



# Electronic Discovery Institute

June 30, 2017

Craig Weinlein  
Executive Director  
The Sedona Conference  
301 East Bethany Home Road, Suite C-297  
Phoenix, AZ 85012

Re: Comments in Response to the Public Draft of the Sedona Principles

Dear Craig.

The undersigned appreciate the opportunity to provide comments regarding the proposed Third Edition of The Sedona Principles. Now that the public comment version has been released, we have discussed the proposed changes with our respective organizations and clients. This letter reflects our sentiments and recommendations.

We very much appreciate and commend the countless hours of volunteer work put into these updates, but we cannot accept the current draft without substantial changes. While we might resolve small nuances of the current public draft through additional dialogue, the changes to the comments in Principle 6 cannot move forward as written.

## Background of Principle 6

When the Sedona Principles were first being discussed, Principle 6 was proposed as an analogue in the e-discovery context to the Business Judgment Rule in the corporate governance context. Since at least 1945 common law courts in the United States have refrained from second-guessing the good faith decisions taken by a corporation's officers and directors, lest judges become called upon, in effect, to manage and oversee the minute, internal affairs of innumerable corporate institutions. The protections of the rule are lost, and the decisions of a corporation's officers and directors are opened to judicial scrutiny, if parties attacking those decisions (typically through shareholder derivative actions) show that the directors or officers acted in bad faith or had a conflict of interest.

Principle 6, as originally conceived and written, reflected this judicial restraint and wisdom. Since the First Edition, Principle 6 has stated "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." Note that the Principle states that "responding parties," not courts and not adverse parties, are best situated to devise their own solutions to meeting the responding party's obligations to preserve and produce ESI. As with the analogous Business Judgment Rule requirement discussed above, unless an adverse party comes forward with evidence that a material piece of evidence was not produced that should have been, the preservation and production decisions of producing parties are not subject to second guessing, motion practice, oversight by the court, or other form of attack. Cases decided in the

last ten years have consistently required such threshold proof prior to opening a disfavored “discovery-on-discovery” inquiry into the preservation and production decisions of a producing party. As with the Business Judgment Rule, this prevents the courts from being called upon to oversee every minute aspect of a producing party’s actions.

### Discussion

As we show below, the proposed changes to Principle 6 and the comments thereto threaten to erode the wisdom behind the principle as originally adopted, and otherwise contain some unwise and unsupported propositions.

#### The Requirement of “Validation” Should Not Be Extended

It appears from the current public comment draft that a rule originally written to give guidance to a producing party and prevent unwarranted second-guessing of its internal preservation and production decisions is being reframed to make such oversight seem routine and acceptable at all stages of a case.

For example, new Comment 6.c bears the title: “Documentation and validation of *discovery processes*” (emphasis added) whereas the comparable comment to the Second Edition version of Principle 6 (Comment 6.e) is entitled “Documentation and validation of *collection procedures* for electronically stored information” (emphasis added). Both Comment 6.e in the Second Edition and Comment 6.e in the First Edition begin “In developing collection procedures . . . organizations should consider,” thereby making clear that the terms “Documentation and validation” referred to the collection stage only. The proposed new Comment discards that limitation and would expand the “validation” requirement well beyond the collection phase, to all phases of a case’s “discovery processes.” Notably, the first line of proposed Comment 6.c underscores the drafters’ deliberate choice to expand the scope of “validation” well beyond the collection stage: “Responding parties and their counsel should consider what documentation and validation of their discovery process (i.e., preservation, collection, review, and production) is appropriate to the needs of the particular case.” We have a number of objections to this approach.

To begin with, the term “validation” itself is an unfortunate choice. It is a loaded term that appears to require a level of scientific certainty that is not required by the Federal Rules. What is required, instead, is reasonable due diligence, or as Rule 26(g) expresses it, “reasonable inquiry,”<sup>1</sup> nothing more. The term “validation” carries the additional connotation that the producing party itself needs to establish the reasonableness of its actions (regarding “collection procedures” in the 2004 and 2007 versions and regarding all “discovery processes” in the proposed Third Edition version), whereas the cases establish no such affirmative requirement.

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<sup>1</sup> Fed. R. Civ. P. 26(g) stipulates that, “[b]y signing [a discovery response] an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after reasonable inquiry (A) with respect to a disclosure, it is complete and correct as of the time it is made . . . .” There is no provision in the rules requiring more than a “reasonable inquiry.”

The undersigned suggest that the loaded term “validation” be dropped altogether. It is unnecessary and confusing.

Second, the expansion of this “validation” requirement beyond the collection stage carries an implication that discovery-on-discovery is routine in every case at every stage, instead of rare and disfavored. It is well settled that discovery-on-discovery is unwarranted without a significant showing of a discovery deficiency.

Third, this validation requirement would interject unprecedented adversarial oversight into the work of counsel and risks encroaching upon privileged attorney-client communications and attorney work product. The preservation, review, and selection processes inherently requires counsel to exercise professional skill, judgment, and reasoning in determining issues of relevance, litigation tactics, trial strategy, and other conclusions about key strategic issues. Accordingly, these processes often, if not always, implicate the attorney-client privilege and the work product protection. To suggest that these traditionally protected activities are subject to the routine oversight of opposing counsel or the court is improper and seeks to change the fundamental nature of our legal system.

Fourth, the proposed draft’s expansion of a “validation” requirement beyond collection overlooks the distinction between the discovery collection process, which can be objectively measured and analyzed, and the inherently subjective nature of the ensuing review and production stages of the EDRM. Unlike the collection of ESI, the review and selection of ESI for production are not processes amenable to simple, empirical validation because they are inextricably intertwined with an attorney’s exercise of professional judgment. The same is true of preservation decisions, which are often made without the benefit of a complaint or an adversary with whom to dialogue.

Finally, this expansion of the “validation” requirement to all stages of a case seemingly comes out of the blue. Proposed Comment 6(c) offers no support in case law or the Federal Rules of Civil Procedure for its departure from existing practices developed by courts and commentators over the past 25 years of e-discovery.

We recommend that the Sedona Conference Working Group reject the changes to the Principle 6 comments and return to the understanding that any “validation” processes are limited to the confines of document *collection* and that Federal Rule of Civil Procedure 26(g) is the proper certification validation for the conduct of parties and their counsel. We also emphasize, as did the last edition, that documenting and validating of collection efforts must be appropriate to the needs of the particular case. Some cases require neither.

#### Proportionality Should Be Emphasized

One of the central aims of the 2015 amendments was to bring considerations of proportionality to the center of all discovery discussions and decisions.

Chief Justice Roberts has stated that proportionality should operate as a brake on discovery costs and burdens. In his 2015 year-end report, he stated, “Rule 26(b)(1) crystalizes

the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.” John Roberts, C. J., *2015 Year-End Report on the Federal Judiciary*, Dec. 31, 2015.

Likewise, as to preservation, the Rules Committee Note to Fed. R. Civ. P. 37(e) emphasizes that considerations of proportionality should be at the forefront when courts evaluate a party’s preservation efforts:

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The Court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts.<sup>2</sup>

The public comment draft concerning Principle 6 commendably includes several references to proportionality, but we submit that discussions of proportionality should occupy a more central place in the comments. For example, Comment 6.c might read, in part:

Comment 6.c. Responding parties are best situated to evaluate the need for proportional documentation and validation considerations for collections, contemplating the needs of a particular case.

Moreover, requiring validation of discovery processes costs money, yet the draft omits any references to proportionality at the same time that it purports to impose these costs on the producing party. Any discussion of a “validation” requirement—if the drafting teams retains the unfortunate term—should include a caution that the costs of validation should be balanced against the requirement of sensible proportionality. Not every case requires granularity. Without proportionality, the burdens of validating and documenting collection efforts will be thrust upon all parties in the same manner and to the same extent (*e.g.*, personal devices, webmail and social media accounts of individual plaintiffs).

Likewise, the negotiation of search strategies costs money, too, and may not succeed if the parties are deadlocked; in especially acrimonious cases negotiating search terms can easily cost more in lawyer time than it saves. Again, the comments should include a caution that all efforts at cooperation and negotiation should be subject to, as Chief Justice Roberts observed, “reasonable limits . . . through increased reliance on the common-sense concept of proportionality.”

### Cooperation Is a Two-way Street

The draft seems to go out of its way to state that “a responding party has no right to demand a requesting party actively assist the responding party with evaluating and selecting the procedures, methodologies, and technologies for meeting the responding party’s preservation and production obligations.” While perhaps literally true as written, this seems to ignore the role that cooperation should play in the discovery process. Should not the comment caution that a

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<sup>2</sup> See generally, Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 Rev. Lit. 117 (2017).

requesting party's refusal to cooperate with the responding party in the discovery process will properly be taken into account by the court if the requesting party later attempts to object to the process that the responding party thereafter selected by itself?

Comment 6.c Suggests That Privilege Is a Qualified Immunity

The second paragraph of proposed Comment 6.c states:

“Documentation of discovery processes may be privileged and therefore not subject to discovery, and should be shared with the requesting party only by agreement (after due consideration of privilege issues—see Principle 10) or after court order based upon a showing of a specific deficiency in a responding party's production (see Comment 6.b).”

This suggests that a court can order the production of privileged material “upon a showing of a specific deficiency in a responding party's production.” This sentence conflates attorney-client privilege with attorney work product and has led the drafting team into error. While attorney work product can be accessed for good cause (which is one of the reasons why discovery-on-discovery should only be allowed for good cause), to the extent that discovery-on-discovery is ever permissible, it can never operate to eviscerate the attorney-client privilege. We suggest that the last clause of this paragraph beginning with “or after court order” be deleted.

\* \* \*

We would be happy to dialogue on these issues.

**ELECTRONIC DISCOVERY INSTITUTE**



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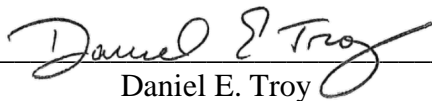
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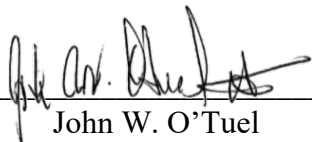
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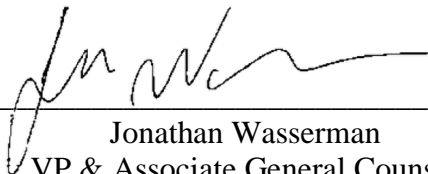
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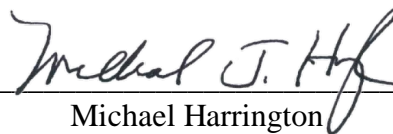
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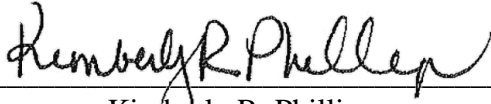
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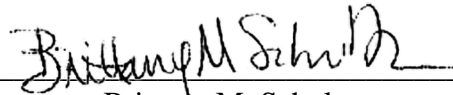
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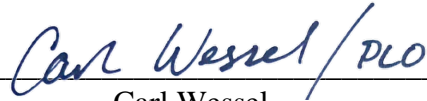
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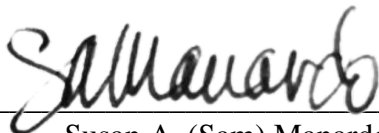
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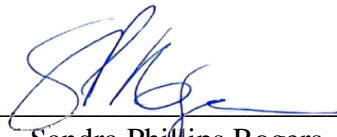
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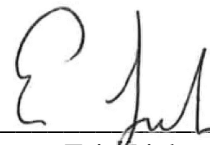
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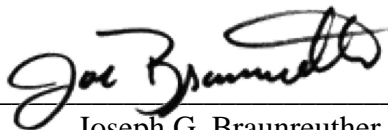
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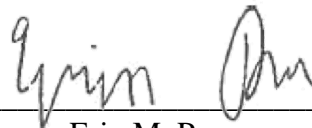
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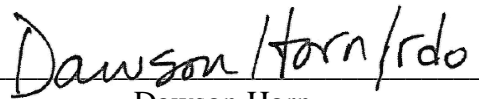


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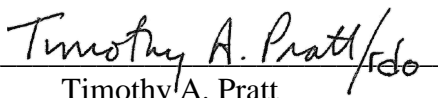
  
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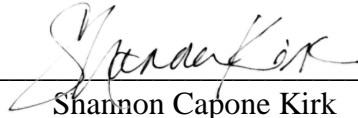
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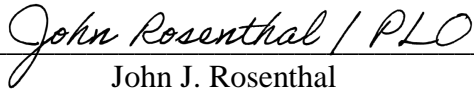
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