

The Sedona Principles (Second Edition): Accommodating the 2006 E-Discovery Amendments

Thomas Y. Allman¹

Abstract

The Sedona Principles (Second Edition 2007), with revisions to *Principles* 8, 12, 13 and 14 and substantially revised Commentary, are intended to accommodate the passage of the 2006 Federal E-Discovery Amendments by providing substantive guidance and practical best practice solutions for the resolution of current and future e-discovery issues.

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APPENDIX A: *The Sedona Principles* (Second Edition 2007)

APPENDIX B: Contrasting Approaches (*Principles* and Rules)

The need to promote best practices in e-discovery remains important after the adoption of the 2006 E-Discovery Amendments to the Federal Rules of Civil Procedure (“the Amendments”).² While the Amendments provide a number of innovative procedural solutions to long-standing problems, they leave many other issues unanswered. The *Sedona Principles, Second Edition* (2007) (the “Second Edition” or the “*Principles*”),³ are particularly useful in filling those gaps while accommodating the changes brought about by the Amendments.

This article summarizes the key provisions of the Second Edition while also describing the challenges involved in their use.

I. Background

The *Principles* consist of fourteen “best practice” recommendations covering the full range of e-discovery issues, together with commentary on their application. They evolved out of an initial meeting of the Sedona Conference® Working Group on Electronic Document Production (“Working Group One”) held in October 2002. An initial version was issued in January, 2004 and updated in a version issued in July 2005.⁴ From the outset, the *Principles* have been of practical use because they dealt with topics not covered elsewhere⁵ and because they provide carefully balanced positions, some of which may differ from existing case law.⁶

The December, 2006 implementation of e-discovery Amendments to the Federal Rules presented both a challenge and an opportunity. At the November, 2006 Annual Meeting of Sedona Conference Working Group One, the attendees discussed whether the *Principles* should be altered to accommodate the Amendments. One view, strongly expressed, was against making any changes. A second view, which ultimately prevailed, favored making minimal changes to the *Principles* coupled with explanatory commentary on the Amendments from the point of view of Working Group One.

¹©Thomas Allman 2008. Tom Allman formerly served as Sr. V.P. and General Counsel of BASF Corporation (1993-2004) and is one of the Editors of the Second Edition of the *Sedona Principles*. He also is co-chair of the Lawyers for Civil Justice Committee on E-Discovery and speaks and writes extensively on the topic of e-discovery and rulemaking.

²The Final Report of the Civil Rules Advisory Committee, dated May 27, 2005 (as revised July 25, 2005) is included as Appendix C to the September 2005 Standing Committee Report to the Judicial Conference, hereinafter “Final Report, C-___,” available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>. Effective December 1, 2007, the Rules were restyled, resulting in some minor changes in text, some inserted headings and, in the case of Rule 37(f), renumbering to Rule 37(e). The current version of the Rules is cited throughout the paper.

³The formal title is *The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007), available at <http://www.thesedonaconference.org>.

⁴See Thomas Y. Allman, *The Sedona Principles and the 2006 Federal Rule Amendments Addressing E-Discovery*, 1 Fed. Cts L. Rev. 15 (2006)(updated version of article initially published electronically in February, 2005).

⁵*Principle 12*, for example, provided that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.” The duty to preserve and produce metadata in discovery is not directly regulated by the Federal Rules, before or after the Amendments.

⁶*Principle 14* suggested that spoliation sanctions should be considered only where “intentional or reckless failure to preserve and produce” existed, in contrast to the holding in *Residential Funding Corporation v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2nd Cir. 2002)(permitting adverse inferences where mere negligence involved).

These twin goals have been met. Substantive changes were made to only four *Principles*,⁷ but a new introductory section⁸ and extensively revised (and new) comments were included to provide commentary on the Amendments.⁹ The fourteen *Principles*, as amended in the Second Edition, are reproduced in Appendix A with the key differences remaining between them and the Amendments summarized in Appendix B.

II. Preservation Obligations

One reason for the enduring relevance of the *Principles* is that the Federal Rules leave the development of *substantive* preservation standards to evolving case law and best practices. The changes involving Rules 16(b), 26(f), 34 and 37¹⁰ regulate the *process* of implementing preservation obligations, including the consequences when and if losses to production occur from the operation in “routine, good faith” of information systems.¹¹ The only references to the substance of preservation obligations are found in the Committee Notes to Rule 26(b)(2)(B) and Rule 37(e), as well as in the introductory comments in the Final Report of the Advisory Committee.¹²

Not surprisingly, therefore, only cosmetic changes were needed in the relevant *Principles* dealing with preservation obligations, although extensive revisions were made to the Comments, especially those involving *Principle 5*.¹³

Thus,

- *Principle 1* states that “organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.”
- *Principle 3* suggests that parties should “confer early in discovery regarding the preservation” and “seek to agree on the scope of each party’s rights and responsibilities.”
- *Principle 5* states that “the obligation to preserve . . . 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* explains that responding parties are “best situated” to evaluate the procedures, methodologies and technologies “appropriate for preserving and producing their own electronic data and documents.”
- *Principle 9* limits the need to preserve “deleted, shadowed, fragmented, or residual” information “absent a showing of special need and relevance”

Preservation best practices are discussed in the expanded Comments to *Principle 5*, now consisting of nine sections, as compared to only three in the 2005 Edition. In part, this expansion reflects the considerable angst associated with identifying and meeting preservation obligations. The *Principles* are recognized as providing useful guidance. For example, in *Miller v. Holzmann*,¹⁴ the court applied *Principle 5* while acknowledging that it accurately captured the evolving case law.

One of the key issues has been the treatment of backup media in advance of discovery. The Final Report of the Advisory Committee cites backup media as an example of inaccessible sources of information for purposes of the “Two-Tiered” approach to production,¹⁵ as discussed in Section III, below. The issue of preservation in advance of discovery presents difficult questions, however, which are treated at length in Comment 5.h. (“Disaster recovery backup tapes”). A reasonable belief in the availability of alternative sources of information plays a major role in reducing the need to preserve this type of storage media, given the burdens and costs involved.¹⁶

In *Zubulake v. UBS Warburg*,¹⁷ the court relied upon the *Principles* for the proposition that “as a general rule . . . a party need not preserve all backup tapes even when it is reasonably anticipates litigation.” In *Consolidated Aluminum Corp. v. Alcoa, Inc.*,¹⁸

⁷ Major changes were made to [Principles 8, 12, 13 and 14](#) with stylistic changes to [Principles 2 and 4](#) and updated terminology (e.g., “electronically stored information”) wherever needed.

⁸ See [Introduction, What is the Relationship Between The Sedona Principles and Court Rules?](#)

⁹ See, e.g., [Comments 1.a; 2.c.; 7.b.; 8.b.; 12.c.; and 14.d.](#) An effort was also made to facilitate cross-reference between the *Principles* and the Amendments by inclusion of a comparative chart. See Appendix B.

¹⁰ [Rule 37\(f\)](#), added as part of the 2006 Amendments, was renumbered as [Rule 37\(e\)](#) as of December 1, 2007 without change in the text. It limits rule based sanctions where electronically stored information is lost as the result of “routine, good faith” operations in the absence of exceptional circumstances.

¹¹ See generally [Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments](#), 13 RICH. J.L. & TECH. 9 at *12-13 (2007) (describing the rejection of initial plans to recommend adding a new Rule 34.1 (“Duty to Preserve”).

¹² Final Report, C-44, C-83 through C-86.

¹³ [Principle 12](#) no longer directly deals with preservation of metadata and is not discussed here. See [Section VI, Form of Production and Metadata](#).

¹⁴ [CA No. 95-01231 \(RCL/JMF\), 2007 WL 172327 \(D. D.C. Jan. 17, 2007\)](#).

¹⁵ See Final Report, C-42.

¹⁶ See [Comment 8.a.](#) (“Scope of Search for active and purposely stored data”), which notes that “mere suspicion that a source may contain potentially relevant information is not sufficient to demand the preservation of that source.”

¹⁷ [220 F.R.D. 212, 217 \(S.D. N.Y. Oct. 22, 2003\)](#)(“*Zubulake IV*”).

¹⁸ [220 F.R.D. 212, 217 \(S.D. N.Y. Oct. 22, 2003\)](#)(“*Zubulake IV*”).

the court relied upon *Principle 5* in holding that Alcoa was not required to preserve every shred of paper but only those documents of which it had ‘actual knowledge’ that they would be material to future claims.

Courts and commentators¹⁹ have also utilized the *Principles* to assist in resolving preservation issues. In *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*,²⁰ the court skillfully blended the teaching of *Principle 6* with existing case law in order to resolve challenges to the preservation process followed in that case.²¹ Comments 5.c. and 5.d. to *Principle 5* recommend use of a “repeatable, documented” process in implementing “legal” or “litigation” holds, a topic which is now the subject of *The Sedona Conference® Commentary on Legal Holds*.²²

The Second Edition also added Comments which respond to the increased focus on attorney responsibility for the execution of preservation obligations, long a concern of the *Principles*.²³ Thus, Comment 6.f. deals with the roles and responsibilities of retained and corporate counsel²⁴ and Comment 14.d. stresses the role of “‘good faith’” in executing them.

In addition, Working Group One is drafting *The Sedona Conference Commentary® on Preserving & Identifying ESI [Electronically Stored Information] That is Not Reasonably Accessible*, with an expectation of issuing it for Public Comment by the time of the 2008 Annual Meeting.²⁵ It will cover preservation issues involving both traditional and cutting edge sources of inaccessible information.²⁶

III. Two -Tiered Discovery

One of the principal innovations of the Amendments is the limitation added by Rule 26(b)(2)(B), whereby a party “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” This “two-tiered” approach requires a showing of “good cause” for discovery from the second tier, subject to the “limitations” found in Fed. R. Civ. P. 26(b)(2)(C).²⁷ The Advisory Committee also added seven factors to consider in the Committee Note.

The two-tiered distinction has been applied to many forms of discovery, including interrogatories,²⁸ requests for production,²⁹ direct access to computers,³⁰ subpoenas³¹ and Rule 30(b)(6) deposition testimony.³²

The *Principles* take a somewhat different approach to the two-tier issue.

Thus,

- *Principle 2* requires that “[w]hen balancing the cost, burden and need,” courts and parties should consider “the technological feasibility and realistic costs” as well as “the nature of the litigation and the amount in controversy.”
- *Principle 4* urges that “discovery requests [be] as clear as possible,” and that “responses and objections should disclose the scope and limits of the production.”³³

¹⁸ [244 F.R.D. 335 \(M.D. La. July 19, 2006\).](#)

¹⁹ See [Mia Mazza, “In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information,” 13 Rich. J. L. & Tech. 11 \(Spring 2007\).](#)

²⁰ [244 F.R.D. 614, 614 \(D. Colo. Mar. 2, 2007\)](#) (applying *Sedona Principle 6* in context of challenge to recycling of backup media).

²¹ For more details on the litigation hold process, please consult the companion publication to the *Sedona Principles* issued by the Sedona Working Group and known as *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in the Electronic Age*, available at <http://www.thosedonaconference.org> (currently undergoing revisions).

²² See *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process* (August 2007 Public Comment Version), available at <http://www.thosedonaconference.org>.

²³ See [Note, E-Ethics: the Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure, 20 Geo. J. Legal Ethics 613, 615-616 \(Summer 2007\)](#) (citing the contributions of the *Principles* in promoting ethical conduct through “defined, orderly procedures”).

²⁴ See e.g., [Phoenix Four, Inc. v. Strategic Resources Corporation, No. 05Civ. 4837\(HB\), 2006 WL 1409413 \(S.D. N.Y. 2006\)](#) (sanctioning failures of counsel).

²⁵ The current draft (October, 2007) was discussed at the WG1 Annual Meeting held in Hilton Head, South Carolina and is available as a “Members Only” resource.

²⁶ Compare [Convolve Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 177 \(S.D.N.Y. 2004\)](#) (declining to recognize a duty to preserve ephemeral information) with [Columbia Pictures v. Bunnell, 2007 WL 2080419 at *3-6 \(C.D. Cal. May 29, 2007\)](#), motion to review denied, [245 F.R.D. 443](#) (Aug. 24, 2007) (requiring future preservation of information temporarily stored in RAM).

²⁷ Section (iii), as amended effective December 1, 2007, provides in relevant part that discovery methods shall be limited when “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account 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.”

²⁸ [Oxford House v. City of Topeka, 2007 WL 1246200 \(D. Kans. April 27, 2007\).](#)

²⁹ [Disability Rights Council v. WMTA, 242 F.R.D. 139 \(D.D. C. June 1, 2007\)](#) (restoration and production from backup media).

³⁰ [Ameriwood Industries, Inc. v. Lieberman \(“Ameriwood I”\), 2006 WL 3825291 \(E.D. Mo. Dec. 27, 2006\).](#)

³¹ [Autoclub Family Insurance v. Ahner, 2007 WL 248 0322 \(E.D. La. August 29, 2007\).](#)

³² [EEOC v. The Boeing Company, 2007 WL 1146446 \(D. Ariz. 2007\).](#)

- *Principle 8* states that the “primary source” of discoverable information should be “active data and information” and that “resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible” requires proof of “need and relevance that outweigh the costs and burdens of retrieving and processing,” including an assessment of “the disruption of business and information management activities.”
- *Principle 9* limits the need to produce “deleted, shadowed, fragmented, or residual” information “absent a showing of special need and relevance.”

Principle 8 was modified in the Second Edition to add a reference to sources that are “not reasonably accessible” as examples of sources which stand in contrast to “active data and information.” Comment 8.a. explains that resort to such inaccessible sources should only occur when good cause exists, consistent with the balancing or proportionality standards of *Principle 2*.

Thus, *Principle 8*, by its primary focus on “active” data, provides a more practical method of implementing the accessibility distinction in the “two-tier” approach by defining what *is* properly included as party-managed discovery. Active data is typically stored on local hard drives, networked servers, distributed devices or offline archival sources from which information can be and routinely is readily accessed without a special restoration effort.³⁴ As noted in Comment 8.b., this invokes “the technical accessibility and the purpose of the storage,” thus giving common sense meaning to the distinction.

Moreover, the formulation in *Principle 8* is useful in determining when sufficient “good cause” exists under Rule 26(b)(2)(B). *Principle 8* speaks of the need to show a “need and relevance” that “outweighs” the costs and burden of retrieving and processing the information, taking into account “the disruption of business and information management activities.”³⁵

Rule 26(b)(2)(B) also requires a party to “identify” those sources that are not reasonably accessible so that the requesting party can determine whether or not to challenge the classification. Comment 8.b. properly cautions that a party may not deliberately make information inaccessible to avoid responding to discovery requests. However, the obligation to “identify” an inaccessible source is not adequately described in the Rule. *Principle 4* suggests that “responses and objections to discovery” which articulate “the scope and limits of what is being produced” provide a pragmatic resolution to the issue.

One open issue under the Amendment is the impact of burdensome privilege review costs on two-tiered discovery. In *Parkdale America LLC v. Travelers*,³⁶ a producing party unsuccessfully argued that information contained in emails was inaccessible because of the cost of the review for privilege that would be required.

The *Principles* encourage courts to enforce the two-tiered concept by denying requests for unduly burdensome production, regardless of the offer of a producing party (or the ability of a court to shift costs). As noted in Comment 13.b. to *Principle 13*, “[s]hifting the costs of extraordinary electronically stored information discovery efforts should not be used as an alternative to sustaining a responding party’s objection to undertaking such efforts in the first place.”

IV. Collection, Review and Processing

The procedures used to collect, review and process electronically stored information are at the heart of e-discovery, but are not typically regulated by the Federal Rules. The *Principles* deal directly with these issues.

Thus,

- *Principle 6* notes that “[r]esponding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronically stored information.”
- *Principle 10* suggests use of “reasonable procedures” to protect privileges.³⁷
- *Principle 11* endorses “data sampling, searching, or the use of selection criteria” as a way to identify data likely to be relevant.

The complexities involved in electronic information have driven development of sophisticated search strategies.³⁸ Comment 11.a. to *Principle 11* points out that “[b]ecause of the enormous volume of information involved, . . . it is often advisable, if not necessary, to use technology tools to help search for, retrieve and produce relevant information.” Courts rely upon the *Sedona*

³³ In contrast, [Rule 26\(b\)\(2\)\(B\)](#) requires an affirmative “identification” by a producing party of any inaccessible sources which may contain discoverable information that the party does not intend to search.

³⁴ See [Whitney Adams and Jeffery Jacobs, *Ghost in the Machine: Legal Developments and Practical Advice in an Age of Electronic Discovery*, 22 NO. 7 ACC Docket 48 at *70 \(2004\)](#).

³⁵ See also [Principle 9](#) which specifies that a showing of “special need and relevance” is necessary to require preservation, review or production of “deleted, shadowed, fragmented, or residual electronically stored information.”

³⁶ [2007 WL 4165247 \(W.D. N.C. Nov. 19, 2007\)](#).

³⁷ See [Hopson v. Mayor and City Council of Baltimore](#), 232 F.R.D. 228, 234 (D. Md. 2005)(noting recommendations of *Principle 10*).

³⁸ See [George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J. L. & Tech. 10 at *9 - *12 \(2007\)](#)(describing the complexity resulting from software and hardware evolution).

Principles to validate and illustrate best practices when disputes arise.³⁹ Thus, in the case of *In re Seroquel Products Liability Litigation*,⁴⁰ the provisions of the Second Edition became the best practice “yard stick” against which conduct in that case was measured.⁴¹

Members of the Working group developed and issued *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*,⁴² available for downloading at the Sedona Conference website. A second project currently underway involves drafting *The Sedona Conference® Commentary on Best Practices in E-Discovery Data Collection, Review and Production; Sampling Methods & Quality Control*, targeted for public comment in late 2008.⁴³

V. Cost-Shifting

Courts usefully employ cost-shifting as a nuanced tool to adjust court-ordered discovery where the balance between benefit and burden is uncertain.⁴⁴ The Committee Note to Rule 26(b)(2)(B) acknowledges that a court may order “limits on the amount, type, or sources of information required to be accessed and produced.” Many courts utilize a hierarchy of seven factors to govern cost-shifting, while tying the right to consider cost shifting to the accessibility or lack thereof of the information sought.⁴⁵

Principle 13 initially mandated shifting the costs of information which is “not reasonably available to the responding party in the ordinary course of business.” However, because of the decision by the Advisory Committee to eschew that approach in the Amendments,⁴⁶ *Principle 13* was modified to state that the costs of retrieving and reviewing information which is not reasonably available “may” (instead of “should”) be shared by or shifted to the requesting party.

Nonetheless, two significant differences remain between the approach under the *Principles* and that of the prevailing case law.

First, the ability to shift costs is not “coupled” to the accessibility of the information,⁴⁷ but turns on an assessment of the burdens or costs involved, especially where high volume makes the costs disproportionate to the matters at issue. As noted in Comment 13.a. to *Principle 13*, “parties should recognize that cost-sharing and cost-shifting remains separately available under Rule 26(b)(2)(C) and Rule 26(c). In particular, the aggregate volume of data requested may be disproportionate to the needs in the case and/or the respective resources of the parties . . . such that a condition of further discovery can be the shifting of some or all costs of such discovery.”

In addition, the types of costs recoverable are broader under the *Principles* than under some existing cases.⁴⁸ As explained in the Comment 2.b. to *Principle 2* [the “proportionality” rule], costs cannot be calculated solely in terms of the expense of computer technicians to retrieve the data but must factor in other litigation costs, including the “interruption and disruption of routine business processes and the costs of reviewing the information.”

VI. Form of Production and Metadata

Fed. R. Civ. P. 34 now acknowledges that electronically stored information can be produced either in the form in which it was “ordinarily maintained” or in a “reasonably useable” form, absent a contrary agreement or court order.⁴⁹ It does not express a preference for production of metadata, one way or the other, as the choice of form (format) necessarily resolves that issue as well.⁵⁰

³⁹ See [Treppe v. Biovail Corporation](#), 233 F.R.D. 363, 374 (S.D. N.Y. 2006) (discussing need for “reasonably comprehensive search strategy,” citing *Sedona Principle 11*). See also [Zakre v. Norddeutsche Landesbank Girozentrale, No. 03-Civ. 0257 \(RWS\), 2004 WL 764895 \(S.D. N.Y. April 9, 2004\)](#) (relying on *Principle 11* to support use of text search capability).

⁴⁰ [MDL Docket No. 1769, 2007 WL 2412946 \(M.D. Fla. August 21, 2007\)](#).

⁴¹ *Id. at**13. (“[While Defendant] purported to embrace the requirements of Rule 26 and the Sedona Principles . . . the reality was to the contrary.”).

⁴² [8 Sedona Conf. J. 189 \(Fall, 2007\)](#) (Public Comment Version) (discussing “existing and evolutionary methods by which a party may choose to search unprecedented volumes of information”).

⁴³ The current draft (Version 2.0) was discussed at the WG1 Annual Meeting held in Hilton Head, South Carolina and is available as a “Members Only” draft.

⁴⁴ See [Panel Discussion, Managing Electronic Discovery: Views from the Judges](#), 76 *Fordham L. Rev.* 1, (October, 2007) (Francis, J.).

⁴⁵ See [Zubulake v. UBS Warburg \(“Zubulake I”\)](#), 217 F.R.D. 309, 320-324 (May 13, 2003) (announcing a seven factor test).

⁴⁶ The Advisory Committee not only rejected mandatory cost shifting, but also added cautionary language in the Committee Note to Rule 26(b)(2)(B) to the effect that the burdens of privilege review can militate against production even if a requesting party is prepared to pay the costs of access.

⁴⁷ Compare [Peskoff v. Faber](#), 240 F.R.D. 26, 31 (D.D.C. Feb. 21, 2007) (“The obvious negative corollary of [the Advisory Committee Note to Rule 26(b)(2)(B)] is that accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a finding of inaccessibility.”).

⁴⁸ See [Principle 13, Comment 13.a.](#) (noting that the ‘total costs of production’ include estimated costs of reviewing retrieved documents for privilege, confidentiality, and privacy purposes.).

⁴⁹ [In re ATM Fee Antitrust Litigation, No. C-04-02676 CRB, 2007 WL 1827635 \(N.D. Cal. June 25, 2007\)](#) (“[T]he form of electronic production required under the new rule may be altered by agreement of the parties or by order of the Court”).

⁵⁰ Comment, [The Requirement for Metadata Production under Williams v. Sprint/United Management Co: An Unnecessary Burden for Litigants Engaged in Electronic Discovery](#), 93 *Cornell L. Rev.* 221, 224 (2007) (“The minutes of the Civil Rules Advisory Committee reveal that the rule makers decided to remain silent on whether to require parties to produce metadata and preferred to leave the issue to the courts, presumably because electronic discovery was such a new and changing area of law that the Committee was not confident in setting down a firm and inflexible rule”).

While the 2005 version of *Principle 12* postulated a mild presumption against preservation and production of metadata,⁵¹ the revision of *Principle 12* in the Second Edition opts for a more sophisticated approach.

Thus,

- *Principle 9* specifies that a showing of “special need and relevance” is necessary to require preservation, review or production of “deleted, shadowed, fragmented, or residual electronically stored information.”
- *Principle 12* suggests that the form or forms of production should “take 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.”

The revision to *Principle 12* outlined above was undertaken only after serious debate. It had been cited, along with *Principle 9*, in *Williams v. Sprint/United Management Company*,⁵² for the proposition that “emerging standards” articulated a general presumption against production of metadata except when a party was, or should be, aware that it was relevant to the dispute. *Principle 12* was also cited in *Kentucky Speedway v. NASCAR*,⁵³ for the proposition that “a party should not be required to produce metadata absent a clear agreement or court order.”

However, after a lengthy and spirited discussion, a compromise was reached whereby *Principle 9* was retained in its original form and *Principle 12* was changed to better reflect the conditions favoring a decision to produce in native format (with full metadata).⁵⁴

When the issue is not resolved by early agreement,⁵⁵ local rule⁵⁶ or by the terms of a case management order,⁵⁷ “good cause” or “special need and relevance” should be established along the lines articulated in *Principle 12*. Thus, in *Michigan First Credit Union v. Cumis Insurance Society*,⁵⁸ the court sustained an objection to production “along with intact metadata” because “production of this metadata would be overly burdensome with no corresponding evidentiary value.” In *Schmidt v. Levi Strauss & Co.*,⁵⁹ the court rejected a motion to compel re-production in “native, electronic” format because the “the apparent burden and expense of such an undertaking” was held to “dwarf any benefit.”

VII. Culpability

Another key - and controversial change - in the Amendments was inclusion of a quasi-safe harbor, or at least a cautionary port of call, as Rule 37(e). The Rule does not provide complete sanctuary since it is applicable only to “rule-based” sanctions (leaving untouched the “inherent” power to sanction) and to those cases where “exceptional circumstances” do not exist.⁶⁰

The original version of *Principle 14* recommended that sanctions be considered only where “an intentional or reckless failure to preserve and produce” existed.⁶¹ However, at the April, 2005 meeting of the Advisory Committee, an “intermediate” culpability standard based on proof of “routine, good faith” conduct was adopted. This standard assumes that a party undertook appropriate measures to preserve information and is arguably less forgiving of responding parties than the “intentional or reckless” requirement originally in *Principle 14*.

Given this inconsistency with Rule 37(e), the definition of culpability was deleted from *Principle 14* and the only remaining reference is neutral, *i.e.*, an allusion to the presence of “culpable” conduct. Thus, *Principle 14* now suggests that sanctions

⁵¹ *Principle 12* formerly provided that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.”

⁵² [No. Civ. A. 03-2200-JWLDJW, 230 F.R.D. 640, \(D. Kan. Sept. 29, 2005\).](#)

⁵³ [Civil Action No. 05-138-WOB, 2006 WL 5097354 \(E.D. Ky. Dec. 18, 2006\).](#)

⁵⁴ The Comments to *Sedona Principle 12* have also been extensively rewritten to explain the advantages and disadvantages of particular forms of production with relationship to the impact of the choices on metadata. See [Comments 12.a. and 12.b.](#), which compare the use of image formats with load files providing relevant system metadata to the use of native formats for production of spreadsheets and dynamic databases.

⁵⁵ See [Maryland Protocol at *4, n. 3](#) (“Meta-Data, especially substantive Meta-Data, need not be routinely produced, except [by agreement or] upon a showing of good cause in a motion filed by the Requesting Party.”).

⁵⁶ See [Wyeth v. Impax laboratories, Civ. A. 06-222-JJF, 2006 WL 3091331 \(D. Del. Oct. 26, 2006\)](#) (applying Delaware Default Standard approving production in imaged files).

⁵⁷ [In re Seroquel Products Liability Litigation, 2007 WL 219989 at *4 \(M.D. Fla. Jan. 26 2007\)](#) (specifying format for production including metadata fields and providing process for resolution of disputes).

⁵⁸ [2007 WL 4098213 \(E.D. Mich. Nov. 16, 2007\).](#)

⁵⁹ [2007 WL 2688467 \(N.D. Cal. Sept. 10, 2007\).](#)

⁶⁰ The full text of Rule 37(e) is as follows: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” See [Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L.J. 561, 621 \(2001\)](#) (criticizing the assumption that the loss of electronically stored information automatically implies an intent to commit spoliation).

⁶¹ See generally, [Thomas Y. Allman, Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery, 2 Fed. Courts Law Review 65, 76 \(2007\)](#) (noting support for a “higher standard of culpability or fault”).

should only be considered when there has been a “culpable” failure to preserve and produce information and a reasonable probability that the loss has materially prejudiced the adverse party.

This revised formulation leaves open the issue of “culpability” in the context of requests for adverse inferences to be resolved in accordance with the law of the jurisdiction applicable to the case. In the case of *Consolidated Aluminum Corporation v. Alcoa, Inc.*,⁶² for example, a court applying precedent from the Fifth Circuit held that “[f]or the spoliator to have a ‘culpable state of mind,’ it must act with fraudulent intent and a desire to suppress the truth [which] is not present where the destruction is simply a matter of routine.” There is an apparent conflict between the Second Circuit and the balance of the Federal Circuits in this regard.⁶³

VIII. Conclusion

The attendees at the November, 2006 Annual Meeting of the Sedona Working Group who endorsed the continued viability of the *Sedona Principles* correctly grasped the continuing need for review and articulation of e-discovery best practices. Working Group One has embarked on an ambitious program to supplement and validate the *Principles* in ways that will assist the courts and the bar as they grapple with the implementation of the 2006 Amendments. The Second Edition of the *Principles* represents an important milestone in that effort.

⁶² [Civil Action No. 03-1055-C-M2, 244 F.R.D. 335, 343-344 \(M.D. La. 2006\)](#).

⁶³ *But see Allman, supra, Id. at 77, n. 67*, noting that the author of the restrictive Second Circuit opinion referenced, [Residential Funding Corporation v. DeGeorge Fin. Corp.](#) 306 F.3d 99, 101 (2nd Cir. 2002) (permitting adverse inference based on negligent conduct), subsequently joined the Advisory Committee and was a member of that Committee when the intermediate standard was adopted as part of [then] Rule 37(f).

APPENDIX A

The Sedona Principles (Second Edition 2007)

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state law 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 law 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 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 to production of electronically stored information.
11. A responding party may satisfy its good faith obligation to preserve and produce potentially responsive 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 responsive 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 for production 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 information ordinarily may be shifted to the requesting party.
14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

APPENDIX B

Contrasting Approaches

Topic	Sedona Principles	Federal Rules
Preservation Obligations	Principle 5 “unreasonable to expect parties to take every conceivable step”	No Rule. <i>See Zubulake V</i> : “party [which] is on notice . . . acts at its own peril” (229 F.R.D. 422, 436)
Metadata and Embedded Data	Principle 12 “reasonably accessible metadata” should be produced as appropriate or necessary	No Rule. Committee Note suggests that one cannot produce in a way that makes it more difficult to use
First Tier Discovery	Principle 8: “primary source” should be “active data and information”	Rule 26(b)(2)(B): information from reasonably accessible sources
Second Tier Discovery	Principle 8: requires showing of “need and relevance” that outweigh “costs and burdens” including “disruption of business and information management activities”	Rule 26(b)(2)(B): “good cause” involves determining if “burden or expense” which “outweighs its likely benefit” [and 7 listed factors in Committee Note]
Cost-Shifting	Principle 13: the “costs of retrieving and reviewing” information “not reasonably available” may be shared or shifted	Rule 26(b)(2)(B): Comm. Note: the “costs of obtaining information from sources that are not reasonably accessible” may be shifted
Identification of Unsearched Sources	Principle 4: “responses and objections” filed in response to discovery should “disclose scope and limits”	Rule 26(b)(2)(B): must “identify” unsearched potential sources of discoverable information
Inadvertent Privilege Waiver	Principle 10: should follow “reasonable procedures to protect privileges”	No Rules. Compare proposed Evidence Rule 502, pending action before Congress
Spoilation Culpability”	Principle 14: requires proof of “culpable” failure to preserve	Rule 37(e): no rule-based sanctions for “routine, good faith” losses absent “exceptional circumstances”