



# The Sedona Conference

## *International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)*

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The rapid proliferation of electronic information and the increasing interdependence amongst individuals, multi-national companies, and governments arising from a global marketplace present novel and unique legal challenges that previously did not exist. Around the world, and particularly in Europe, nations have adopted data protection laws that restrict the collection, processing, retention, and transfer of personal data. The result has been that one of the challenges in the new global economy is the conflict that arises when a party is obligated to disclose information in one forum (e.g., a United States court) but that information is located outside the United States (e.g., typically in the European Union or EU) and is protected by a data protection law, “blocking statute,” bank secrecy law, or other regulation which prohibits its disclosure.

In 2011, The Sedona Conference’s Working Group on International Electronic Information Management, Discovery, and Disclosure (“Working Group 6”), produced the first edition of the *International Principles on Discovery, Disclosure & Data Protection*, which articulated six Principles with commentary and useful forms to assist courts and litigants in addressing the tension between the U.S. tradition of liberal discovery and emerging data protection laws in other nations. Working Group 6’s mandate is an important one: to bring together some of the most experienced attorneys, judges, privacy and compliance officers, technology-thought leaders, and academics from around the globe in a dialogue about the international management, discovery, and disclosure of electronically stored information (“ESI”) involved in cross-border disputes. The 2011 *International Principles* was well-received by practitioners, and individual members of the EUs’ Article 29 Working Party on data protection considered it to be both a positive contribution and an opening for further dialogue.

In 2016, the EU adopted the General Data Protection Regulation (GDPR), which updates and consolidates the data protection laws of the separate EU Member States. At the same time, the most common mechanism for the lawful transfer of personal data from Europe to the U.S., the “Safe Harbor,” was declared invalid by the Court of Justice of the European Union, leading to the negotiation of a new mechanism, “Privacy Shield.” The GDPR will go into effect in May of 2018, and practice under the new Privacy Shield is just beginning to develop. To address uncertainty during this transitional period, Working Group 6 has updated the commentary to the Principles and significantly revised the model practice documents. The Principles themselves have not been substantively changed, having withstood the test of turbulent times.



These six Principles are:

1. With regard to data that is subject to preservation, disclosure, or discovery in a U.S. legal proceeding, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.
2. Where full compliance with both Data Protection Laws and preservation, disclosure, and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.
3. Preservation, disclosure, and discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.
4. Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict.
5. A Data Controller subject to preservation, disclosure, or discovery obligations should be prepared to demonstrate that data protection obligations have been addressed and that appropriate data protection safeguards have been instituted.
6. Data Controllers should retain Protected Data only as long as necessary to satisfy legal or business needs. While a legal action is pending or remains reasonably anticipated, Data Controllers should preserve relevant information, including relevant Protected Data, with appropriate data safeguards.

In the Transitional Edition, these six Principles are accompanied by detailed commentary and analysis, as well as a Bibliography, a Model U.S. Federal Court Order Addressing Cross-Border ESI Discovery, a Model U.S. Federal Court Protective Order, and a model Cross-Border Data Safeguarding Process + Transfer Protocol.

The full text of The Sedona Conference *International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)* is available free for individual download from The Sedona Conference website at [https://thesedonaconference.org/publication/International\\_Litigation\\_Principles](https://thesedonaconference.org/publication/International_Litigation_Principles).

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