The Sedona Conference®

Working Group One on Electronic Document Retention and Production (WG1)

The Sedona Conference® is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. Through a combination of Conferences, Working Groups, and the "magic" of dialogue, The Sedona Conference® seeks to move the law forward in a reasoned and just way. The Sedona Conference® succeeds through the generous contributions of time by its faculties and Working Group members, and is able to fund its operations primarily through the financial support of its members, conference registrants, and sponsorships.

The Sedona Conference® Working Group Series is a series of think-tanks consisting of leading jurists, lawyers, experts and consultants brought together by a desire to address various "tipping point" issues in each area under consideration. We have Working Groups up and running in all three areas of our focus (antitrust law, complex litigation and intellectual property rights), and the output of our Working Groups is frequently submitted for peer review at our Regular Season Conferences, other legal education programs and otherwise. We created the Working Group Series Membership Program to allow all interested people to participate in the process through the provision of early input to Working Group drafts, and access to Members Only postings and Discussion Forums. Membership is open to all, and free to full-time government employees.

Working Group One on Electronic Document Retention and Production was formed in October 2002 with the charge to develop "principles and best practices recommendations for electronic document retention and production." Its most influential work product is *The Sedona Principles for Electronic Document Production*, which was first released for public comment in July 2003. In its first few months, it was citied in the landmark *Zubulake* decision on e-discovery and by the Advisory Committee on Rules of Civil Procedure of the Judicial Conference of the United States in their deliberation on proposed rule amendments.

During 2007, *The Sedona Principles* were updated in light of the new Federal Rules of Civil Procedure and case law developments. The Annotated version of *The Sedona Principles* (Second Edition), with citations to more than 1,000 state and federal judicial opinions, was published by BNA. During 2008, WG1 released updated editions of three other oft-cited publications, *The Sedona Conference® Glossary*, *The Sedona Guidelines for Managing Information & Records in the Electronic Age*, and *Best Practices for the Selection of Electronic Discovery Vendors*. Working Group One also published Commentaries on legal holds, email management and archiving, search and retrieval methods, preservation of "not reasonably accessible" ESI, discovery of ESI held by non-parties, achieving quality in e-discovery process, and ESI evidence and admissibility.

All publications of The Sedona Conference® Working Group Series are available free for individual download and use from The Sedona Conference® web site, http://www.thesedonaconference.org. The most recent publications are listed on the opening page, and all publications are listed under the "Publications" tab. We urge you visit the web site, explore the resources, and consider joining Working Group One.

The Sedona Principles for Electronic Document Production
Second Edition

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.

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 inadequate.

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 by 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.

The Sedona Conference® Glossary:

E-Discovery and Digital Information Management (Third Edition, 2010)

This authoritative Glossary is an outgrowth of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1) and represents the work of its RFP+ Group: a panel of users of electronic discovery vendor services (two from defense firms, two from plaintiff firms, one from a corporate law department, and one consultant/attorney) with input from the RFP+ Vendor Panel, a group of over 35 electronic discovery vendors who signed up as members to support this effort in response to an open invitation, and significant input from the public since the first edition was published in 2005. The goal is to create a common language to facilitate the process of communication between client and counsel, between counsel and e-discovery product and service vendors, between opposing counsel negotiating the scope and conduct of e-discovery. It has also been cited in law review articles and by state and federal courts in e-discovery decisions.

The Glossary defines more than 500 e-discovery terms, from **ablate**[1] to **zone OCR**[2], including such commonly-used (and often misused) terms as **deletion**[3] and **metadata**[4].

The Glossary is available free for individual non-commercial use from The Sedona Conference®, http://www.thesedonaconference.org.

[1] "**Ablate:** Describes the process by which laser-readable 'pits' are burned into the recorded layer of optical discs, DVD-ROMs and CD-ROMs."

[2] "**Zone OCR:** An add-on feature of imaging software that populates data fields by reading certain regions or zones of a document, and then placing the recognized text into the specified field."

[3] "**Deletion:** The process whereby data is removed from active files and other data storage structures on computers and rendered more inaccessible except through the use of special data recovery tools designed to recover deleted data. Deletion occurs on several levels in modern computer systems: (a) File level deletion renders the file inaccessible to the operating system and normal application programs and marks the storage space occupied by the file's directory entry and contents as free and available to re-use for data storage, (b) Record level deletion occurs when a record is rendered inaccessible to a database management system (DBMS) (usually marking the record storage space as available for re-use by the DBMS, although in some cases the space is never reused until the database is compacted) and is also characteristic of many email systems (c) Byte level deletion occurs when text or other information is deleted from the file content (such as the deletion of text from a word processing file); such deletion may render the deleted data inaccessible to the application intended to be used in processing the file, but may not actually remove the data from the file's content until a process such as compaction or rewriting of the file causes the deleted data to be overwritten."

[4] "**Metadata:** Data typically stored electronically that describes characteristics of ESI, found in different places in different forms. Can be supplied by applications, users or the file system. Metadata can describe how, when, and by whom ESI was collected, created, accessed, modified, and how it is formatted. Can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. See also Application Metadata, Document Metadata, Email Metadata, Embedded Metadata, File System Metadata, User-Added Metadata, and Vendor-Added Metadata. For a more thorough discussion, see *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Second Edition)."

The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process

Information is the lifeblood of the modern world, a fact that is at the core of our litigation discovery system. The law has developed rules regarding the manner in which information is to be treated in connection with litigation. One of the principal rules is that whenever litigation is reasonably anticipated or pending against an organization – or an organization contemplates initiating litigation – that organization has a duty to take reasonable steps to preserve relevant information. The duty to preserve information includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation. When preservation of electronically stored information ("ESI") is required, the duty to preserve supersedes records management policies that would otherwise result in the destruction of ESI. A "legal hold" program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen.

The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive. Every day, organizations apply the basic principle to real-world circumstances, confronting the issue of when the obligation is triggered and, once triggered, what is the scope of the obligation. Recent court decisions, most notably *Pension Committee v. Bank of America Securities, LLC,* 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010) and *Rimkus Consulting v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. Feb. 19, 2010) illustrate the importance of understanding preservation obligations on the consequences of ignoring them.

This updated 2010 Commentary is intended to provide guidance on those issues and is divided into two parts: The "trigger" and the "process." Part I addresses the trigger issue and provides practical guidelines for making a determination as to when the duty to preserve relevant information arises. What should be preserved and how the preservation process should be undertaken including the implementation of legal holds is addressed in Part II. The guidelines are intended to facilitate reasonable and good faith compliance with preservation obligations. The guidelines are meant to provide the framework an organization can use to create its own preservation procedures. In addition to the guidelines, suggestions as to best practices are provided along with several illustrations as to how the guidelines and best practices might be applied under hypothetical factual situations.

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.

The Sedona Conference® Commentary on the Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible

This Sedona Conference® Commentary focuses on the decision making process relating to the preservation of sources of electronically stored information that may contain discoverable information that is "not reasonably accessible." The "reasonable accessibility" distinction - introduced by the 2006 Federal E-Discovery Amendments as part of the "two-tiered" approach to discovery - plays a role in, but is not wholly determinative of, preservation obligations.

The central dilemma of preservation planning in the absence of the opportunity to discuss discovery requests or reach prior agreement among the parties is predicting exactly which sources of information may actually be discoverable in a given case. No "bright lines" exist; the duty is to make reasonable assessments in good faith. To assist litigants and the courts, the Working Group developed Guidelines that summarize our recommendations for making those assessments. The Guidelines also discuss how parties may "identify" inaccessible sources that will not be preserved and emphasize the value of cooperative efforts to reach agreements on preservation topics in dispute that reflect the unique demands of each case. The Guidelines are supported by a "Decision Tree" that maps the preservation decision-making process and a chart of "Accessibility Factors" to assist the decision maker in qualifying the relative accessibility of various sources of ESI.

The Guidelines are:

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.

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.

The Sedona Conference® Commentary on Proportionality in Electronic Discovery

This Commentary discusses the origins of the doctrine of proportionality, provides examples of its application, and proposes principles to guide judges, attorneys, and parties in both federal and state courts. The Commentary analyses the proportionality considerations found in the Federal Rules of Civil Procedure, especially the 2006 amendments to Rule 26, designed to guide courts to in assessing whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." It also discusses the attention courts have recently been paying to Rule 26(g), which – in the words of the Civil Rules Advisory Committee – is designed to provide "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."

The Commentary concludes by proposing and discussing the following "Principles of Proportionality:"

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.

The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas

The December 2006 amendments to the Federal Rules of Civil Procedure relating to electronically stored information ("ESI") affected not only discovery practices between parties, but also the acquisition of information from non-parties. This 25-page Commentary describes the changes to Federal Rule of Civil Procedure 45 (third party subpoenas), briefly explains the similarities and differences between amended Rule 45 and amended Rules 26, 34 and 37, and explores what lessons the case law teaches as to whether there are differences in the way courts address the duties of parties and non-parties related to producing ESI. In addition to discussing what the new rules and cases require, the Commentary explores the actual experiences of attorneys and parties and outline best practices.

The Sedona Conference® Framework for Analysis of Cross-Border Discovery Conflicts

Subtitled "A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery," this Public Comment Draft examines the "Catch-22" situation in which the need to gather relevant information from foreign jurisdictions often squarely conflicts with blocking statutes and data privacy regulations that prohibit or restrict such discovery—often upon threat of severe civil and criminal sanctions. At the heart of these conflicts are vastly differing notions of discovery and data privacy and protection. The frequency and intensity of these conflicts is heightened by an expanding global marketplace and the unabated proliferation of electronically stored information ("ESI").

This paper outlines a practical framework for analysis of legal conflicts arising from cross-border discovery of ESI. Although the specific focus of this framework is ESI, the principles outlined here apply generally to print and other tangible evidence as well. The intended audience includes individuals, corporations, legal counsel, regulators and the judiciary. The goal is that the reader use this framework to help navigate the turbulent currents of cross-border conflicts between data privacy and discovery, informed by country-specific data privacy, discovery and disclosure rules and practices.

We hope that this paper offers a broad international perspective on current practices and proposed best practice models to resolve conflicts, which may arise in relation to cross-border transfer of information during discovery. And while much of the analysis arises from the European Union, given the EU Privacy Directives, we believe the framework presented is transferable to any cross-border discovery conflict, regardless of the jurisdictions involved. In the end, the best way to avoid the "Catch-22" of cross-border discovery conflicts is for countries to use the framework below to engage, communicate and collaborate in crafting measures that reinforce data protection and privacy while respecting the legitimate need for the discovery of information as an integral part of the judicial and regulatory process.

The Sedona Conference® Commentary

on the Use of Search and Retrieval Methods in E-Discovery

This Commentary is an outgrowth of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1) and represents the work of its Search and Retrieval Sciences Special Project Team, consisting of a diverse group of lawyers and representatives of firms providing consulting and legal services to the legal community. The mission has been to explore the nature of the search and retrieval process in the context of civil litigation and regulatory compliance in the digital age. The goal is to provide the bench and bar with an educational guide to an area of e-discovery law that we believe will only become more important over time, given the need to accurately and efficiently search for relevant information contained within the exponentially increasing volumes of electronically stored information (ESI) that are subject to litigation, investigations, and regulatory activities.

The findings of the Special Project Team are summarized in eight Practice Points, explained and developed in the 38-page Commentary:

> 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.
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> 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.
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> 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.
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> Practice Point 4. Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.
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> 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.
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> 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 key words, 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.

The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process

The legal profession is at a crossroads: the choice is between continuing to conduct discovery as it has "always been practiced" in a paper world -- before the advent of computers, the Internet, and the exponential growth of electronically stored information (ESI) -- or, alternatively, embracing new ways of thinking in today's digital world. Cost-conscious clients and over-burdened judges are demanding that parties now undertake new approaches to solving litigation problems. The central aim of the present Commentary is to introduce and raise awareness about a variety of processes, tools, techniques, methods, and metrics that fall broadly under the umbrella term "quality measures," and that may be of assistance in taming the ESI beast during the various phases of the discovery workflow process. These include greater use of project management, sampling, and other means to verify the accuracy of what constitutes the "output" of e-discovery. Such collective measures, drawn from a wide variety of scientific and management disciplines, are intended only as an entry-point for further discussion, rather than any type of all-inclusive checklist or cookie-cutter solution to all e-discovery issues.

The discussion in this Commentary is based on the following guiding general principles:

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 e-discovery 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.

This Commentary is intended to be read in conjunction with *The Sedona Conference® Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* (2007), which recognized the need for automated processes being utilized to find relevant electronic evidence, and urged that best practices include new ways of thinking about that subject. As is the case with respect to prior commentaries, we fully understand that the matter of what constitutes best practices in maintaining "quality" in a particular legal case will necessarily be subject to change, given the accelerating pace of technological developments that the law is struggling to keep up with.

The Sedona Conference® Commentary on ESI Evidence & Admissibility

During the last decade, culminating with the adoption of significant amendments to the Federal Rules of Civil Procedure ("FRCP") on December 1, 2006, the legal community has expended significant energy and focus on electronic data. A main focus has been on whether and under what circumstances a litigant must provide such data – known more formally as electronically stored information or "ESI" – to an adverse party.

While there are still significant issues to resolve with the amended FRCP and electronic discovery, the legal community is also grappling with whether and how ESI, once produced, can actually be authenticated and used as evidence at trial or in motion practice. As succinctly noted by Judge Grimm in a recent, leading case on the subject:

> [C]onsidering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted.
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> *Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534, 538 (D. Md. 2007).

This 28-page Commentary focuses specifically on that concern, and is divided into three parts: Part I is a brief survey of the applicability and application of existing evidentiary rules and case law addressing the same. Part II addresses new issues and pitfalls that are looming on the horizon. Part III provides practical guidance on the use of ESI in depositions and in court.

The Sedona Guidelines for Managing Information & Records in The Electronic Age

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.

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.

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.

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.

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.

The Sedona Conference® Commentary on Email Management:

Guidelines for the Selection of a Retention Policy

Electronic mail ("Email") is of vital importance to the productive efforts of an enterprise and its use is growing exponentially. In 2005, the average user processed 75 e-mails a day and the Radicata Group estimates that corporate e-mail traffic per user has increased at a rate of 33% per year since then. Projections are that worldwide traffic in 2006 was at the rate of 183 billion messages per day. Many organizations are struggling to decide how best to cope with the explosion of email while reconciling competing needs imposed by business, regulatory and litigation requirements. This Commentary suggests Guidelines for determining the core elements of an email retention policy suitable for public and private entities. Although the legal, regulatory and cultural environments of each organization vary greatly, there are common elements to a legally defensible email management policy. In our Working Group discussions, we have been struck by the fact that entities of comparable size with similar legal risk and regulatory profiles can and do successfully adopt different retention strategies and that these strategies can vary over time, depending upon the phase of development, the size and complexity of the organization, and the particular issues most significant to the entity at any particular time.

The key is to develop and enforce in good faith those reasonable policies that best fit the entity. Four basic Guidelines are presented and explored in depth in this 14-page Commentary, followed by an Appendix including a flow chart of the decision making process and describing to contrasting retention strategies that can be followed.

The Sedona Conference® Commentary on Inactive Information Sources

The legitimacy of managing corporate information through records management policies that systematically destroy (as well as retain) information has been long recognized by lower courts, and has now been explicitly acknowledged by the United States Supreme Court in the case *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005), in which the Court noted, "'[d]ocument retention policies' … are common in business" and those policies "are created in part to keep certain information from getting into the hands of others, including the Government." This work product of WG1 builds on guidance provided by *The Sedona Guidelines* in addressing a common problem in large organizations today—information stores that persist long after their business value has expired. We first provide some background on how such data stores are created and why they are pervasive. Then we propose a process for analyzing such information stores (on both a retrospective and a prospective basis) in the ordinary course of business and in the context of litigation.

The discussion in this Commentary is based on the following guiding general principles:

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.

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Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process

This paper is an outgrowth of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1), and represents the work of its RFP+ Group: a panel of users of electronic discovery vendor services (two from defense firms, two from plaintiff firms, one from a corporate law department, and one consultant/attorney) with input from the RFP+ Vendor Panel, a group of over 35 electronic discovery vendors who signed up as members to support this effort in response to an open invitation. The goal of the RFP+ Group and this paper is to outline an approach to the selection of an electronic discovery vendor that allows the user to compare apples to apples, to the extent feasible, which makes it easier for all parties to the process to better understand the nature, cost and impact of what is being discussed, in the belief that an informed market will lead to reduced transaction costs, more predictable outcomes, and better business relationships.

The paper includes an explanation of the range of services offered by electronic discovery vendors; scoping the electronic discovery project; the use of Requests for Information (RFIs) to narrow the list of potential vendors; researching vendor background, security, and conflicts; crafting Requests for Proposals (RFPs); and constructing an appropriate matrix for decision-making. Appendices include a RFI and RFP based on a hypothetical fact pattern, non-disclosure agreement, pricing models, and a sample decision matrix. The purpose of the examples is not to provide cookie-cutter forms, but to provide the reader with tools to craft an approach best suited for the needs of a particular case.

This 84-page paper is available free for individual non-commercial use from The Sedona Conference®, http://www.thesedonaconference.org.