

The Sedona Conference
*Commentary on Application of
Attorney-Client Privilege and Work-Product Protection
to Documents and Communications Generated
in the Cybersecurity Context*
(November 2019)

The Sedona Conference Working Group on Data Security and Privacy Liability (WG11) developed the *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context* (“*Commentary*”) to evaluate the application of the attorney-client privilege and work-product protection doctrine to an organization’s cybersecurity information (CI). The *Commentary* seeks to move the law forward by assessing the arguments for and against the discoverability of CI being determined under general principles of attorney-client privilege and work-product protection law, as opposed to modifying those principles in the context of CI.

The goal of the *Commentary* is to address the absence of “settled law” on this topic by assessing:

- (1) how the courts have and can be expected to decide, and what organizational practices will be important to a court’s decision, regarding whether attorney-client privilege or work-product protection apply to documents and communications generated in the cybersecurity context; and
- (2) how the development of the law in this area should be informed not just by established attorney-client privilege and work-product protection principles, but also by the policy rationales underlying these principles generally and those that are unique to the cybersecurity context.

The *Commentary* considers various proposals for adapting existing attorney-client privilege and work-product protection law, or developing entirely new protections, in the CI context. To that end, the *Commentary* calls for enacting a qualified—but not absolute—stand-alone cybersecurity privilege under which CI would enjoy some measure of protection against discoverability, regardless of whether lawyers were sufficiently involved in its creation to otherwise qualify for protection. The *Commentary* also calls for state and federal law to recognize a “no waiver” doctrine that provides a data holder’s disclosure of CI to law enforcement would not waive any privilege or protection that might otherwise be claimed in future civil litigation.



The full text of The Sedona Conference *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context*, is available free for individual download from The Sedona Conference website at:

https://thesedonaconference.org/publication/Commentary_on_Application_of_Attorney-Client_Privilege_and_Work-Product_Protection_to_Documents_and_Communications_Generated_in_the_Cybersecurity_Context.

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