



*ESI in the Criminal Justice System:
From Pre-Indictment Investigation to Trial*

February 10, 2016





The Sedona Conference®

- ❖ Nonprofit 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust, intellectual property, and complex litigation
- ❖ Transcending traditional continuing legal education to combine experience with dialogue, outside of the adversarial system, to contribute to the reasoned and just development of law and policy
- ❖ Supporting Working Groups to develop principles, guidelines, and best practices in targeted areas “ripe” for development



The Sedona Conference® dialogue model

Dialogue: Assuming that many people have pieces of the answer and that together they can craft a solution

Debate: Assuming that there is a right answer and that you have it

Dialogue: Listening to understand, find meaning and agreement

Debate: Listening to find flaws and make counter arguments

Dialogue: Admitting that other's thinking can improve on your own

Debate: Defending one's own views against those of others

Dialogue: Discovering new options, not seeking closure

Debate: Seeking a conclusion or vote that ratifies your position

Excerpted from Daniel Yankelovich, *The Magic of Dialogue* (2001)



Today's agenda

- ❖ The 4th Amendment warrant clause
- ❖ The 4th Amendment and the “reasonable expectation of privacy”
- ❖ Surveillance and seizure of social media
- ❖ *Ex ante* conditions on search warrants for ESI and devices
- ❖ 5th Amendment privilege against self-incrimination
- ❖ Authentication, admissibility, and testimony



Materials

- ❖ *Criminal e-Discovery: A Pocket Guide for Judges* (Federal Judicial Center: 2015)
- ❖ R.J. Hedges, *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (Dec. 2015)
- ❖ R.J. Hedges, *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (Sept. 2015)(revised)
- ❖ T. Brostoff, “ESI Continues to Pose New Technologies for Attorneys, Judges in the Pre-trial Stage,” 15 DDEE 116 (2015)
- ❖ T. Brostoff, “From Quon to Riley and Beyond: Criminal Law eDiscovery and New Trends,” 15 DDEE 527 (2015)
- ❖ T. Brostoff, “Riley’s Implications on Future Jurisprudence and Fourth Amendment Discussed in Webinar,” 14 DDEE 399 (2014)
- ❖ K. Robinson, “Riley’s Tea Leaves: What Will SCOTUS Do Next?” 15 DDEE 308 (2015)

Today's faculty

❖ Donna Lee Elm

- ❖ Middle District of Florida, Tampa FL

❖ Deborah A. Freier

- ❖ Essex County Prosecutor's Office, Newark, NJ

❖ Ronald J. Hedges

- ❖ Ronald J. Hedges LLC, Hackensack NJ



❖ Janet Levine

- ❖ Crowell & Moring, Los Angeles CA

❖ Hon. Anthony E. Porcelli

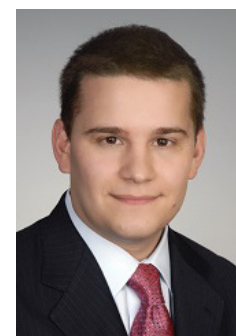
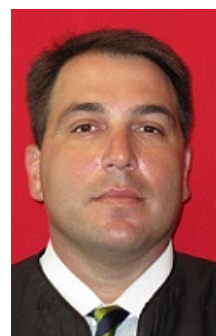
- ❖ Middle District of Florida, Tampa FL

❖ Daniel Shapiro

- ❖ District of New Jersey, Newark, NJ

❖ Kenneth J. Withers

- ❖ The Sedona Conference, Phoenix AZ





The 4th Amendment warrant clause

- ❖ *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015)(*en banc*)
- ❖ *United States v. Graham*, 796 F.3d 332 (4th Cir. Aug. 5, 2015)(rehearing granted *en banc* Oct. 28, 2015)



The 4th Amendment and the “reasonable expectation of privacy”

- ❖ *Belleau v. Wall*, ____ F.3d ____, 2016 WL 374111 (7th Cir. Jan. 29, 2016)
- ❖ *Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2015)



Surveillance and seizure of social media

- ❖ *In re M.C.*, ____ P.3d ____, 2015 WL 865320 (Nev. Feb. 26, 2015)
- ❖ *United States v. Gatson*, Crim. No. 13-705, 2014 WL 7182275 (D.N.J. Dec.16, 2014)



Ex ante conditions on search warrants for ESI and devices

- ❖ *In re Search of Google Email Accounts*, 99 F.Supp.3d 992 (D. Alaska 2015)
- ❖ *United States v. Mulcahey*, Crim. No. 15-10112, 2015 WL 9239755 (D. Mass. Dec. 17, 2015)



5th Amendment privilege against self-incrimination

- ❖ *Commonwealth v. Gelfgatt*, 468 Mass. 512 (2014)
- ❖ *United States v. Doe (In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011)*, 670 F.3d 1335 (11th Cir. 2012)

Authentication, admissibility, and testimony



- ❖ *Collins v. State*, 172 So.3d 724 (Miss. 2015)
- ❖ *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015)
- ❖ *United States v. Vaughn*, No. 14-cr-00023, 2015 WL 6948577 (D.N.J. Nov. 10, 2015)

Questions and comments





Upcoming events

TSCI eDiscovery Negotiation Training: Practical Cooperative Strategies
March 1-2, 2016, Washington, DC

TSCI 10th Annual Program on Staying Ahead of the eDiscovery Curve:
Retooling Your Practice Under the New Federal Rules
March 17-18, 2016, San Diego, CA

8th Annual Sedona Conference International Programme on Cross-
Border Discovery & Data Protection Laws
June 7-8, 2016, Berlin, Germany

For information and to register: <https://thesedonaconference.org>

Questions and comments

