

The Sedona Conference Electronic Information in Government Proceedings Brainstorming Group Draft Outline

Brainstorming Group Members

Michael Blank	Scott Borrowman
Traer Cundiff	Alex Khoury
Christian Mahoney	Glenn Melcher
Gretchen Nygaard	Ray Rivard
Gerald Robinson	Alissa Sagri
George Swoyer	Leah Wolfe

Team Leaders

Heather Kolasinsky	Robb Snow
--------------------	-----------

Steering Committee Liaisons

Ross Gotler	Robert Keeling
Maria Salacuse	

Copyright 2023, The Sedona Conference.

Reprinted with permission.



This document was created for discussion purposes only for the 2023 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to comments@sedonaconference.org.

DRAFT September 27, 2023

Brainstorming Group Update:
Electronic Information in Government Proceedings

1. Background and Charter from the Working Group 1 (WG1 Steering Committee)

The Electronic Information in Government Proceedings Brainstorming Group will consider and make recommendations to the WG1 Steering Committee on whether a Sedona Conference publication providing guidance on eDiscovery in U.S. government investigations and other proceedings may be beneficial.

Potential topics to be considered may include:

- (i) consideration and application of civil discovery concepts and topics such as possession, custody, or control, reasonableness (relevancy) and proportionality, ESI protocols, and privilege logs and clawback (502(d) and statute/regs, BSA/AML) to government proceedings;
- (ii) use of technology-assisted review and other advanced technology tools and analytics;
- (iii) the impact of newer types of sources of electronic information;
- (iv) special considerations for certain types of government matters such as antitrust investigations, regulatory investigations, and FDIC, NLRB, and EEOC proceedings;
- (v) the impact of privacy concerns and laws; and
- (vi) consideration of a potential framework for such proceedings for use by government and private parties (including the cooperative discovery concept).

2. Feedback Requested from Working Group 1 Members:

- a. What is the scope of a potential Sedona paper?
 - i. Should Sedona examine unique aspects of government investigations and proceedings, including litigation, or limit the paper to government investigations and proceedings?
- b. Who is the audience-Government or practitioners, or both?
 - i. What is appetite for government agencies to take advice from Sedona?
 - ii. If the consensus is the Government will not be persuaded by Sedona, should the target audience instead be practitioners?
 - iii. Should the audience be both government agencies and practitioners?
- c. What is the purpose of the paper?
 - i. Would it be helpful for Sedona to take a stance that government actors should follow something like the federal rules?
 - ii. If target audience is practitioners, what topics would be useful to them?
 - iii. Would it be beneficial for Sedona to opine on any of the following topics:
 - 1. the government investigation process,

This document was created for discussion purposes only for the 2023 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to comments@sedonaconference.org.

DRAFT September 27, 2023

2. government administrative proceedings (*i.e.* MSPB/SEC admin trials/OFIA/Social Security Hearings/Immigration Court), including litigation
 3. the *Touhy* request process,
 4. civil investigative demand versus grand jury subpoena,
 5. Plaintiff Relator Whistleblower Proceedings, or
 6. Other topics?
- d. Is there consensus that Sedona should draft a paper?
- i. If yes, what form should a paper take (*e.g.*, Primer, Commentary, etc.)

3. What the Brainstorming Group Has Discussed So Far

a. Audience for a potential paper

- What is appetite for government agencies to take advice from Sedona? Is the government willing to constrain itself to engage or look to Sedona for guidance?
- The government is not a monolith – will this answer vary based on agency?
- The BG has multiple agencies represented, and there is no clear consensus on willingness to take Sedona guidance.
- If the consensus is the Government won't be persuaded by Sedona, should the target audience instead be practitioners? If so, what topics would be useful to practitioners?
- Should the audience be both the government agencies and practitioners?

b. Scope and focus of a potential paper

- What would be beneficial for Sedona to opine on? Should Sedona examine unique aspects of government investigations and proceedings, including litigation?
- Should Sedona make a recommendation on government investigations and administrative proceedings only? Litigation?
 - Discuss how Investigations Differ from Litigation in Important Ways?
 - Should the paper focus on (i) government as a party, (ii) government as a non-party, or (iii) government investigation?
 - Should the paper outline *Touhy* request?
 - Should the paper outline the Administrative Process?
 - Plaintiff Relator Whistleblower Proceedings and the Disclosure and Sharing of Info?
- Would it be helpful for Sedona to take a stance that government actors should follow something like the federal rules? Note: may fit better under Civil Discovery Concepts section.

c. Discussion of Civil Discovery Concepts in the Context of Government Proceedings

- Some agencies, like the FDIC, have Uniform Rules of Practice and Procedure that are based, in part, on the Federal Rules. Others do not.
- Should Sedona Principles (or something similar) apply to government investigations (*e.g.*, Sedona Principle 6)?

This document was created for discussion purposes only for the 2023 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to comments@sedonaconference.org.

DRAFT September 27, 2023

- Should proportionality principles be applied to government investigations and administrative proceedings?
 - Regulatory breadth vs. Rule 26 scope: In the context of its administrative investigations, the EEOC is permitted “access to virtually any material that might cast light on the allegations against the employer.” EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984). Other agencies have similar power.
 - Proportionality principles in FDIC, OCC, and FRB Uniform Rules of Practice and Procedure.
- Production Requests-potential topics for discussion in a paper include:
 - Use of ESI Protocols and Protective Orders
 - Touhy and Civil Investigative Demands
 - Broad Subpoena Powers
 - FOIA Requests
 - Asymmetrical Productions
- Privilege
 - Should unique federal government privileges (*e.g.*, deliberative process, FOIA privileges, common interest, joint defense, bank examination, presidential communications, state secrets, investigatory files, etc.) be discussed?
 - FRE 408 Privileges and Settlement Negotiations?
 - Should 502(d) orders be recommended for administrative proceedings and government investigations?
 - Federal Agencies can share privileged information with other agencies without waiving privilege.
 - Some Federal Agencies (*e.g.*, FDIC) may have the functional equivalent of a 502(d) order for documents produced by target of investigation.
- Possession, Custody, and Control & Rule 45 Subpoenas
 - Should these be addressed in the paper and have they been examined in a government context by other Sedona papers?
- d. Technology
 - Government challenges with technology (*e.g.*, limited resources, security guidelines (FedRAMP, NIST);
 - Is there an opportunity for Sedona to support the use of third-party technology by government agencies and opposing parties?
 - Like the private sector, technology-assisted review, and other advanced technologies, like analytics, are underutilized.
- e. Cooperative Discovery Concept
 - Encouraging greater cooperation using Sedona Principles and Cooperation Proclamation
- f. Should Sedona publish a paper on Government Proceedings? If so, what form should the paper take (*e.g.*, Primer, Commentary, etc.)

© 2023 The Sedona Conference. All rights reserved.

This document was created for discussion purposes only for the 2023 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to comments@sedonaconference.org.

DRAFT September 27, 2023

- No consensus on paper (as of 09/15/23)
- Paper could be used to influence judiciary, ALJs, and government agency legal departments.
- Should the paper focus on unique aspects of government proceedings?
- Should the paper focus on guidance or core principles for private sector to be aware of in government investigations?
 - Will be difficult to get principles to guide govt
 - Some basic principles while following a process
- g. What other Sedona publications are relevant to this topic?
 - The Sedona Conference Primer on Managing Electronic Discovery in Small Cases
 - The Sedona Conference Primer on Crafting eDiscovery Requests with "Reasonable Particularity"
 - The Sedona Conference Commentary on Proportionality in Electronic Discovery
 - The Sedona Principles, Third Ed.
 - The Sedona Conference International Principles for Addressing Data Protection in Cross-Border Government & Internal Investigations