



January 16, 2008

By: Ken Sperl & Mehmet Munur



Kenneth Sperl  
Of Counsel  
(614) 360-2023  
[www.tsibouris.com](http://www.tsibouris.com)  
[ken.sperl@tsibouris.com](mailto:ken.sperl@tsibouris.com)

### Electronic Discovery Update

On January 7, 2008, the ABA Journal reported that Sullivan & Cromwell sued an electronic discovery firm for several errors in the retrieval of electronic records for a client the law firm was representing in litigation. The suit points out the increasing importance of accurate electronic discovery and the possibility of sanctions for failures.

### Have you adjusted your records management procedures for the revised Federal Rules of Civil Procedure?

A working group of the Sedona Conference, whose members include the leading academics and lawyers in their fields and judges, published the second edition of the Sedona Principles in June 2007 in response to the significant changes in the Federal Rules of Civil Procedure ("FRCP") that became effective in December of 2006. The FRCP were amended to include new provisions related to the discovery of electronically stored information ("ESI"). The new edition of the Sedona Principles provides guidance on best practices related to the retention, preservation, and production of ESI in preparation for and during litigation.

The Sedona Principles consist of 14 principles, which are broad and flexible in nature for easy application. They focus on many issues such as reasonable ESI retention and preservation policies; an early conference between parties to alleviate ESI discovery issues; and using technical assistance and outside

counsel in addition to inside counsel. Due to their broad appeal and comprehensive nature the Sedona Principles continue to influence state and federal courts.

### Discoverable Information

The Sedona Principles emphasize that all ESI is potentially discoverable under FRCP 34. ESI may include anything stored on servers, desktops, laptops, cell phones, and flash drives—among other things. Therefore, businesses must create *defensible, rational, and proper* information management policies and programs to prepare for potential discovery. For example, the court in *Del Campo v. Kennedy*, 2006 U.S. Dist. LEXIS 66728 (N.D. Ca. Sept. 8, 2006) prohibited a call center from discarding records of collection telephone calls after 2 weeks and ordered the parties to confer and produce a document preservation plan.

### Proportionality Standard

The Sedona Principles offer guidance for the proportionality standard under FRCP 26 that balances the need for and the cost of electronic discovery. The nature of the litigation, the amount in controversy, the feasibility and the costs of producing the ESI are all part of this balance. However, this balance requires a good faith effort to identify sources and locations that are reasonably likely to contain relevant information and a good faith effort to preserve that information. Such efforts extend to the retention of ESI relevant to *pending or threatened* litigation.

### Preservation of Information

While the onset of the duty to retain and preserve is case and claim specific, once it arises, a business must communicate with the appropriate persons in charge of the ESI to preserve it. This preservation effort should involve inside and outside counsel, records management personnel, and information security personnel. Clear and

timely communication between the legal department and information technology department is likely to minimize the risk of inadvertent destruction of relevant ESI. For example, the failure of UBS employees to follow the directives of legal counsel to preserve documents related to an employment discrimination lawsuit almost resulted in an adverse inference—but for the plaintiff’s inability to prove relevance of the backup tapes. *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y. Oct. 22, 2003).

**Reasonableness Standards**

When parties are “willfully blind” to their obligation to preserve potentially relevant ESI, courts are prompt to issue adverse inference instructions in addition to attorneys’ fees and costs. However, the duty to preserve information does not require all data to be frozen, which would be unduly burdensome. Furthermore, response to discovery requests ordinarily relate to active data and not disaster recovery backup tapes or similar data. The requesting party must show that the need for such ESI outweigh the costs and burdens of retrieving and processing it under the FRCP 26 standard. For example, the court in *Zubulake* noted that there was no duty to preserve *all* backup tapes even when a party reasonably anticipates litigation. However, if a party can determine where the information related to “key players” to the litigation is stored and the information is not otherwise available, then those backup tapes should be preserved.

**Diligence and Sanctions**

The Sedona Principles affirm the responding party’s duty to evaluate the appropriateness of preserving and producing the ESI. Penalties may result in the absence of methodical and organized response to ESI discovery requests. The Principles encourage the responding party to use consultants for technical expertise in collecting, reviewing, and producing ESI.

The Sedona Principles also offer guidance on the propriety of sanctions. They encourage courts to levy sanctions for spoliation only if a court finds a clear duty to preserve, a culpable failure to preserve and produce relevant ESI, and a reasonable probability of material prejudice to the requesting party. However, courts may issue sanctions when they find bad faith or

ongoing destruction of documents during litigation in the absence of intentional spoliation. On the other hand a business’ good faith compliance with a reasonable records management policy is not usually sanctionable absent a duty to preserve the ESI.

**Confidential and Privileged Information**

The Principles also focus on the discovery of confidential and privileged ESI. For example, the parties can enter into non-waiver of confidentiality and privilege agreements. These agreements enable the sequestration, destruction, or return of allegedly privileged information due to inadvertent production under FRCP 26.

**Recommendation**

We recommend that companies update their records management policies and procedures using the revised Sedona Principles as a guide. You should also carefully examine any entity that you plan to use to store and retrieve your electronic records, and make sure the contract you have with that company adequately protects your interests.

+++++

Mr. Sperl has assisted corporate clients in the areas of compliance, governance, technology procurement, licensing, and e-commerce. You may reach him at (614) 360-2023 or [ken.sperl@tsibouris.com](mailto:ken.sperl@tsibouris.com).

This Privacy and Security Update is intended to provide information about important legal developments, not legal advice. Readers should consult legal counsel for advice about their specific circumstances.