October 30, 2009

Article 29 Data Protection Working Party
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Datenschutz und Informationsfreiheit
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RE: Comment of The Sedona Conference® Working Group 6 to Article 29 Data Protection Working Party Working Document 1/2009 ("WP 158")

INTRODUCTION

On February 11, 2009, the Article 29 Data Protection Working Party (the "WP") issued its "Working Document 1/2009 on pre-trial discovery for cross border civil litigation" (also known as "WP158"). In WP158, the Working Party acknowledged the helpfulness of the 2008 public comment draft *Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery* (the "*Framework*"), prepared by The Sedona Conference® Working Group 6 on "International Electronic Information Management, Discovery and Disclosure" ("WG6").

The WP158 extended "an invitation to public consultation with interested parties, courts in other jurisdictions and others to enter a dialogue with the Working Party."

The Sedona Conference® ("Sedona"),[1] and more specifically, its Working Group 6 on "International Electronic Information Management, Discovery and Disclosure" eagerly accepts the invitation of the Working Party to engage in dialogue with the Working Party on the subject of cross-border discovery and related issues outlined in WP158.[2]

[1] The history and purpose of The Sedona Conference® is detailed in Appendix 1, attached.

[2] Sedona WG6 issues a similar invitation to the French Commission nationale de l'informatique et des libertes ("CNIL") and other European data protection authorities. WG6 notes that the recent CNIL deliberation document 2009-474 offers valuable insights and guidance on many of the issues addressed herein.

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Data protection is a fundamental global concern, which we share. We also recognize that data protection may be threatened by fast-moving technology and business practices, which may outpace the development of appropriate legal regulatory structures.

We also share global concerns for the rule of law, and the effective resolution of legal disputes. We acknowledge the difficulty of harmonizing diverse systems of law and regulation, but we are confident that, with appropriate cooperation and dedication, improved understanding and accommodation of competing interests is possible. Sedona pledges to apply its best efforts and resources to aid that process.

Sedona's prior efforts in the areas of document management and disclosure have emphasized the need for cooperation, proportionality, managed review, education of the bar and the judiciary, and creative efforts to develop neutral, fair principles of practice. Sedona WG6 very much hopes to engage with the Article 29 Working Party to help advance the development of similarly neutral, fair and workable principles and procedures, together with model forms of orders and agreements, for use in the area of international disclosure requests.

BACKGROUND

Working Group 6, on "International Electronic Information Management, Discovery and Disclosure," is a multi-jurisdictional effort, addressing issues that arise in the context of e-information management and e-disclosure for multinationals subject to litigation and regulatory oversight in multiple jurisdictions with potentially conflicting internal laws. WG6 held its first meeting in Cambridge, England in the summer of 2005. The Working Group immediately began working on a Global Survey of disclosure law, a resource library, and judicial education programs for the multi-jurisdictional context. The group held its second meeting in September 2006, outside Madrid, its third meeting in December 2007, in Bermuda, and its fourth meeting, in Barcelona, in May 2009 (at the close of a two-day educational conference on international disclosure and privacy issues).

In August 2008, WG6 issued a draft of its *Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery* for public comment. WP158 referenced the *Framework*, noting that it sets out "relevant factors" that U.S. courts should consider "when determining the scope of cross border discovery obligations."

POTENTIAL FOR PRODUCTIVE DIALOGUE BETWEEN THE WP AND WG6

In our view, several factors suggest that productive dialogue between the Working Party and WG6 can produce improved understanding and (potentially) outline a mutually-acceptable protocol for handling cross-border discovery issues.

1. The Sedona process (dialogue, not debate; and consensus wherever possible) aims at gathering broad insights, and at integrating diverse points of view into

"best practice" recommendations. WG6 has actively encouraged participation from experts outside the United States.

2. As outlined in Appendix 1 below, Sedona has succeeded in creating influential best practice guidelines in the areas of discovery, and other aspects of complex litigation.

3. Certain members of the Article 29 Working Party participated in the June 2009 WG6 conference in Barcelona, Spain, resulting in spirited dialogue, and a renewed invitation to WG6 to provide comments on the WP158 analysis.

4. In addition to the WG6 Framework (which largely approaches the problem from the perspective of U.S. courts), members of WG6 have prepared an additional analysis of the problem of cross-border discovery, from the international perspective. *See* Moze Cowper & Amor Esteban, *EDiscovery, Privacy & The Transfer Of Data Across Borders: Proposed Solutions For Cutting The Gordian Knot* (2009) ("Proposed Solutions") (copy attached). WG6 members are actively reviewing the Proposed Solutions framework, taking into account the principles outlined in WP158.

In short, Sedona and WG6 believe that the time is right for international cooperation on this issue. We also believe that mutually-acceptable solutions are possible, and that dialogue is most likely to lead to such solutions.

COMMENTS ON WP158

WG6 believes that its highest and best contribution to this dialogue begins by identifying areas of common ground, rather than by conducting a point-by-point response to WP158. The following comments are intended to highlight such points of agreement, and areas where additional dialogue is most likely to yield positive results. We have organized our comments into three groups—general comments, those relating to processing issues, and those relating to transfer issues.

General Comments

5. WP158 notes that "[t]here is a tension between the disclosure obligations under US litigation or regulatory rules and the application of the data protection requirements of the EU." (WP158 at 2) WG6 agrees, but notes that mutual awareness of this tension can lead to greater understanding and (potentially) agreement on certain shared principles.

6. WP158 observes that certain aspects of the tension "can only be resolved on a governmental basis, perhaps with the introduction of further global agreements along the lines of the Hague Convention." (WP158 at 2) Although WG6 does not discourage such efforts, it notes that (typically) multi-lateral conventions of that type require years of study, drafting and compromise, and may take more years to establish a

critical mass of signatories. Accordingly, WG6 believes that a key aspect of the effort to reduce the tension over cross-border discovery must involve development of mutually-acceptable "best practice" protocols, which may be agreed between parties in litigation, and/or endorsed in the form of discovery orders by courts overseeing international litigation. Such protocols should not await nor require amendments to existing treaties nor drafting of new treaties. Rather, WG6 believes that privacy and data protection safeguards can be enhanced within the existing framework of the EU Directive. WG6 suggests that the Working Party consider using its mandate to help harmonize data protection laws among EU countries by embracing certain safeguards with respect to processing and transfer of personal data in the context of cross-border discovery.

WP158, for example, suggests that E.U. data controllers to approach U.S. "to explain the data protection obligations" imposed upon them. (WP158 at 11) A cooperative statement between Sedona WG6 and the Article 29 Working Party might help support such an explanation to U.S. courts of the special circumstances inherent in international disclosure requests.

7. WP158 notes that, in the United States, "the scope of pre-trial discovery is the widest of any common law country." (WP158 at 2) Such discovery, however, is not unlimited. Litigants in the United States are not permitted to engage in unlimited "fishing expeditions" in discovery. *See* Hon. Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters And E-Discovery*, 30 Cardozo L. Rev. 347, 361 (2008) (citing Advisory Committee Notes to Federal Rules of Civil Procedure, to effect that "[i]nspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy"); *see id.* (citing *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 06 Civ. 551, 2007 WL 169628 (M.D. Fla. Jan. 18, 2007) (denying request for discovery and characterizing request as "fishing expedition").

8. WP158 cites provisions of U.S. civil procedure rules, pursuant to which courts may issue "protective" orders, to limit the "scope of excessively broad pre-trial discovery requests, "or where the burden or expense of the proposed discovery outweighs its likely benefit." (WP158 at 4) Indeed, this form of protective order procedure could form the basis for implementation of the kind of mutually-accepted protocol that WG6 envisions. *See* Sedona *Framework* at 13 (suggesting that protective orders may be used to reduce the scope of processing of personal information, and ensure that data is handled securely); *id.* at 28 (suggesting development of "specific EU provisions for federal and state protective orders and for Case Management Orders").

Comments relating to Legitimate "Processing" of Personal Data

9. In terms of legitimizing the processing of personal data for cross-border discovery purposes, WP158 suggests the use of a "balance of interest" test, which would "take into account issues of proportionality, the relevance of the personal data to the litigation, and the consequences for the data subject." (WP158 at 10) All of these

interests can, at least in theory, be balanced in the context of cross-border litigation. Indeed, such a balancing is suggested in the Sedona *Framework*. *See Framework* at 29 ("the scope of cross-border discovery obligations should be based on a balancing of the needs, costs and burdens of the discovery with the interests of each jurisdiction in protecting the privacy rights and welfare of its citizens").

10. WP158 notes that under the EU Directive, although the initial act of issuing a legal hold notice does not constitute "processing" of personal data, taking any action to ***comply*** with the notice, no matter how small a deviation from the ordinary course of handling, does constitute "processing" of personal data. WG6 acknowledges that view of processing as one difference between the two regions. Indeed, in the United States, processing is generally considered to refer to technical manipulation of data, rather than the mere act of preserving data.

This difference, however, is not necessarily insurmountable. Relatively brief preservation of information (sufficient to determine its relevance to a dispute, and to permit parties to narrow the scope of requests for information, and to obtain necessary protective directions from a court) might be considered appropriate processing for purposes of compliance with a legal obligation, or for other legitimate purposes of the data controller.[3] Such preservation need not result in unrestricted retention of personal data.

11. WP158 suggests, as a "first step," that "controllers should restrict disclosure if possible to anonymised or at least pseudonymised data. After filtering ('culling') the irrelevant data – possibly by a trusted third party in the European Union – a much more limited set of personal data may be disclosed as a second step." (WP158 at 10) This procedure, although fraught with practical and technical difficulties, is not beyond the power of a U.S. court to order, if the cost and burden of the solution is not disproportionate to the harm being avoided. The Sedona *Framework*, moreover, encourages development of "EU approved protocols and processes for pre-filtering of personal data in the host country to ensure that only relevant personal data is transferred for cross-border discovery purposes." *Framework* at 28. The question is whether this procedure (or any other procedures) can offer reasonable assurance of compliance with EU data protection requirements. That question, we believe, should be the subject of further dialogue between the Working Party and WG6.

12. WP158 references concerns about especially "sensitive" personal information. (WP158 at 10) Again, such concerns are familiar to U.S. courts, which often enter protective orders for purposes of restricting access to trade secrets, medical

[3] *See* The Sedona Conference®, *Commentary On Legal Holds* (August 2007), available at http://www.thesedonaconference.org (outlining requirements for basic legal hold form). The *Commentary*, moreover, emphasizes that a legal hold should be entered only when there is a "reasonable" anticipation of litigation, not merely a "possibility" of litigation.

information, and other forms of sensitive data.[4] Such an order, moreover, may pay particular attention to the culling of any sensitive information that is not relevant and material to the pending dispute.

WG6 would be pleased to provide the Article 29 Working Party with samples of protective orders entered in U.S. litigation, which could be the base for a "model" form of protective order. Such a model form, incorporating and harmonizing views from both the U.S. and European perspectives, could serve as a vital aid to courts and parties struggling to balance privacy requirements and the needs of litigants for fair access to relevant information.

Comments relating to Legitimate "Transfers" of Personal Data

13. WP158 recognizes that the EU data protection Directive "does not prevent transfers for litigation purposes," but suggests that "there must be compliance with certain data protection requirements" in such transfers. (WP158 at 7) This is precisely what the WG6 Proposed Solutions paper (cited above) aims to provide. WG6 recognizes the fundamental difference between a business data transfer context in which data protection can be ensured via Safe Harbor and Model Contractual Clauses, on the one hand, and a litigation transfer context which almost necessarily involves some onward transfer to a court or opposing party on the other, where it is much more difficult to ensure a data protection "chain of custody." Nevertheless, WG6 suggests consideration of safeguards that run with the data, such that data protection can be extended through existing tools (e.g., Safe Harbor and Model Contractual Clauses), rather than less practical, and more time consuming and costly methods such as anonymization of large volumes of data.

14. WP158 urges parties in litigation "to involve the data protection officers from the earliest stage." (WP158 at 11) WG6 believe this is sound advice, to the extent that this approach contemplates a data protection officer of the organization, and not of the state. As a result of recent amendments of civil procedure rules in the U.S., these kinds of issues are now among the very first items for discussions between parties, on the commencement of litigation. Courts, moreover, are encouraged under the amended U.S. Federal e-discovery rules to take up such issues at the first conference in every case. *See* U.S. Federal Rule of Civil Procedure 16(b) (initial scheduling order may address "disclosure or discovery" and "other appropriate matters").

15. WP158 encourages EU data controllers to "approach the US courts in part to be able to explain the data protection obligations upon them and ask US courts for relevant protective orders to comply with EU and national data protection rules." (WP158 at 11) Again, we believe this is sound advice. WG6 agrees that mutual and cross-cultural judicial, practitioner and client education and understanding are key. The

[4] Rule 26(c) of the Federal Rules of Civil Procedure, for example, specifically authorizes protective orders to avoid "annoyance, embarrassment, oppression, or undue burden or expense."

Sedona *Framework*, among other things, suggests "cross-border discovery training" as an addition to the curriculum for the training of judges. One potentially very useful aspect of collaboration between the Working Party and WG6 might include outlining essential elements of such a curriculum.

16. WP158 suggests that "[w]here a significant amount of data is to be transferred, the use of Binding Corporate Rules ("BCRs") or Safe Harbor should be considered." (WP158 at 13) As an alternative to BCRs or Safe Harbor, WG6 encourages the Working Party to consider expansion of the use of Model Contractual Clauses for this purpose. This is, in essence, the kernel of the "bill of lading" style certification of compliance suggested in the Proposed Solutions paper referenced above. Admittedly, this concept needs refinement due to the unique nature of transfer of personal data for purposes of discovery in litigation. But the expansion and evolution of existing tools such as Model Contractual Clauses might offer one potential cost-effective interim solution.

17. WP158 expresses concern about the possibility that large transfers of data not be justified "on grounds of the possibility that legal proceedings may be brought one day in US courts." (WP158 at 13) That concern, while legitimate, in our view is quite remote, for several reasons:

(a) The "possibility" of litigation is not the standard for the trigger of data preservation obligations in connection with litigation. Rather, the standard is the "reasonable anticipation" of litigation.

(b) Even where data preservation obligations arise, data transfers are not necessary. Rather, a party need only preserve relevant information. Transfer and production of any such information generally awaits commencement of litigation.

(c) Transfers of data in response to discovery requests are, as noted above),subject to limitations of proportionality and concerns for privacy and confidentiality, which may be reflected in a protective order.

18. WP158 suggests that "[w]here it is possible for The Hague Convention to be used," the Convention procedures "should be considered first as a method of providing for the transfer of information for litigation purposes." (WP158 at 14) The *Framework* notes some instances where U.S. courts have made use of the Hague Convention, *see Framework* at 17. However, strong anecdotal evidence from practitioners and jurists alike suggests that use of the Hague convention is impracticable for cross-border discovery for three main reasons. [5] First, it is too time consuming, costly and narrow

[5] The Hague Convention offers two options for pursuit of international discovery. One, through letters of commission, issued by a judge in one country and executed by a judge in another country, may become unworkable because some Hague Convention signatories have made clear that their courts will not execute requests for pre-trial discovery, in the manner contemplated by U.S. procedure. The second method involves letters rogatory, issued by consular officers. This method may be insufficient because it

when it is available. Second, it is not available in all EU countries, because many have opted out of the cross-border discovery provisions. And third, it faces a major legal hurdle in the United States because of the U.S. Supreme Court decision in *Aerospatiale v. U.S. Dist. Court for the So. District of Iowa*, 482 U.S. 522 (1987) which held that, where a U.S. court has personal jurisdiction over a party, the court may make use of U.S. civil procedure rules to compel discovery. In short, in the U.S., the Hague Convention is an ancillary source of authority for discovery, not an exclusive source. *Aerospatiale* at 544. For this reason, we believe that the Working Party and WG6 should work to develop a mutually-acceptable framework that does not depend, at its core, on compliance with the Hague Convention.

Comments relating to Blocking Statutes

19. WP158 cites an earlier public comment version of The Sedona Conference® *Framework* for the proposition that the French decision in the case of Credit Lyonnais has altered the perception of US courts as to the reality of enforcement of foreign blocking statutes. The current public comment version of the *Framework* corrects this reference in properly referring to the case of *In re Advocat "Christopher X"*, Cour de Cassation, December 12, 2007, Appeal No. 07-83228. *See Framework*, Amended Public Comment Version, p. 21, footnote 95, available at www.thesedonaconference.org.

AREAS FOR FUTURE COOPERATION

WG6 renews its call for further dialogue on the issues outlined above. In particular, we suggest that the Working Party consider one or more of the following suggestions for future cooperation:

1. WG6 would be pleased to answer questions about these comments, in any form you deem appropriate. At your request, one or more of our representatives would be available to make a presentation to a Working Party meeting, to answer questions and facilitate further understandings between the groups.

2. WG6 and its constituents maintain a large store of materials relevant to cross-border discovery. We would be pleased to provide you with access to such materials.

3. WG6 would be pleased to offer one or more of your members or representatives status (on an observer or *ex officio* basis, if you prefer) as members of WG6. Among other things, such membership would permit more regular communications between the groups. In addition, WG6 would support an outreach effort

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only permits a party to examine a witness on a voluntary basis. It does not give a party any authority to demand access to documents. *See generally* American Bar Association, *Obtaining Discovery Abroad* (2d ed. 2005).

to assist EU representatives in understanding the nature and scope of U.S. discovery challenges, and the legal, economic and cultural impact of differences between U.S. and E.U. legal systems.

4. Ultimately, if the concept of a mutually-acceptable protocol for cross-border discovery is of interest to the Working Party, we would suggest the formation of a joint task force, consisting of representatives from the Working Party, and from WG6, to work on drafting such a protocol. Our expectation is that such a protocol would not require any formal approval from the Working Party as a whole, or any other EU authority. Rather, such a protocol would represent a suggested framework, which parties and courts in the United States could use as the basis for negotiations and (where appropriate) entry of necessary protective orders, embodying some or all of the terms of the protocol.

CONTACT INFORMATION

WG6 encourages broad and sustained contacts between its members and representatives of the Working Party. To ensure convenient and effective communications between the groups, however, we suggest the following as central contacts for communications with WG6. We will ensure that all communications are promptly disseminated to our membership.

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We sincerely thank the Working Party for the opportunity to provide these comments, and to actively participate in this dialogue process with you. We are

confident that, working together, the Working Party and WG6 can make a positive, and significant, contribution to the law and practice in this area.

Very truly yours,

M. James Daley
On behalf of The Sedona Conference® Working Group 6

APPENDIX 1

BRIEF HISTORY AND PURPOSE OF THE SEDONA CONFERENCE®

The Sedona Conference® ("Sedona") is a research and educational institute dedicated to the advancement of law and policy in such areas as complex litigation. Sedona exists to allow leading judges, lawyers, experts, academics and others to come together - in conferences and mini-think tanks (called "Working Groups") to engage in dialogue in an effort to move the law forward in a reasoned and just way. Sedona believes that the combined knowledge of experts representing varied viewpoints, focused through the "magic" of dialogue outside an adversarial setting, can achieve critically important consensus on the most difficult issues. Sedona brings together the brightest minds in a think-tank setting with the goal of creating practical solutions and recommendations. Their findings are developed and enhanced through a substantive peer review process and the resulting content widely published in conjunction with educational programs for the bench and bar, so that it can help drive the reasoned and just advancement of law and policy in the areas under study. *See* www.thesedonaconference.org.

Sedona currently operates seven working groups. These groups have had great success in influencing the law in a number of areas. Working Group 1, for example, was formed in Spring 2002. It issued a public comment version of *The Sedona Principles* (addressing best practice principles for electronic document production) in March 2003. A month later, the Federal Judicial Center's Civil Rules Advisory Committee Discovery Subcommittee cited the *Principles* as one of the reasons to focus on possible amendments to the Federal Rules of Civil Procedure in this area. A month later, the *Principles* were cited by the Southern District of New York in the first of many opinions in the seminal *Zubulake* case. It was cited by the District of Kansas as "persuasive authority" where no guidance existed in either the rules or the case law to help resolve the dispute before the court on the discovery of various data in connection with electronic spreadsheets. *Williams v. Sprint/United Management Co.*, 2005 WL 2401626 (D. Kan. Sept. 29, 2005). Since then, WG1 has published the Second Edition of *The Sedona Principles* (June, 2007), and a number of Commentaries of immediate benefit to the Bench and Bar, including: *The Sedona Conference Commentary on Legal Holds, The Sedona Conference Commentary on Best Practices for Search and Information Retrieval, The Sedona Conference Commentary on Email Management and Archiving,* the Second Edition of *Best Practices for Navigating the eDiscovery Vendor Selection Process,* and the Second Edition of *The Sedona Conference Glossary*. Additional commentaries are in process.