

# WG1 Call for Volunteers (November 2022)

## [Brainstorming Group on Practical Guidance for Discovery of Mobile Device Data](#)

## [Brainstorming Group on updating The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”](#)

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We are pleased to announce two new opportunities to become more involved in Working Group 1 (WG1). The Steering Committee is forming two new brainstorming groups. Please see below for fuller descriptions of each one. **Be sure to follow the subsequent instructions for applying and note that the deadline for submitting an application to participate is December 9, 2022.**

## **Brainstorming Group on Practical Guidance for Discovery of Mobile Device Data**

Gone are the days when the contents of mobile devices, specifically phones and tablets, could be presumed to be outside of the scope of discovery obligations. Discovery of mobile device data affects all parties (and often non-parties) in litigation and investigations, whatever their role or size of organization. Yet, there are few sources of practical guidance relating to discovery of mobile device data.

To this end, the Mobile Device Data Brainstorming Group will consider and make recommendations to the WG1 Steering Committee for a Sedona Conference publication that addresses the following issues: (i) when mobile device data (including third-party chat or messaging applications) may or should be collected; (ii) the implications of BYOD and other company policies and procedures around possession, custody, or control of mobile device data; (iii) privacy issues that arise when personal mobile devices are collected; and (iv) practical guidance on collecting mobile device data, including considerations for collecting data from third-party chat or messaging applications. If a paper is recommended, the Brainstorming Group should consider whether addressing this topic should be done in conjunction with updating the 2018 edition of *The Sedona Conference Commentary on BYOD*. The Brainstorming Group will further be charged with drafting an outline of the content for the proposed publication, to be presented at the WG1 Midyear Meeting in April 2023.

The Steering Committee liaisons will be Robert Keeling, Claudia Morgan, and Kelly McNabb.

## **Brainstorming Group on updating The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”**

It has been six years since WG1 published its Commentary on possession, custody, or control discussing the three standards—Legal Right Standard, Legal Right Plus Notification Standard, and the Practical Ability Standard. The Commentary analyzed how each of the federal jurisdictions handled this issue and ultimately recommended the Legal Right test as the most reasoned standard. The Commentary also made recommendations regarding use of the business-judgment rule and creating certain rebuttable presumptions in employing the Legal Right test. Since 2016, numerous cases have addressed this issue, and many have cited to the Commentary.

The Possession, Custody, or Control Brainstorming Group will consider and make recommendations to the WG1 Steering Committee as to whether an update of the 2016 Commentary would be beneficial, including whether the recommendations previously made remain valid and feasible in light of subsequent legal and technological developments. The group will consider whether consensus can be reached regarding the need for an updated Commentary and, if so, recommend to the Steering Committee what to include in an updated Commentary and the format of the update. The Brainstorming Group will further be charged with drafting an outline of the content for the proposed publication, to be presented at the WG1 Midyear Meeting in April 2023.

The Steering Committee liaisons will be Tessa Jacob and Sandra Metallo-Barragan.

### **Expectations of Brainstorming Group Members**

Brainstorming Groups are typically larger in size than Drafting Teams and usually function over a relatively short period of time. In this regard, the work of a Brainstorming Group is more like a sprint than a marathon. Brainstorming Group members are expected to make the following commitments:

- Participation in Brainstorming Groups is a benefit of individual Sedona Conference Working Group Series membership. All Brainstorming Group members must keep their membership current *at all times* during the process.
- As the name suggests, Brainstorming Group members are encouraged to think creatively and actually “brainstorm,” which may go beyond or even challenge the premise of the Brainstorming Group, as warranted.
- Accordingly, Brainstorming Group members are expected to regularly join and participate in Brainstorming Group virtual or telephonic meetings. Brainstorming Group leaders will take attendance for all meetings and track meeting participation and contributions. One or more Brainstorming Group members will be asked to take notes of Group meetings.
- Brainstorming Group members will be expected to draft or assist in drafting portions of the outline and/or perform research as needed.

- Brainstorming Group members are expected to review all team drafts that are circulated, and comment and/or revise/edit as necessary.
- Brainstorming Group members are expected to dialogue, not debate, and work collaboratively as part of a team to achieve consensus.
- If feasible, Brainstorming Group members are strongly encouraged to attend WG1 midyear or annual meetings where their work product is presented to the membership through a panel discussion and dialogue.

It is critical that all Brainstorming Group members are active, engaged participants in the outline drafting efforts in order to produce high-quality work product in a limited timeframe.

## How to Apply

**NOTE:** If you are not currently a Working Group member but are interested in participating, become a member by [signing up for a Working Group Series \(WGS\) membership](#). Once a WGS member, one is eligible to take part in the activities of all Working Groups, including WG1. If you have any questions about how to sign up for a membership or encounter any difficulties while doing so, please contact our office at [info@sedonaconference.org](mailto:info@sedonaconference.org) or (602) 258-4910.

In order to be considered for either of the Brainstorming Groups, please indicate which group(s) and provide separate answers to each of the questions below and submit to Dave Lumia at [dbl@sedonaconference.org](mailto:dbl@sedonaconference.org) **no later than December 9, 2022**. Please be brief when answering the questions; no more than 50 words per answer.

- What is your profession and expertise?
- How many years of experience do you have?
- What organization do you work for?
- Do you regularly represent requesting parties, responding parties, or both?

(Please mark appropriate box with an X.)

Type of Litigation	Requesting	Responding
Symmetric		
Asymmetric		

- What qualifications or experiences make you particularly qualified to serve on this brainstorming group, and why?
- Are you willing and able to attend WG1 midyear/annual meetings to dialogue on the Brainstorming Group's work?
- If you are applying for both Brainstorming Groups, what is your order of preference?

## **Factors in Brainstorming Group Selection**

When selecting members of a Brainstorming Group, we seek differing perspectives, viewpoints, backgrounds, and experiences in order to build a consensus-based document that is beneficial to all stakeholders. Perspectives we seek to have represented on the groups may include, among others:

- Requesting parties
- Responding parties
- In-house counsel
- Outside counsel
- Judges
- Judicial clerks
- Government counsel
- Academics
- Service providers/Technology companies
- Small firms/Solo practitioners

Because The Sedona Conference is a self-selected group of engaged, proactive members, we get many more excellent and eminently qualified applicants for each Group than we can take. If you do not get selected for a Group, please try again! Your application and eagerness to be involved are favorably considered the next time you apply for a Brainstorming Group or Drafting Team. Also remember that as a member of WG1, you will have the opportunity to review and comment on any member-only work-product written by this Group.

### **Important Note About Subsequently Formed Drafting Teams**

Frequently, after the Brainstorming Group has presented an outline to the membership and after a short period of member review and comment, the Steering Committee will approve the formation of a Drafting Team to produce a draft publication on the proposed topic. Being a member of the Brainstorming Group does factor into consideration for Drafting Team membership, but it is not a guarantee that you will be selected. This is because Drafting Teams are usually smaller than Brainstorming Groups, function over a longer period of time, and require a particular balance of perspectives and experiences in order to build a consensus-based document that is beneficial to all stakeholders. Further, a Brainstorming Group is asked to recommend the composition of a subsequent Drafting Team, which may include a different mix of experience, expertise, or perspectives than for the Brainstorming Group.