittee due to overwhelming interest in the Pilot Program from litigants and courts outside of the Seventh Circuit.

The Communications and Outreach Subcommittee will continue during Phase Three to be the point of contact for media inquiries, speaker referrals, and education about the Pilot Program.

F. Mediation Subcommittee

(1.) Members

Mag. Judge Nan Nolan, Retired (Co-Chair)

Christopher Q. King (Co-Chair)

Daniel R. Rizzolo (Co-Chair)

Tiffany Amlot

Debra R. Bernard

Sean Byrne

Michael P. Carbone

Tiffany M. Ferguson

Megan Ferraro

Daniel T. Graham

Alisa Ittner

Ramji Kaul

Colleen M. Kenney

Cinthia Granados Motley

Ashish Prasad

Steve Puiszis

Corey M. Shapiro

Jeffrey C. Sharer

Tomas M. Thompson

Kelly M. Warner

Christina M. Zachariasen

(2.) Subcommittee's Charge and Continuing Role

As a supplement to the Education Subcommittee's efforts, the Committee in Phase Three has established an electronic discovery mediation program (the "E-Mediation Program") to mediate electronic discovery disputes, particularly in cases involving parties who lack the resources to resolve the dispute themselves. The E-Mediation Program will be used in civil cases only. The mediator's services will be provided on a voluntary basis at no cost to the parties or to the Court. The E-Mediation Program is not intended as a substitute for meaningful cooperation and dialog between the parties prior to submission of the dispute to the E-Mediation Program. However, there are instances where a third party mediator may be able to bridge the remaining gap of disagreement between the parties by providing additional electronic discovery education and experience specific to the dispute at issue. If successful, the E-Mediation Program could help reduce the time judges must devote to discovery disputes, and enable discovery disputes to be resolved more quickly and at a lower cost to the parties, thus furthering the goals of Federal Rule of Civil Procedure 1 and the Pilot Program. The newly-developed Mediation Subcommittee has focused on creating and implementing the E-Mediation Program on behalf of the Committee. The Mediation Subcommittee held its initial training session for mediators in April 2013 and expects to begin accepting dispute referrals shortly.

G. National Outreach Subcommittee

(1.) Members

Arthur Gollwitzer III (Chair)
Shannon Brown
Michael P. Carbone
Jason Cashio
Cass Christenson
Kelly Clay
Richard L. Denney
Adrian Fontecilla
Kelly B. Griffith
Maura R. Grossman

Brendan M. Kenney
Stephen M. Kramarsky
Jaime D. Jackson
Mark E. Richardson, III
Mathieu Shapiro
Howard Sklar
Allison Jane Walton
Joy Woller

(2.) Subcommittee's Charge and Continuing Role

The National Outreach Subcommittee is a subcommittee of the Communications and Outreach Subcommittee, focused on publicizing and promoting the Pilot Program outside of the Seventh Circuit. The National Outreach Subcommittee identifies and contacts leaders in the field of ESI discovery around the country, including noted authors and speakers, specialized organizations and bar associations, and conference organizers. The subcommittee provides these leaders with information about the Pilot Program and encourages publication of works and organization of events that address the Pilot Program. The subcommittee also encourages its members to pass along Pilot Program results by word-of-mouth and by using the Principles in their own cases. Finally, the subcommittee looks for interested individuals from outside of the Seventh Circuit to refer to the Membership Subcommittee.

In Phase Three of the Pilot Program, the National Outreach Subcommittee plans to continue its grass-roots efforts to publicize the Pilot Program. In addition, the subcommittee will monitor the development of other ESI pilot programs around the country as well as possible amendments to the Federal Rules of Civil Procedure regarding ESI, preservation obligations, and spoliation sanctions. The subcommittee recognizes that there are other approaches to ESI discovery and plans to review those approaches and try to coordinate our efforts with other similar efforts where possible. Finally, the subcommittee will continue to recruit members from around the nation with an eye towards working with other pilot programs and informing those programs about the Committee's work to date.

H. Membership Subcommittee

(1.) Members

Michael D. Gifford (Co-Chair)

Marie V. Lim (Co-Chair)

Moira K. Dunn

(2.) Subcommittee's Charge and Continuing Role

The Membership Subcommittee was created after the completion of Phase One. It is charged with seeking and screening potential new members for the Committee and encouraging all members to fully participate in the work of the Committee and its subcommittees. To that end, the Membership Subcommittee has developed materials regarding the Committee, its work, and the commitments anticipated of new members. The Membership Subcommittee also coordinates adding new members to the Committee's roster and is available to answer inquiries regarding membership.

During Phase One, Committee membership was heavily oriented toward the Northern District of Illinois. At Phase One's close, the Committee had over fifty (50) members, and consisted of trial judges and lawyers, including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants. During Phase Two, the Committee doubled in size with more than one hundred (100) members, expanded beyond its initial focus in the Northern District, and included members outside of the Seventh Circuit.

During Phase Three, the Membership Subcommittee updated the Committee membership roster as there was concern regarding a number of inactive members who have not attended Committee meetings or assisted with the work of a Subcommittee. Members were asked to confirm their continuing interest in serving on the Committee. Approximately one hundred (100) members confirmed their interest.

The Committee now has members from all across the Seventh Circuit, and from across the country including Illinois, Indiana, Wisconsin, Arizona, California, Colorado, Florida, Louisiana, Minnesota, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, and the District of Columbia. As the Committee grows, the Membership Subcommittee will continue to screen potential new members, as well as reach out to current members to affirm continued interest and involvement in the Pilot Program.

I. Technology Subcommittee

(1.) Members

Sean Byrne (Co-Chair)	
Tomas M. Thompson (Co-Chair)	
Christopher Bojar	Elisabeth McNamara
Margo Eckstein	Constance Mockaitis
Jason B. Fliegel	Lisa Rosen
Jennifer W. Freeman	Karl A. Schieneman
David Glockner	John Walker
Brent Gustafson	Angela M. White
Elizabeth Jaworski	Zachary Ziliak
David D. Lewis	

(2.) Subcommittee's Charge and Continuing Role

The Technology Subcommittee's mission is to provide the bar with practical knowledge and practice pointers about various technologies that can be effectively used to improve efficiency and quality in electronic discovery, while also controlling legal spend.

The Technology Subcommittee is purpose-built to take advantage of the unique perspectives seasoned technologists can bring to the discovery process. This subcommittee is comprised of technology thought-leaders, including in-house and outside technology counsel, information management professionals, litigation support leaders, and software developers. By developing technology-specific practice primers and programs and making them available to the bar free-of-charge in coordination with the Education, Communications and Outreach, and Web Site Subcommittees, the Technology Subcommittee offers a mechanism to bridge the Principles with applied learning and serviceable solutions.

In 2012, the Technology Subcommittee coordinated a critically-acclaimed Computer-Assisted Review Workshop that included a keynote address by Jason Baron from the National Archives and Records Administration, a mock meet and confer and hearing with seasoned litigators and respected information retrieval experts, and a roundtable panel of leading computer-assisted review practitioners. The event brought together thought-leaders and technologists, including several members of the Pilot Program Committee. The program was video-taped and is available on the Committee's web site at www.DiscoveryPilot.com.

For 2013, the Technology Subcommittee has embarked on an initiative to create written materials and guides on various technology-related issues. The first topic, "Handling Personally Identifiable Information in the Context of E-Discovery," will be led by Sean Byrne (Byrne Law Group), Tom Thompson (DLA Piper), and Jack Walker (Deloitte). Additionally, the Technology Subcommittee is working with members of the legal community, including but not limited to Federal Defender panel attorneys, to create and administer training programs designed to help attorneys properly leverage search and review tools in the electronic discovery process.

Toward that end, the Technology Subcommittee has developed a template for its deliverables to ensure consistency in the form of its written submissions and guidance on technology-related issues confronting the Committee and bar. Although individual topics may require some tailoring to the final form, the Technology Subcommittee expects that its deliverables during Phase Three will generally take the following format:

Technology Primer
How to Request or Respond in Discovery
Common Discovery-Related Issues
Tips on Achieving Consensus through Cooperation
Leveraging Your E-Discovery Liaison
How to Address in Your Case Management Order
Dispute Resolution Tips
Appendix A: Checklist
Appendix B: Table of Related Cases

J. Web Site Subcommittee

(1.) Members

Timothy J. Chorvat (Co-Chair)
Christopher Q. King (Co-Chair)
Alexandra G. Buck
Sean Byrne
Jennifer W. Freeman
Michael D. Gifford
Jeffrey C. Sharer
Martin T. Tully
Christina M. Zachariasen

(2.) Subcommittee's Charge and Continuing Role

The Web Site Subcommittee is responsible for designing and managing the Committee's web site, www.DiscoveryPilot.com, which is now the world's window into the Pilot Program.

The DiscoveryPilot.com web site provides the latest information about the Committee's activities, official publications, and educational resources. It is the Committee's primary means of disseminating news and connections to useful resources, and helps to tie together the Committee's numerous outreach and educational activities. The Committee provides the web site as a service to the public, the judiciary, litigants, and the bar. The site makes available the Committee's Principles, reports, and contact information for its membership. DiscoveryPilot.com shares news and recent case law from the courts of the Seventh Circuit concerning electronic discovery and related issues, provides round-the-clock access to webinars and other educational materials, and includes links to other locations where further resources are available, including case law updates from The Sedona Conference®. Members of each of the Committee's subcommittees are able to update applicable portions of the site as frequently as substantive developments warrant.

The Committee launched the DiscoveryPilot.com web site on May 1, 2011. From the time that the Committee was organized in 2009 until May 2011, the Seventh Circuit Bar Association graciously made space available on its web site. The Committee very much appreciates the Seventh Circuit Bar Association's generosity in that regard. As the Committee's work matured and its scope expanded, the Committee decided to create its own web site, under its own domain name, www.DiscoveryPilot.com, which permits the Committee to furnish a wide range of substantive materials in an easy-to-use, contemporary format that interested parties can find and recall readily.

The web site has welcomed visitors from locations throughout the United States and around the world. Of the 13,320 visits through April 5, 2013, not surprisingly, the largest portion of the traffic has come from the Seventh Circuit's business centers (Chicago (with 32% of total visits), Milwaukee (2%), Indianapolis (2%), and Madison (1.2%)), with Washington and New York contributing 5% each, and Denver, Silicon Valley, San Francisco, and Minneapolis rounding out the top ten. DiscoveryPilot.com has been accessed by visitors from over thirteen hundred (1300) locations across the U.S. In addition, foreign users from India, Canada, the United Kingdom, Mexico, and other locations for a total of 86 countries have accessed the site.

The DiscoveryPilot.com web site is designed and powered by Justia, Inc. located in Mountain View, California, and the Committee greatly appreciates the invaluable time and skill that Justia has donated to that effort.

6. JUDGES WHO HAVE PARTICIPATED IN THE PILOT PROGRAM

District Judges

Judge Sarah Evans Barker (S.D. Ind.)
Judge Ruben Castillo (N.D. Ill.)
Judge Edmond Chang (N.D. Ill.)
Chief Judge Charles N. Clevert, Jr. (E.D. Wisc.)
Chief Judge William M. Conley (W.D. Wisc.)
Judge Barbara B. Crabb (W.D. Wisc.)
Judge Robert M. Dow, Jr. (N.D. Ill.)
Judge Gary S. Feinerman (N.D. Ill.)
Judge Joan B. Gottschall (N.D. Ill.)
Chief Judge James F. Holderman (N.D. Ill.)
Judge Virginia M. Kendall (N.D. Ill.)
Judge Matthew F. Kennelly (N.D. Ill.)
Judge Joan Humphrey Lefkow (N.D. Ill.)
Judge Rebecca R. Pallmeyer (N.D. Ill.)
Judge Rudolph T. Randa (E.D. Wisc.)
Judge J.P. Stadtmueller (E.D. Wisc.)
Judge Amy J. St. Eve (N.D. Ill.)

Magistrate Judges

Judge Martin C. Ashman (N.D. Ill.)
Judge David G. Bernthal (C.D. Ill.)
Presiding Judge Geraldine Soat Brown (N.D. Ill.)
Judge William E. Callahan, Jr. (E.D. Wisc.)
Judge Jeffrey Cole (N.D. Ill.)
Judge Susan E. Cox (N.D. Ill.)
Judge Stephen L. Crocker (W.D. Wisc.)
Judge Morton Denlow (N.D. Ill.)
Judge Sheila M. Finnegan (N.D. Ill.)
Judge Jeffrey T. Gilbert (N.D. Ill.)
Judge Aaron E. Goodstein (E.D. Wisc.)
Judge Patricia J. Gorence (E.D. Wisc.)
Judge John A. Gorman (C.D. Ill.)
Judge Arlander Keys (N.D. Ill.)
Judge Young B. Kim (N.D. Ill.)
Judge P. Michael Mahoney (N.D. Ill.)
Judge Michael T. Mason (N.D. Ill.)
Judge Nan R. Nolan (N.D. Ill.)
Judge Sidney I. Schenkier (N.D. Ill.)
Judge Maria Valdez (N.D. Ill.)
Judge Donald G. Wilkerson (S.D. Ill.)

Bankruptcy Judges

Judge Carol A. Doyle (N.D. Ill.)
Judge Eugene R. Wedoff (N.D. Ill.)

7. CONCLUSION

As the Pilot Program continues its mission in Phase Three, it continues to seek to improve the e-discovery process across the country and internationally, by cutting costs, improving efficiency, and providing fairness to all parties in civil and criminal cases.

Education remains a primary goal of the Pilot Program, as is providing up-to-date e-discovery information on www.DiscoveryPilot.com. Additionally, the Committee's webinars and video-recorded programs continue to be available on-demand and free of charge on its web site, including the Committee's webinars: "Discovery of Social Media" and "Managing E-Discovery When Resources are Limited," that were presented live in April 2013.

In addition, the new Mediation Subcommittee is providing free mediation of e-discovery disputes as a public service. A panel of experienced e-discovery practitioners has volunteered to mediate discovery disputes involving electronic discovery at no cost to the parties. These panel members have received training in mediation techniques as part of their inclusion in the E-Mediation Program. The Committee views an E-Mediation Program as a logical extension of the Committee's education and outreach initiatives.

The Committee also is considering for recommendation the Model Discovery Plan and Model Case Management Order No. 2, that were drafted by the Principle Drafting Subcommittee and including in the Appendix that follows. The Discovery Plan and Case Management Order articulate procedures that are designed to make e-discover more cost effective.

The Committee remains open to suggestions and welcomes feedback. You may reach the Committee through DiscoveryPilot@ilnd.uscourts.gov.

The Committee appreciates all the wonderful people who have volunteered their time and talent to make the Seventh Circuit Electronic Discovery Pilot Program the success that it is. The Committee especially thanks Justia, Inc. for its continuing support of www.DiscoveryPilot.com. The Committee will keep you posted as Phase Three continues.

8. APPENDIX

A. Model Discovery Plan

B. Model Case Management Order No. 2

A. Model Discovery Plan

Introduction to Model Discovery Plan

The PDS has developed a Model Discovery Plan for parties to use as a framework to address and resolve specific issues related to the preservation, collection, search, and production of Electronically Stored Information (“ESI”). The Committee expects to formally adopt the Model Discovery Plan at its next full meeting. The Model Discovery Plan is provided in conjunction with the Principles Relating to the Discovery of Electronically Stored Information, and may be used on its own or as part of a broader case management order.

The Model Discovery Plan is intended to be flexible and applicable to all litigations, even those involving limited ESI. To this end, the Model Discovery Plan consists of four modular sections which may be adapted to meet the needs of the particular case. Parties are encouraged and expected to consider the factors affecting proportionality under Federal Rules of Civil Procedure 1 and 26 when crafting a particular discovery plan.

(Proposed) Model Discovery Plan

**IN THE UNITED STATES DISTRICT COURT
FOR THE _____
_____ DIVISION**

<p>_____, Plaintiff, vs. _____, Defendant.</p>		<p>Case No. _____ Judge: _____</p>
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**[PROPOSED]
DISCOVERY PLAN FOR ELECTRONICALLY STORED INFORMATION**

The Court has developed this Model Discovery Plan as a framework that may be used by parties in cases with either limited or extensive discovery of Electronically Stored Information (“ESI”). This Model Plan is provided in conjunction with the Principles Relating to the Discovery of Electronically Stored Information, to address and resolve issues surrounding the discovery of ESI early in the litigation process and without Court intervention whenever possible.

The Model Discovery Plan consists of four modular sections which may be adapted flexibly to meet the needs of the particular case. It is not intended to be an inflexible checklist and must be modified by the parties to address the specific circumstances of the case. For example, if the principle challenge in a case is production format, the parties might use only part C. As a second example, the parties might create a discovery plan early in the case that covers parts A and B,

and reserve the issue of production format addressed in part C for a separate discovery plan to be created later. Similarly, the parties may choose to use the portion of the Model Discovery Plan designed for limited electronic discovery for certain sections of their discovery plan and portions designed for more extensive discovery for another section. In crafting a Discovery Plan applicable or practical for a particular matter, the parties should consider the factors affecting proportionality under Rules 1 and 26, including, the nature of the dispute, amount in controversy, agreements of the parties, and anticipated scope of discovery, as well as the Principles Relating to the Discovery of Electronically Stored Information.

I. PARTIES’ AGREED-TO TERMS

Pursuant to Federal Rule of Civil Procedure 26 and Principle 2.01 of the Seventh Circuit Electronic Discovery Pilot Program (“7th Cir. Pilot Program”), Plaintiff(s) _____ and Defendant(s) _____ (collectively, “the Parties” and each a “Party”), by their respective counsel in the above-captioned action, stipulate and agree that the following discovery plan shall govern the search and production of ESI in this matter (the “Discovery Plan”).

A. SCOPE

1. This Discovery Plan shall govern the production of documents and electronically stored information (“ESI”), as described in Federal Rules of Civil Procedure 26, 33, and 34.

2. The Parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with the Principles Relating to the Discovery of Electronically Stored Information (the “Principles”) of the 7th Cir. Pilot Program.

3. Nothing in this Discovery Plan shall supersede the provisions of any subsequent Stipulated Protective Order.

4. The Parties identify the following categories of ESI most relevant to the Parties’ claims or defenses in this matter. While this categorical identification is not intended as an exhaustive list of potential materials and shall not be construed to waive a party’s right to request additional ESI, or any party’s right to object to production, the following represent the categories of ESI most likely to result in the production of information most relevant to the issues in the case to the best of the Parties’ knowledge at this time:

5. E-discovery will be limited to ESI in the Parties’ custody, possession, or control created on or after _____. [In an effort to expedite the discovery process, the Parties agree to initially limit e-discovery to the period of time most likely to contain the most relevant information to this dispute, _____ to _____. The Parties further agree that they shall preserve, but neither collect nor produce, ESI created between _____ and _____. The Parties reserve the right to request such ESI in the future and reserve the right to object to such production.]

6. The Parties identify the following Third Parties likely to have ESI relevant to this matter

7. The Parties identify the following additional means to focus the scope of ESI in the matter. [Geographical limitations? Limit to one subsidiary or unit within an organization? Limit to specified location or locations? Limit to identified data store or data stores?]:

8. The collection of ESI by the Parties shall be a ___ single collection or ___ sequential collections. [Drafting note: depending upon the facts and circumstances of the particular case, sequential collections can be a means of conducting discovery in a focused and efficient manner.]

B. SEARCHING

1. CASES INVOLVING LIMITED ESI

- a. The Parties agree that relevant ESI may be identified for production by the following means:
 - (1) *[a manual process conducted by the custodians or in-house counsel or outside counsel]*; and/or
 - (2) *[the use of native application search functionality native to the e-mail or other software (e.g. searching within Outlook)]*
- b. In addition to, or instead of the foregoing methodologies, the Parties may agree to use Boolean or other more advanced search capabilities.

2. CASES INVOLVING SUBSTANTIAL ESI

- a. E-mail and unstructured data (e.g., word processing documents, spreadsheets, presentation slides)¹
 - (1) Types of email and unstructured data:
 - (a) Which email systems are involved (e.g. Exchange/Outlook, NotesMail, GroupWise).
 - (b) Is there email stored at Internet Service Providers (ISPs) or cloud email providers.(E.g. gmail, hotmail).

¹ For a definition of “Unstructured Data”, see [The Sedona Conference Glossary](#).

- (c) What file types are involved (e.g. Microsoft Office files Mac, CAD [computer aided design], gif, tiff, pdf, WordPerfect).
 - (d) Are any of the non-email documents located in cloud-based storage?
- (2) Which unstructured data will be searched?
- (a) Custodial or system-wide?
 - (b) If custodial, initial list of custodians?
 - (c) Are there non-custodial unstructured data stores², such as shared data that will be searched?
 - (d) [If necessary - In an effort to expedite the discovery process, the Parties agree to initially limit e-discovery to the above-identified custodians and non-custodial data stores, which the Parties believe are the most likely to contain the most relevant information to this dispute. The Parties further agree that they shall preserve, but neither collect nor produce, unless necessary, ESI from the following additional custodians and non-custodial data stores.]
- (3) What unstructured data stores will be searched?
- (a) Identify custodian's unstructured data stores (e.g., e-mail, network shares, hard drive, etc.)
 - (b) Which, if any, portable media or data storage devices will be searched, and for which custodians?
- (4) Search Protocol
- (a) What search methodology does each Party propose to employ? Search terms? Technology assisted review? Other?
 - (b) Each Party shall be responsible for generating a searching protocol that it believes in good faith will return a reasonably high proportion of responsive documents.
 - (c) If search terms are used, within twenty-one (21) days of the execution of this Discovery Plan, the Parties will exchange proposed search terms and strategies that each Producing Party proposes to use to identify responsive ESI.
 - (d) If a Producing Party has reason to believe that responsive documents are in a language other than English, the Party will include in its proposed search terms any translated search terms it proposes to use.
 - (e) Within seven (7) days of the Parties' exchange of proposed search terms, the Parties will meet and confer to agree on search terms.
 - (f) In the event that any Party issues additional requests for production after the meet and confer described in this Section, the Parties will meet and confer within fourteen (14) days of such requests to discuss the need for

² A "data store" refers to a location where data is stored.

supplemental search terms and to identify supplemental search terms if any.

- b. Enterprise level structured data (E.g. enterprise databases)
 - (1) Are there structured data stores that contain relevant data or information?
 - (2) Are there existing report formats that reasonably provide the information requested?
 - (3) If not, what search capabilities are available to retrieve relevant information?
- c. Inaccessible data?
 - (1) The following types of data stores are presumed to be inaccessible and are not subject to discovery absent a particularized need for the data as established by the facts and legal issues of the case:
 - (a) Deleted, slack, fragmented, or other data only accessible by forensics.
 - (b) Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
 - (c) On-line access data such as temporary internet files, history, cache, cookies, and the like.
 - (d) Back-up data that is substantially duplicative of data that are more accessible elsewhere.
 - (e) Server, system or network logs.
 - (f) Data remaining from systems no longer in use that is unintelligible on the systems in use.
 - (g) Electronic data (e.g. email, calendars, contact data, notes, and text messages) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).
 - (2) [*Insert other inaccessible data stores, if any:*]

C. PRODUCTION FORMAT

1. CASES INVOLVING LIMITED ESI

- a. Document Format.
 - (1) Electronically stored information derived from e-mail and other electronically created files (e.g. Microsoft Office files, WordPerfect) will be produced:
 - (a) ___ as Bates-labeled single page TIFF or pdf images;
 - (b) ___ in native format (the file format associated with the original creating application, such as a Word document or Outlook document)³; or

³ The “native format” of a document is the file structure defined by the original creating software application. *See [The Sedona Conference Glossary](#).*

(c) ___ in hard copy.

(2) Documents Without Standard Pagination. Documents without standard pagination, such as spreadsheets or desktop databases (such as MicrosoftAccess) maintained electronically, will be produced in native format. Any additional structured data production will be limited to existing report formats absent cost shifting.

(3) Web Pages and Social Media Information. Web pages, social media data and other information not otherwise covered in subparts 1.a.(1) or (2) above shall be produced as “screen shots” or “screen captures” unless the Parties agree to perform bulk exports of entire web sites and social media accounts into native format.

(4) In addition to the production as specified above, the Parties may also agree to the production of metadata from fields to be specified by the Parties and the provision of load files pursuant to the Parties’ specification.

2. CASES INVOLVING EXTENSIVE ESI

a. Unstructured Data

(1) Document format.

(a) Electronically stored information derived from e-mail and other electronically created files (e.g. Microsoft Office files, WordPerfect) will be produced as:

(i) ___ Bates-labeled single page/multi-page TIFF, as described in Section 1 of Exhibit 1; or

(ii) ___ pdf images; or

(iii) ___ in native format; or

(iv) ___ in hard copy; or

(v) ___ Other:

(b) Each Party reserves the right to object to production of documents in the format specified herein to the extent that production in such format is impracticable or unreasonably burdensome or expensive.

(c) Each Party reserves the right to request native files for documents that are difficult to understand after they have been produced in the format specified herein or that contain potentially relevant embedded information, and such requests will not be unreasonably denied. Such a request shall be made according to the following protocol.

(i) The requesting Party shall make any such request as soon as reasonably practical after receiving a document production.

(ii) The requesting Party shall provide a list of Bates numbers of the documents that it is requesting to be produced in native file format.

(iii) Within fourteen (14) days of receiving this request, the producing Party will either (i) produce the requested native files to the extent

reasonably practicable or (ii) respond in writing, setting forth its position on the production of the requested documents.

(iv) If the Parties are unable to agree as to the production of the requested documents in native format, the Parties may submit the matter to the Court.

- (2) Metadata format. The Parties agree to produce the ESI metadata fields identified in Section 4 of Exhibit 1, as well as the following fields: *[If any additional fields]*.
 - (3) Load file⁴ format. The Parties agree on the load file specifications provided for in Section 3 of Exhibit 1, except as follows: *[Insert modifications, if any]*
 - (4) Documents without standard pagination, such as spreadsheets or desktop databases (such as Microsoft Access) maintained electronically, will be produced:
 - (a) ___ in native format; or
 - (b) ___ as Bates-labeled single page TIFF or pdf images; or
 - (c) ___ in hard copy.
 - (5) Audio/Video files maintained electronically, will be produced as native files:
 - (6) Parties will produce information from the following databases or systems incorporating databases as a report: *[Parties to identify report output (E.g. Excel)]*
- b. Structured Data
- (1) The Parties should make reasonable efforts to agree upon the production of data from structured data stores in existing report formats, or report formats that can be developed without undue burden.
 - (2) If the issues in the case make exchange of data in a report format insufficient, the Parties should identify the following databases or systems incorporating databases that will require raw data production. *[Parties to identify data output, if any, and what layouts and/or formats will be provided.]*
- c. De-Duplication. A Party is only required to produce a single copy of a responsive document.
- (1) Parties may de-duplicate stand-alone documents or entire document families globally using MD5 or SHA-1 Hash⁵ value matching. ESI that is not an exact duplicate may not be removed.
 - (2) Common system files defined by the NIST library (<http://www.nsl.nist.gov/>) need not be produced
 - (3) Attachments to e-mails shall not be eliminated from the parent e-mail

⁴ A load file relates to a set of scanned images or other files, and indicates where individual pages or files belong together, where each document begins, and what documents are attached to the document. A load file may also contain metadata or extracted text associated with the documents. See [The Sedona Conference Glossary](#).

⁵ A Hash value is a mathematical algorithm that represents a unique value for a given set of data or document, similar to a digital fingerprint. See [The Sedona Conference Glossary](#).

- (4) Paper documents shall not be eliminated as duplicates of responsive ESI. To the extent the Parties de-duplicate stand-alone electronic documents against an e-mail attachment, the attachment to the e-mail must be the document that is produced.
- d. Native files. The Parties will make reasonable efforts to ensure that documents produced in native form are decrypted (or that passwords are supplied), but the Parties have no duty to identify encrypted documents prior to production.

D. THIRD-PARTY ESI

1. A Party that issues a non-party subpoena (the “Issuing Party”) shall include a copy of this Discovery Plan with the subpoena and state that the Parties to the litigation have requested that third-parties produce documents in accordance with the specifications set forth herein.

2. The Issuing Party is responsible for producing any documents obtained under a subpoena to all other Parties.

3. If the Issuing Party receives any hard-copy documents or native files, the Issuing Party will process the documents in accordance with the provisions of this Discovery Plan, and then produce the processed documents to all other Parties.

4. However, any documents the Issuing Party does not intend to process for its own use may be disseminated to all other Parties in the format in which such documents are received by the Issuing Party. If the Issuing Party subsequently processes any such documents, the Issuing Party will produce those processed documents to all other Parties.

5. If the non-party production is not Bates-stamped, the Issuing Party will endorse the non-party production with unique prefixes and Bates numbers prior to producing them to all other Parties.

E. E-DISCOVERY LIAISON (FOR CASES INVOLVING EXTENSIVE ESI)

1. The Parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI.

2. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter.

3. The Parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

4. The Parties’ respective e-discovery liaisons are:

F. OTHER

1. In scanning paper documents, distinct documents should not be merged into a single record, and single documents should not be split into multiple records (*i.e.*, paper documents

should be logically unitized⁶). In the case of an organized compilation of separate documents – for example, a binder containing several separate documents behind numbered tabs – the document behind each tab should be scanned separately, but the relationship among the documents in the compilation should be reflected in the proper coding of the beginning and ending document and attachment fields. The Parties will make their best efforts to unitize the documents correctly.

2. This Discovery Plan shall have no effect on any producing Party’s right to seek reimbursement for costs associated with collection, review, or production of documents or ESI.

3. Nothing in this Discovery Plan should require ESI and other tangible or hard copy documents that are not text-searchable to be made text-searchable. Nevertheless, counsel or the Parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each Party. If a producing Party creates OCR of paper documents or non-text-searchable electronic images it produces for its own use, that producing Party should consider providing OCR to other Parties willing to pay a reasonable share of the cost of OCR.

4. Nothing in this Discovery Plan shall be interpreted to require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity. The Parties do not waive any objections as to the production, discoverability, admissibility, or confidentiality of documents and ESI.

5. Nothing in this Discovery Plan is intended or should be interpreted as narrowing, expanding, or otherwise affecting the rights of the Parties or third parties to object to a subpoena.

6. Counsel executing this Discovery Plan warrant and represent that they are authorized to do so on behalf of themselves and their respective clients.

II. PARTIES’ OUTSTANDING DISAGREEMENTS

The Parties cannot reach agreement and seek relief from the Court on the following issues:

PLAINTIFF COUNSEL

DEFENSE COUNSEL

Dated: _____

Dated: _____

⁶ Logical Unitization is the process of human review of each individual page in an image collection using logical cues to determine pages that belong together as documents. Such cues can be consecutive page numbering, report titles, similar headers and footers and other logical indicators. See [The Sedona Conference Glossary](#).

Exhibit 1 to (Proposed) Model Discovery Plan

1. IMAGES:

- Produce documents in Single Page Group IV TIFF files
- Image Resolution at least 300 DPI
- Black and White unless color is necessary to understand the meaning
- File Naming Convention: Match Bates Number
- Insert Placeholder image for files produced in Native form (see Section 2)
- Original document orientation shall be retained

2. FULL TEXT EXTRACTION / OCR:

- Produce full extracted text for all file types of ESI (Redacted text will not be produced)
- Production format: Single text file for each document, not one text file per page
- File Naming Convention: Match Beg Bates Number

3. LOAD FILE SPECIFICATIONS [*Insert modifications, if any, to fit the needs of the particular case*]:

- **Images Load File:** Opticon OPT file
- **Metadata Load File:** Concordance DAT file with field header information added as the first line of the file. Export using Concordance default delimiters.
- **Extracted TEXT:** Reference File Path to TEXT file in DAT file
- **Native Files Produced:** Reference File Path to Native file in DAT file

4. ESI PRODUCTION METADATA FIELDS [*Insert modifications, if any, to fit the needs of the particular case*]:

- **BegBates:** Beginning Bates Number
- **EndBates:** Ending Bates Number
- **BegAttach:** Beginning Bates number of the first document in an attachment range
- **EndAttach:** Ending Bates number of the last document in attachment range
- **Custodian:** Name of the Custodian of the File(s) Produced – Last Name, First Name format
- **FileName:** Filename of the original digital file name
- **NativeLink:** Path and filename to produced Native file
- **EmailSubject:** Subject line extracted from an email message
- **Title:** Title field extracted from the metadata of a non-email document
- **Author:** Author field extracted from the metadata of a non-email document

- **From:** From field extracted from an email message
- **To:** To or Recipient field extracted from an email message
- **Cc:** CC or Carbon Copy field extracted from an email message
- **BCC:** BCC or Blind Carbon Copy field extracted from an email message
- **DateRcvd:** Received date of an email message (mm/dd/yyyy format)
- **DateSent:** Sent date of an email message (mm/dd/yyyy format)
- **DateCreated:** Date that a file was created (mm/dd/yyyy format)
- **DateModified:** Modification date(s) of a non-email document
- **Fingerprint:** MD5 or SHA-1 has value generated by creating a binary stream of the file
- **ProdVolume:** Identifies production media deliverable
- **ExtractedText:** File path to Extracted Text/OCR File
- **Redacted:** “Yes,” for redacted documents; otherwise, blank

5. PAPER DOCUMENTS METADATA FIELDS:

- **BegBates:** Beginning Bates Number
- **EndBates:** Ending Bates Number
- **BegAttach:** Beginning Bates number of the first document in an attachment range
- **EndAttach:** Ending Bates number of the last document in attachment range
- **Custodian:** Name of the Custodian of the File(s) Produced – Last Name, First Name format
- **ProdVolume:** Identifies production media deliverable

B. Model Case Management Order No. 2

Introduction to Model Case Management Order No. 2

The PDS has drafted and recommended, and the Committee expects to formally adopt at its next full meeting, a proposed model order for managing the process for asserting and challenging claims of privilege from discovery, which is titled Model Case Management Order Number 2 (CMO2). CMO2 seeks to improve efficiency and fairness in addressing waiver and in the process for privilege logging.

First, under the authority of FRE 502(d), CMO2 provides that documents and ESI that otherwise would be subject to attorney-client privilege or work product protection remain privileged or protected notwithstanding their production in the case. In order to avoid disputes about inadvertence and what constitutes reasonable efforts to prevent or rectify production, the order does not require any due diligence at all, whether before or after production. Instead it focuses waiver analysis on the conduct of the producing party after the document or ESI surfaces by use in the case. If the receiving party uses the document or ESI, such as in a negotiation or a brief or a deposition or a hearing, then the producing party must promptly assert the privilege or protection. The intention here is that once the document or ESI surfaces from the rest of the production then the producing party can and should be expected to detect and assert the privilege or protection. The model order does not attempt to resolve what constitutes the necessary “promptness” because this is necessarily a fact specific issue. Also, if the producing party affirmatively uses the document or ESI then the privilege or protection is waived. Again, the intention here is that a party can and should be expected to evaluate privilege or protection before using the privileged or protected material strategically in the litigation. The scope of the waiver is determined by FRE 502(a).

Second, CMO2 provides for a more efficient and effective privilege logging procedure. The burden of establishing the applicability of a discovery privilege rests with the party seeking to invoke the privilege. *Chicago Trust Co. v. Cook County Hospital*, 298 Ill.App.3d 396, 698 N.E.2d 641, 645, 232 Ill.Dec. 550 (1st Dist. 1998), citing *Roach v. Springfield Clinic*, 157 Ill.2d 29, 623 N.E.2d 246, 251, 191 Ill.Dec. 1 (1993). The party asserting the privilege or protection generally meets its initial burden by producing a privilege log. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 267 (D.Md. 2008). If the other party objects to some or all of the log entries, then the party asserting the privilege or protection bears the burden of establishing an “evidentiary basis — by affidavit, deposition transcript, or other evidence — for each element of each privilege/protection claimed for each document or category of document.” *Id.* Generally courts expect privilege logs to provide for each document the date, the author, the recipients, a description of the document, and an indication of the privilege or protection asserted. See Fed. R. Civ. P. Rule 26(b)(5).

Traditionally, the description is expected to be individualized for each document and not just legalese stating the elements of the privilege or protection asserted. When there are many documents to be logged this traditional expectation can make the effective assertion of privilege

or protection unaffordable. That might be an unfortunate but necessary result if the traditional expectations were essential. But, as United States Magistrate Judge John M. Facciola has remarked, even sufficiently thorough privilege logs are essentially “useless.” J. FACCIOLA & J. REDGRAVE, “ASSERTING AND CHALLENGING PRIVILEGE CLAIMS IN MODERN FEDERAL LITIGATION: THE FACCIOLA-REDGRAVE FRAMEWORK,” 4 FEDERAL COURTS REVIEW 19, 51 (2009) (“The second problem is, that even with guidance, privilege logs are often useless to the court or the opposing party because they still do not contain enough information to make a determination of the accuracy of the privilege;” “Indeed, the jurist-author of this article noted a number of years ago that he had ‘found privilege logs useless.’”). This is because the descriptions need not and should not disclose the substance that is subject to the privilege or protection, according to Fed. R. Civ. P. 26(b)(5). At most, the description offers some vague hint at the subject matter of the document or ESI. For example, the description “legal advice about securities law” was found adequate for a privilege log in *In re Adobe Systems, Inc. Securities Litigation*, No. C-90-2453 SBA (FSL), 1991 U.S. Dist. LEXIS 15929, at *12 (N.D. Cal. Oct. 23, 1991). What about just “legal advice”? What does “about securities law” add in the way of assessing the requirements necessary for the attorney-client privilege to apply? Legal advice is privileged whether it is about “securities laws,” “environmental laws,” “real estate laws,” or any other laws whatsoever. So requiring such descriptions is really just make-work. The substantial work required to provide individualized yet opaque descriptions does not advance the inquiry. It just drives up the cost of effectively asserting privilege or protection.

The elements necessary to establish attorney-client privilege are established, for example, by a log entry (and a supporting affidavit if necessary), which establishes that the document was sent between the party and a lawyer, and no one else, and asserts that it was for the purpose of seeking confidential legal advice. This much can be readily provided using computer generated metadata and a handful of automatically generated descriptions. Going further and providing a hint concerning the general subject on which legal advice was sought would either be so general as to be unhelpful anyway or begin, unnecessarily, to reveal some of the substance of the privileged communication. Yet no allusion to a general topic, or even hint at the substance, would add anything necessary to establishing the privilege or the lack thereof, because it makes no difference on what subject legal advice was sought.

The opposing party and the court may be concerned that the logging party is not being truthful about legal advice really having been sought. But if it is assumed that the logging party is being untruthful, there is little reason to expect that it would prepare individualized descriptions that do not facially support the assertion of privilege anyway (or even that it would log documents it seeks to conceal in the first place). An *in camera* review of a sample would be a more efficient and effective way to confirm or assuage the opponent’s and the court’s concerns. In fact, when there are disputes concerning privilege logs involving large volumes of documents, they generally are handled by an *in camera* proceeding preceded by sorting of the disputed documents into categories and an iterative process of rulings on example documents. THE FACCIOLA-REDGRAVE FRAMEWORK offers a far more sensible way to approach the problem

particularly in large document cases, including leveraging existing database fields, categorization of like documents, sampling, and non-waiver orders. CMO2 seeks to streamline the privilege logging process and move the parties and the court directly to the question of developing an efficient and fair protocol for contested assertions of privilege and protection.

(Proposed) Case Management Order No. 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE _____
_____ DIVISION**

<p>_____,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>_____,</p> <p style="text-align: center;">Defendant.</p>		<p>Case No. _____</p> <p>Judge: _____</p>
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**[PROPOSED]
PILOT PROJECT CASE
MANAGEMENT ORDER NO. 2**

**MANAGEMENT OF ATTORNEY-CLIENT
PRIVILEGE & WORK PRODUCT PROTECTION**

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee, which is intended to better promote the “just, speedy, and inexpensive determination” of this action, pursuant to Federal Rule of Civil Procedure 1. In furtherance of Rule 1 and the Pilot Program, it is hereby ordered as follows:

1. ALTERNATIVE PRIVILEGE LOGGING PROTOCOL

1.1 Asserting Privilege or Protection. A party who withholds ESI or documents on the grounds of attorney-client privilege and/or work product protection shall provide:

- (a) a listing of such ESI and documents in electronic spreadsheet format providing as much objective metadata as is reasonably available (e.g., document control number, date, author(s), recipient(s), file type, etc.) and an indication of the privilege and/or protection being asserted; and
- (b) a description of any categories of ESI and documents that the withholding party asserts are privileged or protected and the reasons for asserting that individual review of the category is not worth the time and/or expense

necessary to do so.

“Objective metadata” does not include substantive content from, or a subjective description of the document or ESI being withheld.

1.2 Challenging Asserted Privilege and Protection. If a party challenges an assertion of privilege or protection from discovery then the parties shall meet and confer and make a good faith effort to cooperatively classify the challenged documents and ESI into categories that are subject to common factual and legal issues in so far as practicable. Thereafter, the parties shall jointly request a conference with the Court to devise a plan for resolving the challenges, which normally will include:

- (a) a schedule for briefing the legal issues relevant to each category;
- (b) a ruling date for issues that can be resolved on the briefs alone; and
- (c) a schedule for providing representative samples for the Court’s review *in camera* with respect to any categories that cannot be resolved on the briefs; and
- (d) a schedule for the parties to meet and confer to attempt in good faith to apply the Court’s rulings on the samples to whole categories or within categories insofar as possible; and
- (e) a schedule for repeating this process as needed.

2. NON-WAIVER AND CLAW BACK PROTOCOL (FRE 502(d))

2.1 Non-Waiver By Production. Production of documents and ESI in this case shall be without prejudice to and shall not waive, for purposes of this case or otherwise, any attorney-client privilege or work product protection that otherwise would apply.

2.2 Time For Asserting Privilege And Protection. A producing party may assert privilege or protection over produced documents and ESI at any time by notifying the receiving party(ies) in writing of the assertion of privilege or protection, except that:

- (a) Affirmative use of ESI or a document by the producing party in the case waives privilege and protection with respect to it, and of other ESI and documents to the extent provided by Federal Rules of Evidence, Rule 502(a); and
- (b) Upon use in the case by another of ESI or a document that was produced by a party, that producing party must promptly assert any claimed privilege and/or protection over it and request return or destruction thereof.

2.3 Disputing Claims of Privilege/Protection Over Produced Documents. Upon receipt of notice of the assertion of privilege or protection over produced documents or ESI, the receiving party shall:

- (a) to whatever extent it contests the assertion of privilege or protection, promptly

- so notify the producing party, and maintain the contested documents and ESI in confidence pending resolution of the contest by the Court; and
- (b) to whatever extent the receiving party does not contest the assertion of privilege or protection, promptly certify in writing to the producing party that it has returned or destroyed the applicable document(s) and/or ESI, and has made reasonably diligent efforts to identify and destroy each copy thereof and all information derived therefrom (normally reasonable diligence will not include disaster recovery media).

In the event of a contested assertion of privilege or protection over produced documents that cannot be resolved amicably after meeting and conferring in good faith, either party may bring the contest to the attention of the Court by motion.

ENTERED:

Dated: _____