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The Sedona Conference

Commentary on BYOD:
Principles and Guidance for Developing Policies and Meeting Discovery Obligations

A Project of The Sedona Conference
Working Group on Electronic Document
Retention & Production (WG1)

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THE SEDONA CONFERENCE COMMENTARY ON BYOD: PRINCIPLES AND GUIDANCE FOR DEVELOPING POLICIES AND MEETING DISCOVERY OBLIGATIONS

A Project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1)

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PREFACE

Welcome to the final, May 2018, version of The Sedona Conference *Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The public comment version of this Commentary was published in January 2018 and stems from the increasing practice of Bring Your Own Device (BYOD), where organizations permit or encourage workers to use their own personal devices to access, create, and manage organization information. After a 60-day public comment period, the editors reviewed the public comments received and, where appropriate, incorporated them into this final version.

BYOD is often accomplished through a BYOD program that includes formal or informal rules and guidelines. This Commentary is designed to help organizations develop and implement workable—and legally defensible—BYOD policies and practices. This Commentary also addresses how creating and storing an organization's information on devices owned by employees impacts the organization's discovery obligations.

On behalf of The Sedona Conference, I want to thank all of the drafting team members for their dedication and contributions to this project. Team members that participated and deserve recognition for their work are: Andrea D'Ambra, Emily Fedeles, Katelyn Flynn, Ross Gotler, Peter B. Haskel, Heather Kolasinsky, Mark Michels, Jessica C. Neufeld, Matthew Prewitt,

Lauren E. Schwartzreich, and Ryan Wasell. The Sedona Conference also thanks Alitia Faccone and David Moncure for serving as the Drafting Team Leaders, and Dean Kuckelman and Ronni D. Solomon for serving as Steering Committee Liaisons.

In addition, we encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent litigation best practices; data security and privacy liability; trade secrets; and other "tipping point" issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
May 2018

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A. *The Growth of BYOD*

Mobile computing has obscured the once distinct boundaries between the workplace and private life. Twenty years ago, when an organization hired a new employee, it assigned the employee a desktop computer and a landline phone. Now, either as part of cost-cutting efforts or to accommodate worker preferences, organizations are permitting or encouraging workers to use their own personal devices to access, create, and manage their information—often after hours and outside the office. This practice is commonly referred to as "Bring Your Own Device" or "BYOD," and is often accomplished through a BYOD program that includes a BYOD policy and practices. Those BYOD programs may *require* employees to use their own devices to conduct the organization's business. The devices that are owned and used by the employees to access the organization's emails and documents typically include smartphones and tablet computers, but can also include personal laptops or desktops that access organization information through virtual private networks (VPNs) or other remote access technologies. This Commentary addresses how creating and storing the organization's information on devices that are owned by the employee impact the organization's discovery obligations and security goals.

Several factors have driven the rise of BYOD programs in recent years. For example, today's rapid technological developments in mobile technology motivate workers to purchase their own sophisticated devices rather than wait for their employer's information technology (IT) upgrade program. And workers purchase those devices with the expectation that they can use them for both personal and business purposes. Also, some organizations have adopted a BYOD policy so they do not have to pay for the devices, but many have found that this just shifted

IT expenditures from device purchases to software intended to protect and manage data on those devices.

Another factor driving BYOD adoption is advances in device security, which has made some organizations more comfortable with permitting access to sensitive data from employees' personal mobile devices. Security measures common to today's mobile devices may greatly reduce the risk that an employee's lost device will expose organization emails or other proprietary data. Mobile device management (MDM) software can be used to require security authentication and to segregate personal information from the organization's data. MDM software also lets organizations remotely wipe the device if it is lost or stolen.

B. The Scope of These Principles and Commentary

This Commentary applies specifically to mobile devices that employees "bring" to the workplace. It does not address all of the programs that govern employees' use of mobile computing devices, such as:

- BYOA (Bring Your Own Access—where employees provide their own wireless access to an organization's systems usually though mobile hotspots);
- BYOE (Bring Your Own Encryption—a cloud computing security process where employees use their own encryption software and encryption keys to access a cloud-based organization system);
- BYOI (Bring Your Own Identity—where employees utilize third-party systems (usually social networking sites) as their credentials for accessing organization systems, e.g., "login using Facebook");
- BYON (Bring Your Own Network—where employees create their own personal network instead of utilizing the organization's network); or

Also available as part of the eCourse
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First appeared as part of the conference materials for the
2021 E-Discovery Essentials session
"Discoverability of Mobile Devices, New Technology and Social Media Platforms"