

Third Edition of the U.S. Sedona Principles and Ongoing Developments in Electronic Discovery

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By

Last month, the Sedona Conference announced the publication (forthcoming in 2018) of the third edition of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (the “**Principles**”), and released a “Final/Prepublication Version”. The Principles were developed by the Sedona Conference Working Group on Electronic Document Retention and Production, and represent a set of core principles and best practice recommendations for production of electronic information in litigation. The Principles and extensive commentary to the Principles have been updated twice since their first publication in January 2004 to reflect the continuing developments in technology, the increasing proliferation of electronic documents, the practical issues encountered in litigation, as well as the developments in the law that are often driven by these very factors.

A set of principles was also developed specifically for the Canadian context by the Sedona Canada Working Group. The first edition of the *Sedona Canada Principles Addressing Electronic Discovery* was published in January 2008. The second edition was released in November 2015, and it remains the governing set of best practice recommendations applicable to electronic discovery in Canada. While there are other guidelines that have been developed on this issue, including the *Guidelines for the Discovery of Electronic Documents in Ontario*, the Sedona Canada Principles have been recognized as an authoritative source of guidance for Canadian practitioners, and are explicitly incorporated into the *Ontario Rules of Civil Procedure* (specifically, in Rule 29.1.03 setting out a number of the requirements related to a discovery plan).

While the Sedona Canada Principles is the governing document for the Canadian context, it is worth looking at the latest edition of the U.S. *Sedona Principles* and the developments on electronic discovery issues south of the border, given a higher volume of litigation on this topic compared to Ontario and Canada.

The third edition of the Principles emphasize certain aspects of electronic discovery, such as the principles of proportionality and cooperation among parties and counsel. This likely reflects the importance of these concepts as the backdrop for the more specific requirements imposed by the rules of procedure of various jurisdictions and best practices recommendations.

For example, Principle 2 was revised “to emphasize the fundamental purpose and import of proportionality” which applies to all aspects of electronic discovery, including preservation, searching for the likely relevant documents, review for relevancy and privilege, and the scheduling of production and data delivery specifications. Principle 2 sets forth a revised list of factors to be considered in applying proportionality when balancing the cost, burden and need for electronically stored information.

Proportionality also informs the revisions to Principle 5 which deals with the obligation to preserve electronically stored information. For example, the revised Principle 5 explicitly states that it is unreasonable to expect parties to take every conceivable or disproportionate steps to preserve each instance of relevant information.

Commentary to Principle 3 – which states that the parties should, as soon as practicable, confer and seek to reach agreement regarding preservation and production of electronically stored information – was revised to reflect the amendments to the applicable rules of procedure. However, the revised commentary stresses the benefit of cooperation among counsel, such as reducing unnecessary delay and expenses associated with taking non-meritorious positions in court.

This emphasis on proportionality and cooperation in the Principles accords with the practice in Canada. Proportionality is, of course, already a crucial consideration that is not only addressed in the Sedona Canada Principles, but also permeates the *Rules of Civil Procedure*. Cooperation is also a central concept in the *Sedona Canada Principles*.

The third edition of the Principles also discusses another important development in the United States in the area of electronic discovery: the amendments to Rule 37(e) of the *Federal Rules of Civil Procedure* which became effective as of December 1, 2015. Rule 37(e) now sets out a comprehensive and uniform standard for the imposition of sanctions for the failure to preserve electronically stored information. The failure to preserve potentially relevant evidence is typically referred to as spoliation. Under the amended Rule, a range of measures is available to the court. However, the imposition of the harsher, potentially case-dispositive sanctions – such as enforcing a presumption that the lost information was unfavourable to the spoliator or entering a default judgment – is reserved for cases when there was an intent by the spoliator to deprive another party of the electronically stored information. The amended Rule aligns with Principle 14 which “has long recognized that there must be a sufficient level of culpability to support the imposition of spoliation sanctions”. The higher standard for imposing the harsher sanctions is also in line with the jurisprudence in Canada, pursuant to which spoliation is established – giving rise to a rebuttable presumption that the lost or destroyed evidence would be detrimental to the spoliator’s cause – where there has been an intentional destruction of documents to affect the litigation.¹

As electronic discovery principles and jurisprudence continue to evolve in Canada, the developments in the United States, while grounded in the specific rules and case law south of the border, can provide important guidance, especially with respect to novel issues that will undoubtedly continue to arise in this area.

[1]See, for example, Sedona Canada Principles, 2nd edition (November 2015), Principle 11, and *McDougall v. Black and Decker Canada Inc.*, 2008 ABCA 353.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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