

Electronic Discovery and Reinsurance Arbitration: An Update

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Reprinted from The Quarterly, Volume 15, Number 1, 2008

Published quarterly by ARIAS•U.S.

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I. Introduction

"[T]he rules of discovery must change as society changes, technology increases, and the virtual 'distance' between business and individuals who interact is shrinking ..."¹ With over ninety percent of all information created today originating in electronic formats², production and discovery rules must evolve to accommodate the advances in information creation, storage, and sharing.

Reinsurance arbitrators are not immune from the challenges presented by new and demanding issues developing from the boom in electronic information. In some ways, reinsurance arbitrators face particularly vexing electronic discovery issues, as discovery standards and guidelines within the realm of reinsurance are vague, if they exist at all. While the U.S. federal courts developed an initial set of general rules relating to e-discovery with the institution of the December 1, 2006, amendments to the Federal Rules of Civil Procedure, arbitrators are frequently free to eschew those mandates. Rather, reinsurance arbitration panel members (as well as parties arguing for a particular discovery result) may turn to a variety of resources to inform their discretion when determining a discovery protocol or a discovery dispute in a given matter.

This paper, which builds upon an article published in the *ARIAS•U.S. Quarterly* in 2006 by Peter R. Chaffetz and Andreas A. Frischknecht entitled *Electronic Discovery in Arbitration*,³ will discuss the major differences between paper and electronically stored information, and e-discovery rules under the Federal Arbitration Act and the Federal Rules of Civil Procedure. In addition, we will present updates to the fourteen Sedona Principles, reference discovery language common in reinsurance treaties and contracts, and conclude with an

example litigation holding letter, which may prove useful in communicating with those who may control potentially discoverable information about the scope of their duties to preserve that information when litigation or arbitration is imminent or has been initiated. Additionally, our appendices provide the revised Sedona Principles, a helpful chart cross referencing e-discovery topics with the Federal Rules of Civil Procedure and the Sedona Principles, and a model litigation hold letter.

II. How Electronic Document Production is Different

In deciding what discovery standards to employ and how to implement a discovery protocol in a given reinsurance dispute, it is helpful to evaluate some of the key differences between paper production and e-discovery. The Sedona Conference Working Group on Electronic Document Retention & Production ("Sedona Conference"), known for its fourteen Sedona Principles⁴, created a list of six of these differences.⁵

First, the volume of electronically stored information available for e-discovery is far greater than traditional paper documents.⁶ A single large entity can store millions of e-mails and electronic files each day.⁷

Second, paper documents are more easily disposed of than electronically stored information and files.⁸ Computer users who "delete" files normally have not actually "destroyed" them; they have been tagged as out of use and may or may not be written over at a later time.⁹ Electronic files may persist long after a user deletes his or her own file.

Third, data stored electronically may change form automatically as part of the storage process.¹⁰ Routine manipulation of an electronic file, such as moving it from one folder to another, can also change "metadata" within files.¹¹ This metadata, the fourth noted difference between paper and electronic information storage, is "hidden"



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This article is based on a presentation at the *ARIAS•U.S. Fall Conference*, November 1, 2007.

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information about file characteristics such as date of creation, revision history, and authorship.¹² Metadata’s relevance in reinsurance arbitration proceedings may vary drastically. While metadata may provide crucial information in some claims, in other cases it may provide little material evidentiary value.¹³

Fifth, electronic information may be useless independent of its environmental backdrop.¹⁴ Often to understand electronic information, one needs to know the context and format of the material.¹⁵ Data storage systems also evolve, making “legacy” data stored under older systems difficult to recover.¹⁶

Finally, electronic information may be deposited in many locations, such as hard drives, network servers, and back-up tapes.¹⁷ However, software allows for quicker and more sophisticated file searching than could be done by individual persons.¹⁸

These six distinctions show some of the factors reinsurance arbitrators should evaluate when choosing how to proceed with e-discovery issues. These difference also bring into sharp focus the economics of discovery, as a party tasked with gathering electronically stored information could have an expensive task ahead of itself. The parties will certainly argue over, and present evidence about, expense associated with responding to requests for electronic discovery, thus testing the panel to cobble together an arrangement that protects the parties abilities to present their respective cases, protect confidential or privileged information, and avoid unnecessary or undue expense.

This paper will next discuss discovery and e-discovery guidelines available for reinsurance arbitrators.

III. Discovery Rules Under the Federal Arbitration Act

The Federal Arbitration Act (“FAA”), enacted in 1925¹⁹, leaves open many questions about the scope of discovery in arbitration. The language of the FAA addresses discovery procedures only briefly and vaguely. Some may argue the lack of explicit discovery rules under the FAA is itself an expression of Congressional intent. To the extent the FAA does refer to discovery, that mention is found in Section 7, which provides that “[t]he arbitrators selected . . . may summon in

writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”²⁰

While § 7 clearly provides arbitrators the ability to summon non-parties and produce documents at hearings, courts are split as to whether § 7 allows arbitrators to order parties to produce documents *before* hearings.²¹ The Sixth and Eighth Circuits allow arbitrators to issue pre-hearing discovery subpoenas on non-parties, while the Third and Fourth Circuits interpret § 7 as preventing pre-hearing discovery subpoenas on non-parties.²²

Although the guidance provided by the FAA is minimal, recent amendments to the Federal Rules of Civil Procedure address e-discovery issues directly.

IV. E-Discovery Under the Federal Rules of Civil Procedure

The December 1, 2006 Federal Rules of Civil Procedure amendments moved electronically stored information onto “equal footing” with traditional paper discovery rules.²³ Rule 16(b)(5) provides that scheduling orders should include provisions for e-discovery and disclosure, in an attempt to remind courts to address e-discovery matters early in litigation.²⁴ Similarly, Rule 26(f) requires parties to discuss e-discovery issues at least twenty-one days before the scheduling conference.²⁵ Comments to Rule 26(f) also suggest that parties familiarize themselves with information systems involved in production and develop a discovery plan accordingly, paying particular attention to data preservation issues.²⁶

The Rules also allow parties to test or sample electronically stored information.²⁷ The Rules permit parties to request different forms of production for different document types, acknowledging that producing all electronically stored information in one format could prove unnecessarily costly.²⁸ However, if the form of production is not specifically indicated, the responding party must produce the information in a “reasonably usable” manner or in the form it is usually maintained.²⁹

E-discovery is narrowed under Rule 26(b)(2)(B), which limits production of

materials “not reasonably accessible because of undue burden or cost.”³⁰ However, the court may nevertheless order discovery if good cause is shown.³¹ The amendments allow the court to balance the costs and burdens associated with some e-discovery against the potential benefits of discovery.³²

Finally, while sanctions may be imposed for e-discovery violations, Rule 37(f) prohibits sanctioning of parties who fail to provide electronically stored information as a result of routine, good-faith system operations.³³ This Rule protects destruction of evidence that occurs without culpable conduct.³⁴ Of course, there is no specific analog under the FAA or elsewhere to Rule 37’s authorization of discovery sanctions, and there are no requirements that parties certify they have complied with and/or responded to discovery requests in good faith. Still, a panel has inherent authority to enforce its orders.

Thus, the amendments to the Federal Rules of Civil Procedure target e-discovery issues directly. But even with these recent changes, many e-discovery procedural questions remain unanswered. For the past four years, courts have used the Sedona Principles to fill in some of the gaps.

V. Sedona Principles

The original Sedona Principles were developed in early 2003 by a group of attorneys and practitioners familiar with e-discovery matters who were concerned that a system developed for paper discovery would not translate to e-discovery.³⁵ The fourteen Sedona Principles were “intended to complement the Federal Rules of Civil Procedure, which provide[d] only broad standards, by establishing guidelines specifically tailored to address the unique challenges posed by electronic document production.”³⁶ “The rules do not answer many of the most vexing questions judges and litigants face. They do not govern a litigant’s conduct before suit is filed, nor do they provide substantive rules of law in such important areas as the duty of preservation or the waiver of attorney-

client privilege.”³⁷ The Sedona Principles provide guidance to attorneys facing e-discovery issues, but maintain enough flexibility to adjust to exceptional circumstances.³⁸

Since Mr. Chaffetz’s and Mr. Frischknecht’s article was published in the *ARIAS•U.S. Quarterly*, the Sedona Conference has revised the original fourteen Sedona Principles. The Second Edition Sedona Principles are provided in Appendix A. New language found in the Second Edition Sedona Principles reflects both the changes in the Federal Rules of Civil Procedure and the evolution of technology itself.³⁹ Rules twelve (metadata) and fourteen (sanctions) have been substantially revised.

In choosing e-discovery guidelines for reinsurance arbitrations, it is helpful to understand the relationship between the Sedona Principles and the Federal Rules of Civil Procedure. The original Sedona Principles influenced both academic and judicial responses to e-discovery issues. As one court noted in 2005, “... neither the federal rules nor case law provides sufficient guidance on the production of metadata, [so] the Court next turns to materials issued by the Sedona Conference ... The Court finds two of the Sedona Principles ... particularly helpful in determining whether Defendant was justified in scrubbing the metadata from the electronic spreadsheets.”⁴⁰

In turn, after the Federal Rules of Civil Procedure e-discovery amendments, the Second Edition Sedona Principles were shaped by the language of the new rules.⁴¹ Today, even with the amended rules, courts reference the Sedona Principles as a “leading resource on dealing with electronic discovery.”⁴²

Because of this interplay between the Sedona Principles and the rules, reinsurance arbitrators should consider both guidelines when formulating a response to e-discovery issues.

VI. Discovery Language Common in Reinsurance Treaties and Contracts

An “access to records” clause is one of the most significant contract rights a reinsurer retains through a reinsurance agreement.⁴³ The clause typically reads, “The Reinsurer or its designated representatives shall have access at any reasonable time to all records of the Company which pertain in any way to this reinsurance.”⁴⁴

One commentator observed that access to records clauses may have originated from the context of treaty reinsurance: “The cedant’s obligation to provide information to the reinsurer ... moved from being an active one, as it is under facultative reinsurance, to a passive one. Instead of the active obligation to provide information when each individual risk was accepted or each claim was made, the cedant had a passive obligation to allow its reinsurer to inspect the books and records.”⁴⁵ This commentator notes, however, that despite the difference between treaty and facultative reinsurance contracts, the access to records provisions typically are identical.⁴⁶

The standard clause allows the reinsurer to review whether the ceding business is complying with the terms and conditions of the reinsurance agreement.⁴⁷ Arbitration panels may include more detailed provisions in procedural guidelines. For example, the panel may require parties to cooperate in document exchange.⁴⁸ The panel may also order disclosure of relevant documents, call for depositions, obtain witness lists, and enforce efficiency through limited document production, and witness and expert testimony.⁴⁹ Indeed, panels may consider imposing a “good faith” requirement, akin to the requirements under the Federal Rules, upon counsel and the parties in their respective duties to cooperate in answering discovery.

The discovery guidelines in *ARIAS’s Practical Guide to Reinsurance Arbitration Procedure* allow panels to exercise “discretion and strike the appropriate balance ... between enabling the parties to obtain relevant discovery ... and protecting the

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streamlined, cost-effective intent of the arbitration process.”⁵⁰ The panel may take sensible action in handling e-discovery requests or objections. Comments to the guidelines reinforce the flexibility built into the panel’s discovery oversight.⁵¹ Comment B explains that some cases may require substantial panel involvement, while in others such participation may be unnecessary or even inappropriate.⁵² Comment E notes the panel’s “considerable discretion to limit the amount and type of discovery available to the parties.”⁵³

Echoing the language of Federal Rule of Civil Procedure 26(b)(2)(B), these guidelines state the panel’s objective should be that each party receive “a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense, or delay on the other part(ies).”⁵⁴

VII. Holding Letters

The task of obtaining or retaining electronically stored information for litigation purposes is difficult. Determining when the duty to preserve attaches, the scope of document preservation, and continued compliance requires communication between attorneys, information systems personnel, and organization leaders. Crafting a litigation hold letter to inform key players within an entity of the duty to preserve documents and electronic data also presents challenges and has been called “among the most difficult, and dangerous, aspects of e-discovery.”⁵⁵

Litigants are required by law to preserve evidence.⁵⁶ This duty originates both from Federal Rule of Civil Procedure 37 and court’s power to control its proceedings.⁵⁷ Determining when the duty attaches requires identifying the point at which a person or organization reasonably anticipates it will be involved in litigation.⁵⁸ While the duty applies to all employees of organizations involved in litigation, it is especially important for senior management and attorneys.⁵⁹ But not all documents need be preserved, even once the duty has attached. As Judge Scheindlin wrote in *Zubulake v. UBS*, “preserv[ing] every shred of paper, every e-mail or electronic document, and every backup tape ... would cripple large corporations ... that are almost always involved in litigation.”⁶⁰ Instead, a litigant is under a duty “to preserve what it knows, or

reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”⁶¹

A litigation hold should be disseminated each time the duty to preserve arises.⁶² It is especially important that key players in the organization receive the letter, and that it is provided to information systems personnel who can develop a plan to retain all protected data.⁶³ Some elements the letter should include are: a clear statement of purpose, a description of arbitration and issues involved, guidelines for data to be maintained, the importance of complying with the litigation hold including penalties for violations, and contact information for those overseeing the hold.⁶⁴ Personnel changes, data storage and maintenance changes, and complacency may reduce the effectiveness of the litigation hold letter over time.⁶⁵ Therefore, it is important to remind organizations of their duty to preserve documents on a regular basis.⁶⁶ A sample litigation hold letter is included in Appendix C.

Sanctions for failure to comply with the duty to preserve data and documents can be severe. In *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, an unfavorable discovery violation finding eventually led to a \$1.57 billion judgment against Morgan Stanley.⁶⁷ Other repercussions include default judgments, adverse inferences, and exclusion of evidence.⁶⁸ If arbitrators follow the trend in the court system, it seems likely that deliberate discovery violations could be punished severely.

VIII. Conclusion

While electronic data storage has become more routine in the operation of virtually every business, guidelines for managing e-discovery in arbitration are still developing. Reinsurance arbitrators will best be served by using a variety of resources to keep abreast of the movement to adapt a paper based system to the e-world in order to ensure that all parties to an arbitration receive a fair hearing in an economically viable and feasible forum.

Appendix A - Sedona Principles: Second Edition⁶⁹

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can be reasonably anticipated to be relevant to litigation.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.
3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.
4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.
6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were adequate.
8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires 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.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.
10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.
11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.
12. 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.
13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared or shifted to the requesting party.
14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

Appendix B⁷⁰

Topic of Discussion	Sedona Principle	Federal Rule(s)	Sedona Comments
Discovery Scope	Principles 1, 2, 5, 6, 8, 9, 11	Rule 34(a)	Comments 1a, 2a, 2b, 2c, 3a, 5a, 6c, 8a, 9a, 9b, 11a, 11b
Preservation Obligations	Principles 1, 3, 5, 6, 8, 9, 12	N.A.	Comments 1c, 2c, 3a, 3d, 5a, 5b, 5c, 5d, 5e, 5g, 5h, 5i, 6a, 6b, 6d, 6e, 6f, 8c, 9b, 12a, 12b, 14a
Form of Preservation	Principle 12	N.A.	Comments 12a, 12b
Metadata	Principle 12	N.A.	Comments 6f, 12a, 12b, 12c, 12d
Form of Production	Principles 4, 12	Rule 34(b)	Comments 3b, 4a, 12a, 12b, 12d
Meet and Confer	Principle 3	Rule 26(f)	Comments 1d, 2e, 3a, 3b, 3c, 3d, 4a, 4c, 5a, 7a, 9a, 10a, 12c
Initial Disclosure	Principle 3	Rule 26(a)(1)	Comment 3d
Preservation Orders	Principle 5	N.A.	Comment 5f
Discovery Requests	Principle 4	Rule 34(a)	Comments 3b, 4a, 4b
Tiered Production	Principle 8	Rule 26(b)(2)(B)	Comments 2c, 8a, 8b, 9a
Cost-Shifting	Principle 13	Rule 26(b)(2)(B)	Comments 2c, 13a, 13b, 13c
Proportionality Limits	Principle 2	Rule 26(b)(2)(C) (was Rule 26(b)(2)(b))	Comments 2a, 2b, 13b
ID of Unsearched Sources	Principle 4	Rule 26(b)(2)(B)	Comments 2c, 3a, 4b, 8b
Inadvertent Privilege Production	Principle 10	Rule 26(b)(2)(5)	Comments 10a, 10d
Spoliation Sanctions	Principle 14	N.A.	Comments 14a, 14b, 14c, 14d, 14e, 14f
Safe Harbor	Principle 14	Rule 37(f)	Comments 14b, 14d, 14f
Nonparty Discovery	Principle 13	Rule 45	Comments 7b, 13c

Appendix C - Sample Holding Letter

Re: [Case Name] - Data Preservation

Dear _____:

This firm represents CLIENT in connection with the above referenced matter recently filed against PLAINTIFF for _____.

CLIENT is in the process of initiating discovery against PLAINTIFF and will soon be forwarding subpoenas to each of you requiring the production of documents and other materials that may lead to admission of relevant evidence in the above matter. Accordingly, please be advised that CLIENT believes that you may be in possession of paper documents and electronically stored information that will be an important and irreplaceable source of discovery and/or evidence during the course of the above proceeding. As such, federal law and the rules of discovery require the preservation of all documents and electronic information on each of your individual computers as well as ORGANIZATION'S computer system. This includes, but is not limited to, e-mail and other electronic communication, internet usage, files and network access information.

As you may be aware, the laws and rules prohibiting the spoliation of evidence apply to electronically stored evidence in the same manner that they apply to other forms of evidence, such as paper documents. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly we request that you take all reasonable steps necessary to preserve this information until the final resolution of this matter. These steps must include, but are not limited to:

- * discontinuing all data destruction;
- * preserving any relevant hardware unless an exact replica of the file (i.e., a mirror image) is made;
- * preserving passwords, decryption procedures (and accompanying software), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software; and
- * maintaining all other pertinent information and tools needed to access, review and reconstruct all requested or potentially relevant electronic data.

Electronic Files. Each of you has an obligation to preserve all digital or analog electronic files in electronic format, regardless of whether hard copies of the information exist. This includes preserving:

- * active data (i.e., data immediately and easily accessible on your systems today);
- * archived data (i.e., data residing on backup tapes or other storage media); and
- * deleted data (i.e., data that has been deleted from a computer hard drive but is recoverable through computer forensic techniques).

Emails. You also have an obligation to preserve all potentially relevant internal and external emails that have been sent or received. Email must be preserved in electronic format, regardless of whether hard copies of the information exist.

Internet Activity. You also have an obligation to preserve all records of internet and web browser generated files in electronic format, regardless of whether hard copies of the information exist. This includes internet and web browser generated history files, caches and "cookies" files stored on backup media.

Activity Logs. You further must preserve all hard copies of electronic logs documenting computer use by you.

Supporting Information. You must preserve all supporting information relating to the requested electronic data and/or media including: codebooks, keys, data dictionaries, diagrams, handbooks, or other supporting documents that aid in reading or interpreting database, media, email, hardware, software, or activity log information.

Offline Data Storage. Offline data storage includes, but is not limited to, backup and archival media, floppy diskettes, magnetic, magneto-optical, and/or optical tapes and cartridges, DVDs, CD ROMs, and other removable media. You should immediately suspend all activity that may result in the destruction or modification of any of the data stored on any offline media. This includes overwriting, recycling or erasing all or part of the media. This request includes, but is not limited to, media used to store data from personal computers, laptops, mainframe computers and servers.

Physical Documents. The rules of discovery, as you may know, also require the preservation of physical documents and related evidence and forbids tampering with or destroying such evidence, whether located at ORGANIZATION or elsewhere.

Each of the foregoing requests and obligations applies equally to ORGANIZATION as it is undoubtedly in possession of documents, data and other information that will be relevant to this case. I thank you in advance for your cooperation and request that this correspondence be forwarded to the appropriate technical personnel within ORGANIZATION so that they may take any steps necessary to preserve physical or electronic data.

To the extent that you have any questions regarding your obligations in connection with the foregoing, please feel free to contact me.

Sincerely,

Litigants are required by law to preserve evidence. This duty originates both from Federal Rule of Civil Procedure 37 and court's power to control its proceedings. Determining when the duty attaches requires identifying the point at which a person or organization reasonably anticipates it will be involved in litigation.

- 1 See Dean W. Sattler, Comment, *Is There a Compelling Interest to Compel? Examining Pre-Hearing Subpoenas Under the Federal Arbitration Act*, 27 PACE L. REV. 117, 138 (2006).
- 2 See SEDONA CONF. WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROT., THE SEDONA PRINCIPLES: SECOND EDITION (June 2007) [hereinafter SEDONA PRINCIPLES: SECOND EDITION], available at http://www.thesedonaconference.org/dltForm?did=TS_C_PRINCP_2nd_ed_607.pdf (discussing best practices recommendations and principles for addressing electronic document production).
- 3 See Peter R. Chaffetz & Andreas A. Frischknecht, *Electronic Discovery in Arbitration*, ARIAS•U.S. Q., 4th Quarter 2006, at 2.
- 4 See Part V and Appendix A, *infra*.
- 5 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 2-5.
- 6 See *id.* at 2.
- 7 See *id.*
- 8 See *id.* at 3.
- 9 See *id.*
- 10 See *id.*
- 11 See *id.*
- 12 See *id.* at 3-4; see also Chaffetz, *supra* note 3, at 2.
- 13 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 4.
- 14 See *id.*
- 15 See *id.*
- 16 See *id.*
- 17 See *id.* at 5.
- 18 See *id.*
- 19 See Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act*, DISP. RESOL. J., Aug.-Oct. 2004, at 46.
- 20 Federal Arbitration Act, 9 U.S.C. § 7 (2000).
- 21 See Pearson, *supra* note 19, at 48.
- 22 See Sattler, *supra* note 1, at 119-20 (citing Am. Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir. 1999); Sec. Life Ins. Co. of Am. v. Duncanson & Holt, 228 F.3d 865, 870 (8th Cir. 2000); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); COMCAST Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999)).
- 23 See FED. R. CIV. PRO. 34 & advisory committee's note ¶1 (2006).
- 24 See FED. R. CIV. PRO. 16(B)(5) & advisory committee's note ¶1.
- 25 See FED. R. CIV. PRO. 26(f).
- 26 See FED. R. CIV. PRO. 26 advisory committee's notes ¶¶ 20, 22.
- 27 See FED. R. CIV. PRO. 34(a) & advisory committee's note ¶6.
- 28 See FED. R. CIV. PRO. 34(b) & advisory committee's note ¶6.
- 29 See FED. R. CIV. PRO. 34(b)(ii) & advisory committee's note ¶13.
- 30 FED. R. CIV. PRO. 26(b)(2)(B).
- 31 See *id.*
- 32 See FED. R. CIV. PRO. 26(2)(C) & advisory committee's notes ¶¶ 3-9.
- 33 See FED. R. CIV. PRO. 37(f).
- 34 See FED. R. CIV. PRO. 37(f) advisory committee's note ¶1.
- 35 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at iv.
- 36 Chaffetz, *supra* note 3, at 8 (quoting SEDONA CONF. WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROT., THE SEDONA PRINCIPLES (July 2005), available at http://www.sedonaconference.org/dltForm?did=7_05TSP.pdf).
- 37 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at iv.
- 38 See *id.* at v.
- 39 See *id.* at i.
- 40 Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 650 (D. Kan. 2005).
- 41 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 6.
- 42 In re Seroquel Prods. Liab. Litig., 2007 WL 2412946, at *6 (M.D. Fla. 2007).
- 43 See Michele L. Jacobson et al., *The Access to Records and Claims Cooperation Clauses: Their Impact on Discovery in Arbitration Proceedings*, ARIAS•U.S. Q., 3rd Quarter 2006, at 2.
- 44 See *id.* (quoting Brokers and Reinsurance Markets Association, Contract Wording, <http://www.brma.org/contracts/index.htm>).
- 45 See Kathryn P. Broderick, *Reinsurer's Access to Cedent's Records*, FED'N OF INS. & CORP. COUNS. Q., Fall 1997, available at http://findarticles.com/p/articles/mi_qa3811/is_19970/ai_n8766939/pg_1 (quoting BARLOW LYDE & GILBERT, REINSURANCE PRACTICE AND THE LAW § 18.2 (1993 & 1996 Supp.)).
- 46 See *id.*
- 47 See Jacobson, *supra* note 43, at 2.
- 48 See Insurance and Reinsurance Dispute Resolution Task Force, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (Apr. 2004), http://www.arbitrationtaskforce.org/images/Procedures2004_final.pdf.
- 49 See *id.* §§ 11.1-11.5.
- 50 See ARIAS•US, PRACTICAL GUIDE TO REINSURANCE ARBITRATION PROCEDURE § 4.1 cmt. E (rev. ed. 2004), available at <http://www.arias-us.org/index.cfm?a=41>.
- 51 See *id.* § 4.1 cmts.
- 52 See *id.* § 4.1 cmt. B.
- 53 See *id.* § 4.1 cmt. E.
- 54 See *id.*
- 55 MICHAEL E. LACKEY, *Litigation Holds: Practical Considerations*, in LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 279, 281 (Practising Law Institute, 2006).
- 56 See Alan M. Anderson, *Issuing and Managing Litigation-Hold Notices*, BENCH & B. MINN., Aug. 2007, at 20.
- 57 See *id.* at 20 n.1.
- 58 See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("The obligation to preserve evidence 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." (quoting Fujitsu Ltd. v. Federal Express Corp., 247 F.2d 423, 436 (2d Cir. 1999))).
- 59 See Anderson, *supra* note 56, at 20.
- 60 Zubulake, 220 F.R.D. at 217.
- 61 *Id.*
- 62 See Anderson, *supra* note 56, at 21.
- 63 See *id.* at 22.
- 64 See *id.* at 22-23.
- 65 See LACKEY, *supra* note 55, at 286-87.
- 66 See Anderson, *supra* note 56, at 23.
- 67 See Chaffetz, *supra* note 3, at 3 (citing Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA-03-5045 Al, 2005 WL 674885 (Fla. Cir. Ct. App. Mar. 23, 2005)).
- 68 See LACKEY, *supra* note 55, at 287.
- 69 See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at ii.
- 70 This chart was created by the Sedona Conference Working Group on Electronic Document Retention & Production. See SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at iii.