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Sedona Conference Requests Comment on Third Edition of Its Marque *Principles*



BY TED HISER AND CHUCK RAGAN

The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) this week released for public comment the Third Edition of its marquee publication, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (the Principles). A copy may be downloaded at <https://thesedonaconference.org/>.

Since the Principles were last revised in 2007, technology has revolutionized the way we live, and how organizations operate—all of which impacts what information (and now principally electronically stored information, or ESI) is available for the resolution of disputes in litigation or otherwise. These often startling technological advances include virtual explosions of social media, mobile applications, cloud computing, big data, and data storage, all of which have added, nearly exponentially, to both the sources and volume of digital data. All litigants—large Fortune 500 companies, emerging companies, government agencies, non-profits, and individuals—and their legal counsel confront and must manage the distinct and subtle challenges presented by these developments. Moreover, since 2012, ABA rules of professional conduct have decreed that counsel’s duty of competence extends to keeping abreast of changes in the law and practice, including the benefits and risks associated with relevant technology. In that context, the Federal Rules of Civil

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Procedure that address ESI were yet again amended effective December 1, 2015. No doubt, the time was ripe for re-visiting The Sedona Principles.

The Third Edition of The Sedona Principles takes into account these developments, as well as the teachings of significant Sedona Conference publications during the same time period, including the Sedona Cooperation Proclamation and related guidance, and Commentaries on legal holds, proportionality, protecting privileges and personal privacy, information governance, and managing large scale litigation through processes, methodologies, and technologies. Having observed firsthand the rigor and care invested in the development of the Third Edition, the authors believe it will be an invaluable resource for all who must address the legal and practical issues and potential risks of electronic discovery.

By way of background, The Sedona Conference is a non-profit think tank whose mission is “moving the law forward in a reasoned and just way.” WG1 is a group of attorneys and other professionals experienced with ESI issues in litigation. It first met in October 2002 in an effort to develop guidance on how ESI – with very different features and characteristics from traditional paper information – could be managed effectively in litigation. An original set of core principles and recommendations, labeled The Sedona Principles, emerged for public comment in March 2003, and was published in final form in January 2004. A Second Edition, following the original ESI amendments to the federal rules, was published in June 2007. Over the years, the Principles have been cited frequently by federal and state courts, agencies, scholars, and lawyers.

Like its predecessor editions, the main body of The Sedona Principles Third Edition is comprised of 14 high-level propositions called Principles, each supported by detailed Comments. This publication also includes a new Introduction, which addresses the relationship of the Principles to the Federal Rules, and recognizes that the Principles differ in some respects from the Rules, are intended to have application in state and federal courts, and are not simply a “restatement” of the law. The Introduction also discusses central themes that run throughout the Third Edition—proportionality and cooperation—and highlights the significant changes between the Second and Third editions. A section of the Introduction to the earlier editions, which included extremely valuable descriptions of the significant differences between ESI and paper and the chal-

lenges those differences present in discovery, is excerpted and maintained as an Appendix to the Third Edition.

A Foreword to the Third Edition describes the history of WG1, the structure of The Principles and Comments, and the extraordinary processes WG1 undertook to ensure that the Third Edition embodied the group's best efforts to arrive at consensus on major points. A chart comparing ESI-related Federal Rules with the Principles and Comments in the Third Edition is also provided to assist navigation.

Finally, the Third Edition includes a tribute to two individuals—Richard G. Braman, Sedona's founder and first Executive Director; and William P. Butterfield, a long-time Sedona leader, the Chair of WG1 in 2015-2016, and the pilot of efforts to complete the Third Edition until his untimely passing in December 2016.

Significant Updates. All 14 Principles and the Comments have been reassessed and, where appropriate, updated in light of technological advances, the Rules amendments, and evolving best practices. The more significant changes are:

- Principle 2 on proportionality has been simplified, and its Comments substantially revised to reflect the fundamental importance of proportionality, consistent with the 2015 amendments to Rule 26(b)(1);
- Principle 3 on early meetings to address ESI issues has been expanded to emphasize the importance of timely and open dialogue and exchange of positions between responding and requesting parties;
- Principle 4, consistent with recent judicial decisions cautioning against boilerplate objections to requests for production, has been updated and aligned with the federal rule amendment;
- Principle 5 contains an updated commentary on legal holds, drawing on Sedona's important publications in the area and case law developments;
- Principle 6 regarding the responding party's knowledge and responsibilities with respect to the preservation, collection, and production of ESI remains the same, but its Comments have been expanded;
- Principle 8 has been updated substantially to address the changes over the last decade in how ESI is maintained and transmitted, and, in line with concepts of proportionality, describes a continuum of data sources from which ESI may need to be preserved and produced, ranging from those that are primary sources routinely accessed to those that are less accessible and available only through the expenditure of extraordinary resources;
- Principle 10 and its Comments on protecting privilege have been updated to account for the adoption of Federal Rule of Evidence 502, as well as to provide greater guidance on protecting privileged and otherwise protected information, and on effectively and efficiently preparing privilege logs;
- Principle 12 on forms of production of ESI has been revised almost in its entirety to accommodate the changes in technologies that generate information, as well as those developed to manage ESI in discovery;
- Principle 13 addresses cost allocation, including the 2015 amendment to Rule 26(c); and
- Principle 14 on sanctions has been revised to account for the 2015 amendment of Rule 37(e) and provides supplemental guidance to that rule. The Sedona Conference encourages lawyers, judges, and other interested professionals to review the Third Edition of The Sedona Principles, and invites comments to be submitted to comments@sedonaconference.org. The period for public comment extends until June 30, 2017. The goal of The Sedona Conference remains to produce the highest quality publications that advance the law and thoughtfully consider all perspectives on challenging issues.

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