



How the Emerging Area of e-Discovery Impacts You and Your Clients

Kyle C. Bisceglie

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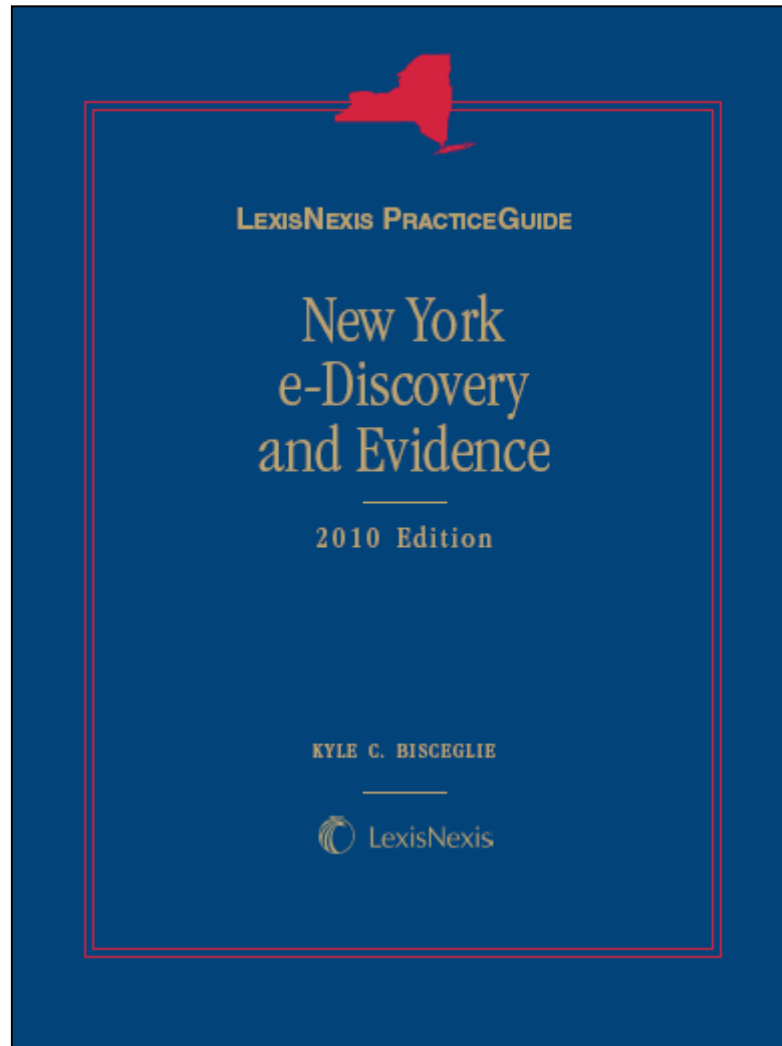
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Meet our distinguished presenter, Kyle C. Bisceglie



Kyle C. Bisceglie

- Martindale-Hubbell “AV” rated litigation partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City
- His practice focuses on complex commercial litigation, securities litigation, corporate governance disputes and electronic discovery.
- In 2009, Mr. Bisceglie litigated commercial cases venued in New York and five other states; won multi-week trial verdict for defense on all counts in California and multi-week \$44 million verdict for plaintiff in New Mexico.
- ESI-related issues have played a significant role in the majority of Mr. Bisceglie’s cases.
- Mr. Bisceglie is the author of **Bisceglie, LexisNexis® Practice Guide: New York e-Discovery and Evidence**, available now.
- Email: kbisceglie@olshanlaw.com

Key Themes in New York e-Discovery

- Case law driven, some new rules, wide variation
- Duty to preserve
- Meet and confer
- Form of production
- Accessible v. inaccessible
- Inspection
- Metadata
- Costs
- Cooperation
- Ethical issues for the unwary

Sources of e-Discovery Rules in New York State and Federal Courts

- **The 2006 e-Discovery Amendments to the Federal Rules of Civil Procedure**
 - Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45 all amended
- **Fed. R. Evid. 502**
- **22 NYCRR § 202.70(g)**
 - Commercial Division Rule 8 (2006)
- **22 NYCRR § 202.12(c)(3)**
 - Uniform Rules of the Supreme and County Courts governing Preliminary Conferences (2009)
- **Nassau, Suffolk, Westchester and Onondaga County Preliminary Conference Orders**
- **Electronic Discovery Guidelines - Nassau County, Commercial Division (2009)**
- **Proposed changes**

Comparison of Federal and State e-Discovery Rules

Subject	Federal	New York
Electronic Discovery	Fed. R. Civ. P. 16 – scheduling order may include provisions for disclosure or discovery of ESI	Not directly addressed CPLR 3120 – inspection of “documents and things” has been interpreted to include ESI
	Fed. R. Civ. P. 26 – party must disclose ESI but is excused from producing information that is not reasonably accessible because of undue burden or cost	CPLR 3120 – information must be material and necessary
Privilege or Work Product Protection	Fed. R. Civ. P. 26 – privilege or work product protection can be asserted after production of privileged information by giving notice of the claim; receiving party must return, sequester or destroy specified information or make reasonable efforts to retrieve disclosed information	CPLR 4503 – defines attorney -client privilege CPLR 3101 – defines attorney work product as “unobtainable”
	Fed. R. Evid. 502 – inadvertent disclosure of privileged information is not a waiver	CPLR 4548 – privilege is not waived for e electronic communications simply because transmitted electronically
Meet and Confer Requirement	Fed. R. Civ. P. 26(f) – conference should address form of production of ESI as well as claims of privilege	Commercial Division Rule 8(b) – counsel must meet and confer prior to preliminary conference ; Rule 202.12(c) of the Uniform Rules of the Supreme and County Courts governing preliminary conferences
ESI as Business Record	Fed. R. Civ. P. 33 – ESI is a business record	
Form of Production of ESI	Fed. R. Civ. P. 34 – ESI should be produced in a reasonably usable form or as kept in the usual course or business	CPLR 3122 – documents should be produced as they are kept in the course of business
Sanctions	Fed. R. Civ. P. 37 – authorizes sanctions for failure to comply with order to disclose	CPLR 3126 – setting out sanctions court may impose for failure or refusal to comply with order to disclose
Subpoenas	Fed. R. Civ. P. 45 – subpoenas on third -parties may request ESI	CPLR Article 23

Key Federal Cases In New York

- *Zubulake v. UBS Warburg LLC et. al.*, 217 F.R.D. 309 (S.D.N.Y. 2003) (“Zubulake I”) (distinction between accessible and inaccessible data and 7 part cost-shifting test for inaccessible)
- *Zubulake v. UBS Warburg LLC et. al.*, 220 F.R.D. 212 (S.D.N.Y. 2003) (“Zubulake IV”) (trigger and scope of the duty to preserve)
- *Zubulake v. UBS Warburg LLC et. al.*, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”) (applies to both outside and in-house counsel)
- *Gordon Partners et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179 (S.D.N.Y. 2007) (document production required when you have legal or practical ability to obtain them from third parties)
- **Recent Key Decision:**
 - *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs et. al.*, No. CIV. 05-9016, 2010 U.S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 11, 2010) (the law after July of 2004 provides that failure to issue a written litigation hold constitutes gross negligence)

Key New York State Cases

- *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 604, 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006)
- *Einstein v. 357 LLC*, No. 604199/07 (Sup. Ct. New York County Nov. 4, 2009)
- *Etzion v. Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (Sup. Ct. Nassau County 2005)
- *Finkelman v. Klaus*, 17 Misc. 3d 1138A, 856 N.Y.S.2d 23 (Sup. Ct. Nassau County Nov. 28, 2007)
- *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019A, 798 N.Y.S.2d 345 (Sup. Ct. Nassau County 2004)
- *Scott v. Beth Israel Medical Center Inc.*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (Sup. Ct. New York County 2007)
- *T.A. Ahern Contractors Corp. v. The Dormitory Authority of the State of New York*, 24 Misc. 3d 416, 875 N.Y.S.2d 862 (Sup. Ct. New York County 2009)
- *Weiller v. N.Y. Life Ins. Co.*, 6 Misc. 3d 1038A, 800 N.Y.S.2d 359 (Sup. Ct. New York County 2005)

Duty to Preserve – What does it mean?

○ **Duty to Preserve – When does it arise?**

- Federal: “The obligation to preserve arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Zubulake IV*.
- State: Unclear. Arguable that no pre-litigation duty to preserve exists unless you are the plaintiff.

○ **Pre-Litigation – How do you ensure compliance by adversary?**

- Send letter
- Pre-litigation preservation order or disclosure – New York state only. Available under CPLR 3102(c).

○ **Post-Litigation – How do you ensure compliance by adversary?**

- Preservation order
- Meet and confer
- Move for sanctions

○ **Common Issues – What must be preserved?**

- Auto-deleting feature
- Back-up tapes
- Recycling of hardware

Duty to Preserve – How to Execute

- **Issue Written Hold to Client**

- **Federal Court:**

- “The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when the party should have known the evidence may be relevant to future litigation.” *Zubulake IV*.

- At a minimum, “a party should suspend its routine document and retention/destruction policy and put hold in place.” *Zubulake IV*.

- “Failure to issue a written litigation hold constitutes gross negligence.” *Univ. of Montreal Pension Plan*

- **State Court: Unclear when to issue the hold**

- “In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices.”

- Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 693 N.Y.S.2d 787 (4th Dep’t 1999).

- The Joint Committee on Electronic Discovery of The Association of the Bar of the City of New York found the issue so unclear it proposed a new CPLR 3119(a), which defines the point at which a party’s duty to preserve attaches.

- CPLR 3102 applies to ESI.

- **Interview key custodians**

- Duty to preserve includes a duty to oversee compliance with the hold and monitor efforts to retain and produce documents. *Zubulake IV*.

- **Preserve then collect**

Meet and Confer

- **Federal Court**

- Fed. R. Civ. P. 26(f) & 16(b)

- **State Court**

- 22 NYCRR § 202.12(c)(3)
 - Uniform Rules of the Supreme and County Courts governing preliminary conferences
- 22 NYCRR § 202.70(g)
 - Commercial Division Rule 8

Form of Production

- **Fed. R. Civ. P. 34 and 45:**

- Request and subpoena “may specify the form or forms in which electronically stored information is to be produced.”
- “Need not produce the same electronically stored information in more than one form.”

- **Proposed Form of Production:**

- Documents should be produced in the form in which they are maintained.
- Electronically stored information (“ESI”) should be produced in TIFF format with load file. Native format with metadata should be preserved and maintained, and plaintiffs reserve the right to seek native format of ESI on a particularized basis where relevant and/or necessary to discover relevant metadata or evidence.

Inaccessibility

- **Fed. R. Civ. P. 26 and 45:**

- “Need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.”

- ***Zubulake I***

- Range of accessible to inaccessible:
 1. Active, online data;
 2. Near-line data;
 3. Offline storage/archive;
 4. Back-up tapes; and
 5. Erased fragmented or damaged data.
- 7 factor “guidance” for cost shifting as to inaccessible data only

Metadata

- **What is metadata?**
- **Federal Court** – Fed. R. Civ. P. 34(b) and 45(d) permit selection of form but Rules do not address metadata
- **State Court** – not addressed directly
 - “After vigorous debate, the Joint Committee decided not to address the issue of metadata. “
 - Described as “controversial issue on which viewpoints continue to evolve.”
 - “More time is needed to allow the issue to evolve.”
 - N.Y.S.B.A. Comm. on Prof'l Ethics Op. 749
 - N.Y.S.B.A. Comm. on Prof'l Ethics Op. 738
 - A.B.C.N.Y. Comm. on Prof'l and Judicial Ethics Formal Op. 2003-04
- **How to avoid unwitting disclosure**
- **When is metadata helpful?**
 - Drafting history
 - When document was accessed
 - Authentication

Disclosure: Who Pays?

- **Federal Court** – Responding party bears the cost unless ESI is inaccessible then cost shifting analysis is done.
 - Fed. R. Civ. P. 26(b); *Zubulake I.*
- **State Court** – The party obtaining disclosure bears the cost of production.
 - *Lipco Elec. Corp. v. ASG Consulting Corp*
 - *T.A. Ahern Contractors Corp. v. The Dormitory Authority of State of New York*
 - *Delta Fin. Corp. v. Morrison*
 - *Etzion v. Etzion*

Confronting Ethical Issues

- Effective April 1, 2009 – New York adopted ABA’s Model Rules of Professional Conduct (“NYRPC”) that supersede former Disciplinary Rules of the Code of Professional responsibility
- Why important?
 - Technology tests our ethical boundaries
 - Ease of lapse – push button
 - Scale of lapse
- Consequences of lapse:
 - **Zubulake V**: (When duty to preserve attached and emails were willfully deleted, emails were presumed relevant and adverse inference instruction was given)
 - **Scott v. Beth Israel Medical Center Inc**: (attorney-client privilege was waived by using employer email system; employer had published policies prohibiting personal use of email system)
 - **Einstein v. 357 LLC**: (failing to disclose nature of email system and failure to implement a litigation hold were grounds for adverse inference on core liability issues)
 - **Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs et. al.**: (failure to direct employees to *preserve* all relevant records or create a mechanism for *collecting* the preserved records resulted in monetary sanctions and an adverse inference instruction)

Duty of Competence

NYRPC 1.1(a) –

- A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Duty to Supervise

- **N.Y.R.P.C. 5.1(c):** A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.
- **Associates:**
 - N.Y.R.P.C. 5.1(c): A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate.
- **Outsourcing:**
 - **Issue: Unlicensed practice of law**
 - Lawyer supervision of non-lawyer is “key.”
 - Lawyer should “independently verify” work.
 - A.B.C.N.Y. Comm. On Prof'l and Judicial Ethics Op. 2006-3.
 - **Issue: Imputation of conflicts**
 - Conflicts of contract attorney may be imputed to law firm, depending upon facts and circumstances.
 - N.Y.S.B.A. Comm. on Prof'l Ethics Op. 715 (1999)
 - Imputation of conflicts from “of counsel” attorney depends on relationship between attorney and law firm.
 - *Hempstead Video Inc. v. Valley Stream*, 409 F.3d 127, 136 (2d Cir. 2005)
 - Supervising lawyer should inquire whether non-lawyer is performing services adverse to client.
 - A.B.C.N.Y. Comm. on Prof'l and Judicial Ethics Op. 2006-3.
 - **Issue: Confidentiality**
 - Client consent required, where client confidences may be revealed to non-lawyer.
 - A.B.C.N.Y. Comm. on Prof'l and Judicial Ethics Op. 2006-3.
- **Additional steps to consider (per A.B.C.N.Y.):**
 - Contract provisions, including remedies for breach
 - Periodic reminders
 - Inspection of facility and auditing

Duty of Cooperation

- **Is there a “duty of cooperation?”**

- Sedona Conference Cooperation Proclamation
 - ♣ Adopted in:
 - *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009)
 - *Capitol Records v. Mp3tunes*, 2009 U.S. Dist. LEXIS 74760 (S.D.N.Y. Aug. 13, 2009)
 - NYRPC 1.1(a), 3.3(f)(3), 3.4(a)
 - New York Standards of Civility (1997)

- **Compare:**

- Old NY DR 7-101(A) “Representing a Client Zealously”
- Bill E. Boie, The Non-Cooperation Proclamation at

<http://e-discoveryteam.com/2009/10/25/the-non-cooperation-proclamation>

Ethical Issues - Email

- **Governing New York Rules of Professional Conduct**
 - NYRPC 1.6(a) – “A lawyer shall not knowingly reveal confidential information.”
 - NYRPC 1.6(c) – “A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing ... confidential information of a client.”

- **Useful New York State Bar Association Ethics Committee Opinions**
 - N.Y.S.B.A. Comm. on Prof’l Ethics Op. 709 (1998) – attorney should use reasonable care in email, depends on likelihood of interception.
 - N.Y.S.B.A. Comm. on Prof’l Ethics Op. 782 (2004) – “use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets.”
 - N.Y.S.B.A. Comm. on Prof’l Ethics Op. 749 (2001) – Use of metadata “deceitful.”
 - N.Y.S.B.A. Comm. on Prof’l Ethics Op. 738 (2008) – Searching inadvertently sent metadata

- **Guiding Caselaw**
 - *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934 (Sup. Ct. New York County 2007) – (Using employer email may waive privilege)
 - *Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, 2005 U.S. Dist. LEXIS 468 (S.D.N.Y. Jan. 7, 2005) (courtesy copy to non-employee precludes assertion of privilege unless party can provide evidence non-employee was acting as an agent)

- **A.B.C.N.Y. Committee On Professional and Judicial Ethics Opinion 1998-2**
 - “A law firm need not encrypt all e-mail communications containing confidential client information, but should advise its clients and prospective clients communicating with the firm by e-mail that security of communications over the Internet is not as secure as other forms of communications.”

- **CPLR 4548**
 - “No communication loses its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.”

Privilege Issues

- **Inadvertently Produced Material**

- **Federal Court**

- ♣ Fed. R. Evid. 502(b) – Inadvertent disclosures of privileged information will not waive privileges if (1) the holder takes reasonable steps to prevent disclosure and (2) promptly takes steps to rectify the error.

- **State Court**

- ♣ Will not generally waive the privilege as long as:
 - The disclosing party intended to maintain confidentiality
 - Reasonable steps were taken to prevent disclosure
 - Party asserting privilege acted promptly to remedy the situation
 - Recipient will not suffer undue prejudice from protective order.
 - *John Blair Communications, Inc. v. Reliance Capital Group, L.P.*, 182 A.D.2d 578, 582 N.Y.S.2d 720 (1st Dep't 1992)

- **Non-Disclosure Agreements (including “claw-backs” and “quick peeks”)**

- **State Court**

- ♣ Non-waiver agreement applies to parties

- **Federal Court**

- ♣ Fed. R. Evid. 502(d) – Order can make non-waiver agreement binding in other courts

Evidence Issues

- **Source of Evidence Rules:**
 - **State Court:** No evidentiary code; mix of case law and statutory rules, predominantly CPLR Article 45.
 - **Federal Court:** Federal Rules of Evidence
- **Admissibility for Summary Judgment**
 - **Federal Court:** Only admissible evidence is considered.
 - **State Court:** Hearsay may be considered, but it is often, by itself, insufficient.
- **Relevance**
- **Authentication**
 - **Websites:** “There is no way plaintiff can overcome the presumption that the information he discovered on the internet is inherently untrustworthy. Anyone can put anything on the internet Any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Evid. 807. Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form.”
 - *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F.Supp. 2d 773, 774-75 (S.D.Tex. 1999)
 - **Metadata:** “Absent proof of alteration, computer generated data . . . is generally admissible and taken as true.”
 - *E.g., CA, Inc. v. Simple.com, Inc.*, 2009 U.S. Dist. LEXIS 25242 (E.D.N.Y. Mar. 5, 2009)
- **Hearsay**
 - Business Records – CPLR 4518/Fed. R. Evid. 803(6)
 - Public Records – CPLR 4520/Fed. R. Evid. 803(8)
 - Hearsay within hearsay – non-hearsay, admission by party opponent and adoptive admissions
- **Best Evidence**

Foreign Discovery

- **Moore's Law:** The speed and storage capacity of computing hardware doubles every two years.
- **Globalization**
- **Disclosure of ESI residing in foreign jurisdictions**
 - **Federal analysis:** If “true conflict” exists, court engages in comity analysis.
 - *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987)
 - **General rule in New York:** Court makes no distinction based on where items to be disclosed are located.
 - *Richbell Info. Servs., Inc. v. Jupiter Partners L.P.*, 32 A.D.3d 150, 816 N.Y.S.2d 470 (1st Dep't 2006)
 - **Hague Convention**
 - The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444
 - Consider resorting to the Hague Convention in the absence of personal jurisdiction over the party from whom discovery is sought.
- **Common Foreign Laws that Conflict with US Pre-Trial Discovery Laws**
 - EU Data Protection Directive
 - European Convention on Human Rights
 - Article 23 of the Hague Convention
 - Blocking Statutes
- **Solving Practical Problems**

Discovery from Non-Parties

- **Federal Court**

- Fed. R. Evid. 45 after 2006 e-discovery Amendments

- **State Court**

- CPLR 2303, 3120(3), 3111, 3101

- **Special rules applicable to internet service providers**

- Digital Millennium Copyright Act of 1998
- Stored Communications Act

- **Costs**

- Federal Court: Disclosing party pays with exceptions
- State Court: Requesting party pays with rare exception

- ♣ *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (Sup. Ct. Nassau County November 28, 2007)

Practice Tip Summary

- Competence
- Preserve
- Demand preservation
- Look to federal law
- Plan carefully about ESI
- Speak to IT regarding form
- Memorialize your efforts
- Meet and confer

Resources for More Information

Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR (August 2009)

- Joint Committee on Electronic Discovery of The Association of the Bar of the City of New York
- <http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf>

Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation (Spring 2009)

- Joint E-Discovery Subcommittee of The Association of the Bar of the City of New York
- http://www.nycbar.org/Publications/pdf/Manual_State_Trial_Courts_Condensed.pdf

Bisceglie, LexisNexis® Practice Guide: New York e-Discovery and Evidence (2010) – call to order: 1-800-223-1940

Arkfeld, Best Practices Guide for Electronic Discovery and Evidence (2009)
www.sedonaconference.org

Questions?



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