



*The Sedona Conference Webinar on
Information Governance
and Defensible Disposition
October 30, 2018*





The Sedona Conference®

- ❖ Nonprofit 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust, intellectual property, and complex litigation
- ❖ Transcending traditional continuing legal education to combine experience with dialogue, outside of the adversarial system, to contribute to the reasoned and just development of law and policy
- ❖ Supporting Working Groups to develop principles, guidelines, and best practices in targeted areas “ripe” for development



The Sedona Conference® dialogue model

Dialogue: Assuming that many people have pieces of the answer and that together they can craft a solution

Debate: Assuming that there is a right answer and that you have it

Dialogue: Listening to understand, find meaning and agreement

Debate: Listening to find flaws and make counter arguments

Dialogue: Admitting that other's thinking can improve on your own

Debate: Defending one's own views against those of others

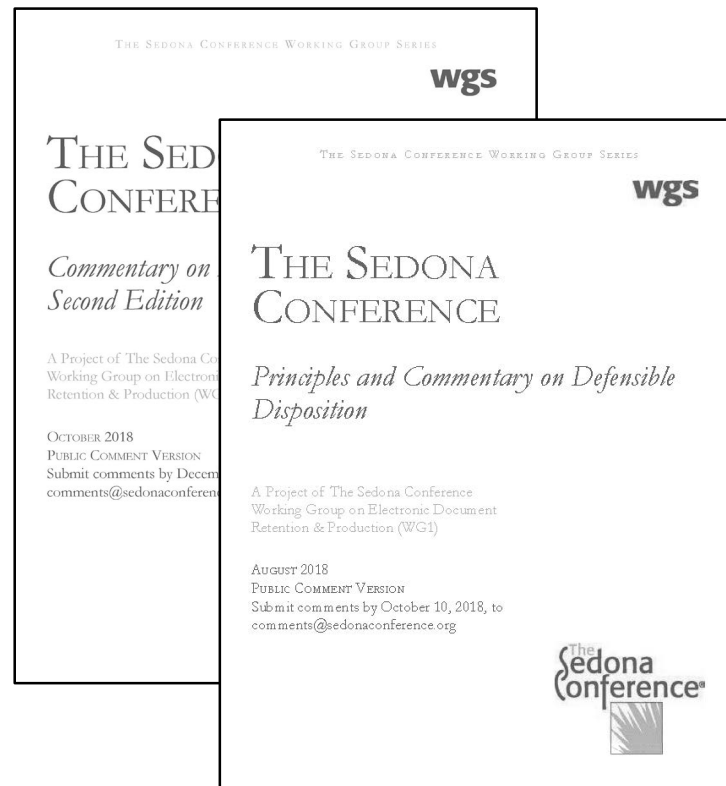
Dialogue: Discovering new options, not seeking closure

Debate: Seeking a conclusion or vote that ratifies your position

Excerpted from Daniel Yankelovich, *The Magic of Dialogue* (2001)

Today's agenda

- ❖ The Sedona Conference, *Commentary on Information Governance*, 2d Edition
- ❖ The Sedona Conference, *Principles and Commentary on Defensible Disposition*





Today's agenda

- ❖ Commentary on Information Governance
 - ❖ The “Information Governance Imperative”
 - ❖ Why a 2d Edition?
 - ❖ Principles and Commentary
- ❖ Focus on “Defensible Disposition”
 - ❖ The problem of ROT
 - ❖ Principles and Commentary
- ❖ Your questions and comments

Today's dialogue leaders



- ❖ Tara S. Emory, Driven, Inc., Falls Church, VA
- ❖ David C. Shonka, Redgrave LLP, Washington DC
- ❖ Robb D. Snow, Jr., Federal Deposit Ins. Corp., Arlington, VA
- ❖ Cheryl Strom, McDonald's Corp., Chicago, IL
- ❖ Kenneth J. Withers, The Sedona Conference, Phoenix, AZ



Tell us about yourself

The closest match to my role is:

- a) IG or RIM professional
- b) IT professional
- c) Legal or regulatory compliance (including eDiscovery)
- d) Attorney who regularly counsels clients on IG, privacy, or data security issues
- e) Provider of IG consulting, services, or products



Tell us about yourself

True or false: “Information Governance is a priority in my organization or for my clients”

- a) True
- b) False
- c) It's complicated



Tell us about yourself

Which of the following are challenges for your organization or clients (you may choose more than one):

- a) Executive support for IG
- b) Corporate culture/staff compliance
- c) Data remediation
- d) Staffing of IG positions
- e) Others



The “IG imperative”

- ❖ Information doubles every 18-24 months
- ❖ By 2020, 40% of all ESI will live in or pass through the cloud
- ❖ Veritas: “Business data will unnecessarily cost organizations around the world a cumulative \$3.3 trillion to manage by the year 2020”
- ❖ Storage is NOT cheap
 - ❖ Microsoft: For every \$1 spent on creating a document, \$10 is spent managing it; but 85% of documents are never retrieved



The “IG imperative”

- ❖ Smallwood, *Information Governance: Concepts, Strategies, and Best Practices* (2014)
 - ❖ 99% of information will not be retrieved 10-15 days after creation
 - ❖ Approximately 50% of businesses recreate records because they cannot find the originals
- ❖ Gartner: More than 50% of data migration projects will exceed budget or result in some form of business disruption due to flawed execution



The business case for IG

The primary goal of IG is to develop and implement processes, policies, and technologies that will enable your agency or organization to organize, store, and track data for retention, control, and business purposes.



The business case for IG

Specific goals of an IG program include:

- ❖ Implementing a strategy to effectively manage data by creating a consistent location or place for data
- ❖ Reducing duplication of information
- ❖ Providing centralized access to data
- ❖ Improving business continuity
- ❖ Better management of records and information for appropriate retention and control



The business case for IG

Cost benefits of an IG program include:

- ❖ Less staff time spent searching for information
- ❖ Cost savings from less storage, retrieval, and handling of paper records
- ❖ Improved cost-efficiency in electronic records storage and retrieval
- ❖ Reduced IT and staff costs for managing data infrastructure



The business case for IG

The efficiency gains of an IG program include:

- ❖ Improved business processes through faster access to and retrieval of information
- ❖ Promotes information sharing across the organization and between divisions, and potential for re-use of information
- ❖ Improved access to records in response to external audit and regulatory inquiries/legal discovery issues
- ❖ Enhanced ability to provide accurate, timely, and transparent responses to legislative and regulatory requirements



The business case for IG

Examples of reduced risks and improved organizational performance include:

- ❖ Reducing retention of duplicate and ephemeral records through single-instance storage
- ❖ Mitigation of business and reputational risk
- ❖ Improved compliance with statutory and regulatory recordkeeping requirements
- ❖ Enhanced protection and management of confidential, sensitive, and private information



The business case for IG

More examples of reduced risks and improved organizational performance include:

- ❖ Improved business continuity planning by identifying and managing critical records
- ❖ Reduced risk of unauthorized destruction of permanent records
- ❖ Improved reporting as records of archival value are identified at source and captured by the records management process



The business case for IG

Big challenges for IG implementation include:

- ❖ Assessing costs and risks (storage, management, retrieval, data breach, eDiscovery preservation and review)
- ❖ Addressing organizational culture (“keep everything”, “do nothing”, “out-of-sight, out-of-mind”)
- ❖ Identifying information that has medium- to long-term business value



The Sedona IG Commentary

The 2014 first edition included:

- ❖ The definition of Information Governance, its fundamental elements, and the resulting benefits to the organization
- ❖ Why traditional, siloed approaches to managing information have prevented adequate consideration of information value, risk, and compliance for the organization as a whole
- ❖ How hard costs, soft costs, opportunity costs, and risk accumulate for organizations lacking adequate control of information
- ❖ The crucial role of executive sponsorship and ongoing commitment



Why a 2d edition?

- ❖ Technological advances since 2014
- ❖ Maturity of IG as a distinct discipline
- ❖ Better integration of IG with broader business goals
- ❖ IG emerging from eDiscovery's shadow
- ❖ Sharper focus in cost analysis

Why a 2d edition?

- ❖ Consistency with new and updated Sedona Conference publications
- ❖ Updated citations to case law, statutes, and regulations
- ❖ Updated and more consistent use of terminology
- ❖ Updated illustrations



Why a 2d edition?

- ❖ Principle 4: Expanded discussion of stakeholder roles and responsibilities
- ❖ Principle 6: Expanded discussion of IG and legal holds, defensible disposition
- ❖ Principle 7: Discussion of GDPR
- ❖ Principle 8: Discussion of Sedona *International Litigation Principles*
- ❖ Principle 10: Discussion of Technology Assisted Review (TAR)



Sedona IG Principle 1

“Organizations should consider implementing an Information Governance program to make coordinated, proactive decisions about information for the benefit of the overall organization that address information-related requirements and manage risks while optimizing value.”



Sedona IG Principle 2

“An Information Governance program should maintain sufficient independence from any particular department or division to ensure that decisions are made for the benefit of the overall organization.”



Sedona IG Principle 3

“All stakeholders’ views/needs should be represented in an organization’s Information Governance program.”



Sedona IG Principle 4

“The strategic objectives of an organization’s Information Governance program should be based upon a comprehensive assessment of information-related practices, requirements, risks, and opportunities.”



Sedona IG Principle 5

“An Information Governance program should be established with the structure, direction, resources, and accountability to provide reasonable assurance that the program’s objectives will be achieved.”



Sedona IG Principle 6

“The effective, timely, and consistent disposal of physical and electronic information that no longer needs to be retained should be a core component of any Information Governance program.”



Sedona IG Principle 7

“When Information Governance decisions require an organization to reconcile conflicting laws or obligations, the organization should act in good faith and give due respect to considerations such as data privacy, data protection, data security, records and information management (RIM), risk management, and sound business practices.”



Sedona IG Principle 8

“If an organization has acted in good faith in its attempt to reconcile conflicting laws and obligations, a court or other authority reviewing the organization’s actions should do so under a standard of reasonableness according to the circumstances at the time such actions were taken.”



Sedona IG Principle 9

“An organization should consider reasonable measures to maintain the integrity and availability of long-term information assets throughout their intended useful life.”



Sedona IG Principle 10

“An organization should consider leveraging the power of new technologies in its Information Governance program.”



Sedona IG Principle 11

“An organization should periodically review and update its Information Governance program to ensure that it continues to meet the organization’s needs as they evolve.”



Defensible Disposition (DD)

Sedona IG Principle 6:

“The effective, timely, and consistent disposal of physical and electronic information that no longer needs to be retained should be a core component of any Information Governance program.”

The cost of ROT

- ❖ ROT = Redundant, Outdated & Trivial Information
 - ❖ Employees waste between .8 and 2.4 hours/day looking for information
 - ❖ Costs an estimated \$3.3 trillion annually to store and manage
 - ❖ Microsoft: 50% of documents are duplicates; 60% are obsolete



Sedona DD Principle 1

“Absent a legal retention or preservation obligation, organizations may dispose of their information.”

- ❖ Comment 1.a. An organization should, in the ordinary course of business, properly dispose of information that it does not need
- ❖ Comment 1.b. When designing and implementing an information disposition program, organizations should consider the obligation to preserve information that is relevant to the claims and defenses and proportional to the needs of any pending or anticipated litigation.



Sedona DD Principle 1

“Absent a legal retention or preservation obligation, organizations may dispose of their information.”

- ❖ Comment 1.c. When designing and implementing an information disposition program, organizations should consider the obligation to preserve information that is relevant to the subject matter of government inquiries or investigations that are pending or threatened against the organization.
- ❖ Comment 1.d. When designing and implementing an information disposition program, organizations should consider applicable statutory and regulatory obligations to retain information.



DD Principle 1: Illustration A

In a products liability suit, the plaintiff requests discovery regarding the product manufacturer's written Information Governance program, its retention schedule, and a list of relevant information that no longer exists; when that ESI was destroyed; and why that information was destroyed. In responding to the manufacturer's relevance and proportionality objections, the plaintiff makes no showing that the manufacturer violated its duty to preserve ESI after the lawsuit was pending or reasonably anticipated. The manufacturer is entitled to stand on its objections.



DD Principle 1: Illustration B

Pursuant to its retention schedule, a product manufacturer routinely disposes of product testing results that show the product is unsafe but retains testing results that show the product is safe. The manufacturer later argues that it did not anticipate litigation until it was sued, years after the unhelpful testing results were destroyed. In determining when litigation was anticipated, or reasonably should have been anticipated, the court may consider, among other factors, the “selective disposition” by the organization. In addition, if the court determines that the organization violated a duty to preserve, the court may consider the organization’s “selective disposition” in determining whether the organization acted with an “intent to deprive” under Rule 37(e)(2).



Sedona DD Principle 2

“When designing and implementing an information disposition program, organizations should identify and manage the risks of over-retention.”

- ❖ Comment 2.a. Information has a lifecycle, including a time when disposal is beneficial.
- ❖ Comment 2.b. To determine the “right” time for disposal, risks and costs of retention and disposal should be evaluated.



The value of disposal

1. Increased productivity and efficiency
2. Reduced storage costs
3. Improved legal compliance
4. Reduced discovery costs and risks
5. Enhanced data privacy and security benefits



Sedona DD Principle 3

“Disposition should be based on Information Governance policies that reflect and harmonize with an organization’s information, technological capabilities, and objectives.”

- ❖ Comment 3.a. To create effective information disposition policies, organizations should establish core components of an Information Governance program, which should reflect what information it has, when it can be disposed of, how it is stored, and who owns it.
- ❖ Comment 3.b. An organization should understand its technological capabilities and define its information objectives in the context of those capabilities.



Information disposition challenges

- ❖ Unstructured information
- ❖ Mergers and acquisitions
- ❖ Former employees
- ❖ Shared file sites
- ❖ Personally Identifiable Information (“PII”)
- ❖ Law firms, eDiscovery vendors, and adversaries
- ❖ In-house legal departments
- ❖ Hoarders
- ❖ Regulations
- ❖ Culture change and timing



Success for *any* IG program

- ❖ The organization needs to know where its information is and how it is used
- ❖ Senior level must buy into the program and interested stakeholders must be engaged
- ❖ There must be an accountable, high-level official who has control over the program and reports directly to the top
- ❖ The program needs to properly planned, funded, and executed with organizational objectives in mind
- ❖ The program involves risk assessment and decisions must be based on a risk/benefit and value analysis
- ❖ The program needs monitoring, constant upkeep, and of course re-assessment when things go off the tracks



Defensible disposition questions

- ❖ What are the dangers of “selective disposition”?
- ❖ How does the General Data Protection Regulation (GDPR) in the European Union affect disposition?
- ❖ How do the New York State financial sector security regulations affect disposition?
- ❖ How might the California Consumer Privacy Act (CCPA), going into effect in 2020, affect disposition?



Public comments welcome

- ❖ Public comment period for *Defensible Disposition* closed earlier this month
- ❖ Public comment period for *Information Governance, 2d Edition* open through December 5, 2018
- ❖ Send all comments to:
comments@sedonaconference.org

Questions and comments?



Upcoming events

Working Group 12
Inaugural Annual Meeting on Trade Secrets
November 5-6, 2018 | Hollywood, CA



thesedonaconference.org/node/7726

Upcoming events

Working Group 6
Annual Meeting on Cross-Border Discovery
January 14-15, 2019 | St. Pete Beach, FL



thesedonaconference.org/node/7999

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Thanks to today's dialogue leaders



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Thank you!

