

## Overview of Changes to *The Sedona Principles* in 2004

The Sedona Conference



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# OVERVIEW OF CHANGES TO *THE SEDONA PRINCIPLES IN 2004*

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## *The Sedona Conference<sup>SM</sup> Working Group or Electronic Document Retention and Production Sedona, AZ*

Nearly a year ago, the Sedona Conference Working Group on Electronic Document Production published *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*. At that time, the Working Group issued an open call to all interested people and organizations requesting comments on *The Sedona Principles*. We received many comments, both orally and in writing, which helped us understand how to refine *The Sedona Principles* to reflect better the “best practices” for the discovery of electronic information and to highlight issues of importance to courts, litigants and counsel. Also, in the intervening months since the initial publication of *The Sedona Principles*, new cases have been decided and new secondary authorities published which inform the way in which litigants address electronic discovery. Accordingly, the Working Group is pleased to announce the publication of the revised *Sedona Principles*.

Readers who are familiar with the initial version of *The Sedona Principles* may notice several changes between that version and the current version. Most notably, the introduction to *The Sedona Principles* has been completely revised to better introduce readers to concepts involved in electronic discovery. This reformulated introduction, we think, better serves to provide readers without a background in electronic discovery with the information necessary to understand the complex issues implicated by the discovery of electronic information.

We have also revised *The Sedona Principles* to account for the many developments in the law of electronic discovery that have occurred since our initial publication. Cases such *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 216 F.R.D. 280, 217 F.R.D. 309, and 2003 WL 22410619 (S.D.N.Y. 2003), *Keir v. UnumProvident Corp.*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003), and *Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 WL 21468573 (W.D. Tenn. May 13, 2003) have helped form the emerging body of law addressing electronic discovery. We also included references to the proposed revisions to the ABA Civil Discovery Standards addressing electronic discovery issues that were disseminated in November of 2003.

The Principles themselves have changed in two ways. First, we reviewed and revised the language from a stylistic vantage point to better communicate the principle. Second, we changed the text of Principles 7 and 11. Principle 7 was revised to better focus on the standard for evaluating and challenging production adequacy under Rule 37. Principle 11 was modified to reflect a better understanding of metadata and the complex issues that can arise regarding preservation and production of metadata.

The commentary has also been revised in a number of ways. First, we reviewed and revised the language from a stylistic viewpoint to clarify and simplify the statements. Second, we eliminated statement, citations and illustrations where we did not think they provided meaningful guidance to the comment. Third, we added citations to significant new authorities as noted above. Fourth, in some areas we rewrote commentary to make clear that the Working Group does not intend to endorse the methodology or selection criteria employed by one particular vendor over that employed by another. Fifth, we added entirely new commentary in the following areas:

- The Benefits of Written Document Management Policies
- Written Records Management Policies Should Account for Records in Both Paper and Electronic Form
- Privilege Logos for Voluminous Electronic Documents
- Preservation of Expert Witness Drafts and Materials
- Use of Special Masters and Court-Appointed Experts to Preserve Privilege
- Protection of Confidentiality and Privilege Regarding “Clawback” or “Quick Peek” Productions
- Sampling
- Cost-Shifting Cannot Replace Reasonable Limits on the Scope of Discovery
- “Negligent” vs. “Culpable” Spoliation
- The Good Faith Destruction in Compliance with a Reasonable Records Management Policy Should Not Be Considered Sanctionable Conduct Absent Reasonable Notice to the Organization of a Duty to Preserve the Documents

When the public comment version of *The Sedona Principles* was published in 2003, it was our hope that they could serve as a guide to litigants and courts alike. The role that *The Sedona Principles* have played during the intervening time has exceeded our greatest expectation. We offer the revised *Sedona Principles* in our continuing effort to help practitioners, litigants and courts alike in addressing the challenging issues involved in the world of electronic discovery.

Finally, we are very thankful for the contributions of all persons who have taken the time to comment upon the March 2003 version of *The Sedona Principles*, and especially thankful for all of the contributions and efforts of the participants, members and observers to the Working Group for helping us make this a better document.

January 21, 2004

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