

The Sedona Conference and Its Impact on E-Discovery

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CHAPTER 35

THE SEDONA CONFERENCE AND ITS IMPACT ON E-DISCOVERY

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I. WHY “SEDONA”?

Sedona is a small city in the high desert of Arizona, spread among the rugged canyons and mesas of the Oak Creek Valley, about thirty miles south of Flagstaff. It is home to a vibrant community of cowboy artists, retirees, and a few hardy descendants of the original homesteaders who have coaxed apples and wine grapes from the dry, rocky soil for a century and a half. The spectacular red rock formations that have made Sedona a tourist destination have also served as the backdrop for countless Hollywood westerns, going back to silent movie days. The red rocks have also attracted a community of New Age practitioners who claim that the rocks mark the location of vortices where subtle electromagnetic energies spiral, having a direct effect on the consciousness of those persons standing on them.

So how did “Sedona” become synonymous with “eDiscovery”? Sedona’s association with eDiscovery has less to do with town itself—or even its famed vortices—than with one particular resident, whose intelligence, energy, and eccentricity made him a pioneer in eDiscovery practice: the late Richard G. Braman (1953–2014). He was the founder, and for its formative years the Executive Director, of The Sedona Conference, a “nonpartisan, nonprofit 501(c)(3) research and educational

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institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights,” according to its website. The mission of Conference is “to move the law forward in a reasoned and just way through the creation and publication of nonpartisan consensus commentaries and through advanced legal education for the bench and bar.”

Richard (never “Rick” or “Dick”) was something of a child prodigy—graduating high school at the top of his class a year early, serving on the staff of the Selective Service Law Reporter at age eighteen, promoting jazz and blues concerts before going to college, working in a record store while studying at the University of Minnesota (again, graduating a year early), and landing a coveted clerkship in the antitrust department of Brobeck, Phleger & Harrison in San Francisco. San Francisco was not as inviting as he thought it might be, so he returned to the upper Midwest and joined the boutique plaintiffs’ class action firm of Opperman & Paquin. Music had always been his passion, however, and at the age of thirty-one he opened his own jazz club, Gabriel’s (his middle name), which for two years served as a popular venue for nationally known jazz musicians to perform for slightly perplexed Minneapolis audiences. The performers and critics always gave the venue rave reviews, but it had a limited audience. Richard closed the club and returned to practice law with Minneapolis’ oldest law firm, Gray, Plant, Mooty, Mooty, & Bennett, rising to become co-chair of its antitrust practice group. And it was from there that he decided to take a sabbatical and to explore a possible new direction in his life. In 1997, Richard and his new wife packed up the car and headed west, relocating from chilly Minneapolis to warmer Arizona.

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Like other leaders of the Minnesota bar, Richard had served on the faculty of many conventional Continuing Legal Education (CLE) programs and was an attendee of many more. He was discouraged by the dull non-interactive lectures, supported by even duller overhead projections, given to bored audiences who were just as likely to be doing crossword puzzles in the back of the room as taking notes. Richard wanted to use his sabbatical to experiment with a new form of CLE, based less on the lecture-hall style of pedagogy and more on the “graduate seminar” model. The choice of Sedona was somewhat fortuitous—he occasionally told people that it could have easily been Santa Fe or Aspen—but Sedona offered an environment conducive to his vision. It was (in the late 1990s) “off the grid,” with no major airport, interstate highway connection, courthouse, major law offices, or even reliable cell phone reception. Just the spot for a monastic-style retreat.

II. “DIALOGUE, NOT DEBATE”

Richard’s model for The Sedona Conference was simple but unique for its time. Richard would hold annual conferences in just three areas of law: antitrust, intellectual property, and complex civil litigation.¹ Attendance would be limited to forty-five people (few meeting venues in Sedona could support much more), who were not called “audience members,” but “participants,” as they were expected to actively participate

1 Originally there was a fourth annual conference on entertainment law. However, after the first year, that area of law was dropped, as the personalities of successful entertainment lawyers didn’t mesh well with the “dialogue” ethos of The Sedona Conference.

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in dialogue with a relatively large faculty of twelve to fifteen experienced lawyers and top legal academics. Faculty members were discouraged from delivering lectures. Instead, they were required to prepare, with their fellow panel members, brief presentations on their specific topic, followed by open-ended questions on “tipping point” issues, to be addressed by the other faculty and participants. Faculty members often noted that this style of presentation required more collaborative preparation than the conventional lecture but resulted in a much more engaging CLE program.

The concept of “dialogue” as part of a CLE program was unusual enough that every conference started, as it still does today, with an explanation of the difference between dialogue and debate, the mode of interaction to which lawyers are more accustomed to. Richard would tell participants to leave their “advocate” hats, and highly developed adversarial skills, at the door, and think less about their narrow client interests and more about the best interests of the legal system as a whole. To illustrate what he meant, he would often quote from social scientist and pollster Daniel Yankelovich’s book, *The Magic of Dialogue: Transforming Conflict into Cooperation*:

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

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

Dialogue: Listening to understand, find meaning and agreement.

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Debate: Listening to find flaws and make counter arguments.

Dialogue: Admitting that others' 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.²

The goal of each conference was not just to identify the emerging areas in the law where attorneys, litigants, and judges need practical understanding and guidance, but to try to reach consensus “to advance the law in a reasoned and just way.” This required another element, called The Sedona Rule. The Rule is essentially the same as the Chatham House Rule,³ and it encourages open dialogue by prohibiting participants from quoting or paraphrasing any other participant's contribution outside of the conference itself. It does not prohibit general reporting, and often members of the media or bloggers participate in Sedona Conference events, but the prohibition on attribution allows people to participate more freely, knowing that their comments won't be repeated back to them later in a different context.

2 Daniel Yankelovich, *The Magic of Dialogue: Transforming Conflict into Cooperation* (Boston: Nicholas Brealey, 2001).

3 <https://www.chathamhouse.org/chatham-house-rule>.

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The format was an immediate success, with waiting lists to attend each new conference. Part of that success was due to Richard's ability to attract top talent as both faculty and participants. But it was also due to Richard's natural showmanship and disarming personality. Every communication from Richard started with a big "Howdy!" Suits and ties were strongly discouraged. The faculty was required to attend the entire conference and participate from the floor during sessions when they were not on the dais. Socializing was considered as important, and potentially as productive, as the formal sessions.

This collegial atmosphere was especially appreciated by judges in attendance. Hon. Shira Scheindlin (ret.), U.S. District Judge for the Southern District of New York commented, while Richard was still alive,

He really likes judges and I think he senses their need to participate, as equals, in the development of the law and the legal profession. With me he crossed the line—the line I really wanted someone to cross. In his unaffected, down home, mid-Western, never-wear-a suit manner, "Your Honor" soon gave way to "Shira"—a name I forgot I had. We became real friends—confidants who could share our highs and our lows—and who could count on each other for support whenever we needed it.⁴

The dialogue at the conferences was supported by rigorous academic preparation. Faculty were encouraged to contribute

4 Remarks of Hon. Shira A. Scheindlin, "Celebration of the Impact of The Sedona Conference & the Vision of Richard G. Braman," Sept. 24, 2011, Arlington, VA. Copy on file with the author.

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original papers to the conference materials, which participants were expected to read in advance, in order to prepare questions and comments. The best papers from the three conferences were assembled each year and published in *The Sedona Conference Journal*. Authors were given an opportunity to revise and update their papers before publication, addressing the comments and incorporating observations based on the dialogue. This was the inverse of the conventional CLE, in which the faculty members gave lectures based on papers they had written and published months, or even years, before. It was an early version of crowd-sourced peer review, and while the first few volumes of *The Sedona Conference Journal* had limited circulation and looked much like a “home brew” ‘zine, in a few years it was being distributed by every online legal publisher and is today a highly respected legal journal.

III. WORKING TOWARDS CONSENSUS

For an organization that aims to move the law forward, holding three small conferences and publishing a Journal each year doesn’t seem like it would have much impact. The attendees of the conferences weren’t fully satisfied with their experience at Sedona, no matter how instructive and enjoyable and it was. The law wasn’t going to move forward with only sixty-five people meeting for two days, three times a year, among the red rocks—even with the help of cosmic vortices.

This sentiment surfaced at the close of the 3d Annual Sedona Conference on Complex Litigation held in 2001. Two original papers had been presented exploring an emerging issue in civil litigation—the discovery of electronically stored information

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(ESI).⁵ While the Civil Rules Advisory Committee of the Judicial Conference was beginning to look into eDiscovery, there was very little case law addressing it at that time and almost no interest from legal academia. Most of the “eDiscovery legal education” offered to the bench and bar at the time was presented by technical consultants and service providers who were not squarely addressing the legal issues. While the dialogue at the conference was productive, the feeling was that much more needed to be done.

This led to the establishment of The Sedona Conference Working Group Series, which took the concepts of dialogue and peer review one step further. Richard, with the encouragement of his Advisory Board and the assistance of one particularly active member, Jonathan Redgrave, established the first Working Group in 2002. Working Group 1 would address eDiscovery and related issues of electronic document management in civil litigation by meeting independently of the “regular season” conferences, identifying discreet issues, and working collaboratively to produce commentaries containing legal analysis, proposing broad principles, and providing practical guidance for judges and practitioners. These commentaries would be published in the *Journal*, but also made available free online (a website was established shortly after) and distributed widely to courts, libraries, and law schools.

5 Barbara A. Caulfield and Zuzana Svihra, *Electronic Discovery Issues for 2002: Requiring the Losing Party to Pay for the Costs of Digital Discovery*, 2 SEDONA CONF. J. 181 (2001); Jonathan M. Redgrave and Ted S. Hiser, *The Information Age, Part I: Fishing in the Ocean, A Critical Examination of Discovery in the Electronic Age*, 2 SEDONA CONF. J. 195 (2001).

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While membership in the Working Group was open to all, there was a formal membership process, and a strong emphasis on diversity and balance: plaintiff and defense lawyers, government and in-house corporate lawyers, non-lawyers with valuable technical knowledge, and other important constituencies would all be represented. And each commentary the Working Group would produce would go through a demanding peer review process, designed to come as close as possible to consensus on the principles enunciated and practice guidelines proposed. Over time, as eleven more Working Groups have been brought into existence, and as overall membership in these Working Groups now exceeds 1,600 people, the process has become more complex and formalized, often appearing convoluted and opaque to the uninitiated. But the goal remains to achieve consensus through dialogue incorporating diverse viewpoints. And it is this process, as inefficient as it may appear, that gives the Working Group Series commentaries weight and credibility far beyond the usual papers presented at CLE conferences or published in law reviews.

Another factor that gives the Working Group Series publications added credibility is the way The Sedona Conference, as a non-profit organization, is financed. Its income is derived from three main sources: annual membership dues, the proceeds from events, and sponsorship by law firms and corporations. The sponsorship structure is key to The Sedona Conference's status as a non-partisan public charity. The forty-five to fifty sponsors who sign up each year represent a wide variety of organizations with divergent interests, and none exercise any control over the individual Working Groups or conferences. Sponsorships are capped at \$10,000 per year, and no single

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sponsor can contribute more than 2% of The Sedona Conference's annual income. This prevents The Sedona Conference from ever becoming captive of any particular constituency or interest group.

The commentary drafting process starts with the Working Group's Steering Committee of six to twelve people, all recognized experts in their field. The Steering Committee identifies a potential topic for commentary treatment, based on feedback from the membership and dialogue at annual Working Group meetings or the regular season conferences. The Steering Committee then calls for volunteers to form a Brainstorming Team, which drafts a detailed outline establishing the scope of the proposed commentary. That brainstorming outline is circulated to the entire membership for comment and is presented at the next scheduled Working Group meeting for dialogue. If there is consensus to move forward with the project, the Steering Committee puts out a second call for volunteers to form a Drafting Team. The Drafting Team is usually smaller than the Brainstorming Group and its composition is carefully engineered to ensure viewpoint diversity—all major stakeholder groups need to be represented. A first draft of the commentary is circulated to the membership and presented at the next scheduled Working Group meeting. Once the Steering Committee determines there is enough consensus to move to publication (which may take several iterations), the commentary is published on the Sedona Conference website and made available for free to the general public. The public is invited to attend a webinar discussing the draft and to comment orally or in writing. At the close of the public comment period (usually sixty days), the draft goes back to the drafting team for review

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and consideration of the comments. The final draft is then submitted to the Steering Committee, which may either authorize it for publication and distribution, or if it has significantly changed, re-submit it to the membership for further dialogue. At best, the process can take eighteen months. Generally, it takes longer, and occasionally consensus is never reached—the final commentary is withdrawn, although the public-comment draft will remain available.

IV. THE SEDONA PRINCIPLES

In the first years of Working Group 1, the drafting process was simpler and faster, as the entire membership could fit into a medium-sized boardroom. It also benefited from the fact that it was addressing an entirely new area of law in which partisan positions had not hardened. Plaintiffs, defendants, and judges were all operating with a relatively clean slate and a shared interest in establishing a common language and set of expectations for the conduct of eDiscovery.

The effort to draft the document that became “The Sedona Principles” began with a meeting in Phoenix in October 2002 attended by about thirty people. The meeting and subsequent drafting was led primarily by Jonathan Redgrave, with significant input from BASF general counsel Thomas Allman; Steven C. Bennett and Ted S. Hiser of Jones Day; retired U.S. Magistrate Judge John L. Carroll; consultant Robert Eisenberg; Gary L. Hayden of Ford Motor Company; Sidney Kanazawa of Van Etten Suzumoto & Becket; Timothy L. Moorehead of BP America; Ashish Prasad of Mayer Brown Rowe & Maw; Charles R. Ragan of Pillsbury Winthrop; Lori Ann Wagner of

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Faegre & Benson; and several others. John H. Jessen, CEO of Electronic Evidence Discovery, Inc., provided invaluable technical and logistical support. In keeping with the transparency of the process, a complete list of the participants and their affiliations was appended to the public draft and subsequent editions.

The scope and format of what became The Sedona Principles was not pre-determined. Some envisioned a “how to” guide for the discovery of particular types of ESI (email, databases, backup tapes, etc.). Another proposed approach was to draft a high-level, objective overview of the technical and legal challenges of eDiscovery, followed by a series of “white papers” staking out the positions of different parties—plaintiffs, defendants, technical experts, etc. Others thought that the Working Group should actively intervene in the federal rulemaking process that was then underway and propose amendments to the Federal Rules of Civil Procedure. Still others were looking for high-level statements of “reasonableness” in discovery, with examples. Richard Braman intervened to mediate, and the group settled on a heavily researched statement of the need for eDiscovery standards, followed by a set of fourteen overarching principles, with each principle explained and illustrated by comments, similar to the format of American Law Institute’s iconic *Restatements*. The fourteen original principles were:

1. Electronic data and documents are potentially discoverable under FED. R. CIV. P. 34 or its state law equivalents, and organizations must therefore properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.

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2. When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in FED. R. CIV. P. 26(b)(2) and its state law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.
3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek, if possible, to reach agreement concerning the scope of each party's rights and responsibilities.
4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.
5. The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.
6. Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents.

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7. When the responding party has shown that it has acted reasonably to preserve and produce relevant electronic data and documents, the burden should be on the requesting party to show that additional efforts are warranted under the circumstances of the case.
8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval, and resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual data or documents.
10. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.
11. A responding party may properly access and identify potentially responsive electronic data and documents by using reasonable selection criteria, such as search terms or samples.
12. Absent specific objection, agreement of the parties or order of the court, electronic documents normally include the information intentionally entered and saved by a computer user.

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13. Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.
14. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, it is found that there was an intentional or reckless failure to preserve and produce relevant electronic data, and a showing of a reasonable probability that the loss of the evidence materially prejudiced the adverse party.⁶

The Working Group met Jonathan Redgrave's ambitious drafting and review schedule, and on March 15, 2003, only six months after they first met, Working Group 1 published the draft of *The Sedona Principles* for public comment. It received immediate positive attention from the bench and bar. While

6 While the concepts behind *The Sedona Principles* have withstood the test of time, the wording of the principles has evolved since 2003, in keeping with amendments to the relevant court rules and advances in technology. Each iteration of *The Sedona Principles* has been preserved and is available for comparison at https://thesedonaconference.org/publication/The_Sedona_Principles.

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still in draft form, this first articulation of the *Principles* influenced the development of the law. It was cited in the landmark case of *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) and heavily influenced the deliberations of the Civil Rules Advisory Committee of the Judicial Conference that ultimately led to the 2006 amendments to the Federal Rules of Civil Procedure.

Seventeen years later, *The Sedona Principles* is in its third edition. It has been cited in over 150 published court decisions and nearly 1,000 secondary legal sources. While several other treatises and handbooks on eDiscovery have been published since 2003, *The Sedona Principles* was the first and is still considered the most authoritative guide for civil litigators and courts.

V. SUBSEQUENT WORKING GROUP 1 COMMENTARIES

When the first Working Group drafting team started work in October 2002, it was split into no less than ten smaller task forces, each addressing a subtopic. However, it quickly became apparent that the myriad issues surrounding the management and production of electronic documents were not going to be effectively addressed by one set of principles, let alone one commentary. The scope of the first commentary would need to be restricted to broad, overarching principles, and while the comments following each principle identified relevant subtopics (definitions, preservation, accessibility, etc.), each of these subtopics, and many more, deserved independent in-depth treatment.

The first project the Working Group undertook after drafting the Principles was to draft an essential prequel: *The Sedona*

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Guidelines for Managing Information & Records in the Electronic Age,⁷ which came out in September 2004. This commentary addressed the day-to-day management of electronic communications, documents, and records, establishing a foundational set of guidelines for what later became the discipline of Information Governance.

Simultaneously, a subgroup was established to draft a glossary of technical and legal eDiscovery terms. This was not strictly a Working Group 1 project. A separate group of legal support service organizations was established to provide input on how various technical terms are used in day-to-day practice, and to distinguish between meaningful technical terms and the “marketing speak” that was confusing to lawyers and courts. The *Sedona Conference Glossary*,⁸ now in its fourth edition, debuted in May 2005, and was followed shortly by a companion piece, *Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors*,⁹ in July of that year. The litigation support consultants and service providers who participated in the process, and still do today as members of The Sedona Conference Technology Resource Panel,¹⁰ all pledged to use terms in their contracts and marketing material as defined in the *Glossary*, and to abide by the best practices outlines in the *Navigating* paper.

7 https://thesedonaconference.org/publication/Guidelines_for_Managing_Information_and_Electronic_Records.

8 https://thesedonaconference.org/publication/The_Sedona_Conference_Glossary.

9 https://thesedonaconference.org/publication/Selection_of_Electronic_Discovery_Vendors.

10 <https://thesedonaconference.org/trp>.

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These four publications—*The Sedona Principles*, the *Guidelines*, *Glossary*, and *Navigating* paper—constituted the core of Working Group 1’s publications in its early years. The Working Group then turned to producing commentaries addressing, with greater specificity, the important subtopics identified at the outset of the *Principles* drafting process. Some of these subtopics lent themselves to the formulation of “principles,” high-level normative statements of law and practice based on broad consensus. Other drafting teams settled on “guidelines” or “best practices,” which while enjoying the same broad consensus, are intended to be more flexible and case-specific. Still other teams, finding that their subtopics were less developed in the law, opted to draft “primers,” which explain the novel issues and technologies involved, but stop short of proposing principles, guidelines, or best practices at this stage. These follow-up commentaries, all of which are still available for download from The Sedona Conference’s website,¹¹ include:

- The Sedona Conference Commentary on Email Management
- The Sedona Conference Commentary on ESI Evidence & Admissibility
- The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas
- The Sedona Conference Commentary on Legal Holds: The Trigger & the Process

11 <https://thesedonaconference.org/publications>.

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- The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in eDiscovery
- The Sedona Conference Commentary on Inactive Information Sources
- The Sedona Conference Commentary on Achieving Quality in the eDiscovery Process
- The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible
- The Sedona Conference Commentary on Ethics & Metadata
- The Sedona Conference Commentary on Proportionality in Electronic Discovery
- The Sedona Conference Primer on Social Media
- The Sedona Conference Database Principles
- The Sedona Conference Commentary on the Protection of Privileged ESI
- The Sedona Conference Commentary on Information Governance
- The Sedona Conference Commentary on Privacy and Information Security
- The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”
- The Sedona Conference TAR Case Law Primer
- The Sedona Conference Commentary on Defense of Process

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- The Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests
- The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations
- The Sedona Conference Principles and Commentary on Defensible Disposition

These commentaries are often presented at conventional CLE programs by members of the drafting teams and made available to law schools and court libraries free of charge. The Sedona Conference itself launched a more conventional CLE series in 2007, called The Sedona Conference Institute (TSCI). These programs occur several times a year at various locations around the country and serve to showcase not only the consensus-based publications Working Group 1, but those of other Sedona Working Groups. The TSCI materials also include non-consensus papers contributed by individual TSCI faculty members, some of which are published in *The Sedona Conference Journal* and become the inspiration for later consensus-based commentaries.

VI. THE COOPERATION PROCLAMATION

It may be considered ironic that the one of the publications for which The Sedona Conference is best known, *The Cooperation Proclamation*, was not the product of a Working Group's painstaking consensus-building process, but the work of one person: Richard Braman. The concept of cooperation in civil

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litigation and the controversy surrounding it is explored in depth in Chapters 14 and 15. These chapters will outline how *The Cooperation Proclamation* came to be, how it is different from prior calls for “civility” by the bar, and its impact on eDiscovery.

The genesis of *The Cooperation Proclamation* is best described by an eyewitness at its birth, Jason R. Baron, the former Director of Litigation for the U.S. National Archives and Records Administration (NARA). In a tribute to Braman after his passing, Baron wrote:

I was privileged to be present at the moment that Richard “got religion” on the subject of cooperation: the date was March 20, 2007, during a symposium entitled “And Justice For All . . .” sponsored by Georgetown Law School and [data analytics company] H5, where Richard appeared along with [U.S. Supreme Court Associate] Justice Stephen Breyer and others, including moderator Professor Arthur Miller, legendary professor at Harvard and NYU. After Richard made an emphatic point about the need for dialogue and cooperation in eDiscovery given the growing technical complexity of the subject matter, Prof. Miller postured in mock disbelief: “Richard, we will get back to that utopian notion” later. That was the moment: Richard, with a burr in his saddle, came back to The Sedona Conference and with fired up enthusiasm began a campaign that resulted in serious conversations about cooperation in the legal space, leading to the Proclamation.¹²

12 Jason R. Baron, Remembering Richard Braman, <http://iginitiative.com/rememering-richard-g-braman-3/>.

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The *Proclamation* itself is a short document—less than 1500 words—and was not intended to be an end-unto-itself. It was launched in a webinar in October 2008 that included U.S. Magistrate Judge John Facciola of the District of Columbia, among others, who explained how cooperation between adversary counsel was required by the Rules of Civil Procedure, the Model Rules of Professional Conduct, numerous local rules and standing orders, and the need to reduce the cost and delay associated with eDiscovery through negotiation, proportionality, and avoidance of formal motion practice. The webinar was attended by reporters for several legal news outlets and received extensive coverage.

One week later, the *Proclamation* was cited by then-U.S. Magistrate Judge Paul W. Grimm of the District of Maryland in his famous opinion, *Mancia v. Mayflower Textile Services*.¹³ Over the next year, the *Proclamation* was cited in eleven more judicial opinions. It was formally published in a special supplement to Volume 10 of *The Sedona Conference Journal*, which included a Preface authored by Associate Justice Breyer and three well-researched law review articles:

- The Sedona Conference, The Case for Cooperation, 10 SEDONA CONF. J. 331 (2009).
- Steven S. Gensler, A Bull's-Eye View of Cooperation in Discovery, 10 SEDONA CONF. J. 339 (2009).
- Ralph C. Losey, *Mancia v. Mayflower* Begins a Pilgrimage to the New World of Cooperation, 10 SEDONA CONF. J. 377 (2009).

13 253 F.R.D. 354 (D. Md. Oct. 15, 2008).

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As of 2020, the *Proclamation* has gathered more than 200 endorsements from state and federal judges and has been cited in at least sixty-four reported decisions. It has also been cited in more than 300 secondary legal sources and countless articles in the legal press.¹⁴

The *Proclamation* was intended to go beyond being an exhortation to civility by spurring action. One team of Working Group 1 members assembled a collection of cooperative litigation strategies and published a “toolkit” for counsel on The Sedona Conference website.¹⁵ Another team, consisting entirely of sitting and recently retired judges, supported by a few staff, assembled a unique set of resources for state and federal judges.¹⁶ The *Judicial Resources* were updated in 2014, and a third edition is planned for 2020. The *Resources* start from the premise that judges can’t force parties to be cooperative, but they can establish expectations of cooperation at the outset of litigation and set up a number of procedural “carrots and sticks” designed to facilitate cooperation between the parties. As such, it is a powerful set of tools to operationalize both cooperation and the judicial philosophy of active case management.

Perhaps the most significant activity inspired by the *Proclamation* has been specialized training in negotiation skills for

14 The full text of the *Proclamation* and a current list of endorsements, as well as a sampling of citations to the *Proclamation*, may be found at <https://thesedonaconference.org/node/51>.

15 The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel, https://thesedonaconference.org/publication/Cooperation_Guidance_for_Litigators_and_In-House_Counsel.

16 The Sedona Conference Cooperation Proclamation: Resources for the Judiciary, https://thesedonaconference.org/publication/Resources_for_the_Judiciary.

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litigators. Each year, The Sedona Conference Institute holds a special “eDiscovery Negotiation Training” program in a different city in North America. These programs differ significantly from other TSCI programs, featuring a very small participant base (usually around forty) and a high student-to-faculty ratio (2:1). The participants are divided into teams and assigned a set of discovery problems in a hypothetical employment discrimination action. The teams must attempt to resolve the problems through negotiations over a two-day period. They are observed by the faculty, who provide the participants with a critique of their performance. These intense, immersive programs are very popular and always have a waiting list, allowing the Sedona staff to select a cohort each year from diverse backgrounds and practice settings. Participants range from recent law school graduates to senior litigators with 20+ years of experience, from large and small law firms, representing both plaintiffs and defendants.

VII. GETTING PAST 1: OTHER ACTIVE SEDONA CONFERENCE WORKING GROUPS

eDiscovery law and practice are bottomless sources of inspiration for further study, so Working Group 1 will continue to generate commentaries as digital technology and responsive law evolves. But the Sedona Conference Working Group Series is not just about eDiscovery. Other Working Groups have formed over the years with different foci, but all share a common theme: providing guidance on cutting-edge issues emerging from the intersection of law and digital technology. eDiscovery practitioners are well advised to look at the

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publications and activities of other Sedona Working Groups to get a wider view of these issues. A complete list of all the active Working Groups and their mission statements is available at <https://thesedonaconference.org/wgs>. Here are some highlights of interest to “data lawyers”:

A. Working Group 2: Protective Orders, Confidentiality, and Public Access

The mission of Working Group 2 was to develop principles and best practices addressing protective orders, confidentiality issues, sealing orders, and motions to vacate or modify orders to permit public access. Working Group 2’s final report is available at https://thesedonaconference.org/publication/Working_Group_2_Guidelines, along with prior drafts and opposing views. The draft report was the subject of a series of “town hall” meetings held in Newark, Dallas, Denver, and Birmingham, and extensive public comment. The final report has been incorporated into the curriculum of several judicial education conferences and cited favorably by members of the U.S. Judicial Conference in their negotiations with Congress on rules reform in this area.

B. Working Group 6: International Electronic Information Management, Discovery, and Disclosure

The mission of Working Group 6 is to address issues that arise in the context of digital information management, discovery, and disclosure for organizations subject to litigation and regulatory oversight in multiple jurisdictions with potentially conflicting international laws. Working Group 6’s first

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publication, the *Framework for Analysis of Cross-Border Conflicts*,¹⁷ was released in 2008 and cited shortly thereafter by the European Commission's Article 29 Working Party as an important contribution to the emerging international dialogue on disclosure and privacy. Other significant publications of Working Group 6 include:

- The Sedona Conference International Litigation Principles on Discovery, Disclosure & Data Protection in Civil Litigation¹⁸
- The Sedona Conference International Investigations Principles¹⁹
- The Sedona Conference Practical In-House Approaches for Cross-Border Discovery and Data Protection²⁰
- The Sedona Conference Commentary and Principles on Jurisdictional Conflicts over Transfers of Personal Data Across Borders²¹

C. Working Group 7: “Sedona Canada”

The mission of Working Group 7 is to create forward-looking principles and best practice recommendations for

17 https://thesedonaconference.org/publication/Framework_for_Analysis_of_Cross-Border_Discovery_Conflicts.

18 https://thesedonaconference.org/publication/International_Litigation_Principles.

19 https://thesedonaconference.org/publication/International_Investigations_Principles.

20 https://thesedonaconference.org/publication/Practical_In-House_Approaches_for_Cross-Border_Discovery_and_Data_Protection.

21 https://thesedonaconference.org/publication/Commentary_and_Principles_on_Jurisdictional_Conflicts_over_Transfers_of_Personal_Data_Across_Borders.

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lawyers, courts, businesses, and others who regularly confront eDiscovery issues in Canada. The first edition of *The Sedona Canada Principles*²² was released in early 2008 (in both English and French) and was immediately recognized by federal and provincial courts as an authoritative source of guidance for Canadian practitioners. It was explicitly referenced in the Ontario Rules of Civil Procedure and practice directives that went into effect in January 2010. The second edition of *The Sedona Canada Principles* was published in 2015, and a third edition is planned for 2020.

D. Working Group 11: Data Security and Privacy Liability

The mission of Working Group 11 is to identify and comment on trends in data security and privacy law, to help organizations prepare for and respond to data breaches, and to assist attorneys and judicial officers in resolving questions of legal liability and damages. Among the commentaries that Working Group 11 has published so far are:

- The Sedona Conference Data Privacy Primer²³
- The Sedona Conference Incident Response Guide²⁴
- The Sedona Conference Commentary on Application of Attorney-Client Privilege and Work-Product Protection

22 https://thesedonaconference.org/publication/The_Sedona_Canada_Principles.

23 https://thesedonaconference.org/publication/The_Sedona_Conference_Data_Privacy_Primer.

24 https://thesedonaconference.org/publication/Incident_Response_Guide.

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to Documents and Communications Generated in the Cybersecurity Context²⁵

- The Sedona Conference Commentary on Data Privacy and Security Issues in Mergers & Acquisitions Practice²⁶

E. Working Group 12: Trade Secrets

The mission of Working Group 12 is to develop consensus and non-partisan principles for best practices in managing trade secret litigation and well-vetted recommendations for consideration in protecting trade secrets, recognizing that every organization, both large and small, has and uses trade secrets; that trade secret disputes frequently intersect with other important public policies such as employee mobility and international trade; and that trade secret disputes are litigated in both state and federal courts. Working Group 12 was formed in 2019 and hasn't published any commentaries to date but had several in different stages of drafting and peer review.

25 https://thesedonaconference.org/publication/Commentary_on_Application_of_Atorney-Client_Privilege_and_Work-Product_Protection_to_Documents_and_Communications_Generated_in_the_Cybersecurity_Context.

26 https://thesedonaconference.org/publication/Commentary_on_Data_Privacy_and_Security_Issues_in_Mergers_and_Acquisitions_Practice.