FEDERAL COURTS LAW REVIEW – 2005 Fed. Cts. L. Rev. 3

THE SEDONA PRODUCTION PRINCIPLES AND THE PROPOSED FEDERAL RULES ADDRESSING E-DISCOVERY

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Abstract

[a.1] In recent years, two parallel processes have proceeded, both of which have profound implications for the future of the treatment of electronic documents during the civil discovery process. The first was the creation of *The Sedona Principles*, a document that sets forth the best practices relating to the discovery of electronic documents. The other was the work of the Civil Rules Advisory Committee in drafting and promulgating proposed amendments to the Federal Rules of Civil Procedure that address the discovery of electronic documents. *The Sedona Principles* complement the proposed amendments and provide a framework that can be used to commend certain proposed amendments and suggest modification to other proposed amendments. In this article, the author analyzes the proposed amendments through the prism of *The Sedona Principles* and offers suggestions on how the proposed amendments can be modified to better suit the needs of civil litigants.

Table of Contents

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[1] In the spring of 2002, the lawyers who would later form themselves into the Sedona Conference Working Group on Electronic Document Production met to discuss ways to develop "best practices" in addressing electronic document production. Over the next two years, the working group prepared drafts of principles to guide analysis of the unique problems presented by the application of discovery rules and principles in the electronic environment. These draft principles were widely disseminated and discussed at meetings held to consider the many comments received. This process, which will certainly continue, has now produced *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004 Version).[1]

[2] Nearly simultaneously, the Civil Rules Advisory Committee (the "Committee") has engaged in a similar process and has now promulgated for public comment proposed amendments to the Federal Rules of Civil Procedure designed to address perceived gaps and inadequacies in existing rules as applied to discovery of electronically stored information.[2]

[3] Given the nearly simultaneous birth and gestation periods of the Sedona Principles and the Proposed Rules, it is profitable to consider how they converge, complement each other, or diverge and to discuss, where appropriate, what improvements are possible.[3] In the end, I believe that the

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[1] *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Jan. 2004) is available at www.thesedonaconference.org/ publications. I will refer to the principles as the "Sedona Principles" or the "Principles," and all pinpoint references are to the PDF version of the Principles that is available at this website.

[2] The proposed rules, promulgated in August 2004, are available at http://www.uscourts.gov/rules/newrules1.html. I will refer to them as the "Proposed Rules," and all pinpoint references are to printed version that is available at this website. Public comments have been solicited (with a deadline of February 15, 2005), and public hearings are scheduled to occur in San Francisco, Dallas, and Washington, D.C.

[3] Please note that the Federal Courts Law Review now contains David Isom's primer on electronic discovery for judges. The reader may find it to be a helpful overview of the problems that the Sedona

Sedona Production Principles are generally consistent with the key points in the Proposed Rules and should prove helpful in further discussions of their impact.

I. "Two-Tiered" Discovery of Electronically Stored Information: The Problem of Inaccessible Data

[I.1] Electronic records differ from paper records in a number of ways, including the manner in which the information is stored. It is one thing to demand a piece of paper from a file cabinet and quite another to demand all information about a topic that may exist electronically. To be sure, the presence of information on a single desktop computer hard drive, where it may be retrieved with a single keystroke, might not present a problem in discovery. However, the identification and retrieval of such information on the network of computers, or as back-up data stored for disaster recovery, present very different issues. Additionally, what is present on the computer screen may not be the whole story. A computer operator may well be unaware of it, but stored within the computer may be data, otherwise invisible, that arguably meets the discovery demand, such as metadata or residual or legacy data.[4] Should these forms of data be treated the same as the data that can be produced with a keystroke even though it is much more expensive and time-consuming to retrieve and produce them?

II. The Approach of the Proposed Rules

[II.1] The principal innovation of the Proposed Rules is to deal with this problem by a self-managed presumptive limitation on production of "electronically stored information" that is not "reasonably accessible." Rule 34(a) would be amended to extend discovery to "electronically stored

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Principles and the Proposed Rules address. *See* David K. Isom, *Electronic Discovery Primer for Judges*, *at* http://www.fclr.org/content/fclr.htm.

[4] *Id*. at 17-19.

information,"[5] and Rule 26(b)(2) would require a showing of "good cause" for production of electronically stored information that "[a] party identifies as not reasonably accessible**.**"[6] This two-tiered approach echoes the distinction embodied in 1999 in Texas Rule of Civil Procedure 196.4, which requires production without a court order of "electronic or magnetic data" that is "reasonably available to the responding party in the ordinary course of its business."[7] However, a Texas court can order production of information that is not reasonably available and mandate payment of the "reasonable costs" of any "extraordinary steps" required to retrieve and produce the information.[8] No such mandate is proposed in the amendment to Federal Rule 26(b)(2).

III. The Approach of the Sedona Principles

[III.1] The Sedona Principles also support an approach that, if triggered by an appropriate objection, would limit production of inaccessible electronic information without a special showing. Four interrelated Principles are involved:

> Sedona Principle 8 states that "[t]he primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval." It also states that "[r]esort to disaster recovery backup tapes and other sources of data r

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[5] Proposed Rules, *supra* note 2, at 24.

[6] *Id.* at 6.

[7] Tex. R. Civ. P. 196.4.

[8] *Id.*

outweigh the cost, burden and disruption of retrieving and processing the data from such sources."[9]

Sedona Principle 9 provides that "[a]bsent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented, or residual data or documents."[10]

Sedona Principle 12 provides 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."[11]

Sedona Principle 13 provides that if electronic information sought for production "is not reasonably available to the responding party in the ordinary course of business," the costs of "retrieving and reviewing such electronic information should be shifted to the requesting party."[12]

[III.2] At the heart of the distinction drawn by these Principles lies the concept that "active data," which is routinely accessed or used, is different from information that is costly and time-consuming to restore. As the Committee notes with regard to the Proposed Rules, information that is stored solely for disaster-recovery purposes (and not actually accessed), "legacy" data retained in obsolete systems, and deleted information that can be restored only through extraordinary efforts all fall into

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[9] Sedona Principles, *supra* note 1, at 31.

[10] *Id.* at 33.

[11] *Id.* at 41.

[12] *Id.* at 44.

the latter category, *e.g.,* information that is too costly and time-consuming to restore.[13] Sedona Principle 8 reminds us that a robust retrieval capability is often a crucial characteristic of such "active" information ("purposely stored in a manner that anticipates future use and permits efficient searching and retrieval").[14] Testimony at the San Francisco public hearings made the further point that even "accessible" data may also be burdensome to produce, thus evoking the separate and additional objection under Federal Rule of Civil Procedure 26(b)(2)(iii).[15] It is hoped that, over time, the distinction between information that is "reasonably accessible" and that which is not will become both useful and manageable.

IV. Identification of Information Not Produced

[IV.1] Both Sedona Principle 4 and Proposed Rule 26(f) require that a producing party communicate information about electronically stored information that is not being produced because it is not "reasonably accessible." However, unlike Proposed Rule 26(f), which requires that a party "identify" the information, Sedona Principle 4 emphasizes the need for a clear discovery request by the party seeking production so that the producing party can interpose a meaningful objection framed by the request. Thus:

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[13] Proposed Rules, *supra* note 2, at 11-12.

[14] Sedona Principles, *supra* note 1, at 31.

[15] This familiar rule permits a court to limit the discovery sought if "the burden or expense of the proposed discovery outweighs the likely benefit" when the court balances the factors identified in the rest of the Rule against each other. FED. R. CIV. P. 26(b)(2)(iii).

> Sedona Principle 4 requires discovery requests to "make as clear as possible what electronic documents and data" are being sought while responses and objections "should disclose the scope and limits of what is being produced."[16]

The approach of Sedona Principle 4 seems preferable to the mechanical requirements of Proposed Rule 26(f).

[IV.2] The Proposed Committee Note to Rule 26(b)(2) states that a party must identify what information it "is neither reviewing nor producing."[17] While the Proposed Note minimizes the burden somewhat by suggesting that a producing party can merely "describe a certain type of information,"[18] this could still lead to listing requirements, which would undermine the value of the two-tiered approach. To repeat, the premise of the presumptive limitation is that active data will provide the properly discoverable information in all but the most unusual cases. To require a description, and therefore an examination, of inaccessible data would defeat that premise. This problem can be avoided in the Proposed Rules by stating the principle in positive terms: "[A] party need not provide discovery of information that is not reasonably accessible except by a court order on a showing of good cause." Under this approach, the normal process of objection and motion to compel would provide the appropriate review.

V. Good Cause for Production

[V.1] Sedona Principle 2, like Proposed Rule 26(b)(2), contemplates that a decision on whether to order production of inaccessible material be based on a "balancing standard." In turn, the Proposed

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[16] Sedona Principles, *supra* note 1, at 19.

[17] Proposed Rules, *supra* note 2, at 13.

[18] *Id.*

Committee Note relies on the Manual for Complex Litigation for the point that requiring "good cause" in Proposed Rule 26(b)(2) will "discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems."

[V.2] The Sedona Principles emphasize the objective factors relating to such an order. Thus:

> Sedona Principle 2 suggests that courts should consider "the technological feasibility and realistic costs of preserving, retrieving, producing, and reviewing electronic data, as well as the nature of the litigation and the amount in controversy."[19]
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> Sedona Principle 8 requires the requesting party "to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing" the inaccessible data.[20]

VI. Cost-Shifting

[VI.1] The Sedona Principles differ from Proposed Rule 26(b)(2) with regard to the allocation of costs associated with the production of inaccessible information. Proposed Rule 26(b)(2) would allow a court to "order discovery of [inaccessible] information for good cause and may specify terms and conditions for such discovery."[21] The Proposed Committee Note suggests, but does not mandate, "provisions regarding the cost of production."[22] Sedona Principle 13 is quite different:

> Sedona Principle 13 provides that if electronic information sought for production "is not reasonably available to the responding party in the ordinary course of business,"

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[19] Sedona Principles, *supra* note 1, at 14.

[20] *Id.* at 31.

[21] Proposed Rules, *supra* note 2, at 6.

[22] *Id.* at 14.

the costs of, absent special circumstances, "retrieving and reviewing such electronic information should be shifted to the requesting party."[23]

[VI.2] In this regard, practitioners claim a positive experience with mandatory cost-shifting under Texas state practice.[24] It may be useful for the Committee to consider, consistent with the Sedona Principles, including a Committee Note urging cost-shifting where extraordinary costs are incurred.

VII. Early Discussion of Contentious Issues

[VII.1] Another key reform in the Proposed Rules is to mandate early discussion of contentious issues surrounding electronically stored information. Several issues are singled out for such discussion.

[VII.2] First, Rule 26(f), as amended, would require parties to "discuss" issues relating to "preserving discoverable information" both prior to and at the Scheduling Conference, with related changes in Rule 16(b)(5) and Form 35.[25] The Proposed Rules do not purport to spell out the scope of preservation obligations that arise under state and other substantive law and that precede litigation. However, the Proposed Committee Note suggests that parties could agree to "specific provisions" that balance the need to "preserve relevant evidence with the need to continue routine activities critical to ongoing business [since] [w]holesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted."[26]

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[23] Sedona Principles, *supra* note 1, at 44.

[24] At a conference on the Proposed Rules held at Fordham Law School, the Texas Rule's author, Steve Sussman, Esq., indicated that the reaction to the mandatory cost-shifting has been favorable from both the bench and the bar.

[25] Proposed Rules, *supra* note 2, at 2, 8, 51.

[26] *Id.* at 19.

[VII.3] Second, Rule 26(f) would be amended to require early discussion of issues relating to "disclosure or discovery of electronically stored information," including the "form in which it should be produced" and whether an order should issue "protecting the right to assert privilege" after the production of information.[27]

VIII. Preservation Obligations

[VIII.1] Sedona Principle 6 emphasizes that responding parties, not the courts, can best determine the most efficient manner in which to address preservation obligations involving their electronic information. Similarly, the Committee has properly noted its reluctance to extend the Rules to pre-litigation conduct.[28] Moreover, the Sedona Principles emphasize the importance of reasonable conduct, with an emphasis on practical and good-faith efforts:

> Sedona Principle 5 states that the preservation obligation "requires reasonable and good faith efforts to retain information that may be relevant," but that "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[29]
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[27] *Id.* at 9.

[28] *See* Proposed Committee Note to Rule 37(f) ("Rule 37(f) addresses only sanctions [imposed] under the Civil Rules and applies only to the loss of electronically stored information [which occurs] after commencement of the action in which discovery is sought."). Proposed Rules, *supra* note 2, at 34.

[29] Sedona Principles, *supra* note 1, at 20.

[30] *Id.* at 27.

[VIII.2] A key methodology used by producing parties to implement preservation obligations is the now-familiar "litigation hold" process. An excellent discussion of this approach is now 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*."[31] Chapter 5 provides practical suggestions for and commentary about appropriate methods for preserving information relating to actual or reasonably anticipated litigation, governmental investigations, or audits.

IX. Early Discussion of Preservation Issues

[IX.1] The early discussion of contentious discovery matters, including preservation issues, is also a core recommendation of the Sedona Principles. The focus is on the voluntary resolution of contentious matters already at issue in order to encourage parties to resolve their disputes without creating ones that do not exist:

> Sedona Principle 3 suggests that "[t]he parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities."[32]
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> Sedona Principle 11 provides that "[a] responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching,

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[31] Released on September 1, 2004 for public comment and available at www.thesedonaconference.org.

[32] Sedona Principles, *supra* note 1, at 16.

or the use of selection criteria, to identify data most likely to contain responsive information."[33]

[IX.2] Nothing in the Sedona Principles or in the Proposed Rules suggests that courts should attempt to dominate preservation planning. Producing parties with multiple concurrent litigation need the flexibility to balance operational and litigation needs in individual cases. The Committee has properly resisted efforts to routinely mandate the issuance of preservation orders; however, it may be appropriate to describe the limited circumstances under which they should be employed.

X. "Safe Harbor" for Deletions Due to Routine Operations

[X.1] Another major provision in the Proposed Rules is the creation of a "safe harbor" from sanctions for the effects of routine computer operations that occur without any intention of avoiding preservation obligations. Thus, the deletion or loss of electronic information may often be a natural byproduct of computer-based technology. This is not, however, indicative of an intent to avoid preservation obligations or production requirements and should not yield sanctions. Accordingly, Proposed Rule 37(f) would provide a limited "safe harbor" for the loss of information due to the "routine operation of the party's electronic information system" if the "party [also] took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action."[34] The protection would be lost if "a court order requiring preservation of electronically stored information is violated" and would apply only to sanctions under the Rules.[35]

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[33] *Id.* at 39.

[34] Proposed Rules, *supra* note 2, at 31-32.

[35] *Id.* at 33-34.

The Committee has noted a proposed alternative formulation that would deal with the culpability required to deny safe harbor protection. Under this alternative, Rule 37(f) would deny the safe harbor if the party "intentionally or recklessly failed to preserve the information" or violated an order requiring preservation of that information.[36]

XI. Preservation Obligations in Rule 37(f)

[XI.1] Sedona Principle 14 adopts a multi-faceted approach to sanctions for loss of information, requiring proof of violation of preservation duties, intentional or reckless conduct, and material prejudice.

> Sedona Principle 14 prohibits sanctions unless it is shown that a party had a "clear duty to preserve," that there was an "intentional or reckless" failure to do so and that there was a "reasonable probability that the loss of evidence has materially prejudiced the adverse party."[37]

[XI.2] The Proposed Rules would apply elements of this approach to a relatively limited situation–routine business operations that cause a failure to produce discoverable information–to acknowledge that it is not practical, because of the volume of ongoing litigation, to shut down portions of ongoing systems and processes that are serving the enterprise as a whole, such as disaster recovery systems.[38] The Committee proposal for Rule 37(f) conditions the availability of the "safe harbor" on whether or not the party undertook "reasonable steps to preserve" the information

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[36] *Id.* at 32-33, n. **.

[37] Sedona Principles, *supra* note 1, at 47.

[38] *See* Thomas Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUNSEL JOURNAL 417 (2003).

(presumably the information ultimately lost by the routine operation) at a time it should have known that the information was "discoverable."[39]

[IX.3] This concern reflects the limited nature of the proposal. As *Zubulake v. UBS Warburg LLC* (*"Zubulake V")*[40] has shown, inappropriate actions undertaken with regard to other sources of that same information–such as an individual deleting active information after notice of a litigation hold–would still be subject to potential sanctions without regard to the safe harbor.

XII. Preservation Orders

[XII.1] The Proposed Committee Note to Rule 37(f) states that "[i]n most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without a court order."[41] This emphasizes the importance of the initial "meet and confer" conference in discussions of disputes over the preservation of inaccessible information requested by the party seeking discovery.

XIII. Culpability

[XIII.1] As noted above, Sedona Principle 14 requires, as a pre-condition to any sanctions for loss of discoverable information, a showing that the party acted with an "intentional or reckless" intent.[42] The Committee has asked for comments on its alternative to Proposed Rule 37(f), which would deny a safe harbor if a party "intentionally or recklessly failed to preserve the information," presumably

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[39] Proposed Rules, *supra* note 2, at 32.

[40] No. 02 Civ. 1243 (SAS), 2004 WL 1620866 (S.D. N.Y. July 20, 2004).

[41] Proposed Rules, *supra* note 2, at 34.

[42] Sedona Principles, *supra* note 1, at 47.

referring to the information lost by the routine operation.[43] This is an interesting suggestion that addresses the practical concern that the exact dimensions of preservation obligations are sometimes more apparent in hindsight.

XIV. Conclusion

[XIV.1] In its Report, the Committee suggests that amending the Federal Rules to provide national standards is preferable to *ad hoc* evolution of lower court case law supplemented by local district court rules.[44] A very clear example of the compelling logic behind this conclusion is seen in the "Default Standard" adopted by the District of Delaware, which requires identification of a "retention coordinator" who then has seven (7) days to "implement" procedures to prevent modifications of documents.[45] If multiple District Courts were to enact contrasting requirements of this type, the risk of inconsistent demands and differing hindsight evaluations is substantial. Uniform national standards, properly confined to appropriate rule-making subjects, are appropriate.

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[43] Proposed Rules, *supra* note 2, at 32-33, n. **.

[44] *Id.* at 3-4.

[45] *Default Standard for Discovery of Electronic Documents ("E-Discovery")*, *at* http://www.ded.uscourts.gov/Announce/HotPage21.htm.