Lieff Cabraser Heimann & Bernstein
Attorneys at Law

Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
t 212.355.9500
f 212.355.9592

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Rachel Geman
Partner
rgeman@lchb.com

VIA E-MAIL
comments@sedonaconference.org

The Sedona Conference
Working Group on Electronic Document
Retention & Production

RE: *Crafting eDiscovery Requests with "Reasonable Particularity": Comment on Behalf of National Employment Lawyers Association/New York (Amicus Committee)*

To Whom It May Concern:

My name is Rachel Geman. I am a partner at Lieff, Cabraser, Heimann & Bernstein, LLP ("LCHB"), a 100 lawyer-plus plaintiff-side law firm. I represent clients in class action and complex litigation, where extensive discovery is the norm, and Sedona is an invaluable resource. All my work is on the plaintiff side. While generally I receive more discovery than I produce, I am mindful of the hassle and inefficiency unspecific and off-the-shelf discovery requests can carry, especially insofar as I have represented government entities and other non-individual clients. Further, responding to unspecific and overbroad discovery on behalf of individuals who are unfamiliar with the legal system offers a singular set of challenges.

I am providing the below comments to your primer, *Crafting eDiscovery Requests with "Reasonable Particularity",* on behalf of the Amicus Committee of National Employment Lawyers' Association/New York ("NELA/NY"). NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship. NELA/NY, the New York affiliate of NELA, has more than 300 members and is one of NELA's largest affiliates. NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation, including through the work of its Amicus Committee.

We support Sedona's general exhortation for parties to cooperate and focus on strategies to front-load relevant discovery for overall efficiency. However, we want to emphasize the pronounced informational asymmetry between parties in employment cases, and to caution against over-generalizing what might seem like common-sense rules across all cases. At a high

level, it should go without saying that specific is better than boilerplate. But, we do urge Sedona to stop short of the implicit conclusion that 'unspecific' denotes a lack of effort or a hide-the-ball approach by the requesting party.

There are multiple circumstances under which a requesting party is at even more of an informational disadvantage than is the case in some of the types of disputes you mention (e.g., a contract dispute between sophisticated parties, where all of your points are well-taken). For example, low-wage or other employees sometimes are kept in the dark about even the threshold fact of *who their actual employer is*. They may be given only limited, ambiguous, or affirmatively-misleading information about pay deductions, work issues, and related topics. They may be affirmatively misled about the reasons for personnel decisions.

We are not suggesting asymmetry is limited to employment. A consumer who has had a consumer product or serviced "crammed" on them may not have even heard of the defendant until a d/b/a named showed up on a bill; a victim of a dangerous drug may only know they are injured, not the allocation of responsibility, etc.

Nor are we suggesting, of course, that discovery misconduct is limited to one side, or that all employers engage in problematic behavior. However, we are noting that the differences between and among different parties in different circumstances are such that Sedona might want to consider saying that the more information the requesting party has going into discovery, the more that can be expected (and the converse is true as well).

Indeed, specificity can only go so far before it creates an incentive for a party to obfuscate what is out there, and becomes a thumb on the scale for the party with the superior access to information (usually the defendant in employment litigation). Discovery is an iterative process and perhaps especially so in employment discrimination cases. At the outset of discovery, plaintiffs in employment discrimination and other employment-law cases often do not know what relevant documents exist or where they are stored. Plaintiffs often discover relevant information—particularly documentary evidence that has not yet been produced—by deposing employees of the defendant. In addition, documents produced in discovery often reveal the existence of further relevant information that then becomes the subject of subsequent discovery requests. It is therefore difficult, in the initial stages of a litigation, where limited depositions have taken place and limited document discovery has been produced, to state with great particularity what evidence will be necessary to complete discovery, even with respect to a particular claim. Plaintiffs therefore often serve broad requests and multiple sets of requests for production of documents based on what they learn at each phase. Plaintiffs also frequently sequence depositions to ensure that they gather appropriate background information.

Turning to the specifics, and along the same lines, we have some comments on the helpful list of practice considerations for drafting requests, at Section IV(C) (at 21-24).

1. **"Request Specific, Identifiable, or Discrete Documents."** In this section, we believe the discussion about policy implementation—namely, the focus on the request for

"any and all documents related to policies and procedures" and related discussion—inadvertently might be interpreted or cited to suggest that a default is that implementation documents are *not* normally relevant.

However, while at times that only the four corners of a policy is in dispute, that is rare in employment litigation, or complex litigation in general.

Almost inevitably, defendants resist discovery about how policies are implemented in practice. Yet a sophisticated company's policies may be squeaky clean—don't accept or provide kickbacks, don't discriminate, follow the law, etc.—but it is the actual practices that are at the heart of the case. Similarly, alternative policies that a company considered, and the reasons they rejected them, are often relevant as well.

Thus, we respectfully respect that "any and all documents related to policies and procedures" should not be treated as a paradigmatic 'sloppy' request.

We also wonder whether your helpful discussion of how "any and all" documents are indeed sometimes appropriately used could be moved up to this section, rather than at the end (or ONLY at the end) of the "sufficient to show" section.

2. "Sufficient to Show." 'Sufficient to show" productions can be useful to both parties under some circumstances. Here, we want to caution about some of the ways it can easily be misused. In an employment case, for example, an employer might say that documents about an employer's job performance are sufficient to show that the reason for the adverse action was legitimate and not pretextual. However, this might occlude not only a fuller picture of the employee's performance, but also how other employees with the same performance or purported issues were treated. We think it might be worth stressing that 'sufficient to show' should not refer to or excuse a cherry-picked subset of such documents.

3. "Limit Requests to Specific Custodians." We think it must be stressed that an early limiting of requests to certain custodians *requires a threshold, initial level of transparency by the party that wants to limit request about who the custodians and relevant departments are, and the time period for which they held their positions, etc*. Otherwise, a request by the producing party to the receiving party to have the latter limit their requests can simply be an excuse for delay (or, even to later claim that producing the truly relevant custodians—who have been discovered through depositions—would be too burdensome because the defendant has already produced documents from less relevant custodians of whom the plaintiff was aware). This is a particular concern in employment cases where there may be ambiguity over who the actual decision-makers are.

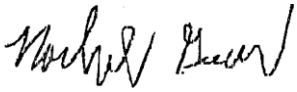
4. "Include a Temporal Scope in the Request." We agree that different requests might carry different temporal scopes, and think it is worth stressing that in certain

requests and areas, e.g., data in discrimination cases, that getting data for before the start of the relevant time is important for modeling.[1] Generally, though, as plaintiffs we do not think a request- by-request negotiation for temporal scope is appropriate, as it can be a cause of delay.

5. "Requests Tied to Specific Allegations or Arguments." In particular, we find that across types of cases, but especially in employment and false claims act matters, that defendants often veer outside the claims in the case by directing broad and unspecific discovery purportedly related to the plaintiff's 'credibility' but in fact having nothing to do with the allegations in the case. We think Sedona could consider stressing that a party should refrain from attempted end-runs around the particularity requests under the aegis of vague broad terms such as 'credibility.'

The NELA/NY Amicus Committee thanks you for your consideration of our comments.

Very truly yours,



Rachel Geman

[1] *See, e.g., Kargbo v. Nat'l RR. Passenger Corp.*, No. 15-698, 2016 WL 10998394, at *6 (D.D.C. Jan. 14, 2016) (permitting discovery in an individual Title VII case for five years prior to filing of complaint because even discriminatory incidents that are time-barred can be used as background evidence); *see also Owens v. Sprint/United Mgmt. Co.*,221 F.R.D. 649, 655 n.29 (D. Kan. 2004) (collecting cases reflecting a consensus that discovery going back at least four years prior to the liability period is reasonable); *Gaul v. ZEP Mfg. Co.*, No. Civ.A. 3-2439, 2004 WL 231298, at *2 (E.D. Pa. Feb. 5, 2004) (granting discovery for five years). Particularly "[iln a case involving class-wide discrimination," courts are likely to permit discovery "over an extensive period of time." *Pleasants v. Allbaugh*, 208 FR.D. 7, 9 (D.D.C. 2002).