

Observations on “The Sedona Principles”

John L. Carroll

Dean, Cumberland School of Law, Samford University, Birmingham AL

Kenneth J. Withers

Research Associate, Federal Judicial Center, Washington DC

The opinions expressed in this article are those of the authors, and do not necessarily represent positions of their respective employers.

In October 2002, the authors of this article were invited to attend the Sedona Conference Working Group on Electronic Document Production as observers. Our “observer” status was unique. The participants in the Working Group were private practice lawyers, in-house counsel for large corporations, and a select group of consultants in the electronic evidence and records management fields. The Working Group had a mission, which is well stated in the Introduction to *The Sedona Principles*. That mission was to develop “best practices” for addressing requests for production of computer-based data in civil litigation. The members of the group primarily represented businesses and institutions with large-scale data collections and significant or frequent litigation. Their deliberations naturally focused on the problems as they saw them and the solutions that they believed would be in their best interest to put forward. Those solutions included recommended business practices, positions to advocate in court, and recommendations for changes in the applicable rules and case law. Elements of all three appear in different measure in each of the 14 principles.

The interests of the authors of this article are different. As academics closely identified with the federal judiciary, our broad interest is in the administration of justice and the integrity of the courts. Our narrower interest is in assisting judges with the complex issues surrounding electronic discovery in civil cases. While we hope that our interests and the interests of the working group are not in opposition, we recognize that they are different. Therefore we did not participate in the deliberations of the working group or the drafting of the resulting *Sedona Principles*. We attended the initial working group meeting and made some observations on the issues from our viewpoint, but then stepped back and let the working group members conduct their own debate and develop their own consensus.

The resulting document is an extremely helpful “first salvo” in what we hope will become a broader debate. Without endorsing any of the Principles themselves, we can say that the recommended business practices found in *The Sedona Principles* will assist judges in determining what benchmarks or baselines exist for business parties responding to electronic discovery requests. The positions advocated in *The Sedona Principles*, and especially the commentaries following each principle, will assist judges in assessing the arguments of the litigants in front of

them and put them into a broader context. And the recommendations for changes in the rules or case law will assist those judges who are charged with ongoing assessment of the effectiveness of our Federal Rules of Civil Procedure and consideration of proposed amendments under the Rules Enabling Act. We anticipate that other groups with particular viewpoints on electronic discovery will come forward with comments on *The Sedona Principles* or draft original documents with the same clarity and sense of purpose.

In making the following observations, we concentrate on that third constructive function of *The Sedona Principles*-- assessment of our current rules and proposals for rule amendments. Here we note that the drafters of *The Sedona Principles* did not draft a document directed primarily to the judiciary. But many of the principles call for rules changes directly or indirectly, by recommending the establishment of presumptions or specific judicial action beyond the exercise of judicial discretion on a case-by-case basis. Our observations therefore steer clear of the principles that enunciate standards of practice for business or their legal advocates, or that serve to restate current rules and case law.

OBSERVATIONS ON THE INTRODUCTION AND SECTION ONE

The Introduction to *The Sedona Principles* acknowledges that its drafters were “concerned about the adequacy of rules and concepts that were developed largely for paper discovery...” (*Principles*, page 1) In the first section, after a discussion of the differences between electronic and conventional discovery, the drafters state, “the current rules do not effectively address a myriad of issues unique to electronic documents.” (*Principles*, page 7) And it is on this point that we would like to make our first, and perhaps most basic, observations.

The rules of civil procedure are not intended to “address a myriad of issues unique” to any form of discovery. They are intended to provide a procedural framework for litigants and the court, and to provide judges with the tools needed to “secure the just, speedy and inexpensive determination of every action.” (Rule 1)

The drafters state in the following paragraph that they have “first hand experience of unreasonable and unfair burdens... spending millions of dollars to process and review large volumes of electronic documents... and preserving at great cost thousands of backup tapes...” (*Principles*, page 7) The drafters state that the Federal Rules of Civil Procedure place them in a situation in which “parties are left to guess as to what their obligation are, with the threat of discovery violations for incorrect guesses.” (*Principles*, page 7) The drafters call for the courts to issue standards.

We believe this critique of the state of the law is unwarranted. The legal and procedural rules relating to document preservation and production are clear. However, they are typical of broadly written rules designed to allow a judge to apply the rule to a number of different of cases. If there is a problem, it is a problem with a lack of standards for the design and implementation of electronic business practices and the management of the data those processes generate, not with

the legal rules which judges apply. These standards, which would allow a more informed application of the clear legal rules by the courts, must come from business and not the courts. To the extent that the drafters of *The Sedona Principles* can start a dialog leading to the establishment of some clear standards of business conduct, this document will go a long way to answering their needs in this area.

In the meantime, we absolutely agree with the final paragraph on page 8 of *The Sedona Principles*. “Dialogue and reasonableness are essential,” particularly early discussion. Thus, if there needs to be a rule change, it is one that should foster early discussion about the issues.

OBSERVATIONS ON THE PRINCIPLES THEMSELVES

Principle 1 “Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents, and organizations must therefore properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.”

We agree with this principle, insofar as it acknowledges the definition of “discoverable matter” in Rule 34. We also agree with the principle regarding the duty of preservation, if we all agree that the present standard, which focuses on objective knowledge of evidence relevant to present and future litigation, is the same as “reasonably anticipated.”

Principle 2 “When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state law equivalents, which requires considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.”

This principle appears to be an endorsement of Rule 26(b)(2), and as such, we agree with it. The case law, especially in recent months, indicates that the current rule is working. We also think that the drafters’ comment following this principle makes an important point regarding “hidden” costs and burdens, which parties, advocates, and judges need to keep in mind.

There is a danger, however, in any principle or commentary that discusses Rule 26(b)(2) in isolation. That specific rule is a subsection of a much larger rule regarding discoverability, which establishes that the touchstone for all discovery questions is relevance. By concentrating on the balancing factors found in Rule 26(b)(2), however important they may be, we risk glossing over the fact that there is another side to the balance, a factor which needs to be considered before one reaches Rule 26(b)(2) — the relevance of the proposed discovery to the claims and defenses of the parties or the subject matter of the dispute. Discovery is driven by relevance, modified in appropriate cases by logistical and cost concerns, not the other way around.

Principle 3 “Parties should confer early in discovery regarding the preservation and production of electronic data and documents and seek when these matters are at issue in the litigation, if possible, to reach agreement concerning the scope of each party’s rights and responsibilities.”

In the field of electronic discovery, we believe this principle states the central lesson of the current case law, the commentary in the legal press, and the discussions in rulemaking circles. As a practical matter, there is broad consensus that “the preservation and production of electronic data and documents” should be discussed by the parties, and agreements reached to the extent possible, during their conference under Rule 26(f), if not sooner. Counsel and judges should also be prepared to discuss electronic discovery plans and any potential issues during the Rule 16(b) pretrial conference with the court, whether any rule expressly requires it or not.

Principle 4 “Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.”

We completely agree with this principle, and point out again that the touchstone of all discovery is relevance. The clearer the relationship between the discovery requests and the facts in dispute, the easier it will be for all concerned to evaluate their response.

Many complaints about overbroad electronic discovery stem from parties requesting whole categories of computer data simply because they exist, without relating the requests to the issues of the case. The flip side is blanket refusals to produce whole categories of data simply because they are not readily understood by counsel or are perceived to be too burdensome to produce. Neither party appears to consider the relevance of the requested data to the issues in dispute. A conference concentrating on relevance will often narrow the request and create an opportunity for a more satisfactory response. If litigants would be more careful to relate their requests and their responses to the issues, the need for active judicial intervention would be reduced, and narrow the scope of any remaining questions that do come before the court.

Principle 5 “The obligation to preserve electronic data and documents 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 data.”

We reiterate that the case law currently defines the data preservation obligations of parties, and it does not include requiring the parties to “take every conceivable step to preserve all potentially relevant data.” It requires that parties take reasonable steps to preserve data reasonably related to the facts of current or anticipated litigation. Decisions relating to legal standards like “potentially relevant data” are made every day by lawyers in a wide variety of contexts. Data preservation is precisely the kind of issue that should be worked out by counsel not long after

litigation starts. And if agreement cannot be reached, it is the kind of issue for which a protective order can be sought. No rule change is called for, unless it is requirement that the parties discuss this issue early in the case, with resort to the court if the parties can't reach agreement.

Counsel should advise clients to implement sound electronic records management and litigation response procedures that effectively preserve data relevant to reasonably anticipated litigation. If clients fail to do that, they may someday face a court-imposed data preservation order that will likely be more expensive and may appear to order "every conceivable step to preserve all potentially relevant data." In those situations, where the court is given no reasonable alternative, the court will usually move to protect the integrity of the adjudicatory process, which calls for preservation of the evidence.

Principle 6 "Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents."

We agree with this principle and with the obvious corollary, that responding parties are responsible for the reasonably anticipated consequences of their choices. The corollary applies if a party has a history of discovery sanctions or if it has no reliable electronic document management procedures.

The comments of the drafters following this principle discuss an important issue, which is the role of forensic-style data retrieval and analysis procedures in civil discovery. We believe that the adoption of such discovery methods as a standard procedure is costly and unnecessary. Similarly, on-site inspection of computer systems is fraught with legal and logistical problems, and should be considered an extraordinary method of discovery, more akin to Rule 35 than Rule 34. The methodology used to respond to a request for computer-based information will depend on the issues of the case and the particulars of the information and communications technologies employed by the responding party in the ordinary course of business. While all parties should be held to a standard of reasonable professional behavior in the conduct of discovery (*cf. Gates Rubber, Tulip Computers, Metropolitan Opera*, and similar cases), the precise methods, or choice of vendor or consultant, should not be dictated by the court.

Principle 7 "When the responding party has shown that it has acted reasonably to preserve and produce relevant electronic data and documents, the burden should be on the requesting party to show that additional efforts are warranted under the circumstances of the case."

This is a difficult principle for us to comment on, as neither of us are entirely clear on what it means. To the extent that this calls for a change in the rules or revision of the case law based on Rule 26, we cannot endorse it.

In a motion to compel discovery, the burden is on the requesting party to demonstrate the relevance of the proposed discovery to the claims, defenses, or subject matter of the dispute. The responding party may then challenge the relevancy of the proposed discovery, or establish that the likely burdens of the proposed discovery outweigh the likely benefits. If the motion to compel stems from a dispute over the adequacy of a response to an otherwise unchallenged request for electronic data or documents (or any other discoverable item), the burden is on the responding party to show that it acted reasonably to produce the requested material. If a party is shown to have acted reasonably, that should end the inquiry. Likewise, in a motion for a protective order, the burden is on the moving party to show either that the proposed discovery is not relevant to the claims, defenses, or subject matter of the dispute, or that the likely burdens outweigh the likely benefits. Under no scenario does the burden shift to the requesting party to show that the responding party's actions or proposed actions are unreasonable.

This principle appears to be based on two notions that contradict earlier stated principles. First, it posits that there is some standard operating procedure in responding to electronic discovery requests that is deemed presumptively "reasonable." However, that violates Principle 6. Second, it assumes that the parties have not met and conferred on the scope of discovery and the methodology to be used in responding (a violation of Principle 3) or that the conference has failed.

The second comment offered by the drafters following this principle would extend it to discovery of third parties under Rule 45. We reiterate the concerns we have stated in regards to any attempt to amend Rule 26 or the case law under this principle. The touchstone of "relevance" remains the same under either Rule 26 or Rule 45. However, the case law already is consistent in holding that the balance of the proposed discovery against the likely burdens weighs much more heavily against imposing burdens on non-litigant third parties.

Principle 8 "The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval, and resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources."

We agree that in the vast majority of cases, requests for discovery of electronic data documents will be answered reasonably with material accessed from active data and from data archives that are organized for search and retrieval in the normal course of business, but that is because in the vast majority of cases, relevant material resides there. However, one can easily imagine a case, particularly in the employment or trade secret theft areas, where such easily produced discovery materials would have marginal relevance to the claims and defenses of the parties, and where the primary source for relevant discovery would be metadata or system data. The requesting party would not be obliged to make a special showing to be entitled to discovery into matters clearly related to the claims and defenses of the parties, based solely based on the information

technology employed by the responding party. This would require a new rule or a major revision of the case law establishing a presumption against discoverability of data generated or stored using particular technologies, without reference to relevance. This would also violate Principle Six.

The touchstone for analysis of all discovery questions is relevance, as Comment 8b states — relevance first to the claims and defenses of the parties, and then, for good cause, relevance to the subject matter of the dispute. The current rules provide that a party may object to a discovery request or seek a protective order if the likely cost, burden, and disruption of proposed discovery would outweigh the need and relevance.

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 data or documents.”

We agree that it is a rare civil action that would require preservation, review, or production of such data. But as we discussed in our observations on Principles 8 and 9, this is an issue that should be resolved by the parties at the outset of litigation, with reference to the relevance of the requested data to the claims and defenses of the parties. No presumption should be created, either by rule or by standard of practice, that certain categories of data are outside the scope of discovery, creating an obligation on the part of requesting parties to establish “special” need and relevance.” Once relevance is established, then likely burden can then be assessed and a balance struck. It should be pointed out that the balance may well be different if the question is preserving, reviewing, or producing the relevant data. The current rules are designed to facilitate that discussion between the parties at the Rule 26(f) stage or earlier, and the current rules empower the judge to decide if agreement cannot be reached. The illustrations presented by the drafters in the comments following this principle demonstrate this.

Principle 10 “A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.”

We agree. While it should be axiomatic that parties should design and implement reasonable procedures to protect privileges and other potential objections to producing otherwise responsive data or risk losing them, a party that uses such reasonable procedures should not be penalized for the occasional mistake. The comments following this principle indicate that this situation is usually handled by a non-waiver agreement or protective order.

Principle 11 “A responding party may properly access and identify potentially responsive electronic data and documents by using reasonable selection criteria, such as search terms or samples.”

Under Principle 6, parties are in the best position to decide the procedures they will use to

respond to discovery requests. With large text-based data compilations, word and concept searches are well-accepted methods for locating and retrieving responsive data. To narrow large collections of backup media, sampling is likewise a well-accepted methodology. Technology is developing rapidly in this area, and promises to give parties better tools to reduce the scope of searches, reducing costs and burdens all around.

We recommend, however, that methodology be discussed by the parties before the searches begin, most likely at the Rule 26(f) conference. This recommendation follows Principle 3 and might serve to diffuse potential disputes, avoiding unnecessary duplication and costs.

Principle 12 “Absent a specific objection, agreement of the parties or order of the court, electronic documents normally include the information intentionally entered and saved by a computer user.”

This principle shares the same pitfall as Principles 8 and 9. While in most cases, discovery will not need to go beyond “information intentionally entered and saved by a computer user,” the primary question must be the relevance of the discovery request to the claims and defenses of the parties, not the information technology employed by the respondent. One can easily imagine cases in which the information “intentionally entered and saved” by the user of a computer spreadsheet or enterprise wide database is insignificant, compared with the data generated by the automated processes the user’s action triggered. Likewise, many cases in the employment or trade secret theft areas turn on such system-generated data. As we have stated in our observations on Principles 8 and 9, the fact that such discovery may be rare does not support an argument in favor of amending the current rules, establishing any new presumptions, or shifting current burdens of persuasion. Quite the opposite.

Principle 13 “Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic 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 data or formatting of 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 should be shifted to the requesting party.”

As the starting point for advocating cost-shifting in any particular case, we have no objection to this principle. However, we do not agree that the current rules or the case law should be rewritten to accept this principle in all cases. In recent months, courts have demonstrated that they are well equipped to decide the question of cost shifting on using number of factors (see *Rowe Entertainment* and the cases following it), of which the access to the requested data “in the ordinary course of business” is but one. Cost shifting is an issue that should be worked out by the parties. If they cannot reach agreement, then the power of the court can be invoked.

Principle 14 “Sanctions, including spoliation findings, should only be considered by the

court if, upon a showing of a clear duty to preserve, it is found that there was an intentional or reckless failure to preserve and produce relevant electronic data, and a showing of a reasonable probability that the loss of the evidence materially prejudiced the adverse party.”

Although we would generally agree with this principle as a position for advocacy, the current state of the law is more than adequate to resolve this issue, should it arise in any particular case. If the principle were considered a proposal for an amendment to Rule 37 or the case law on discovery sanctions, it would significantly narrow the current law on spoliation by eliminating negligence acts as possible bases for a finding of spoliation, and by requiring a “reasonable probability” that the loss of the evidence materially prejudiced the adverse party. The former would have far-reaching policy implications and the latter has been expressly rejected by nearly every court that has considered the question. In addition, we are averse to importing into civil litigation a standard of proof for spoliation that appears to be based on the criminal law of obstruction of justice, primarily *Brady* cases.

A BRIEF SUMMARY

The creation of *The Sedona Principles* represents a tremendous effort, and the drafters deserve praise. In particular, the principles do a good job of identifying problem areas and staking out a clear position. This will be an invaluable contribution to the debate on electronic discovery.

The principles make clear, and we certainly agree, that reasonableness, early communication between counsel and then early resort to the court if the parties cannot reach agreement are the keys to solving the problems identified. The key is to create a mechanism under which, very early in the litigation, the parties are required to communicate about issues relating to the discovery of electronic material, exchange relevant information about their systems, and either come to agreement or clearly present remaining areas of contention to the court.

Beyond that, the “myriad of issues” that *The Sedona Principles* say the rules are inadequate to handle can be raised and resolved under the present rules structure and case law.