

COVER LETTER TO THE SEDONA PRINCIPLES, THIRD EDITION

Building consensus through dialogue is not an easy or quick process, particularly with a document as significant to The Sedona Conference as “*The Sedona Principles*.” As explained in the *Foreword to The Sedona Principles, Third Edition*, that process began with the recruitment of a drafting team in 2013 comprised of a diverse set of experienced practitioners from across the legal spectrum, and continued through four years of drafts and revisions discussed at Working Group 1 (WG1) semi-annual meetings each year, as well as during online WG1 meetings dedicated solely to the *Third Edition*. The process has now reached its conclusion following a ninety-day public comment period that ended on June 30, 2017. As with the prior WG1 in-person and online meetings, all WG1 members as well as the public at large were encouraged to express their views on *The Sedona Principles, Third Edition*, and all public comments were carefully considered by the Drafting Team and the Judicial Participant.

The comments received during the public comment period were varied and often disparate, coming from lawyers, law firms, and organizations—some of whom align with and advocate nearly exclusively for responding parties and others that align with and advocate nearly exclusively for requesting parties. Several comments recommended minor changes to clarify meaning and intent of the Commentaries, and the Drafting Team and Judicial Participant adopted a number of these suggestions. Other comments recommended substantive and wholesale changes to the Principles and the Commentaries that had already been considered and rejected by the WG1 membership or Steering Committee during the drafting process, and the Drafting Team and Judicial Participant dismissed them as previously settled in the consensus process.

While the goal of many of the individuals and groups who submitted comments is to advance the interests of either predominantly requesting or predominantly responding parties in asymmetrical litigation, the mission of The Sedona Conference is “Moving the law forward in a reasoned and just way” —for *all* parties. We are confident that *The Sedona Principles, Third Edition* furthers that mission.

The following summarizes the majority, although not all, of the substantive public comments received, and the unanimous response of the Drafting Team, including the Judicial Participant.

We received comments asserting that Principle 2 overstates the importance of proportionality, as well as counter-comments that proportionality should be emphasized more, both in Principle 2 and throughout the Commentary to *The Sedona Principles, Third Edition*. The Drafting Team concluded that Comment 2.a. appropriately describes proportionality as being “on par with relevance when negotiating and formulating preservation and discovery plans,” and that the quoted reference to the 2015 Committee Notes appropriately describes the 2015 amendments to Rule 26(b)(1) as “reinforc[ing] the Rule 26(g) obligation of the parties to consider [proportionality] in making discovery requests, responses, and objections.” On the other hand, the Drafting Team agreed with a suggestion to add the sentiments of Chief Justice Roberts on proportionality, as expressed in his 2015 year-end report on the federal judiciary, which have been added to footnote 34.

Public comments were submitted suggesting expanding the Commentary to Principle 5 to include detailed advice on how to meet preservation obligations in specialized circumstances. The Drafting Team concluded that the Commentary to Principle 5 should continue to generally describe the preservation obligation, and readers should turn to *The Sedona Conference’s Commentary on Legal Holds: The Trigger & The Process* for more specific guidance as cited in footnote 64.

Consistent with the WG1 online and in-person meetings, we received many public comments addressing perceived flaws with Principle 6 and the Commentaries to Principle 6.

First, public comments were sent in arguing that proposed changes to the text of Principle 6 threaten to erode its wisdom. However, the March 30, 2017, Public Comment draft did not propose *any* changes to the language of Principle 6 itself, which has remained unchanged since the First Edition. Other public comments proposed that Principle 6 and accompanying Commentaries should be limited to the preservation and collection phases of discovery, since responding parties do not always have superior knowledge regarding the other subsequent steps in the discovery process. The Drafting Team concluded that the bases for Principle 6, as set out in Comment 6.a., apply to all stages of the discovery process—not just preservation and production.

Additional public comments argued that references to cooperation in Comment 6.b. strip Principle 6 of its import and effect, thus favoring requesting parties, while others argued the opposite proposition: i.e., Comment 6.b. is weighted too heavily in favor of

responding parties. The Drafting Team concluded that the reference to cooperation in Comment 6.b. is properly balanced by the reference to Principle 6 in Comment 3.d., and that Comment 6.b. reflects the consensus view of WG1 that there should be no discovery on discovery absent evidence-based indicia of a material failure by the responding party to meet its obligations. Separately, the Drafting Team also responded to public comments that Comment 6.b. should treat cooperation as more of a “two-way street” by cautioning that requesting parties who refuse to participate in the discovery process may weaken their ability to later challenge that process.

Public comments were submitted asserting that the validation suggested in Comment 6.c. should be limited to collection procedures, given the risk that the word “validation” may be misconstrued. While noting that “validation” has been part of Comment 6.c. since the Principles were originally published in 2003 without any misconception of that Comment over those many years, the Drafting Team nonetheless revised the first paragraph of 6.c. to address the argued perceived risk of misconception.

Additional comments suggested that Comment 6.c. misstated the law regarding waiver of privilege and work product. The Drafting Team responded by modifying the second paragraph of Comment 6.c. to clarify the intended reading of the Comment.

A minor edit was made to Comment 10.g. in response to public comment to clarify that WG1 is not taking a position on the effectiveness of technology assisted review (TAR) for privilege review.

Conflicting public comments were received regarding Comment 12.b.ii. and the subject of native file production. Some argued that Comment 12.b.ii. should go further in requiring native production where that format is more compatible with the reviewing party’s complex review software. Others argued that Comment 12.b.ii. goes too far in suggesting that the responding party’s review platform should influence the form of production. The Drafting Team concluded that Comment 12.b.ii. as written strikes the appropriate balance between those positions.

Finally, public comment was submitted asserting that Comment 14.b. incorrectly suggests a negligence standard, and that the Comment’s use of “sanctions” is inconsistent

with Rule 37(e). The Drafting Team concluded that Comment 14.b. appropriately distinguishes between sanctions and remedial measures, and adopts the “intent to deprive” standard.

October 2017

**The Sedona Principles, Third Edition
Drafting Team**

Anthony J. Diana
Amor A. Esteban
Joseph P. Guglielmo[†]
Ted S. Hiser[^]
Dean Kuckelman^{†^}

Eric P. Mandel[†]
Timothy M. Opsitnick
Charles R. Ragan[^]
Dena C. Sharp
Martin T. Tully

Judicial Participant

The Honorable Andrew J. Peck[^]

**Team Leader and WG1
Steering Committee Liaison**

William P. Butterfield[†]

[†] WG1 Steering Committee [^] Editorial Style Committee

The foregoing statement represents the consensus views of the Drafting Team; it does not necessarily represent the views of any of the above individuals, their employers, partners, shareholders, clients, or any other organizations to which they belong; nor does it necessarily represent official positions of The Sedona Conference.

This document may be cited as:

Cover Letter to The Sedona Principles, Third Edition, THE SEDONA CONFERENCE (2017), <https://thesedonaconference.org/publication/The%20Sedona%20Principles>.