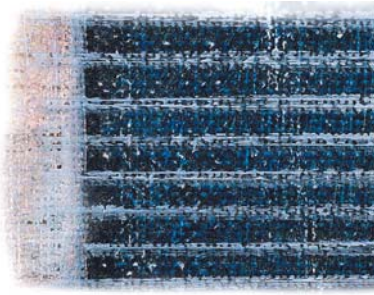
**MORE THAN A YEAR AGO, Judge Shira Scheindlin handed down her fifth in a series of opinions addressing e-discovery issues in *Zubulake v UBS Warburg LLC (Zubulake V).*[1] In this decision, Judge Scheindlin outlined parties' and counsel's obligations to preserve and produce electronic information in the course of litigation. While Judge Scheindlin's opinion takes these obligations to a completely new level, particularly for outside counsel, it has been met with little criticism. While her opinion may keep some counsel up at night, it is at least a light in the otherwise dark arena of e-discovery. Therefore, until there is specific precedent in our jurisdiction on this issue, Michigan lawyers and their clients are well advised to work within the parameters of *Zubulake V.***

# Zubulake V

# Counsel's Obligations to Preserve and Produce Electronic Information



BY JANET RAMSEY

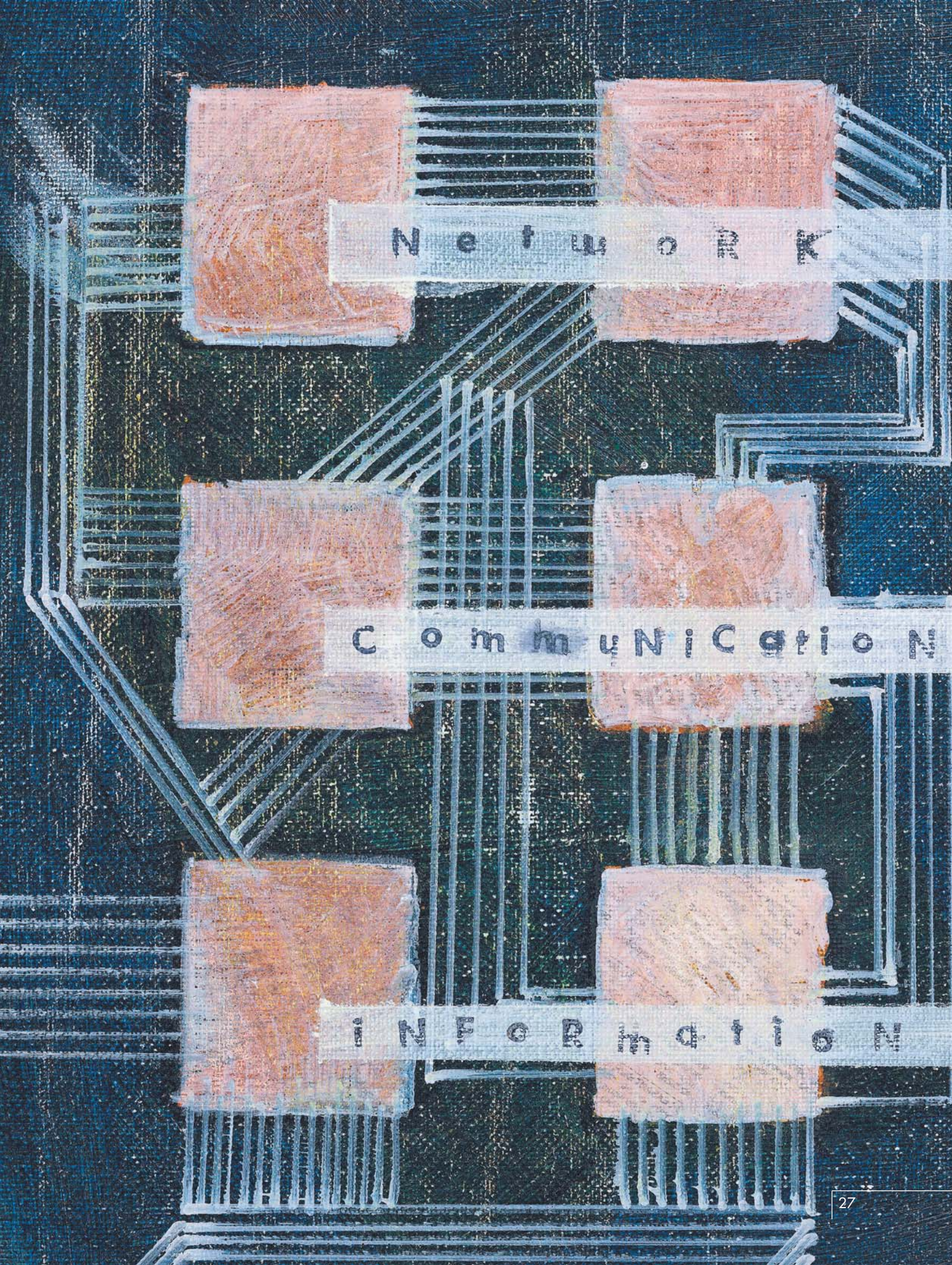
Some Michigan lawyers may ask themselves: Why should we be concerned about a Southern District of New York decision? As Michigan lawyers in both state and federal court, we should be concerned about this decision because even a year after *Zubulake V* was handed down, Judge Scheindlin is still the only real game in town. She is an "observer" to the Sedona Conference Working Group, a research institute that publishes proposed guidelines for dealing with thorny legal issues, such as the duty to preserve electronic documents. In fact, the Sedona Guidelines adopted many of Judge Scheindlin's suggestions in *Zubulake V.*[2] In addition, *Zubulake V* has already been influential outside the Southern District of New York.[3] Many lawyers may have read press regarding the opinion last year and dismissed it as an anomaly. To do so would be dangerous. Therefore, this article will outline Judge Scheindlin's decision in *Zubulake V* and the resulting obligations for counsel.

## *Zubulake V:* To Preserve and Produce

In *Zubulake V,* the plaintiff filed a gender discrimination claim against her employer. In her initial discovery requests, she requested the usual documents, including electronic information. More than two years later, and after four written decisions by the district court regarding e-discovery, the plaintiff was still attempting to receive all requested discovery, without much success. As a result, Judge Scheindlin issued *Zubulake V* and addressed not only a party's obligations to adequately preserve and produce electronic information, but counsel's obligations as well.

The lawyers in *Zubulake V* were actually relatively sophisticated in the area of e-discovery. To preserve electronic information, they did all of the following: (a) gave oral instructions to employees, telling them not to destroy or delete relevant information; (b) instructed IT personnel to stop recycling backup tapes after receiving a discovery request for backup tapes; and (c) met with a number of key players in the litigation and instructed them to preserve relevant documents, including e-mails.

Despite these efforts, the plaintiff discovered that certain backup tapes had been deleted, at least one e-mail had been permanently lost, and many e-mails were produced long after her requests were made, due to the complicated recovery efforts required. Based on this evidence, the district court held that certain employees had acted willfully in destroying this electronic information, and sanctioned the company with costs, fees, and, most importantly, an adverse inference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instruction regarding the deleted e-mails that were lost.

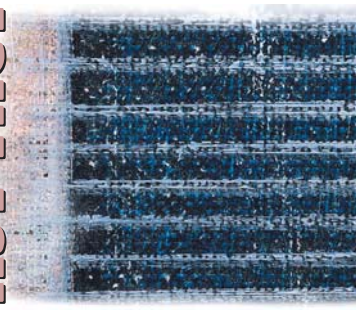
In addition, Judge Scheindlin discussed at length *counsel's* failure to prevent this result. In particular, she criticized counsel for failing to understand how electronic information was stored, failing to communicate the litigation hold that was issued to certain key employees, failing to directly ask another key employee to produce her electronic files, and failing to preserve relevant backup tapes. However, because of the dearth of caselaw regarding counsel's obligations in this area, Judge Scheindlin stayed her hand and did not sanction the lawyers involved. What she did instead was outline a series of guidelines for counsel when dealing with e-discovery issues.

**Counsel's obligation under *Zubulake V* is to locate all sources of potentially relevant information, whether in paper or electronic form, and preserve this information.**

**Clients need to be aware of all duties to preserve information, whether imposed by litigation or state or federal regulation.**

**Until clients begin to realize the impact of technology in litigation, client education is necessary to provide the best service possible and avoid potentially damaging sanctions litigation.**

FAST FACTS



## Counsel's Obligations After *Zubulake V*

Counsel's overarching obligation under *Zubulake V* is to locate all sources of potentially relevant information and preserve this information. In order to do this adequately, Judge Scheindlin states that counsel must become fully familiar with the client's document retention policies and data retention architecture. To accomplish this, counsel must speak to the client's information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy.

Counsel must then communicate with key players in the litigation to understand how they stored information. "Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected." Judge Scheindlin, anticipating the outcry this obligation would require, goes on to state that if it is not feasible to speak with every key player, "counsel must be more creative." For example, she recommends that it may be possible to run a system-wide keyword search. If so, counsel could then preserve a copy of each "hit" to review at a later time.

However "creative" counsel becomes in his/her initial litigation hold protocol, "[i]t is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information." Therefore, *Zubulake V* imposes a continuing obligation on counsel to communicate this hold to new employees, and remind current employees of their obligations. According to Judge Scheindlin, this obligation should not come as a surprise under the duty to supplement discovery responses under Federal Rules of Civil Procedure 26. This continuing duty to supplement disclosures then "strongly suggests that parties also have a duty to make sure that discoverable information is not lost." As a result, counsel must make sure that relevant information is retained. "[A] party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel." And, because counsel is more aware of the legal duties surrounding e-discovery preservation and production, counsel must be actively involved and monitor these obligations.

To comply with Judge Scheindlin's approach outlined in *Zubulake V,* counsel should take the following steps when he/she reasonably anticipates litigation:

1. **Determine the scope of the litigation hold.** Counsel must first determine the scope of information that must be preserved. This includes not only identifying relevant subject matters and employees, but also sites of potentially relevant information, such as hard drives, backup tapes, or personal digital assistants. Ninety-two percent of the new information created today is in electronic form, and the majority of that information is never reduced to paper.[4] As this trend towards "paperless" offices continues, it becomes imperative that counsel know which methods the client uses to communicate both internally and externally.

2. **Know the system.** To manage this issue effectively, counsel must become familiar with the client's document retention policies and IT system. This will inevitably involve a discussion between counsel and the client's IT representative regarding all possible locations of potentially relevant information, as well as the procedures that need to be put in place to preserve this information.

A plain language understanding of these systems is also essential for the client's entire leadership team. Some of the biggest e-discovery sanctions have been handed down for an executive officer's failure to comply with his or her discovery obligations.[5] For example, in *United States v Philip Morris USA Inc,*[6] the court sanctioned 11 corporate managers and/or officers $250,000 *each* for failing to comply with the in-house document preservation policy.

3. **Issue the litigation hold.** Counsel must issue a "litigation hold" at the onset of litigation or whenever litigation is reasonably anticipated. This hold should be periodically re-issued so that new employees are aware of it and it is fresh in the minds of all employees.

4. **Communicate, discuss, and reissue the litigation hold.** Counsel cannot simply send a litigation hold form letter and consider his/her duties satisfied. Instead, counsel must communicate directly with the "key players" in the litigation, which include, at a minimum, those individuals identified in the client's initial disclosure. These key players should be periodically reminded that the preservation duty is still in place.

5. **Implement full production.** Instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media that the party is required to retain is identified and stored in a safe place. If there is a small

number of backup tapes, counsel should take physical possession; if a larger number, they should be segregated and placed in storage.

The above five steps merely outline the basic guidelines of *Zubulake V.* For further guidance, please see the recommended resources listed at the end of this article.

## Morgan Stanley: Why e-Discovery Compliance is Imperative

Many lawyers may read the *Zubulake V* e-discovery preservation and production obligations and think: Why bother? What's the worst that could happen? As Morgan Stanley & Co., Inc. and its lawyers at Kirkland & Ellis recently learned, courts are taking these obligations quite seriously. In *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc,* the plaintiff, billionaire financier Ronald O. Perelman, was awarded more than $1.4 billion by a jury that said it found evidence that defendant Morgan Stanley acted fraudulently in plaintiff's 1998 sale of his Coleman Holdings Inc. to Sunbeam Corp. This award, which represents $604.3 million in compensatory damages and $850 million in punitive damages, was entered after the jury received an adverse inference instruction related to Morgan Stanley's e-discovery tactics. The court also revoked the pro hac vice admission of one of the Kirkland & Ellis lawyers due to these same e-discovery tactics.

Pursuant to SEC regulations, the investment firm was required to retain e-mails in a readily accessible form for two years. Despite this federal regulation, Morgan Stanley continued to overwrite e-mails every 12 months. In addition, Morgan Stanley was ordered to produce backup tapes, review e-mails, conduct searches, produce responsive documents, and then provide a certification of compliance with this order. Morgan Stanley filed a certification of compliance with the court, even though it knew that thousands of backup tapes had not been reviewed. In addition, Morgan Stanley never alerted the plaintiff or the court to these additional backup tapes and other responsive information until months after it had filed the certificate of compliance. The court granted the plaintiff's motion for an adverse inference instruction, noting "[t]he conclusion is inescapable that [the defendant] sought to thwart discovery."[7]

Not only was an adverse inference instruction issued, but the plaintiff's attorney was also allowed to discuss Morgan Stanley's behavior in his closing argument. "Morgan Stanley hid evidence, Morgan Stanley destroyed evidence, Morgan Stanley filed false certifications, Morgan Stanley lied to the court and Morgan Stanley sought in every way possible to cover up its wrongdoing," plaintiff's attorney, John Scarola, said in closing arguments.[8] In light of this type of evidence, the jury's award seems inevitable.

Morgan Stanley's experience demonstrates many lessons. Clients need to be aware of all duties to preserve electronic information, whether imposed by litigation or state or federal regulation. In addition, it should not need to be said, but complete candor with the court is vital during e-discovery. The lawyer needs to be able to explain the client's IT system, as well as any burden or expense involved in producing information off that system. If necessary, work with the client's IT representative to provide a plain English explanation of the procedure and expense for complying with these e-discovery obligations. Finally, Morgan Stanley's problems began when they did not follow the first step listed above—determine your scope. Morgan Stanley and its attorneys never sat down and had a true grasp of the extent of potentially relevant electronic information. Lacking this basic foundation, they became trapped in a cycle of finding additional electronic information, having to review and produce it, and then having to explain its late disclosure.

## *Zubulake V:* Does It Go Too Far?

At first, second, and even third glance, the *Zubulake V* obligations seem onerous. But in light of the lax attitude many corporate entities take towards the preservation and production of electronic information, counsel may, in fact, be the party best situated to prevent the destruction of this information. However, it is not the Arthur Andersons and Enrons of the world that are the most likely problems.

Instead, research indicates that most companies simply are not prepared to efficiently preserve and produce electronic information when the time comes. In 2000, the American Bar Association's Section of Litigation conducted a survey at its annual meeting to determine clients' level of preparedness for e-discovery issues.[9] The survey found that 82 percent of the lawyers' clients did not have an established protocol for handling electronic discovery requests.[10] In addition, approximately 60 percent of the lawyers said that in 30 to 60 percent of their cases involving e-discovery, their clients were not aware that electronic information could later become evidence in litigation.[11]

This level of unpreparedness is also supported by the results of a 2003 survey of records management professionals.[12] This survey found that 47 percent of the organizations polled did not include electronic records in their document retention schedules, and 59 percent did not have any formal e-mail retention policy.[13] In addition, 65 percent of the organizations do not include electronic records in their legal holds, and only 54 percent even have a formal system for implementing legal holds.[14] Finally, while 93 percent of the organizations believe that the process by which their electronic records are managed will be important in future litigation, 62 percent are either "not at all confident" or only "slightly confident" that their organization could demonstrate that its electronic records were accurate, reliable and trustworthy.[15] In light of these responses, the survey concluded that most organizations "are not prepared to meet many of their current or future compliance and legal responsibilities."[16]

In light of this research, requiring counsel to educate their clients on electronic information preservation and production does not seem too unreasonable. Until clients begin to realize the impact of technology in litigation, client education on this issue is necessary to provide the best service possible and avoid potentially damaging sanctions litigation.

## Recommended Resources

- ABA Civil Discovery Standards, amended in August of 2004, available at http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf.

- ALAS Loss Prevention Hotline Bulletin No. 2004-19 (August 9, 2004).
- Federal Rules of Civil Procedure, Proposed Amendments. See Report of the Civil Rules Advisory Committee, August 2004, available at http://www.uscourts.gov/rules/newrules1.html.
- Lange, Michele C. S. and Kristin M. Nimsger, *Electronic Evidence and Discovery: What Every Lawyer Should Know* (ABA Second on Science and Technology 2004).
- Phillips, Karen K., "Further Thoughts on Preserving Electronic Documents," *ALAS Loss Prevention Journal,* Volume XVI, No. 2, Summer 2005.
- *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (September 2004 Public Comment Draft), available at http://www.thesedonaconference.org/publications_html.
- *The Sedona Principles: Best Practices Recommendation & Principles for Addressing Electronic Document Production* (January 2004), available at http://www.thesedonaconference.org/publications_html.
- Warner Norcross & Judd LLP Privacy and Information Taskforce, Rodney Martin, Chair, http://www.wnj.com. ◆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## Footnotes

1. 2004 WL 1620866 (SD NY July 20, 2004).
2. See *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (September 2004 Public Comment Draft), available at http://www.thesedonaconference.org/publications_html.
3. See *Mosaid Technologies Inc v Samsung Electronics Co, Ltd,* 348 F Supp 2d 332 (D NJ 2004); *Hagemeyer North America, Inc v Gateway Data Sciences Corp,* 222 FRD 594 (ED Wis 2004); *Portis v City of Chicago,* 2004 WL 2812084 (ND Ill 2004).
4. See Lyman, Peter and Hal R. Varian, "How Much Information? 2003," available at http://www.sims.berkeley.edu/how-much-info-2003.
5. *United States v Philip Morris USA Inc,* 327 F Supp 2d 21 (D DC 2004) (sanctioning 11 corporate managers and/or officers $250,000 each for failing to comply with the in-house policy); *Danis v USN Communications, Inc,* 2000 WL 1694325 (ND Ill 2000) (recommending that defendant CEO be sanctioned $10,000 for document preservation failings).
6. 327 F Supp 2d 21 (D DC 2004).
7. *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc,* 2005 WL 679071 (Fla Cir Ct Mar 1, 2005); see also *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc,* 2005 WL 674885 (Fla Cir Ct Mar 23, 2005).
8. Jill Barton, "Jury Orders Firm to Pay Perelman $1.4 Billion: Morgan Stanley Cited for Fraud in Coleman Sale," *Washington Post,* May 19, 2005, at E03.
9. PricewaterhouseCoopers/ABA Section of Litigation Pulse Survey, "Digital Discovery and Its Importance on the Practice of Litigation," available at http://www.pwcglobal.com/extweb/ncsurvres.nsf/DocID/OB7E36DD776473F3852568E0004C0165.
10. Id.
11. Id.
12. Robert F. Williams, "Electronic Records Management Survey: A Call to Action," available at http://www.merresource.com/whitepapers/pdf/survey.pdf.
13. Id.
14. Id.
15. Id.
16. Id.