The Sedona Principles after the Federal Amendments: The Second Edition (2007)

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The *Second Edition* of the *Sedona Principles*, with revisions to *Principles* 8, 12, 13 and 14 and substantially revised Commentary reflects the passage of the 2006 Federal Amendments and provides a useful benchmark of current best e-discovery practices.

The Sedona Conference© Working Group on Best Practices for Electronic Document & Production (WG1) (the "Working Group") recently issued *The Sedona Principles, Second Edition ("Sedona Principles" or "Second Edition*.[2] The *Sedona Principles* consist of fourteen "best practices recommendations and principles" covering the entire range of e-discovery issues, together with commentary on their application.[3] A separate Glossary provides authoritative definitions of e-discovery terms for use by courts and parties.[4]

The primary purpose in producing a *Second Edition* was to reflect the impact of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure ("the

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[2] The formal title is The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production (June 2007), available at http://www.thesedonaconference.org.

[3] The *Sedona Principles* have retained remarkable consistency since their inception. The Working Group met in October 2002 and issued an initial draft of the *Sedona Principles* for public comment in March 2003. After relatively minor revisions to two *Principles*, the final version was formally issued in January, 2004. *See* "*Overview of Changes to the Sedona Principles in 2004*," 5 Sedona Conf. J. 215 (Fall 2004). An updated version of the *Principle*s was issued in July 2005 without any changes being made in the *Principles*.

[4] The Sedona Glossary, now issued as a standalone document, provides useful definitions of important terms related to electronic discovery. The May 2005 version of the Glossary is also available at http://www.thesedonaconference.org.

Amendments)[5] and to provide useful commentary on their implementation. After discussion at the Annual Working Group Meeting in La Jolla, California in the Fall of 2006, *Principles* 12 and 14 were revised[6] and virtually all of the Commentaries were extensively rewritten. Several new Commentaries were added reflecting additional topics of concern[7] and a general upgrading of terminology, such as the use of "electronically stored information," was also undertaken.

The *Sedona Principles* (Second Edition) are thus in a position to assist both courts and parties facing e-discovery disputes in the post- 2006 Amendments context.

The following discussion summarizes the important features of the *Second Edition* that will help serve that purpose.

Preservation Obligations – Sedona Principles 3, 5 and 8

*The Sedona Principle*s have played and will continue to play a particularly important role in helping provide *de facto* "national standards" for discussion of preservation obligations in regard to e-discovery.[8] The Civil Rules Advisory Committee relegated the topic to evolving case law in the 2006 Amendments by its refusal to enact preservation standards.[9] In large measure, this reflects the Civil Rules Advisory

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[5] *See* Report of the Committee on Rules of Practice and Procedure, September 2005, *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf (hereinafter "Standing Committee Report") (incorporating, as Appendix C, the final version of the Advisory Committee Report which describes the evolution of the Amendments and Committee Notes and contains their final form.).

[6] The Steering Committee ultimately decided to make certain changes to *Principles* 8 and 13 to the *Second Edition*, as discussed below.

[7] See e.g., Comments 6.f. (roles and responsibilities of retained and corporate counsel) and 14.d.("good faith" under the 2006 Amendments). The former was prompted in part by *Phoenix Four, Inc. v. Strategic Resources Corporation*, No. 05Civ. 4837(HB), 2006 WL 1409413 (S.D. N.Y. 2006)(identifying and sanctioning failures of counsel).

[8] *See Zubulake v. UBS Warburg LLC*, 2004 WL 1620866, *16 (S.D.NY. 2004) ("Zubulake V) (recognizing the role of the Sedona Principles in the development of useful guidance on e-discovery issues). *See also Quotient, Inc. v. Toon*, No. 13-C-05-64087, 2005 WL 4006493 (Cir. Ct. Md. 2005)(relying on Sedona Principles in assessing need for preservation order).

[9] *See generally* Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13, 16 (2006) (summarizing reasons for and evolution of the amendments).

Committee's reluctance to opine about obligations which may arise before the commencement of litigation. Judicial rulemaking authority is limited under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2000), to pending civil actions. With one exception,[10] the *Sedona Principles*[11] relating to the duty to preserve potentially discoverable electronically stored information remain intact with upgrades to their Commentaries being the primary changes in the *Second Edition*.

Thus, *Principle* 3, now echoed by Rule 26(f) of the 2006 Amendments, encourages parties to "confer early in discovery regarding preservation and production . . . and seek to agree on the scope" of the respective obligations involved. *Principle* 5 provides that that a preservation obligation is met by "reasonable and good faith efforts" but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." This principle is representative of the evolving case law[12] and is consistent with the preservation standard recommended by the American College of Trial Lawyers during the Public Hearings.[13]

The landmark case of *Zubulake v. UBS Warburg*, 220 F.R.D. 212 at 217 (S.D. N.Y. Oct.22, 2003)("*Zubulake IV*"), [14] relied upon the *Sedona Principles* for the

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[10] *Sedona Principle 12* has evolved in the *Second Edition* from articulating a mild presumption against preservation of metadata, per se, to a more sophisticated focus on the need for such preservation in light of the issue of the form or form of production. See Discussion of *Principle 12, infra*.

[11] *See Sedona Principles* 1 (when preservation required), 2 (role of proportionality), 3 (early conference regarding preservation), 5 (duty to preserve), 6 (procedures for preservation), 7 (burden of proof on challenges), 8 (disaster recovery backup tapes), 9 (shadowed, fragmented or residual data), 11(processes to satisfy preservation duties), 12 (metadata) and 14 (sanctions for failure to preserve).

[12] *See Miller v. Holzmann*, CA No. 95-01231 (RCL/JMF), 2007 WL 172327 (D. D.C. Jan. 17, 2007) (holding that *Sedona Principle* 5 is reasonable and in accordance with developing case law).

[13] *See* Letter from Robert L. Byman, Chairman, American College of Trial Lawyers, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Jan. 25, 2005), http://www.uscourts.gov/rules/e-discovery.html (recommending that the Advisory Committee include a standard of reasonableness for both preservation and production).

[14] There were a total of opinions issued by Judge Shira in what has come to be known as the "Zubulake" litigation (involving preservation obligations in the context of an employment discrimination claim in the financial services industry). They are: *Zubulake*: *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003),

proposition that "as a general rule . . . a party need not preserve all backup tapes even when it is reasonably anticipates litigation."[15] Many courts have cited or specifically followed that holding. For example, in *Consolidated Aluminum Corp. v. Alcoa, Inc*.,[16] the court held that Alcoa was not required to preserve every shred of paper but only those documents of which it had 'actual knowledge' that they would be material to future claims.[17]

Principle 6 articulates that responding parties are "best situated" to evaluate the procedures, methodologies and technologies "appropriate for preserving and producing their own electronic data and documents."[18] The leading case of *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,* [19] skillfully blends the teaching of *Principle* 6 with case law in order to resolve challenges to a litigation hold process.[20]

Production – Sedona Principles 2, 4, 8 and 11

The 2006 Amendments distinguish in Rule 26(b)(2)B) between production from sources of electronic information that are accessible and those that are not, limiting production from the latter absent a showing of good cause in the face of the burdens and

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Zubulake II, 230 F.R. D, 290 (May 13, 2003), *Zubulake* III, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *Zubulake* IV, 220 F.R.D. 212 (S.D.N.Y.Oct. 22, 2003) and *Zubulake* V, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004).

[15] 220 F.R.D. 212 at 217 (S.D. N.Y. Oct.22, 2003*).*

[16] No. 03-1055-C-M2, 2006 WL 2583308, *5 (M.D. La. July 19, 2006)

[17] *See also E*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592 (D. Minn. 2005) (holding in reliance on the Sedona Principles that when backup tapes are used to preserve evidence that was not preserved through a litigation hold, the backup tapes should be produced).

[18] *See* Mia Mazza, "In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information," 13 Rich. J. L. & Tech. 11 (Spring 2007).

[19] No. 04-CV-00329-WYD-CBS, 2007 U.S. Dist. LEXIS 15277 at *1 (D. Colo. Mar. 2, 2007) (applying *Sedona Principle* 6 in context of finding it reasonable to continue recycling of backup media).

[20] An excellent discussion of this topic is also available in the companion publication to the *Sedona Principles* issued by the Sedona Working Group and known as *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in the Electronic Age.* Available at http://www.thesedonaconference.org (currently undergoing revisions by the Working Group Steering Committee).

costs involved.[21] The Advisory Committee was informed that in the vast majority of cases, production from those sources meets the needs of the parties and permits rapid and efficient pursuit of appropriate and just results.[22] Information stored solely for disaster-recovery purposes, "legacy" data retained in obsolete systems, and deleted or fragmentary information that can be restored only through extraordinary efforts all fall into the latter category, e.g., information that is unduly burdensome and costly to access.[23]

The 2005 version of *Sedona Principle* 8 makes a similar distinction by providing for a focus on "active data" which is "purposely stored in a manner that anticipates future use and permits efficient searching and retrieval." Both *Sedona Principle* 4 and Rule 26(b)(2)(B) require that a producing party communicate information about electronically stored information that is not being searched or from which production is not being made.[24] However, *Sedona Principle* 4 couples its disclosure requirement with a requirement that discovery requests "make as clear as possible what electronic documents and data" are being sought. *Sedona Principle* 2 advocates application of a "proportionality" standard reflecting the "technological feasibility and realistic costs of preserving, retrieving, reviewing and producing" in light of the nature of the litigation and the amount in controversy.[25] *Sedona Principle* 11 emphasizes the importance of

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[21] The Rule provides that a party "need not provide discovery of electronically stored information from sources that the party identifies as not reasonable accessible because of undue burden or cost." This is sometimes referred to as a "two-tiered" approach to production. See Lee H. Rosenthal, A Few Thoughts on Electronic Discovery After December 1, 2006, 116 Yale L. J. Pocket Part 167 (2006). .

[22] *See* FED. R. CIV. P. 1 (requiring that the Federal Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action").

[23] *See* Standing Committee Report, *supra* note 5.

[24] *Sedona Princple* 4 requires that responses and objections "should disclose the scope and limits of what is being produced."

[25] *See Analog Devices, Inc. v. Michalski*, No. 01 CVS 10614, 2006 WL 3287382, *10 (Bus. Ct., Sup. Ct. N.C. 2006)(noting factors listed in Comment 2.b.to *Sedona Principle* 2)

using "reasonable selection criteria, such as search terms or sample"[26] and *Sedona Principle* 10 emphasizes the use of non-waiver agreements to reduce the impact of the inadvertent production of privileged information.[27]

The primary change in the production *Principles* in the *Second Edition* is the incorporation of the "accessibility" concept from the 2006 Amendments into *Principle* 8 and throughout the Commentaries.[28] *Sedona Principle* 8 now provides that "[t]he primary source of electronically stored information should be active data and information" and that "[r]esort to . . . sources of electronically stored information that are not reasonably accessible [in addition to "active data"] requires that the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities."

Sedona Principle 8, as revised, represents a practical approach to assessing production obligations involving electronically stored information.[29] Active data is typically stored on local hard drives, networked servers, and distributed devices or offline archival sources from which information can be accessed without a special restoration

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[26] *See Treppel v. Biovail Corporation*, 233 F.R.D. 363, 374 (S.D. N.Y. 2006)(discussing need for "reasonably comprehensive search strategy" in order to meet obligation to conduct a "diligent search," citing *Sedona Principle* 11).

[27] *See Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005)(noting the recommendation to that effect in Comment 10.a. to *Sedona Principle* 10).

[28] New Comments were added to discussions of *Principles* 2 and 8 discuss the implementation of production obligations from sources which are deemed to be not reasonable accessible. See Comments 2.c. and 8.b.

[29] The "stored" concept helps differentiate between information that is discoverable per se and that which must be transmuted into a different from for production purposes. *Compare Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (discussing the duty to undertake to preserve certain "ephemeral" information in the absence of a discovery order) with *Columbia Pictures Industries v. Justin Bunnell*, Case No. CV 06-1093 FMC(JCx), 2007 U.S. Dist. LEXIS 46364 (May 29, 2007)(holding that information temporarily residing in RAM is stored and subject to a duty to preserve and produce).

effort.[30] Comment 8.b notes that *Principle* 8 "addresses the technical accessibility and the purpose of the storage, rather than simply the burdens and costs associated with access." Thus, the need for a special restorative effort is the distinctive feature of the requirement of good cause. This approach should help in giving meaning to the somewhat cumbersome formulation ("not reasonably accessible because of undue burden or cost") found in Rule 26(b0(2)[31]

Production (Metadata and Form) - Sedona Principle 12

The 2005 version of *Sedona Principle 12* provided that "[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court."[32] As part of the 2006 Amendments, Rule 34 was amended to provide that electronically stored information could be produced in either the form in which it was ordinarily maintained or in a "reasonably useable" form. Neither the rule nor the Advisory Committee Comments to Rule 34 directly address the extent to which metadata would be required in a particular case.

After considerable discussion at the La Jolla Annual Meeting and among the Steering Committee, *Sedona Principle* 12 has been extensively revised to both reflect the

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[30] *See* Whitney Adams and Jeffery Jacobs, "Ghost in the Machine: Legal Developments and Practical Advice in an Age of Electronic Discovery," 22 NO. 7 ACC Docket 48 at *70 (2004).

[31] *In Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)("Zubulake I"), the court noted a "similarity" between the two approaches in arguing that the Sedona Principles supported its adoption of the accessibility distinction. There have been 5 decisions, four related to electronic discovery in *Zubulake*. *See also Zubulake* II, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake* IV, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake* V, 229 F.R.D. 422 (S.D.N.Y. 2004).

[32] The evolution of the Principle has been controversial and complex. As initially proposed in 2003, *Principle* 12 had suggested that "[a]bsent a specific objection, agreement of the parties or order of the court, electronic documents normally include the information intentionally entered and saved by a computer user." As finally issued in 2004, it provided that "[u]nless the producing party knows that particular metadata is material to the resolution of a dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court." The 2005 revision eliminated the qualification about the knowledge of the producing party.

emphasis on "form or forms" of production in the 2006 Amendments and to provide a more neutral view of the need for metadata.

Sedona Principle 12 now provides that in the absence of early agreement on the topic or a court order, production should be made in either the form or forms in which the information is ordinarily maintained or in a reasonably usable form, "taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."[33] The Comments to *Principle* 12 have also been extensively rewritten to explain the advantages and disadvantages of particular forms of production with relationship to the impact of the choices on metadata.[34]

Cost Shifting - Sedona Principle 13

One of the hallmarks of the *Sedona Principles* from the inception was the tacit adoption of the logic of the Texas Rule requiring mandatory cost-shifting in order to shift the incentives away from excessive requests for electronic discovery. Texas Rule of Civil Procedure 196.4 requires production without a court order only of "electronic or magnetic data" that is "reasonably available to the responding party in its ordinary course of its business."[35] A Texas court which orders production of unavailable information

[33] The full text of *Sedona Principle 12* is: "Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."

[34] *See* Comments 12.a. and 12.b., which reference the use of image formats with load files providing relevant system metadata and the use of native formats in regard to spreadsheets and dynamic databases.

[35] TEX. R. CIV. P. 196.4.

must also mandate payment of the "reasonable expenses" of any "extraordinary steps required in retrieving and producing the information.

However, after the decision by the Civil Rules Advisory Committee to eschew that approach in the 2006 Amendments,[36] the Steering Committee of the Working Group decided to modify *Sedona Principle* 13 to state that the costs of retrieving and reviewing information which is not reasonably available "may" (instead of "should") be shared by or shifted to the requesting party.[37]

Culpability for Sanctions: Sedona Principle 14

The original version of *Sedona Principle* 14 recommended that sanctions should be considered only where "an intentional or reckless failure to preserve and produce" the information exists. Rule 37(f), on the other hand, adopted an "intermediate" standard of "good faith" as the measure of required culpability.[38] This standard involves proof that the party undertook appropriate measures to preserve information at risk of loss and is arguably less forgiving of responding parties than the "intentional or reckless" requirement in *Sedona Principle* 14.

Accordingly, *Principle 14* has been revised to simply recommend that sanctions should not issue without a finding of a "culpable failure to preserve and produce."

Conclusion

[36] The Advisory Committee not only rejected mandatory cost shifting, but also added cautionary language in the Committee Note to Rule 26(b)(2)(B) to the effect that the burdens of privilege review can militate against production even if a requesting party is prepared to pay the costs of access.
[37] The 2005 Version of *Sedona Principle* 13 provided that "costs of retrieving and reviewing" [information from sources not reasonably available in the ordinary course of business] should be shifted to the requesting party."
[38] The full text of Rule 37(f) is as follows: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 621 (2001) (criticizing the assumption that the loss of electronically stored information automatically implies an intent to spoil).

The attendees at the November, 2006 Annual Meeting of the Sedona Working Group which authorized development of the *Sedona Principles (Second Edition)* correctly grasped that there remains a continuing and important task in the review and identification of best e-discovery practices. The Second Edition can best be seen as providing the updated platform from which that work will proceed over the next few years.