Sedona principles

The *Sedona Canada Principles Addressing Electronic Discovery* create a series of guidlines, with extensive annotation, for the discovery of electronic content. These principles are the product of the Sedona working group on e-discovery, which has been revising the principles since 2008. These principles are updated as new technologies and types of data are introduced. The working group's focus is, as the title of its principles suggests, electronic discovery.

The current principles are:

1. Electronically stored information is discoverable;
2. In any proceeding, steps taken in the discovery process should be proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available ESI; (iv) the importance of the ESI to the court's adjudication in a given case; and (v) the costs, burden, and delay that the discovery of the ESI may impose on the parties;
3. As soon as litigation or investigation is anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information;
4. Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review, and production of electronically stored information;
5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden;
6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure;
7. A party may use electronic tools and processes to satisfy its discovery obligations;
8. The parties should agree as early as possible in the litigation process on the scope, format, and organization of information to be exchanged;
9. During the discovery process, the parties should agree to or seek judicial direction as necessary on measures to protect privileges, privacy, trade secrets, and other confidential information relating to the production of electronically stored information;
10. During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions;
11. Sanctions may be appropriate where a party will be materially prejudiced by another party’s failure to meet its discovery obligations with respect to electronically stored information; and
12. The reasonable costs of all phases of discovery of electronically stored information should generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

These principles impose obligations upon litigants to preserve electronic evidence, especially when litigation is in the offing. They also affect the conduct of litigation, which is important for counsel dealing with discovery issues.

The Sedona warning

A Sedona warning should be included in any demand letter that threatens litigation if the demands are not met.

A Sedona warning is an important part of any demand letter in the modern era. Most people's affairs, whether they be business or private, is conducted by electronic means. The Sedona warning reminds a letter's recipient that electronic evidence must be preserved.

The content of a Sedona warning will change based on context and circumstance. When drafting demand letters, the important elements of the warning are:

1. electronic evidence exists or is likely to exist regarding the matters for which demand is made;
2. particulars of any information that may be relevant to the matter (i.e. correspondence or accounting records, to name a couple);
3. reference to Rule 30 of the *Rules of Civil Procedure* (https://www.ontario.ca/laws/regulation/900194#BK281);
4. reference to the *Sedona Canada Principles Addressing Electronic Discovery*;
5. a broad description of the scope of the obligation to preserve evidence, which may read as follows:

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The obligation to preserve evidence includes (but is not limited to) all
electronic communications and the original source metadata on the applicable
servers, personal electronic devices, e-mail providers, laptops, desktops,
mobile/cellular devices, cloud storage facilities, and/or any other
electronic systems.
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Advising clients

Our clients should also always be given advice relating to the Sedona Principles as soon as litigation is mooted. This advice is basic, and may involve taking the additional step of collecting and preserving evidence in our firm's system. Solicitors will make the final decision about how much assistance the client needs in order to preserve electronic evidence.

As a general rule, solicitors should err on the side of caution. One can safely assume that clients are disorganized and unscrupulous. Electronic evidence should be gathered and preserved in our server as a matter of course.

The advice to clients should, in the first instance, mirror the Sedona warning provided in our demand letters (for which, see above).

We add the following invitation to the above warning:

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Our representation of you is contingent on you and/or your organization
taking all of the appropriate steps, including those that we recommend, to
preserve electronic evidence. Please collect all electronic evidence without
delay and submit it to us by uploading it to our server. Should you not have
the technical means to obtain and preserve evidence, we can provide these to
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you through our organization or a private investigator. If you are having trouble downloading or extracting records, such as text messages or encrypted documents, please advise us of this difficulty as soon as it arises. Preserving evidence is part of the cost of litigation. You must shoulder that cost to increase your chances of success in the courts.

Sedona throughout litigation

Discovery is an ongoing process, so counsel should be mindful of the need to preserve electronic evidence if it is discovered in the course of proceedings. Counsel should advise clients of this obligation.

Further reading

3-sedona_canada_principles_third_edition.pdf