

Principles and Guidelines from The Sedona Conference®

October 2012

(Most recent publication included is International Principles)

Links to Related Items:

State Court and Local Federal Rules

Summary of Selected eDiscovery Cases, 2010 to Present

Summary of Selected eDiscovery Cases Before 2010



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OVERVIEW

This document compiles principles, guidelines, and practice points from Sedona publications pertaining to electronic discovery in U.S. courts. All publications cited below are available at <https://thesedonaconference.org//publications>.

A. Production (2007)

Full title: *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. 2007)

Principle 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 reasonably be anticipated to be relevant to litigation.

Principle 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.

Principle 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.

Principle 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.

Principle 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.

Principle 6

Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

Principle 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 inadequate.

Principle 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.

Principle 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.

Principle 10

A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.

Principle 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.

Principle 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.

Principle 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 by or shifted to the requesting party.

Principle 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.

B. RIM (2007)

Full title: *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age* (2d ed. 2007)

Guideline 1

An organization should have reasonable policies and procedures for managing its information and records.

- (a) Information and records management is important in the electronic age.
- (b) The hallmark of an organization's information and records management policies should be reasonableness.
- (c) Defensible policies need not mandate the retention of all information and documents.

Guideline 2

An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.

- (a) No single standard or model can fully meet an organization's unique needs.
- (b) Information and records management requires practical, flexible and scalable solutions that address the differences in an organization's business needs, operations, IT infrastructure and regulatory and legal responsibilities.
- (c) An organization must assess its legal requirements for retention and destruction in developing an information and records management policy.
- (d) An organization should assess the operational and strategic value of its information and records in developing an information and records management program.
- (e) A business continuation or disaster recovery plan has different purposes from those of an information and records management program.

Guideline 3

An organization need not retain all electronic information ever generated or received.

- (a) Destruction is an acceptable stage in the information life cycle; an organization may destroy or delete electronic information when there is no continuing value or need to retain it.

- (b) Systematic deletion of electronic information is not synonymous with evidence spoliation.
- (c) Absent a legal requirement to the contrary, organizations may adopt programs that routinely delete certain recorded communications, such as electronic mail, instant messaging, text messaging and voice-mail.
- (d) Absent a legal requirement to the contrary, organizations may recycle or destroy hardware or media that contain data retained for business continuation or disaster recovery purposes.
- (e) Absent a legal requirement to the contrary, organizations may systematically delete or destroy residual, shadowed or deleted data.
- (f) Absent a legal requirement to the contrary, organizations are not required to preserve metadata; but may find it useful to do so in some instances.

Guideline 4

An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.

- (a) Information and records management policies must be put into practice.
- (b) Information and records management policies and practices should be documented.
- (c) An organization should define roles and responsibilities for program direction and administration within its information and records management policies.
- (d) An organization should guide employees regarding how to identify and maintain information that has a business purpose or is required to be maintained by law or regulation.
- (e) An organization may choose to define separately the roles and responsibilities of content and technology custodians for electronic records management.
- (f) An organization should consider the impact of technology (including potential benefits) on the creation, retention and destruction of information and records.
- (g) An organization should recognize the importance of employee education concerning its information and records management program, policies and procedures.
- (h) An organization should consider conducting periodic compliance reviews of its information and records management policies and procedures, and responding to the findings of those reviews as appropriate.
- (i) Policies and procedures regarding electronic management and retention should be coordinated and/or integrated with the organization's policies regarding the use of property and information, including applicable privacy rights or obligations.
- (j) Policies and procedures should be revised as necessary in response to changes in workforce or organizational structure, business practices, legal or regulatory requirements and technology.

Guideline 5

An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.

- (a) An organization must recognize that suspending the normal disposition of electronic information and records may be necessary in certain circumstances.
- (b) An organization's information and records management program should anticipate circumstances that will trigger the suspension of normal destruction procedures.
- (c) An organization should identify persons with authority to suspend normal destruction procedures and impose a legal hold.
- (d) An organization's information and records management procedures should recognize and may describe the process for suspending normal records and information destruction and identify the individuals responsible for implementing a legal hold.
- (e) Legal holds and procedures should be appropriately tailored to the circumstances.
- (f) Effectively communicating notice of a legal hold should be an essential component of an organization's information and records management program.
- (g) Documenting the steps taken to implement a legal hold may be beneficial.
- (h) If an organization takes reasonable steps to implement a legal hold, it should not be held responsible for the acts of an individual acting outside the scope of authority and/or in a manner inconsistent with the legal hold notice.
- (i) Legal holds are exceptions to ordinary retention practices and when the exigency underlying the hold no longer exists (*i.e.*, there is no continuing duty to preserve the information), organizations are free to lift the legal hold.

C. Protective Orders (2007)

Full title: *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases (2007)* (only the discovery principles are reprinted here)

Principle 1

There is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court.

Principle 2

Absent an agreement between the parties or a court order based on a showing of good cause, a litigant is not precluded from disclosing the fruits of discovery to non-parties.

Principle 3

A protective order entered under Fed. R. Civ. P 26(c) to facilitate the exchange of discovery materials does not substitute for the individualized judicial determination necessary for sealing such material, if filed with the court on a non-discovery matter.

Principle 4

On a proper showing, non-parties should be permitted to intervene to challenge a protective order.

D. Search (2007)

Full title: *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* (2007 Public Comment Version)

Practice Point 1

In many settings involving electronically stored information, reliance solely on a Manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. In such cases, the use of automated search methods should be viewed as reasonable, valuable, and even necessary.

Practice Point 2

Success in using any automated search method or technology will be enhanced by a well thought out process with substantial human input on the front end.

Practice Point 3

The choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.

Practice Point 4

Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.

Practice Point 5

The use of search and information retrieval tools does not guarantee that all responsive documents will be identified in large data collections, due to characteristics of human language. Moreover, differing search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval.

Practice Point 6

Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).

Practice Point 7

Parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials).

Practice Point 8

Parties and the courts should be alert to new and evolving search and information retrieval methods.

E. Email Management (2007)

Full title: *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy (2007)*

Guideline 1

Email retention policies should reflect the input of functional and business units through a team approach and should include the entire organization including any operations outside the United States.

Guideline 2

The team should develop a current understanding of email retention policies and practices actually in use within the entity.

Guideline 3

An entity should select features for updates and revisions of email retention policy with the understanding that a variety of possible approaches reflecting size, complexity and policy priorities are possible.

Guideline 4

Any technical solutions should meet the functional requirements identified as part of policy development and should be carefully integrated into existing systems.

F. Not Reasonably Accessible Sources (2008)

Full title: *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that Are Not Reasonably Accessible (2008)*

Guideline 1

Where litigation is anticipated but no plaintiff has emerged or other considerations make it impossible to initiate a dialogue, the producing party should make preservation decisions by a process conforming to that set forth in the Decision Tree in Figure 1.

Guideline 2

As soon as feasible, preservation issues should be openly and cooperatively discussed in sufficient detail so the parties can reach mutually satisfactory

accommodation and also evaluate the need, if any, to seek court intervention or assistance.

Guideline 3

In conjunction with the initial discussions or where appropriate in the response to discovery requests, parties should clearly identify the inaccessible sources reasonably related to the discovery or claims which are not being searched or preserved.

Guideline 4

A party should exercise caution when it decides for business reasons to move potentially discoverable information subject to a preservation duty from accessible to less accessible data stores.

Guideline 5

It is acceptable practice, in the absence of an applicable preservation duty, for entities to manage their information in a way that minimizes accumulations of inaccessible data, provided that adequate provisions are made to accommodate preservation imperatives.

Guideline 6

An entity should encourage appropriate cooperation among legal and other functions and business units within the organization to help ensure that preservation obligations are met and that resources are effectively utilized.

G. Quality in E-Discovery Process (2009)

Full title: *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process (2009 Public Comment Version)*

Principle 1

In cases involving ESI of increasing scope and complexity, the attorney in charge should utilize project management and exercise leadership to ensure that a reasonable process has been followed by his or her legal team to locate responsive material.

Principle 2

Parties should employ reasonable forms or measures of quality at appropriate points in the ediscovery process, consistent with the needs of the case and their legal and ethical responsibilities.

Principle 3

Implementing a well thought out e-discovery “process” should seek to enhance the overall quality of the production in the form of: (a) reducing the time from request to response; (b) reducing cost; and (c) improving the accuracy and completeness of responses to requests.

Principle 4

Practicing cooperation and striving for greater transparency within the adversary paradigm are key ingredients to obtaining a better quality outcome in e-discovery. Parties should confer early in discovery, including, where appropriate, exchanging information on any quality measures which may be used.

H. Inactive Information Sources (2009)

Full title: *The Sedona Conference® Commentary on Inactive Information Sources* (2009 Public Comment Version)

Principle 1

Subject to any preservation obligations related to pending or reasonably anticipated litigation or government investigation, an organization should take reasonable steps to determine whether an inactive information store contains information that the organization should retain based on legal retention requirements or business needs.

Principle 2

Subject to any preservation obligations related to pending or reasonably anticipated litigation or government investigation, an organization should avoid excessive retention of inactive information by destroying it when it is no longer necessary to meet legal retention requirements or business needs.

Principle 3

An organization should take reasonable steps to determine whether an inactive information store contains information that is potentially relevant in a pending or reasonably anticipated litigation or government investigation.

Principle 4

An organization should take reasonable measures, through IT practices and user-facing policies and procedures, to reduce the ongoing accumulation of inactive information.

Principle 5

An organization should consider establishing policies and procedures for the orderly migration of data required to be retained or preserved to supported formats, systems and media to reduce the need to retain/preserve inactive information.

Principle 6

An organization should consider whether and how its policies/procedures regarding inactive information should apply to third parties in possession of the organization's inactive information.

Principle 7

An organization should consider periodically reviewing and updating any policies and procedures regarding inactive information to account for changes in laws,

new forms of inactive information, and new technical capabilities or changes in business organization or requirements.

Principle 8

An organization should take reasonable steps to index/identify/organize/map corporate records (as reasonable, based on business needs) so as to minimize over-retention and disorganization.

I. Legal Holds (2010)

Full title: *The Sedona Conference® Commentary on Legal Holds: The Trigger & the Process* (2010)

Guideline 1

A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

Guideline 2

Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.

Guideline 3

Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

Guideline 4

Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

Guideline 5

Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made.

Guideline 6

The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

Guideline 7

Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the

accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

Guideline 8

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

- (a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective
- (b) Is in an appropriate form, which may be written
- (c) Provides information on how preservation is to be undertaken
- (d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
- (e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9

An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

Guideline 10

Compliance with a legal hold should be regularly monitored.

Guideline 11

Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

J. Proportionality (2010)

Full title: *The Sedona Conference® Commentary on Proportionality in Electronic Discovery (2010)*

Principle 1

The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

Principle 2

Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

Principle 3

Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

Principle 4

Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

Principle 5

Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

Principle 6

Technologies to reduce cost and burden should be considered in the proportionality analysis.

K. Databases (2011)

Full title: *The Sedona Conference® Database Principles: Addressing the Preservation & Production of Databases & Database Information in Civil Litigation* (2011 Public Comment Version)

Principle 1

Absent a specific showing of need or relevance, a requesting party is entitled only to database fields that contain relevant information, not the entire database in which the information resides or the underlying database application or database engine.

Principle 2

Due to differences in the way that information is stored or programmed into a database, not all information in a database may be equally accessible, and a party's request for such information must be analyzed for relevance and proportionality.

Principle 3

Requesting and responding parties should use empirical information, such as that generated from test queries and pilot projects, to ascertain the burden to produce information stored in databases and to reach consensus on the scope of discovery.

Principle 4

A responding party must use reasonable measures to validate ESI collected from database systems to ensure completeness and accuracy of the data acquisition.

Principle 5

Verifying information that has been correctly exported from a larger database or

repository is a separate analysis from establishing the accuracy, authenticity, or admissibility of the substantive information contained within the data.

Principle 6

The way in which a requesting party intends to use database information is an important factor in determining an appropriate format of production.

L. International Principles (2011)

Full title: *The Sedona Conference® International Principles on Discovery, Disclosure & Data Protection (2011)*

Principle 1

With regard to data that is subject to preservation, disclosure, or discovery, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.

Principle 2

Where full compliance with both Data Protection Laws and preservation, disclosure, and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.

Principle 3

Preservation or discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.

Principle 4

Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict.

Principle 5

A Data Controller subject to preservation, disclosure, or discovery obligations should be prepared to demonstrate that data protection obligations have been addressed and that appropriate data protection safeguards have been instituted.

Principle 6

Data Controllers should retain Protected Data only as long as necessary to satisfy legal or business needs. While a legal action is pending or remains reasonably anticipated, Data Controllers should preserve relevant information, including relevant Protected Data, with appropriate data safeguards.