

The Sedona Conference

Commentary on Cross-Border Privilege Issues

(October 2021 Public Comment Version)

The Sedona Conference Working Group 6 on International Electronic Information Management, Discovery, and Disclosure (WG6) developed the *Commentary on Cross-Border Privilege Issues* (“*Commentary*”) to (1) provide an overview of select laws and the differences between them and (2) set forth practice points to consider in managing and resolving the conflicts that can arise in multijurisdictional matters where the protections afforded in one jurisdiction may not be recognized in, or may be in conflict with, those of another.

Section I is the introduction to the *Commentary*. Section II of the *Commentary* broadly explains the distinctions between common law and civil law privilege and other legal protections against disclosure. Section III lays out practical considerations for navigating these differences. Section IV explores the choice-of-law analysis used by some courts for deciding the application of privilege laws. Finally, Section V provides an appendix of privilege and other legal protections in selected exemplar jurisdictions.

The practice points outlined in Section III are as follows:

- **Practice Point 1:** Be Mindful That Approaches to Privilege Differ
- **Practice Point 2:** Be Aware of the Limitations on In-House Counsel Privilege
- **Practice Point 3:** Consider Applicable Governmental and Regulatory Privileges and Weigh the Risks of Waiver before Making a Regulatory Disclosure
- **Practice Point 4:** Be Proactive in Exploring and Exercising Options to Protect Applicable Privileges
- **Practice Point 5:** Assess Possible Privilege Waivers and Take Practical Steps to Minimize Waiver Risks Going Forward
- **Practice Point 6:** Special Planning is Necessary for Parallel Proceedings and Simultaneous or Sequential Litigation
- **Practice Point 7:** Assist Courts with Cross-Border Privilege Issues, as Courts May Lack Familiarity with Relevant Jurisdictional Laws
- **Practice Point 8:** Understand Applicable Choice-of-Law and Comity Principles

The full text of The Sedona Conference *Commentary on Cross-Border Privilege Issues*, Public Comment Version, is available free for individual download from

The Sedona Conference website at

https://thesedonaconference.org/publication/Commentary_on_Cross-Border_Privilege_Issues.

© 2021 The Sedona Conference. Reprinted courtesy of The Sedona Conference.