Selected Public Commentary on

The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

A Project of The Sedona Conference®
Working Group on Protective Orders,
Confidentiality & Public Access (WG2)

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Foreword

This is a collection of nine comments received by The Sedona Conference in response to the publication of Working Group 2's public comment draft, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, in April 2005. Seven of these comments were submitted by organizations and two by law professors. They are not all of the comments received by the Working Group during the two-year public comment period. Many more were received from individuals, and approximately 200 people attended four "Town Hall Meetings" held in Newark, Dallas, Denver, and Birmingham. All the comments received were considered by the editorial team during their preparation of the 2006 edition of the *Guidelines*.

The Sedona Conference and its Working Groups are not forums for advocacy, although many skilled advocates are active participants. The Working Groups strive for consensus through dialogue, a process which values listening skills over debating skills. But these comments, divergent as they may be, have been considered by Working Group 2 in their dialogue leading up to the revision of the *Guidelines* in the summer of 2006. We believe that these contributions to the dialogue are necessary to understanding the issues that Working Group 2 explored.

Richard G. Braman, Executive Director
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September 1, 2006

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DEPARTMENT OF LAW

July 26, 2005

Hon. Ronald J. Hedges
United States District Court for the
District of New Jersey
Martin Luther King, Jr. Federal Building
50 Walnut Street
Newark, NJ 07101

Dear Judge Hedges:

Thank you for the opportunity to comment on the *Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, and to participate in the conference on September 8. In particular, you have asked me to focus on Chapter 2 ("Discovery"). Following are my written comments.

On the whole, I believe the Best Practices are an important step towards more effective, uniform management of discovery in cases involving trade secret and other confidential information. As an intellectual property law professor, and a former litigator in intellectual property, trade secret, and consumer class action cases, it seems clear to me that negotiated protective orders facilitate the efficient resolution of many types of cases. A common set of Best Practices such as those reflected in the *Guidelines* will provide litigants with some degree of confidence that appropriate protective orders will be available for discovery materials regardless of a case's venue. This should reduce forum-shopping and other inefficiencies resulting from local variances in protective order practice.

I am concerned, however, that the Best Practices reflect the public interest nature of certain types of litigation. In particular, I believe Principles 1 and 4 could be expanded upon somewhat to reflect this concern. I do not have any particular concerns about the *Guidelines'* presentation of Principles 2 and 3. My specific observations are set forth under the relevant Principles below.

Principle 1 There is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court.

I agree with this general statement except as it relates to cases that can be classified as "private attorney general" or "public interest" actions. Such cases often seek remedies, such as mandatory injunctions, that are public as well as private in nature. In such cases, the discovery process takes on a quasi-public flavor.

The quasi-public nature of discovery in such cases is particularly pronounced when a given case is part of a larger group of cases brought by individuals and government regulators. Such cases often are aggregated for pretrial purposes in an MDL proceeding, with discovery materials produced into centralized document depositories. The tobacco cases are an example of this type of litigation.

I would suggest that there is a reasonable expectation in such cases that the public ultimately will gain access to information disclosed during the discovery process. One way to balance the private and public interests in such cases might be to establish an "exploding" depository lock – that is, confidential information produced into the document depository would remain presumptively unavailable to the public for a limited time, after which the depository would become freely accessible. This would protect a business litigant's genuine need for confidentiality, as the urgency of any confidentiality designation for most business data passes as the product and marketing cycle advances, while recognizing the public interest in the availability of information produced in "private attorney general" cases.

Principle 4 On a proper showing, non-parties should be permitted to intervene to challenge a protective order that limits disclosure of otherwise discoverable information.

In general, I agree with this principle. Consistent with my comments under Principle 1 above, however, I would suggest a corollary to Principle 4: at least in certain types of "public interest" cases, parties should have a duty to provide adequate notice to the public of the amount and general nature of the discovery information that has been designated as "confidential."

The right to intervene helps protect the public interest in the disclosure of information affecting public health, safety or welfare. A right to intervene might prove chimerical if the public is unaware of what materials have been designated as confidential, or even of whether any claims of confidentiality have been made at all. Although plaintiff's counsel in a "public interest" case presumably is acting in some respect on the public's behalf, there is always a danger that the discovery and settlement process can become somewhat collusive, as the attorneys tend to focus on what is best for their individual clients and their own fee awards.

In the sorts of cases I described above, particularly where there is a document depository, it would be simple to provide public notice of confidentiality designations. For example, a website could be established in conjunction with the depository listing the depository's contents and, ideally, providing links to electronic copies of non-confidential documents. Under the governing case management / protective order, a party seeking to claim confidentiality for discovery materials could be required to submit a confidentiality log. This would resemble a privilege log, in that it would provide a general description of each document produced under a confidentiality designation. The log could then be posted on the depository website, which would constitute the requisite public notice of the claim of confidentiality. In cases where there is no depository, the log could be filed with the court and noted on the public docket.

I hope these comments are helpful. Please feel free to call if you would like to discuss any of the comments further. Thank you again for the opportunity to participate in this important project.

Respectfully,

Prof. David W. Opderbeck
Assistant Professor, Law Department
Baruch College, City University of New York,
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HARVARD LAW SCHOOL

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March 17, 2006
by e-mail to sedonaconference@earthlink.net and U.S. mail

Richard G. Braman, Esq.
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The Sedona Conference
180 Broken Arrow Way South
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Dear Mr. Braman:

I have noted with particular interest that the Sedona Conference is in the process of attempting to develop practice guidelines regarding court confidentiality and I have reviewed the "Revised April 2005 Public Comment Draft" of *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access In Civil Cases.*

I have observed and commented on the court confidentiality debate for many years, including writing a comprehensive law review article[1] and many shorter written commentaries.[2] In addition, I have reviewed many state legislative proposals and court rule amendments, and have testified numerous times on this issue before the federal rule makers as well as the United States Senate and House of Representatives.

My views continue to be the same: as applied to your project, I believe that the current system that empowers the courts to use balanced discretion to protect litigants' privacy, property, and confidentiality in appropriate cases works well and does not need to be changed. Of course, there might be discrete areas in which "practice guidelines" might serve a useful purpose, but any such guidelines would have to be carefully articulated to ensure that they did not limit a judge's discretion to enter protective and sealing orders and did not restrict the ability of the parties to assure confidentiality in civil litigation.

In that connection, I would be very interested in any information that Sedona has compiled that demonstrated the need for practice guidelines. My own experience teaches

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[1] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access To The Courts*, 105 HARV. L. REV. 427 (1991).

[2] 2. See, e.g., Arthur R. Miller, *Traveling Courthouse Circuses*, A.B.A. J. 100 (Feb. 1999); Arthur R. Miller, *Protective Order Practice: No Need To Amend F.R.C.P. 26(c)*, Prod. Safety & Liab. Rptr. 438 (BNA) (Apr. 21, 1995); Arthur R. Miller, *Private Lives or Public Access?* A.B.A. J. 65 (August 1991); Arthur R. Miller, *Renewed Tension Between Right To Privacy*, Boston Globe, March 10, 1991, § A, pg. 31, col. 1.

that the system has been functioning quite well without such guidelines. Do you have evidence that there are serious problems in practice that these guidelines are designed to address? Or, as I have said before, is this a solution in search of a problem? “It has been my experience that when a proposal will not go away, it is being driven by something other than the merits.”[3]

More to the point, perhaps, is my conclusion upon reviewing the Sedona Draft, that, although it attempts moderation, it reflects a decided bias in favor of public access and that it does not give due regard to the need to protect confidential information or the costs to the civil justice system and those participating in it of failing to do so. As one example, I cite Principle 1 in Chapter 4 that effectively penalizes people who fail to use a "private dispute resolution process" without any acknowledgement of the prohibitive costs of that alternative which effectively denies millions of Americans of that choice, and the lesser procedural qualities of many of those processes.

Indeed, the more time that passes, the more secure I am in the knowledge that the use of protective and sealing orders and extra-judicial confidentiality agreements agreed to among the litigants is not prone to the serious abuses that some have trumpeted. At the same time, as a student of the courts and an active practitioner for more than forty years, I have no doubt that an assurance of confidentiality often is an essential ingredient for starting the information exchange flowing among the parties during discovery. That, in turn, facilitates the truth-seeking goals of the adversary process and the resolution of cases on their merits. Similarly, it ensures production of the materials that persuade parties to settle and comforts litigants that the price of peace was fair.

Therefore, I trust that the Sedona Conference will consider the following points before proceeding with your endeavor.

Confidentiality Is Necessary To the Efficient Functioning of the Civil Justice System.

Take away or restrict the ability to protect confidentiality and the entire civil justice system will suffer. If the parties are discouraged or prevented from agreeing to confidentiality or a protective order among themselves the entire process is adversely impacted. Not only will proceedings be slower and more contentious, but in some instances proceedings will come to a complete halt while the court attempts to understand and implement the unnecessary and burdensome procedures suggested by many of the draft guidelines. The vast majority of discovery productivity and exhibits attached to various submissions is either inadmissible from an evidentiary point of view or never will become part of the truth-seeking aspects of the litigation.

Thus, the courts are likely to become mired in motions and proceedings that siphon precious judicial resources away from higher level duties, such as presiding over trials or writing opinions or managing their cases and that force judges to devote time to tedious,

[3] *Traveling Courthouse Circuses,* A.B.A. J. at 100.

low-level tasks, such as document review for purposes unrelated to the resolution of disputes. This drain on limited judicial resources is particularly wasteful when we remember that discovery was designed to be self-executing. Thus, the parties generally are expected to be able to resolve discovery disputes themselves. Protective and sealing orders are devices that always have promoted that design.

Confidentiality serves several values in the civil justice system. A brief analysis of these values demonstrates that they are fundamental and often of constitutional dimension, such as rights to privacy and property. The value of public access to court information simply does not rise to, much less transcend, these essential rights. Your group also should consider the effects that a decrease in the availability of confidentiality would have on the litigation process as a whole.

Confidentiality is of paramount importance, particularly during discovery, because the willingness of the parties to produce information voluntarily often hinges on a guarantee that it will be preserved. Remove this guarantee and discovery will become more contentious, requiring frequent court intervention. Less information will be produced, making it more difficult to ascertain the facts underlying the dispute. Without all the facts, rendering a fair, just resolution of the dispute becomes less likely and reaching a settlement becomes more problematic. Consequently, any changes regarding confidentiality inevitably will produce a chain reaction affecting the entire litigation process.

To the extent that the guidelines encourage a public information function of courts, it long has been my view that although laudable in the abstract, any such purpose that public access serves is more appropriately accomplished by numerous other branches and agencies of government that are far better equipped to identify issues affecting public health or safety and to disseminate relevant information to the public. Superimposing a public information function on the courts decreases their efficiency, delays justice, and distorts the sole purpose for which courts exist – the resolution of disputes. The current law and rules appear to me to strike a fair, workable balance between confidentiality and public access. And, I am not convinced that practice guidelines, particularly as drafted, are necessary or desirable.

Courts Must Protect The Public's Constitutionally Protected Privacy Rights.

Due to the invasive nature of the litigation process, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. The Supreme Court has indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown.[4] Restricting the discretion of courts to keep sensitive information confidential, even indirectly by guidelines that overemphasize public access, would be a very costly

[4] *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984)

mistake for several substantive reasons.[5] There is a strong, symbiotic inter-relationship between rules of procedure and substantive rights. Procedure exists to give effect to substantive rights. For example, procedural rules governing service of process protect substantive rights under the Due Process clause.[6] By protecting confidential information to make certain that it is used solely to resolve disputes, courts also protect substantive rights of the parties -- rights that may be placed in jeopardy quite unintentionally during the disclosure process by a desire to make the litigation process efficient and fair .[7]

Practice guidelines that would grant a "presumption of public access to all documents filed with the court" to be overcome only by "compelling reasons" in "narrow situations" where there is no "narrower alternative," that require "written findings … and conclusions…" for "any sealing order" and that urge a plethora of local court rules and standing orders to "facilitate and expedite" public access,[8] do not appear to me to recognize the right to keep private matters private and inevitably will place litigants' privacy rights at risk.

Contrary to the assumption in the draft Guidelines, litigants do not give up their rights to privacy merely because they have walked, voluntarily or involuntarily, through the courthouse door.[9] It is too glib to assert that this is a cost of or a condition on the availability of one of society's basic service systems. The rulemakers who created the broad discovery regime of modern civil procedure in order to promote the resolution of civil disputes on the merits, never intended that rights of privacy or confidentiality be destroyed in the process. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access.

Because of my belief in the importance of the right to privacy in our computerized world, about which I have written extensively,[10] I am opposed to any proposal that would even indirectly attempt to tilt the balance against the discretion of the courts to protect the privacy rights of litigants.[11]

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[5] Id. at 34-36 (discovery process is subject to substantial abuse that could damage the litigants' interests).

[6] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[7] *Seattle Times*, 467 U.S. at 35.

[8] See generally, The Sedona Guidelines, Chapter 1, Principle 1.

[9] "Do litigants give up a measure of their privacy and autonomy when they enter the doors of the public courthouse in order to resolve their dispute?" The Sedona Guidelines, Introduction at 1. My answer is NO: *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).

[10] See, e.g., A. Miller, *The Assault on Privacy* (1971); A. Miller, *Press Versus Privacy* 16 Gonzaga L. Rev. 843 (1981).

[11] Cf. *In re Halkin* 598 F.2d 176,195 (D.C. Cir. 1979) ("Only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain.").

The Draft Guidelines Would Restrict Litigants' Ability to Protect their Intellectual Property and Confidential Information.

Another substantive right that litigants often are compelled to place at risk in order to resolve a dispute is the right to the exclusive use of private property. Information is often very valuable -- so valuable that it can be bought and sold for significant sums of money. It is not surprising then, that our legal system considers information to be property.[12] To expedite resolution of a lawsuit, rules of procedure can compel all litigants to reveal information in which a property right exists, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may or may not be involved in the lawsuit.[13] Protective and sealing orders, limiting access to and use of proprietary information, are the most effective means of protecting the commercial value of this type of information while still making it available for use in the litigation at hand. The only alternative might be denying disclosure altogether.[14]

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Numerous provisions of the federal and state Constitutions are intended to protect personal property and the right to its exclusive use against government abuse or appropriation without compensation. Confidentiality is the sine qua non of preserving the modern property right in information that has become the backbone of the American economy. This "property" is exceptionally fragile, for once its confidentiality is lost, the value that comes from confidentiality -- exclusive ownership and possession of the information -- is irretrievably destroyed and can never be restored. Although our Nation's founders never contemplated a world of semiconductors, television, and the Internet, they foresaw the need to protect property rights in industrial and artistic creativity and embedded it in the United States Constitution, in Art. I, § 8, cl. 8. The states have embellished that basic theme and recognize that the courts have an obligation to protect litigants' property rights when compelled to produce informational property in discovery in civil litigation in order to promote the just resolution of civil disputes.

Protective orders, sealing orders, and confidentiality agreements are the primary means of protecting constitutionally recognized intellectual property rights in litigation. However, as drafted, the Sedona Guidelines would make it more difficult for the courts to protect those rights. Liberal grants of the right to intervene, recognition that "the public has standing, and has grounds to intervene" to "obtain access to documents filed with the court,"[15] and relegating protective orders to "provisional" status[16] would subject litigants

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[12] *Carpenter v. United States*, 484 U.S. 19, 24-26 (1987); *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1000-01 (1984); see also 8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure: Civil 2d §* 2043 (1994); Warren & Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

[13] 14. Hoenig, *Protective Confidentiality Orders*, New York Law Journal, Mar. 5, 1990, at 6-7; *"FBI Stings Parts Counterfeiters," "Holograms Battle Counterfeit GM Parts,"* Automotive News, Jan. 22, 1990, at 19 and 20.

[14] *In re Halkin* 598 F.2d 176, 195 (D.C. Cir. 1979) (only alternative to use of protective order might be denial of discovery).

[15] The Sedona Guidelines, Chapter 1, Principle 5.

to increased risk that their property rights will be violated. There also is no recognition of the transaction costs to litigants and the system of establishing wide-angle intervention, motion, and appeal rights. That is exacerbated by vague references to "interested" persons or public "interest" that are no where defined.

Other sections of the draft Guidelines are equally troubling. For example, Chapter 4, Settlements, Principle 1, states that: "In choosing a public forum to resolve a dispute rather than a private dispute resolution process, parties limit their ability to keep information confidential." And, the text accompanying that Principle states that confidentiality requirements "may be void as against public policy if such provisions are incorporated in a private settlement agreement that affects health and safety." These "principles" remind me of so many of the misguided and rejected "Sunshine in Litigation" bills I have reviewed, that ask us to accept as gospel that a handful of documents taken out of context in highly complex litigation are evidence of widespread wrong-doing, or that the allegations set forth in a complaint are invariably true. As a consequence of these assumptions, the Guidelines' proposals could compel the litigants to reveal personal or corporate documents, regardless of how proprietary, how valuable, how irrelevant, how embarrassing, or how confidential they might be.

It is much more rational to allow the whole truth-finding process to run its course before we require judges to make judgments about whether or not particular bits of information produced to an adversary solely for purposes of litigation should be released to the public. It is the full adversarial process, with its rules of evidence and cross-examination procedures, that acts as the crucible from which the truth will emerge. If we by-pass that process and do not allow it to operate, or require the premature resolution of such difficult and important issues and the disclosure of untested information produced in the civil litigation discovery process, we will not be serving the truth – we will be serving less noble ends.

The truth is that courts rarely use their authority to issue protective orders or to seal information, especially in today's environment. The almost two-decade national debate on protective orders has made judges aware of the values that are at stake. When orders do issue, there is compelling evidence that preserving confidentiality is of primary importance. The present practice should be retained – relying on our courts to use their balanced discretion to issue confidentiality orders to protect the legitimate interests of the parties, and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is no need to hamstring the process with unnecessary practice guidelines and local rules.

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[16] The Sedona Guidelines, Chapter 2, Principle 2.

All indications are that the current system works quite well. The public, including the news media, already has plentiful access to the courts and court records; information affecting significant public interests is available to all. As I have said before: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process."[17]

I hope you find these comments helpful.

Sincerely,

Arthur R. Miller
Bruce Bromley Professor of Law

[17] *A.B.A.J. at* 100 (Feb. 1999).

COMMENTS

on

THE SEDONA GUIDELINES:

Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

By

Lawyers for Civil Justice
Defense Research Institute
Federation of Defense & Corporate Counsel
International Association of Defense Counsel

March 15, 2006

COMMENTS

BY
LCJ, DRI, FDCC, and IADC[1]

ON
THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY AND PUBLIC ACCESS IN CIVIL CASES

Our long history of supporting the discretion of judges to protect the privacy, property, and confidentiality of litigants, by issuing protective orders, sealing court records, and respecting and enforcing confidentiality agreements is based on solid legal principles which are necessary to protect the interests of litigants and consumers alike. While we support the Sedona Working Group in the "desire", as stated in the Foreword, "to help bring some clarity and uniformity to practices involving protective orders in civil litigation and determinations affecting public access to documents filed or referred to in court", we question whether a compelling need exists for such guidelines. And, we are concerned that to address a perceived problem for which a compelling need does not exist would have serious consequences for our legal system. We trust that our comments will assist the Working Group in achieving its objective.

Overall, our members report that current practice, law, and rules in most courts strike a fair, workable balance between confidentiality and public access, notwithstanding attempts by

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporate counsel and civil defense trial lawyers supporting improvements in the civil justice system. The Defense Research Institute ("DRI") is a national organization of defense trial lawyers and corporate counsel. The Federation of Defense & Corporate Counsel ("FDCC") is an organization composed of attorneys and others who are actively engaged in the administration of civil defense litigation throughout the world. The International Association of Defense Counsel ("IADC") is an organization dedicated to enhancing the development, skills, professionalism, and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society, and its members. In the interest of reducing the burden, these organizations have submitted a single set of comments in response to the "Revised April 2005 Public Comment Draft" of *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access In Civil Cases* ("the Draft").

some since 1989 to skew that balance in favor of access to and disclosure of confidential information. See R. L. Marcus, *The Discovery Confidentiality Controversy,* 1991 Univ. Ill. L. Rev. 457; A. W. Cortese, *ATLA's Protective Order Campaign: Undermining Confidence in the Courts,* 18 Prod. Safety & Liability Rptr. (BNA) 465 (April 19, 1991).

Accordingly, these brief comments raise the following questions about the Draft: (1) Are trial counsel on both sides of the "v" facing many, serious problems in this area that would support a compelling need for practice guidelines addressing protective orders, confidentiality and public access in civil cases? (2) Does the Draft overemphasize the right of public access and reflect a pro-disclosure, pro-access bias? (3) Does the Draft draw a sufficiently clear distinction between court files and discovery or does the emphasis on public access blur that distinction? (4) Is there sufficient emphasis on constitutionally protected property and privacy rights in the information at risk of disclosure in litigation? And (5) Does the Draft presume incorrectly that parties which risk loss of confidential information choose a public rather than a private forum and ignore the reality that those parties are most often dragged unwillingly into such litigation and should not be *prima facie* subject to loss of their property and privacy rights merely because their adversary has selected a public forum?

We examine these questions and give some examples of areas of the Draft that fuel our concerns with it.

(1) As indicated above, our members report encountering few problems in protective or sealing order practice that would require a complete set of practice guidelines or a call for all courts, state and federal, to adopt local rules or standing orders regulating the practice.

We believe it is significant that since 1989, more than 40 state legislatures and rule making bodies as well as Congress and the Judicial Conference have rejected proposals that attempted to alter the delicate balance between fundamental property and privacy rights and the need for public access or disclosure by constricting judicial authority in this area. And, the

federal Judiciary's own studies of these issues have acknowledged the insignificance of the number of cases involving confidential settlement agreements and protective orders. The ongoing campaign to shift this decision-making authority away from judges has gained little traction because quite simply, no problem has been proven to exist. We therefore question whether it is worthwhile to attempt to resurrect this debate in the guise of practice guidelines after so much of the country's bench and bar already has spoken.

In fact, the Committee on Rules of Practice and Procedure of the United States Judicial Conference has concluded on several occasions that there were very few problems with and no need to amend the rules or practice regarding the issuance of protective or sealing orders. See, e.g., *Letter of from Judge Paul V. Niemeyer, Chair, Civil Rules Advisory Committee of the Judicial Conference to the Chair of the U.S. House Judiciary Committee* (March 23, 1998); See also, R. T. Reagan, et al., *Sealed Settlement Agreements in Federal District Court,* Federal Judicial Center (2004) (An examination of 288,846 federal district court cases revealed 1,270 cases that appeared to have sealed settlement agreements, for a sealed settlement rate of less than one half of one percent.) See also, E. C. Wiggins, et al., *Protective Order Activity in Three Federal Judicial Districts: Report to the Advisory Committee on Civil Rules,* Federal Judicial Center (April 16, 1996) [Report to the Civil Rules Advisory Committee evaluating the efficacy of FRCP 26(c)]. To the extent that docketing of protective or sealing orders or procedures applicable to issuance of such orders are a problem in some courts or some types of cases those matters should be addressed as necessary and appropriate in the affected jurisdiction. See, *e.g.*, Connecticut Bar Association, *Report of the Task Force on Confidentiality and the Courts* (December 14 2004).

(2) As a general matter, we suggest that The Draft should focus on the needs of the practicing lawyers who operate in the legal system in the context of its traditional function of settling private disputes. The right of public access to information produced in the litigation process depends on: (1) "whether the place and process have historically been open to the press

and general public", and (2) "whether public access plays a significant positive role in the functioning of the particular process in question". *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986), applying *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). In our view, The Draft reflects an overall, if not intentional, pro-access, pro disclosure bias. Therefore, we suggest emphasizing the concepts laid down in *Seattle Times* and its progeny and deemphasizing the references to the courts as public institutions and the importance of public participation in a democratic society. The latter are important concepts, but not [redacted]

particularly when the courts have had little difficulty in applying the teaching of *Seattle Times* to individual cases in those extremely rare instances in which they have been called on to strike a fair balance between access and confidentiality. For example, there is little in Chapter 3, Trials, that would benefit litigants or trial counsel other than those who seek to "facilitate and expedite" access to personal, private information. Indeed, there is much that would impede the trial process. Best Practices No. 1 at 28 states that written juror questionnaires should be available to

Constitution. Fear that intensely personal information cannot be kept confidential in litigation would have a chilling effect, not only on settlements, but on the commencement and defense of claims.

For example, as with the Introduction, the overall tone of draft Chapter 1 appears to favor public access over the rights of litigants to privacy and the protection of their property. Principle 1 refers to a "qualified right of access" while the discussion elevates the right to a presumption that can be overcome only in "narrow situations" by "compelling reasons" to deny access. Courts generally take a more balanced approach to private litigation where there is good cause to protect confidentiality. The Court's business may be public, but that does not mean that any member of the public has the unfettered right to any and all information involved in court litigation. Moreover, there is no need, as stated in Chapter 1, Principle 1, Best Practices 1, for courts to issue local rules or standing orders to "facilitate and expedite" public access. On the contrary, courts should be more concerned with preserving the confidentiality of proprietary and private information contained in court documents than with "facilitating and expediting" public access. And, imposing on courts the necessity of supporting all sealing orders with written findings and conclusions as stated in Chapter 1, Principle 1, Best Practices 5, is a burdensome and unnecessary interference with the smooth functioning of the legal system. It is also inappropriate to suggest, as in Best Practices 6, that sealing orders be entered for a limited time only. Depending on the circumstances in particular cases, the parties and the judge are in the best position to determine such matters.

(4) The Draft should make it absolutely clear that the right of public access to court proceedings and records is "not absolute" and "has never been extended beyond the confines of the courtroom and court documents." A. R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 428, 429 (1991). And, judges have wide discretion to determine the parameters of such access. "Indeed, our justice system recognizes a variety of situations in which confidentiality is not only acceptable, it is essential." *Id.* The use of

protective and sealing orders are essential to the maintenance of litigants' rights of privacy, property, and confidentiality and judges' discretion to issue such orders should not be restricted. *Seattle Times v. Rhinehart*, 467 U.S. 20, 31, 34-35 (1984) (rejecting the notion that the public has a right to access to discovery materials exchanged between private litigants, and concluding that no right of access to discovery existed at common law, or could be found in the constitution.)

The reality of modern litigation is that by paying a nominal fee and satisfying liberal pleading standards in a complaint, parties gain the sweeping power of civil discovery. Frequently, a defendant must supply private documents and information before a frivolous case can be dismissed. Indeed, defendants often have to produce millions of documents barely connected to the issues being litigated. *See, The Sedona Principles For Electronic Document Production*, Introduction at 3 & Cmt. 10.d. In such discovery, "[t]rade secrets or confidential marketing, research, or commercial information may be at stake." (Public Comment Draft, Introduction, at 1)

In addition to the commercial concerns, the privacy interests threatened by this process are very real. Personnel records, private correspondence, and personal emails may all be fair game. As the Supreme Court noted, liberal discovery rules afford litigants an opportunity "to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35. See also, A.R. Miller, *op. cit. supra at* 467 ("a constitutional basis may exist for a litigant's right to avoid public disclosure of private information, and that several "courts of appeals have . . .recognize[d] a constitutional right of informational privacy.") In our view, the Draft unfairly minimizes legitimate and constitutionally protected property and privacy rights which deserve fuller treatment in any discussion of these issues.

Principle 2 in Chapter 2 on Discovery exemplifies a related concern. It states that, "A litigant has the right to disclose the fruits of discovery to non-parties, absent an agreement

between the parties or an order issued based on a showing of good cause." The implication that agreements or court orders are the *only* limitations on a litigant's right to disclose information obtained in discovery is not accurate. The laws and legal ethics impose other constraints. A litigant, for example, could not use such information for extortion. Further, as the Draft recognizes in Discovery Principle 1, Best Practice 3 "a party should not use the threat of exposure of confidential or private information obtained during discovery as leverage in a lawsuit." And, it would be improper to disclose information solely to cause embarrassment or to harass an opponent... *See* Fed.R.Civ.P. 26(b) and (c).

(5) Parties at greatest risk of loss of confidential information do not generally choose a public rather than a private forum to resolve their disputes. Yet the Draft appears to ignore the reality that those parties are most often dragged unwillingly into litigation and should not be *prima facie* subject to loss of their property and privacy rights merely because their adversary has selected a public forum. For example, the Introduction to the Draft at 1 suggests that the parties "might give up a measure of their privacy" by electing to resolve their dispute in a public forum. And, in Chapter 4, Settlements, Principle 1, it is suggested that: "In choosing [illegible]

practice guidelines and is an unfortunate throwback to the unsuccessful campaigns to restrict judges' discretion to enter protective orders or seal settlements "affecting the public health and safety" that have been rejected in Congress, by the Judicial Conference, and in over 40 states in the last 15 years. Arguably, every settlement of a product liability or personal injury action "affects health and safety" one way or another, because that is, after all, the subject of the law suit.

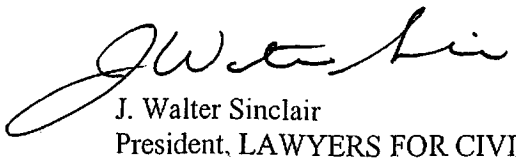
As Professor Arthur Miller noted in a 1999 article:

> "And my own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements.
>
> * * *
>
> Ironically, the center's study found that protective orders most often were used to protect the privacy of plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure." Arthur R. Miller, *Traveling Courthouse Circuses,* ABA Journal "Perspective" (Feb. 1999)

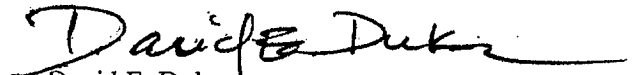
CONCLUSION

While we commend The Sedona Conference for studying this controversial practice area, we question whether practice guidelines are necessary or appropriate. There appears to us to be no compelling need to attempt to constrain parties or counsel in seeking judicial protection of litigants' property and privacy rights or to attempt to influence the exercise of judicial discretion in any particular direction through practice guidelines or best practices. To do so is not warranted by empirical evidence or experience. Experience and studies have shown that judges are sensitive to the competing interests and have done a good job in balancing the interests in particular cases on a full record.

Respectfully submitted,



J. Walter Sinclair
President, LAWYERS FOR CIVIL JUSTICE



David E. Dukes
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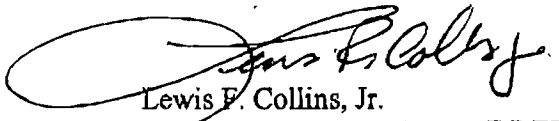

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ASSOCIATION OF TRIAL LAWYERS OF AMERICA

March 30, 2006

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Executive Director
The Sedona Conference
180 Broken Arrow Way South
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Re: ATLA Comments on April 2005 Public Comment Draft of Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

Dear Mr. Braman:

On behalf of the Association of Trial Lawyers of America (ATLA), I am pleased to offer the following comments on the April 2005 Public Comment Draft of THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES (hereinafter "the Draft").

Although I know you are familiar with ATLA to some degree, let me first state for the record that ATLA is a bar association of approximately 60,000 members who for the most part (but not exclusively) represent plaintiffs in personal injury, civil rights, employment, and environmental litigation; the defense in criminal cases; and either side in commercial and family litigation.

Our staff has examined the Draft and several other comments that have been made on it to date. We are more than satisfied that the prodigious work of the Conference's Working Group II has been carried out responsibly and thoroughly, and that the final product that will emerge from your process will be grounded in the best scholarship on this issues, well-balanced, and fair to all sides in litigation. Very importantly, we believe it will also be fair to the judges who must address these issues in their courtrooms.

For those reasons, I will limit my comments at this time to the areas in which our members have historically been most active, and will not attempt to address other matters (e.g. media access and privacy) as to which other organizations have more expertise. I am most concerned with two

particular sets of comments that were posted earlier this month on your Web site by Professor Arthur R. Miller and by a consortium of defense-side organizations which, apparently, have common interest in this subject matter: Lawyers for Civil Justice, the Defense Research Institute, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel (hereinafter referred to collectively as "LCJ").

Contrary to the suggestions made by the LCJ group and Prof. Miller,[1] ATLA has never conducted an organized "campaign" against protective orders or other secrecy mechanisms addressed in the Draft. In 1989 ATLA's Board of Governors, in an effort to encourage a more balanced approach to litigation, did adopt an important resolution (attached below as Appendix A) condemning protective orders that conceal dangers to the public health and safety. Our publications and CLE programs have of course included material about secrecy in the courts. But ATLA has left it to local courts and state legislatures to reach their own conclusions about secrecy. ATLA does not lobby state legislatures. That having been said, let me emphasize how proud I am of the stand ATLA and other consumer-side organizations have taken in this area. ATLA members can take great pride in the contributions their work makes to public health and safety.

I will now address the main points raised in the LCJ and Miller comments:

1. There is indeed a problem with excessive and abusive use of protective orders, confidentiality agreements sealed (or otherwise secret) settlements, and other mechanisms that keep court proceedings and related documents secret.

The LCJ and Miller comments state that defense lawyers report that there is no problem with current practices. Our members would disagree emphatically. Defense lawyers still routinely use their clients' economic power to extract secrecy agreements as the price of production of discovery material that they should produce without such demands. They still condition offers of settlement on confidentiality, require the return or destruction of material produced in discovery, insist that plaintiff lawyers promise not to represent clients against the same defendants or in similar cases in the future,[2] and, sometimes, even ask plaintiff lawyers to cooperate in concealing matters uncovered in litigation from regulatory bodies—and even from the courts themselves.[3] In some extreme cases, defendants have even succeeded in having the official court records of certain cases expunged and

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[1] LCJ comments at 3; "The most relentless attack on protective orders has come from the plaintiffs' bar, which, through the Association of Trial Lawyers of America (ATLA), has pledged that stopping what it characterizes as 'secrecy' in the courts will be its highest priority." Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 442 (1991) (hereinafter "Miller 1991"). (In a footnote to that article Prof. Miller disclosed that the article "was assisted by a research grant from the Product Liability Advisory Council Foundation.")

[2] *See, e.g.*, Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal And Unethical*, 31 Hofstra L. Rev. 1 (2002) (hereinafter "Gillers").

[3] *See* discussion of the *Fentress* case, n. 9 *infra*.

the files removed from the physical precincts of the courts.[4]

Even without such demands to plaintiff lawyers, routine court practices outside of the adversary system can result in secrecy unknown to judges. It appears that there are courts where papers are routinely filed under seal by clerks without judges being aware of it. I do not suggest that such action constitutes misconduct by clerks, absent a clear rule against it. It is, rather, an informal practice that has evolved over time and has been allowed to continue because no guidelines are provided for clerks and judges to follow. Judges cannot exercise their discretion as to secrecy requests of which they are ignorant.

The number of cases in which secrecy is used is very considerable. The LCJ and Miller comments make much of the finding of the well-known Federal Judicial Center 2004 study of sealed settlements that "a sealed settlement is filed in less than one half of one percent of civil cases."[5] But neither the percentage nor the raw number of cases in which secrecy mechanisms are employed is the problem, and never has been. The problem is the abuse of the practices that allow such secrecy.

The FJC study is notable for emphasizing not what happens but what does *not* happen. The actual incidence of secrecy is very significant, both quantitatively and qualitatively. The FJC researchers examined records of cases terminated in calendar years 2001 and 2002 from 58 of the 94 federal district courts,[6] and found 1,272 sealed settlements.[7] Using the kind of rough calculations lawyers are wont to use, if we extrapolate to the whole 94 districts, there may be as many as 400 more sealed settlements, with a rough total close to 1700. The report states that about 30% of the sealed settlements were in personal injury cases,[8] which might be as many as 500 of the 1700 cases. This means that, in 2001 and 2002 alone, federal courts allowed the sealing of settlement documents in upwards of 500 personal injury cases.

The 500 case figure, however, is a very small tip of a very large iceberg. It refers just to settlements that are both sealed *and* filed in courts—and in federal courts, at that. Every litigator knows that the number of settlements overall vastly outnumbers the number of *sealed* settlements that are actually *filed* in courts. It can reasonably be expected that the number of such settlements

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[4] The paradigm case of this kind is probably Foltz v. State Farm Mutual Automobile Ins. Co., 331 F.3d 1122 (9th Cir. 2003), an insurance fraud case in which the 9th Circuit, 331 F.3d at 1128, footnote 2, had the following to say: "No questions are raised in these appeals concerning the propriety of either the district court's release of some of the court files to State Farm 'for final disposition,' or the removal of the *Foltz* litigation records from the court's computer system. These files and records were eventually restored. Consequently, although we find the actions taken troubling, . . . we do not address their propriety."

[5] FEDERAL JUDICIAL CENTER, SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (2004) at 1 (available at http://www.fjc.gov/library/fjc_catalog.nsf (downloaded March 29, 2006) (hereinafter "FJC study").

[6] FJC study at A-2.

[7] FJC study, Appendix A, Table A.

[8] FJC study, Table 1 at 5.

in the state courts—which are typically said to handle over 95% of all litigation in the United States—is exponentially higher than that. But the exact number is less important than the fact that even one sealed settlement can keep a dangerous product on the market for extra years, disabling safety regulators from knowing of the problem, and prioritizing profit over the safety of the public.

Secrecy confers a number of advantages on defendants in tort cases. An obvious one is that it may reduce publicity over the fact that a lawsuit was settled—or even that it ever existed. It may conceal evidence of negligence, gross negligence, intentional misconduct, criminal behavior, or product defects that have escaped the notice of chronically underfunded federal and state regulatory agencies. With the settlement amount kept secret, it is also possible for defendants to claim that lawsuits against it are "frivolous," and that its settlements are entered into for nuisance value only.[9]

Not only is the incidence of the uses of secrecy excessive, but the panoply of subjects of the lawsuits in which they are used is broad. I have what I think of as a "dirty dozen" areas of litigation in which secrecy has been employed—i.e. not just twelve instances of its use, but twelve entire subjects of tort litigation. They include:

- Pharmaceuticals.[10]

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[9] John Monk, *Ford Settlement Open to All in S.C.*, The State (Columbia, S.C.), June 19, 2005, www.thestate.com/mld/state/2005/06/19/news/local/11931812.htm (downloaded June 20, 205) (hereinafter "Monk Ford article") (quoting Ford Motor Co. representative, addressing a recent $3.5 million settlement of a lawsuit alleging injuries resulting from a defective door latch (which could not be sealed in federal court in South Carolina, owing to the ban on sealed settlements), saying "We face so many frivolous lawsuits in a year that if we kept statistics, they just would be meaningless.").

[10] On January 1, 2005, the *British Medical Journal* published a news article stating that it had received documents from an anonymous sender that suggested a failure by Eli Lilly to disclose to the FDA adverse events from use of Prozac. The documents are said to have "gone missing" during the pendency of a Kentucky case called *Fentress v. Eli Lilly & Co.*, which arose from a murderous rampage by a man who was taking Prozac. The story was reported widely around the world, including by CNN, whose report stated that the papers were stamped "CONFIDENTIAL --- FENTRESS." *Papers Indicate Firm Knew Possible Prozac Suicide Risk,* www.cnn.com/2005/HEALTH/01/03/prozac. documents. *See also* Sara Schaefer-Muñoz, *Eli Lilly Documents Are Linked to Prozac Concerns*, WALL ST. J., Dec. 31, 2004.

In defending the *Fentress* case, Lilly had claimed that it was always meticulous about reporting problems with its drugs to the FDA. However, plaintiffs' attorneys uncovered evidence that Lilly had failed to report to the FDA numerous adverse reactions to another of its drugs, Oraflex. Oraflex was withdrawn from the market in 1982 after patients taking the drug developed liver and kidney problems. Over 100 Oraflex patients died worldwide, more than 25 of them in the U.S. Lilly pleaded guilty in 1985 to 25 criminal counts of failing to inform the FDA of the adverse reactions to Oraflex.

A court decision in the *Fentress* case indicates that Lilly's attorneys made a secret deal that they would settle the case if the plaintiff agreed not to attempt to introduce the Oraflex evidence at trial. The Oraflex evidence—critical to the plaintiffs' case—was in fact not introduced, and the jury brought back a verdict for Lilly. The deal, essentially, had the plaintiffs publicly "lose" the case but privately settle, thereby adding credence to Lilly's public assertions that its drug was safe.

The trial judge in the *Fentress* case, John W. Potter, smelled a rat and quizzed all the attorneys as to whether there had been a settlement. They lied to the judge, saying that there was none. However, the judge insisted that the court's docket entry show the case "dismissed as settled." For his trouble, Judge Potter was sued by Lilly. The Kentucky

- Medical devices.[11]
- Automobiles and their component parts.[12]
- Employment abuses.[13]
- Clergy abuse.[14]

Supreme Court later exonerated him. Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996). The story of the *Fentress* case was featured prominently in a popular book on legal ethics: RICHARD A. ZITRIN AND CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 193-201 (Ballantine 1999). An article based on the book's coverage of the case, "Hide and Secrets in Louisville," is reprinted at www.lectlaw.com/filesh/zbk03.htm (last visited Feb, 23, 2005).

[11] *E.g.*, the Bjork-Shiley heart artificial valve. *See* Richard A. Zitrin, *What Judges Can and Should Do About Secrecy in the Courts*, Paper presented at 2000 Roscoe Pound Institute Forum for State Court Judges, in OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE (Forum report; Forum materials available at http://www.roscoepound.org/new/2000forum.htm) (last visited March 30, 2006). *See also* Robert Schwaneberg, *The Dilemma of Secret Settlements*, Newark (N.J.) Star-Ledger, October 19, 2003, available at http://www.tlpj.org/News_PDF/Fall%2003%20PDF/star%20ledger2_10-19-03.pdf (last visited March 30, 2006); KEEPING SECRETS: JUSTICE ON TRIAL (1990) (report of joint conference by Association of Trial Lawyers of America and the Society of professional Journalists, including discussion of role of secret settlements in litigation stemming from failures of Bjork-Shiley artificial heart valves).

[12] See, e.g., Richmond Eustis, *Judge Orders Unsealing of Secret Firestone Documents From Fatal 1997 Crash*, Fulton County Daily Rep., Sept. 29, 2000 (reporting that data sealed under a settlement agreement showed an unusual pattern of defects in tires manufactured at a particular Firestone plant between 1990 and 1995; Firestone opposed a suit brought by news organizations to unseal the data on the grounds it constituted "trade secrets"); James V. Grimaldi & Carrie Johnson, *Factory Linked To Bad Tires*, Wash. Post, Sept. 28, 2000, at E1 (discussing data involving the safety of Firestone tires that was unsealed after a lawsuit was filed by the media).

[13] FJC study at p. C-112: *Deuss v. Ebenezer Home of Tennessee Inc.* (TN-M 3:01-cv-00589 filed 06/29/2001), described by the FJC researchers as follows: "Class action pursuant to the Fair Labor Standards Act, alleging that a nursing home failed to properly compensate its employees, including the activities director and nursing technician, for overtime work. The case settled. The settlement agreement was filed under seal."

[14] In an article on the initiative of the federal judges in South Carolina to ban secret settlements, The New York Times quoted a lawyer who had represented abuse victims in claims against the Catholic Church in Boston: "Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, ... said he regretted having participated in secret settlements in some early abuse cases. 'It was a terrible mistake,' he said, 'and I think people were harmed by it.' " Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N. Y. Times, Sept. 2, 2002, at A1.

- Consumer products, including baby products,[15] televisions,[16] and sports equipment.[17]
- Insurance fraud.[18]
- Medical malpractice.[19]

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[15] See, e.g., E. Marla Felcher, Ph.D., *Safety Secrets Keep Consumers in the Dark*, Trial, April 2001 at 40, 49 (observing that "[c]onfidential settlements have become the norm in industries like juvenile products, where a company's financial health rests heavily on its ability to project a nurturing, caring safety-conscious public image."). *See also* E. MARLA FELCHER, PH.D., IT'S NO ACCIDENT: HOW CORPORATIONS SELL DANGEROUS BABY PRODUCTS (Common Courage Press 2001).

[16] Dr. E. Marla Felcher has documented Zenith's use of secret settlements (including one at the Texas State Capitol) to facilitate the company's denials that its televisions have ever caught fire, despite *hundreds* of consumer injuries and deaths, and, unsurprisingly, *hundreds* of lawsuits against the company. *See* E. Marla Felcher, Ph.D., *The Secret History of Zenith TV's* (in progress, March 30, 2006 draft, on file with ATLA staff); *see also* Daniel Zwerdling, Report on Zenith Television Fires, All Things Considered (National Public Radio), Mar. 14, 1988 (transcript on file with ATLA staff).

[17] FJC study at p. C-93: *Mahoney v. Daisy Manufacturing Co.* (PA-E 2:99-cv-04286 filed 08/25/1999), described by the FJC researchers as follows: "Product liability action by the parents of a 16-year-old boy who suffered a severe brain injury when he was shot in the head with an air gun by a friend. The plaintiffs alleged that the air gun was defective because a BB became lodged in the internal parts of the gun and allowed numerous rounds of air to be fired, which caused the user to erroneously believe the gun was empty. A third party complaint was filed by the manufacturer and distributor against the person who fired the air gun. The petition to seal court documents related to the settlement was granted."

Further investigation by ATLA staff revealed the following: In May of 1999, 16-year-old John Mahoney was struck in the head by a bb fired from a "Daisy" Powerline Model 856 air rifle. He suffered severe brain damage, and died after languishing in a near-vegetative state for over 3 years. In the course of representing the boy's parents, attorney Andy Youman of Philadelphia, PA discovered that Daisy had secretly settled lawsuits based on the same product defect, effectively keeping the danger from coming to the public's attention, prior to John Mahoney's injury. After extensive motion practice, numerous defense requests for protective orders, motions to quash subpoenas of defendants' employees, and motions to compel discovery, the case was settled for $17,950,000. Daisy requested a confidential settlement, but the boy's parents refused, and further insisted on a settlement agreement provision that permitted Mr. Youman to provide all information from the case to the U.S. Consumer Product Safety Commission for its lawsuit against Daisy. The rifles, were eventually ordered recalled by the CPSC. Daisy sold 7.5 million of the "Powerline" Model 856 air rifles while they were in production. Telephone conversation with attorney Andy Youman by James E. Rooks, Jr., ATLA staff attorney.

See also Lawsuit Seeks Recall of Two Daisy Airgun Models, Consumer Affairs, Oct. 30, 2001, http://www.consumeraffairs.com/news/airgun.html (last visited March 29, 2006); David Schepp, *Safety Agency Sets Sights on Rifles: Some Daisy Air Rifles Are Marketed to Youths*, BBC News, Oct. 30, 2001, http://news.bbc.co.uk/1/hi/business/1628533.stm (last visited Mar. 29, 2006).

[18] Foltz v. State Farm Mutual Automobile Ins. Co., 331 F.3d 1122 (9th Cir. 2003).

[19] John Monk, *Medical Mistakes Kept Secret*, The State (Columbia, S.C.), June 18, 2002 (relating pattern of secret settlements in medical malpractice cases in South Carolina).

- Misconduct of government officials and employees ("Whose tax money is it?")[20]
- Environmental litigation.[21]

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[20] *See, e.g.*, Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994); Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002).

[21] In his article for the South Carolina Law Review's 2003 Symposium on Court Enforced Secrecy, Judge Anderson described the secrecy aspects of a major surface water contamination case over which he presided (Whitfield v. Sangamo Weston, Inc., C/A No. 6:84-3184 (D.S.C.)) as follows:

> The case involved over 350 plaintiffs who contended that they were injured when the defendant deposited polychlorinated biphenyls (PCBs) into Lake Hartwell, a 56,000 acre public lake on the Savannah River in upstate South Carolina. The case included traditional property value diminution claims as well as many personal injury claims asserting the plaintiffs developed cancer and other diseases as a result of being exposed to the lake water.
>
> The first judge assigned to the case was appointed to the court of appeals. The judge who inherited his docket handed it off to me shortly after I was appointed. The case promised to be a daunting task for a neophyte judge; it had been pending for three years and the trial was predicted to last six months.
>
> After receiving the case, I conducted a summary jury trial in front of an advisory jury in an effort to provide a catalyst for settlement. When the advisory jury quickly returned a verdict for the defendant, the plaintiffs' settlement demand was reduced and the parties engaged in earnest settlement negotiations. Ultimately, the parties structured a novel arrangement: The defendant would pay $3.5 million into a fund that would be used to set up a medical monitoring and primary medical care program for all 350 plaintiffs who lived near the lake. The bulk of the settlement funds was given to the Medical University of South Carolina, who agreed to enter into a contract with a physician with an office near the plaintiffs. Under this contract, the physician would furnish free primary medical care to all the plaintiffs for the duration of their lives. Also, the Medical University, working with the physician, would conduct epidemiological studies on all the plaintiffs and monitor their medical condition in an effort to learn more about the long-term health effects of exposure to PCBs. A small amount of the settlement money would be used for a per capita distribution to each plaintiff.
>
> The plan had all of the markings of a "win/win" settlement: The plaintiffs received free medical care for life, plus a monetary settlement; the defendant earned considerable good will for providing for plaintiffs' medical needs; and the Medical University and the local physician received accolades for spearheading such an innovative program.
>
> Because the group of plaintiffs included some minors and others whose settlements required court approval, it was necessary for me to review and approve the settlement. During the approval process, I was told that court-ordered secrecy at settlement, and a return of all "smoking gun" documents, was a non-negotiable prerequisite to the entire settlement: If I did not go along, the carefully crafted package would fall apart and the case would move forward to a six-month trial. Moreover, inasmuch as the summary jury had already returned a verdict for the defendant after less than thirty minutes of deliberation, it was entirely possible that the plaintiffs would recover nothing at the conclusion of the trial and all subsequent appeals. As a judge with six months experience on the bench and other difficult cases awaiting me, I went along with the request for court-ordered secrecy.

Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: the Case Against Government-enforced Secrecy*, 55 S.C. L. Rev. 711, 729-730 (2004) (part of the South Carolina Law Review's Symposium on Court-Enforced Secrecy).

- Schoolteacher misconduct.[22]

- Injuries to, and wrongful deaths of, nursing home residents.[23]

The list is merely suggestive. It is perfectly clear from the mass of information and scholarship that is now available on this subject that secrecy has been used in litigation to conceal all manner of information. This is especially troubling in the areas of products liability, medical malpractice, sexual abuse and harassment, and consumer fraud. It is simply not true that there is no problem involving secrecy in the courts to justify The Sedona Conference's development of guidelines in this area.

2. There is indeed a compelling need for guidelines of the kind developed by the Sedona Conference.

Contrary to the Miller and LCJ arguments, the need for better practices relating to secrecy was established long ago. We will never get rid of confidentiality in the courts entirely—nor should we. There are legitimate uses for confidentiality, including *truly* private information (in which the majority of the public, and the vast majority of litigators, have not the slightest interest) and *legitimate* trade secrets. It is the abuse of these categories, not their legitimate uses, that concerns reformers in this area. The bar has tried leaving these matters entirely to the discretion of the courts and to the professionalism of attorneys. That has worked to some extent, but substantial problems still remain. Attorneys still overreach in their secrecy demands. Judges still grope for fair solutions to the problems litigants present them with. Case law exists, but it has been slow in developing, and it is not all consistent. The way to reduce abuse in this area is for lawyers and judges to have guidance of the sort for which The Sedona Conference has become renowned.

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[22] *Lawyer on Choir School: Abuse Was Rampant*, Trenton (N.J.) Trentonian, Nov. 30, 2004, http://www.zwire.com/site/news.cfm?newsid=13458898&BRD=1697&PAG=461&dept_id=44551&rfi=6 (downloaded Dec. 1, 2004) (relating long pattern of abuse of students at well-regarded N.J. choir school).

[23] It is well known that, above and beyond the usual reasons for operators of nursing homes to want court records of actions against them kept secret (because of the public's well-justified anger at negligence and abuse that injures or kills the most vulnerable citizens), keeping litigation records secret also affords them a possibility of avoiding penalties that might be imposed by Medicare and state regulators. The FJC's 2004 study includes references to three nursing home cases: at p. C-21: *United States ex rel. Carroll v. Living Centers of America Inc.* (FL-M 8:97-cv-02600 filed 10/23/1997), described by the FJC researchers as follows: "*Qui tam* action under the False Claims Act for fraudulent Medicare billing against a provider of nursing homes. The government's notice to intervene reported a settlement agreement had been reached. The court ordered that all contents of the court's file remain under seal (except the complaint and the notice to intervene). A sealed settlement agreement apparently was filed"; at p. C-87: *Estate of Mayo v. Kindred Nursing Centers East LLC*, (NC-M 1:02-cv-00260 filed 04/05/2002), described by the FJC researchers as follows: "Medical malpractice action against a nursing home for wrongful death resulting from the insertion of a feeding tube into a patient's trachea instead of her esophagus, resulting in her lungs receiving feeding solution. The case was dismissed pursuant to a sealed consent order"; at p. C-7: *Gregory v. Assisted Living Concepts Inc.* (AZ 2:00-cv-01339 filed 07/13/2000), described by the FJC researchers as follows: "Personal injury action for physical and mental injuries, including a stroke, because of negligent care by a nursing home. The court permitted the parties to file their "Joint Motion for Expedited Approval of Settlement and Stipulation to Dismiss with Prejudice" and all exhibits under seal; on the same day the court approved the parties' settlement agreement and dismissed the action with prejudice."

3. The "current system" is no longer "current." Limits on court secrecy are here to stay.

In his comment, Prof. Miller states that "the current system that empowers the courts to use balanced discretion to protect litigants' privacy, property, and confidentiality in appropriate cases works well and does not need to be changed."[24] We have the greatest respect for Prof. Miller and his fine work in many other areas,[25] but the fact is that the "current system" isn't the system it was in 1989 when ATLA adopted its anti-secrecy resolution, or in 1991 when Prof. Miller wrote his much-cited law review article on protective orders.[26] The LCJ group takes a different tack, arguing that "[m]ore than 40 state legislatures and rule making bodies . . . have rejected proposals that attempted to [restrict secrecy practices]."[27]

Both of these statements are specious. The real "current" situation is vastly different from what it was nearly two decades ago, in two respects:

Regulation. Secrecy practices are currently regulated to a significant extent, albeit in a patchwork manner that makes the development of the Sedona Guidelines very important. It may well be that proposals to control secrecy that have come before 40 legislative and rulemaking bodies at one time or another have not been adopted (usually after furious lobbying by corporate interests), but the really important fact (which LCJ omits entirely) is that over 20 states now have some sort of anti-secrecy measures in force. Despite the failure thus far of the federal court rulemakers to adopt comparable rules, numerous federal district courts have done so *sua sponte*.[28] According to the 2003 Progress Report of the FJC study,[29] *47 district courts have some sort of local rules on sealing*. On the state court side, *29 states have statutes or rules on sealing*.

These are only the rules on *sealing* of court records. Other rules and statutes have also been adopted to control other aspects of protective orders and the protection of public health and safety from concealment of public hazards. If, indeed, 40 states have rejected one or more proposed statute or court rule intended to provide stronger regulation of secrecy practices in the courts, the FJC research shows that numerous state legislatures and rulemaking bodies have reached different conclusions—and simple arithmetic shows that some of those states are counted by the ICJ commentators in the "40 states" they say have rejected stronger secrecy limits.

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[24] Miller comments at 1.

[25] *E.g.*, Arthur R Miller, *The Pretrial Rush to Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003)

[26] Miller 1991.

[27] LCJ comments at 3.

[28] FJC study, Appendix A.

[29] SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT—MAY 2003 PROGRESS REPORT 2-6, available at http://www.fjc.gov/library/fjc_catalog.nsf:

In 1989, when ATLA's Board adopted its resolution, there were virtually *no* such protections. How this proliferation of protections against court secrecy since then could result from "unsuccessful campaigns to restrict judges' discretion to enter protective orders or seal settlements"[30] escapes me.

Academic investigation. Whereas in 1991 court secrecy attracted the attention of only a few academics and other legal writers, the amount of published analysis on this subject now is vastly greater—and the great majority of present scholarly work on this subject concludes that the routine use of court secrecy disserves the public and should have no place in America's courts. This scholarship goes well beyond the early examinations of the public policy aspects of the subject to inevitable conclusions that much use of secrecy mechanisms is actually illegal.[31]

It is no wonder that Prof. Miller and the LCJ group cite no recent court rules, literature (other than Prof. Miller's own articles) or court decisions in their comments.

4. The arguments of the LCJ group and Professor Miller do not make an adequate case for turning the clock back to the era of unfettered use of secrecy to avoid responsibility for negligence and other misconduct.

To a considerable extent, the LCJ and Miller comments merely recycle long-discredited scare stories:

- They express concern that "intensely personal information" will be publicized if the Sedona Guidelines are adopted by the courts[32]—yet they provide no evidence or examples to show that this has ever been a problem.

- They raise the specter that trade secrets will be obtained and used by litigants' business competitors. As my predecessor as ATLA president Mary Alexander put it so well when she wrote to the federal court in South carolina when it was considering banning secret settlements, "is there a company that wants to steal the secret process for making defective tires that will explode and lead to lawsuits against that company?"[33]

- They worry that information obtained in discovery will be used for "extortion," yet, again,

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[30] LCJ comments at 9.

[31] *See, e.g.*, Gillers, *supra*,, and John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. Rev. 829 (2004) (arguing that many uses of secrecy constitute "compounding" of criminal acts.).

[32] LCJ comments at 8.

[33] Letter from Mary E. Alexander, J.D., M.P.H., President, Association of Trial Lawyers of America, to Larry W. Propes, Clerk of Court (Sept. 24, 2002), in the court's record of public comments, available at http://www.scd.uscourts.gov/notices/COMLR503.pdf (last visited Apr. 2, 2004).

they provide no examples of instances in which that has happened.[34]

- Professor Miller voices concern that "[s]uperimposing a public information function on the courts decreases their efficiency [and] delays justice. . . ."[35]—without evident concern that the courts at present can be and are used to *conceal* information and to *thwart* justice.

- Surprisingly, they make the shopworn argument that better controls on secrecy practices will have "a chilling effect . . . on settlements [and] on the commencement and defense of claims." This is a specious argument that the pro-secrecy forces have made ever since 1989, and it has long since been debunked. It has even been discarded by one of the defense bar's most vociferous opponents of anti-secrecy rules in my own state of South Carolina.[36]

- Finally, the LCJ group makes the astonishing suggestion that the Working Group, in its drafting process, should deemphasize the guidelines' "references to the courts as public institutions and the importance of public participation in a democratic society."[37] I trust that the Working Group will find that suggestion as bizarre as I do, and will reject it out of hand.

Prof. Miller and the LCJ group make no new arguments and provide no new evidence for their stale positions, yet they seek to reverse The Sedona Conference's well-balanced drafting process. A glance at the Working Group's roster shows that it is extraordinarily well-populated. It includes a number of defense lawyers and corporate counsel who have had ample time and opportunity to argue the pro-secrecy side if they were so inclined—and, as I understand it, some have done so. The Working Group has had ample opportunity to consider all sides of the issue, and to acquaint itself with the mass of argument, scholarly literature, and court decisions on the subject. The Working Group has done a very comprehensive job, and we applaud them for it.

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[34] LCJ comments at 8.

[35] Miller at 3.

[36] Monk article, *supra*: "In 2002, when [the chief judge of the federal district court] proposed banning secret settlements in matters of public safety, defense lawyers objected. They said forcing public disclosure would deter settlements, lead to more trials and clog the court system. None of that has happened, acknowledged prominent defense lawyer Mills Gallivan, past president of the S.C. Defense Trial Attorneys' Association. 'I don't think it has caused more cases going to trial.' " *See also* James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. Rev. 859 (2004) (inviting "any attorney or judge who knows of a case in which [a secrecy request was refused, with the result that] settlement was 'chilled' to contact me with details of the litigation." He extended the same invitation in James E. Rooks, Jr., *Let the Sun Shine In*, 39 TRIAL 18 (June 2003). Rooks reports that no attorney has ever contacted him to provide such information).

[37] LCJ comments at 5.

Conclusion

The days of unrestricted use of secrecy in our courts have been over for some time now. We now need some good guidance for the bar on how to make future practice consistent, fair, just, and effective. The Sedona Conference's Working Group is on the right track, and ATLA wishes all of its members the best as you complete this critical project.

Sincerely,

Kenneth M Suggs
President

Appendix A

RESOLUTION

ATLA BOARD OF GOVERNORS

MAY 6, 1989

TAMPA, FLORIDA

PROTECTIVE ORDERS

WHEREAS, current judicial interpretation often deviates prejudicially from the mandate of the established Rule FRCP 26(c) impeding an efficient, just, and speedy resolution of disputes; and,

WHEREAS, defendants in personal injury actions, as a condition to discovery or settlement, often demand the execution of an agreement ("Secrecy Agreement") or the entrance of an order ("Secrecy Order") which includes provisions, inter alia, (i) prohibiting the dissemination of discovery materials; (ii) precluding the disclosure of the contents of pleadings, motions and discovery requests; (iii) forbidding any communication concerning the terms of the ultimate resolution of a claim; (iv) enjoining plaintiff's counsel's participation in other similar cases; (v) insisting on the return and/or destruction not only of discovery materials but counsel's personal notes; and,

WHEREAS, Secrecy Agreements and Secrecy Orders which ignore the interest of individual victims, the courts and the pubic have harmful effects including: (i) they make it difficult if not impossible for plaintiff's counsel to fairly and properly prepare the victim's case; (ii) they guarantee an unfair advantage to defense counsel who retain full access to their collaborative mechanism; (iii) they inject collateral issues totally unrelated to the merits of the case; (iv) they greatly increase the time, effort and transactional costs associated with the preparation and presentation of a civil action; (v) they diminish the likelihood that the civil justice system will operate so as to secure the just, speedy and inexpensive determination of every action; (vi) they encourage the suppression and destruction of relevant documents by unscrupulous defendants and other discovery materials; (vii) they have a chilling effect on the right of persons to resort to the courts for redress of their grievances; and,

WHEREAS, the strong policy favoring openness in discovery, and public access to the materials which affect the decisions and the conduct of the civil justice system is based on recognition that the free flow of information is vital to the safety, health and general welfare of the public and to exposing unsafe products and activities for investigation and to the proper operation of the civil justice system, the governmental regulatory system, and the professional disciplinary system;

NOW, THEREFORE, BE IT RESOLVED that The Association of Trial Lawyers of America:

1) Encourages courts to refuse to enter any Secrecy Order and/or refuse to enforce any Secrecy Agreement in the absence of a finding based on a good cause showing supported by a particularized proof of the following: (a) that the proponent of the Agreement or Order possesses a cognizable legal interest entitled to the protection of secrecy; (b) that the subject materials meet the rigorous legal criteria applicable to the trade secrets or privileged information or otherwise justify the court in exercising its judicial power to restrict the openness of discovery or public access to information; (c) that disclosure of the materials is, in fact, likely to result in a clearly defined and very serious harm.

2) Encourages courts in those rare instances in which a good cause showing supported by particularized proof would seem to justify the entrance of a Secrecy Order, to insist on the adoption of and the enforcement of such specific terms as are necessary and appropriate to protect such competing interest as the public's right to know, the rights of claimants involved in other similar actions, the public's concern for judicial economy, including: (a) provision for limited disclosure to counsel representing plaintiffs in similar cases, to government agencies or to professional disciplinary bodies who agree to be bound by appropriate agreements or court orders against broader dissemination; (b) stringent safeguards surrounding any ordered return or destruction of documents to ensure that full and accurate copies of all documents will be available to the appropriate agencies or to other litigants in the future; (c) stringent safeguards that no Secrecy Agreement or Secrecy Order should prohibit an attorney from representing any other claimant in a similar action against the defendant or others; (d) stringent safeguards to the effect that no Secrecy Agreement or Secrecy Order should prohibit reporting to a governmental agency those facts reasonably necessary to prevent injuries to others.

3) Encourages courts to look favorably on and/or to freely grant petitions for modification which seek relief from Secrecy Agreements and/or Secrecy Orders which were entered into or obtained by a procedure which did not conform to the criteria stated in Resolution (1) above and/or which do not contain provisions similar to those contained in Resolution (2) above.

4) Discourages attorneys from agreeing to Secrecy Agreements and encourages attorneys to resist entry of Secrecy Orders that prevent disclosure of documents obtained during discovery to fellow attorneys handling similar cases, or to public agencies charged with enforcing safety.

Association
OF DEFENSE TRIAL ATTORNEYS

www.adtalaw.com

March 30, 2006

Mr. Richard C. Bramen
Executive Director
The Sedona Conference

Dear Mr. Bramen:

The Association of Defense Trial Attorneys has been afforded the opportunity to review the paper prepared by The Sedona Conference entitled *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*. Protective Orders are an important tool for litigants and, when appropriately employed, enhance the ability of the judicial system to respond to the manifold needs of parties before the court. We appreciate the time, effort and resources that the Sedona Conference invested into this important issue.

The ADTA unconditionally endorses the *Comments on the Sedona Guidelines* prepared by the Lawyers for Civil Justice dated March 15, 2006. These comments, in our view, represent a balanced and equitable approach to the use of protective orders and encourage their use when the courts deem them necessary. Citizens are best served when the courts are able to balance the needs of the parties against other competing interests and can assure that a fair and balanced judicial review is available when appropriate

April 25, 2006

Richard G. Braman, Esq.
Executive Director
The Sedona Conference®
180 Broken Arrow Way South
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Re: THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY AND PUBLIC ACCESS IN CIVIL CASES

Dear Mr. Braman:

I write on behalf of the Associated Press ("AP") to express our reservations about certain aspects of the April 2005 Public Comment Draft of THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY, AND PUBLIC ACCESS IN CIVIL CASES (hereinafter "the Draft Guidelines"). AP recognizes the importance of maintaining an effective civil litigation system to resolve disputes, and applauds the Sedona Conference for its efforts to make civil litigation procedures work more smoothly and swiftly. However, some of the important societal interests advanced through the current system of *public* litigation are sacrificed in the Draft Guidelines for the sake of efficiency. The litigants may benefit, but the public which provides the forum and the authority for resolving disputes will suffer.

AP's Interest in Access

Founded in 1848, AP is the world's oldest and largest newsgathering organization. The AP is a not-for profit news cooperative, whose members and subscribers include newspapers, magazines, broadcast and cable news organizations, and Internet content providers. AP provides news to more than 5,000 news outlets on a daily basis.

AP's reporters routinely cover newsworthy cases in the state and federal courts in every state of the Nation. Since the United States Supreme Court first recognized a constitutional right of access to judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), AP has worked vigorously to define this important public right. In the immediate aftermath of *Richmond Newspapers*, AP provided each of its courtroom reporters with a "palm card" specifying what to say in open court to challenge closure of a proceeding and to learn the basis for any closure. AP was then among the first to establish through litigation that the right of access extends to pre-trial proceedings, including motions and documents filed with a court. *See Associated Press v. United States District*

Court, 705 F.2d 1143 (9th Cir. 1983). In subsequent years, AP has pursued scores of lawsuits in both state and federal forums to define and fully enforce the right of access.

AP's Concerns With The Draft Guidelines

The right of access remains critical to AP's ability to inform the public fully and accurately about the workings of the judicial system and the important issues that are resolved in the courts. AP thus has serious concerns over any effort to scale back or restrict the scope of this right. The Draft Guidelines appear to do just this in certain respects, which we urge you to reconsider.

1. Public Interest in Discovery Materials. The Draft Guidelines articulate a proposed principle that "[t]here is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to a court." The Draft further provides that parties to a lawsuit may be barred from disclosing discovery material by "an order based on a showing of good cause," and suggests that such "good cause" could be based upon nothing more than a general statement from the parties that "a legitimate need for privacy or confidentiality" exists. In this respect, the Draft Guidelines fail to recognize the significant public interest in the disclosure of discovery material in certain cases, an interest reflected in existing law and practice. As Judge Posner explained in *Citizens First National Bank v. Cincinnati Insurance Co.*, 178 F.3rd 943 (7th Cir. 1999), even though pre-trial discovery "is usually conducted in private . . . the public at large pays for the courts and therefore has an interest in what goes on at *all* stages of a judicial proceeding." 178 F.3rd at 944-45 (emphasis added). Even accepting that the full First Amendment right of access does not extend to unfiled discovery materials, Rule 26(c) of Federal Rules of Civil Procedure has always limited the extent to which a party to a law suit can be barred from disseminating information learned during the course of a lawsuit. *See, e.g., Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984) (upholding restrictions placed on use of discovery based upon a finding of "good cause" as required by Rule 26(c)); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3rd 893, 898 (7th Cir. 1994) (requiring judicial determination of "good cause" to support protective order restricting the use of discovery materials). Moreover, as the Seventh Circuit emphasized in *Grove Fresh*, "where the rights of litigants come into conflict with the rights of the media and public at large, the trial judge's responsibilities are heightened."

The Draft Guidelines brush aside the significant public interest that exists in the fruits of discovery and inappropriately move the line between what the public may know and what it may not. Federal courts have regularly imposed upon civil litigants an obligation under Rule 26(c) to make a proper evidentiary showing of good cause before access to civil discovery may be denied to the public and have continued to do so after the Supreme Court's decision in *Seattle Times* rejecting a First Amendment access right. *See, e.g., Estate of Rosenblum v. New York City*, 21 Media L. Rep. 1987 (E.D.N.Y. 1993) (refusing to close deposition of the Mayor of New York in a civil lawsuit); *Avirgan v. Hull*, 118 F.R.D. 252

(D.D.C. 1987) (rejecting attempt to restrict access to deposition for failure to demonstrate good cause); *Laxalt v. McClatchy*, 622 F.Supp. 737 (D. Nev. 1985) (same); *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985), *cert. denied*, 479 U.S. 1043 (1987) (limitations on use of discovery must be supported by finding of "good cause"). Indeed, there are many situations where the public has a compelling interest in knowing what information is developed through civil litigation. Cases involving pollution sites, product safety or health risks, mass tort litigation generally, and civil lawsuits against public officials are just a few obvious examples where legitimate and significant interests in access abound.

The Draft Guidelines dismiss the important issues advanced by such access to civil discovery far too casually under a proposed broad principle asserting an absence of any "presumed right of the public to participate in the discovery process or to have access to the fruits of discovery." At a minimum, the Guidelines should recognize the contrary authority and should acknowledge that the public often possesses a compelling interest in civil discovery. The Guidelines do acknowledge, as they must, that the public has standing to intervene to challenge a blanket protective order barring the disclosure of discovery, but fail to adequately embrace the public interest in discovery, or to articulate a standard of "good cause" that will adequately protect this interest.

2. Categorical Closure. The Draft Guidelines also break from existing law in suggesting that entire categories of cases might be sealed as a matter of public policy. (Draft Guidelines at 2.) This approach ignores precedent and is theoretically incoherent. It is certainly the case that some types of judicial proceedings routinely involve facts that are more likely to satisfy the high standard for overcoming the public's right of access. Yet, the public has an important interest in overseeing the operation of the courts even in these instances. Thus, although family court proceedings or bankruptcy proceedings, for example, may routinely include information that legitimately can be redacted or withheld from disclosure, the same basic standards and principles should govern the court's exercise of discretion in electing to deny access. There should be no "categorical" exceptions to access, exempting entire courts or types of proceedings. As the Supreme Court made plain in *Globe Newspapers, Inc. v. Superior Court*, 449 U.S. 894 (1980), even legislatures are constrained in the extent to which they can direct categories of proceedings to be closed.

3. Jury Identifying Information. Finally, AP disagrees with those commenter's who have urged that juror identifying information and juror questionnaires be kept confidential. The Draft Guidelines' call for the disclosure of such information is consistent with historical practice and the weight of authority. Public jury selection can be traced back at least to early 16th Century England, and it was "common practice in America when the Constitution was adopted." *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 507-08 (1984). Moreover, public access to juror identities plays a positive role in the functioning of the judicial system. It promotes the public perception of fairness, generates confidence that the process is being conducted fairly and enhances the performance of jurors. To the extent that courts today in certain cases rely more heavily on written juror questionnaires than the

process of *voir dire* should not alter the nature of the public's interest in knowing who is selected to serve as jurors and the basis for exercising discrimination among potential jurors. In this respect the Draft Guidelines are consistent with existing law and should not be revised.

AP recognizes that the proposed Guidelines can themselves play a positive role in furthering the development of a coherent set of standards to protect the public interest in civil litigation. With the refinements noted, the Guidelines would be a valuable step forward in explaining how the more recently recognized constitutional right of access co-exists with the access protections of the Federal Rules of Civil Procedures. Thank you for you efforts.

Very truly yours,

David Tomlin
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THE FREEDOM OF INFORMATION FOUNDATION OF TEXAS

April 28, 2006

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Re: Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

Dear Mr. Braman:

The Freedom of Information Foundation of Texas is a non-profit foundation whose goals since 1978 have been to protect and preserve open government. Its board of directors includes journalists, government officials, and attorneys specializing in First Amendment issues. We believe the referenced draft is flawed in that it would provide less access to court documents then the law currently allows in several respects.

Chapter 1, Principle 3 provides "a qualified right of access" to judgments, opinions and orders. Such documents cannot be sealed under any circumstances under Texas law. Rule 76(1) of the Texas Rules of Civil Procedure provides that "no court order or opinion issued in the adjudication of a case may be sealed." This rule has been in effect since 1990, thereby proving that it is unnecessary to qualify the public's right to court orders and opinions. The draft's examples mention the protection of trade secrets as a potential reason for denying the public access to portions of judicial opinions, but as numerous federal courts have held, the traditional way for judges to accommodate trade secrets is to keep the trade secrets themselves under seal, referring to them only indirectly in the opinion. *See e.g., Pepsi Co., Inc. v. Redmond*, 23 Med. L. Rptr. (7th Cir. 1995). As the Seventh Circuit noted, "holding trade secrets in confidence is one thing, holding entire judicial proceedings in confidence quite another. Opinions are not the litigants' property. They belong to the public, which underwrites the judicial system that produces them." Trade secrets are obviously litigated in Texas state courts, yet Texas has not found it necessary to qualify the public's right of access to orders and opinions.

Second, Chapter 2, Principle 1 is overly broad. It would also be a step backward from the existing law of many states, including Texas. Again, the Texas Rules of Civil Procedure provide for a presumption of openness with regard to unfiled discovery "concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." Such discovery may be sealed only upon a showing of all of the following:

(a) **a specific, serious and substantial interest which clearly outweighs:**
(1) **this presumption of openness;**
(2) **any probably adverse effect that sealing will have upon the general public health or safety;**

400 S. Record St., Suite 240, Dallas, Texas 75202 Office 214.977.6658 Fax 214.977.6666
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(b) **no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted. Tex. R. Civ. Proc. 76a.**

While private litigants have a presumed right to conduct discovery privately, that presumed right should not come at the expense of public health and safety, the administration of public office, or the operation of government.

Finally, Chapter 4, Principle 5 states that "absent exceptional circumstances, settlements with public entities should never be confidential." It is well settled law in Texas, Florida and many other states that settlements with a government agency can never be confidential. *See,* for example, Texas Government Code § 552.022(a)(18) (making government settlement agreements public documents under the state's Public Information Act); *The Tribune Co. v. Hardee,* 1980 Med. L. Rptr. 1318 (Fla. Cir. Ct. 1991) (public hospital must disclose settlement agreement under Florida Public Records Act even though settlement agreement in a federal lawsuit contains confidentiality provision); *Tribune-Review Pub. Co. v. Westmoreland County Housing Authority,* 2003 Pa. LEXIS 1793 (Pennsylvania 2003) (when a public body enters into a settlement agreement containing a confidentiality clause, it makes a promise it cannot keep). These states have found no need for an "exceptional circumstances" exception to the public's right to review their own governments' settlement agreements. The draft's creation of an "exceptional circumstances" qualification to the public's right of access would restrict more information than the law presently allows. We believe that is a step in the wrong direction.

We appreciate the opportunity to comment on the draft.

Sincerely,

Katherine Garner
Executive Director

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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May 4, 2006

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Re: Comments of the Forum on Communications Law of the American Bar Association on April 2005 Public Comment Draft of SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY, AND PUBLIC ACCESS IN CIVIL CASES

Dear Mr. Braman:

On behalf of the American Bar Association Forum on Communications Law (the "Forum"), I am pleased to offer the following comments on the April 2005 Public Comment Draft of THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY, AND PUBLIC ACCESS IN CIVIL CASES (hereinafter "the draft").

The lawyer membership of the Forum consists of practitioners who represent print and broadcast media, telephone companies, specialized carriers, satellite systems, and broadcast and cable organizations. The leadership as well as the membership of the Forum includes lawyers from regulatory agencies, private firms, academia, and corporate legal departments. A significant number of our members specialize in representing the media in court on newsgathering and content issues.

The Forum's purpose is to encourage discussion of evolving issues and problems relating to legal counseling and representation of the print media, telecommunications industry, and the electronic media, among practitioners, media organizations, and the public.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Our membership consists of individuals only, and the views expressed in these comments should not be taken as expressing the opinion of any firm or organization with whom any of our members or leaders is affiliated. Moreover, the comments provided in this letter have not been approved by nor do they represent the views of any entity other than the Forum on Communications Law.

General Comments

Overall, the Forum wholeheartedly supports the work of the Sedona Conference Second Working Group ("WG2") that is embodied in the public discussion draft, and, with a few qualifications addressed below, urges The Sedona Conference to adopt the Guidelines, with appropriate modifications, as its final work product.

The public's interest in monitoring the operations of the courts in civil litigation is much broader than the interest of the litigants in a particular case, and includes the right and opportunity to be informed of the social problems and risks to the general public that underlie matters presented for resolution in civil actions. It is undeniable, for example, that numerous lives could have been saved had the public been aware of a tread separation defect in Firestone tires and that such awareness was prevented by overbroad protective orders that entered in civil cases in which plaintiffs sought damages over deaths and injuries suffered as a result of the defect.

The Forum believes the Guidelines represent an accurate and forward-looking restatement of current law in the areas of confidentiality and public access in civil proceedings.

We are aware that the draft embodies some principles that arguably represent a retrenchment of recent pro-access legal developments, primarily in the area of discovery. Specifically, the Guidelines facilitate the discovery process and the more speedy adjudication of disputes by proposing a "best practice" under which a court may enter a broad protective order, based upon the parties' stipulated designations of confidential documents, without the court examining the content of the documents or assessing the potential for disclosure of such documents to cause identifiable harms to protected interests. There are decisions in the federal circuit courts holding that such "rubber-stamping" of a process of confidentiality designations by the parties should not occur at any stage of the litigation.

However, we guardedly agree with the WG2 that broad protective orders entered upon appropriate stipulations by the parties is necessary at the early stages of a civil suit to get the discovery process moving, and does not offend public policy, provided that the burden of establishing good cause for entry of a protective order based upon the contents of the particular documents in issue remains upon the party seeking protection, and that that burden must be met once a confidentiality designation has been challenged by a party or an intervening non-party.

Members of and spokespersons for the defense bar who have submitted comments in opposition to the WG2 Guidelines have suggested that there is no need for public awareness of evidence of potential risks to the general public that are exposed in civil discovery and that responses to such matters are best left to government regulatory agencies. These commentators have also suggested that the news media and the public lack the expertise to properly evaluate and attach appropriate significance to evidence developed in discovery and/or filed with the court in the pre-trial stages of a civil case. Imperfect as it may be, our system does entrust to the public and the press the right and opportunity to sort through matters of record in our courts for information that may be of public significance and to assess its relevance. The view that this responsibility is solely the prerogative of government officials is simply not consistent with our constitutional heritage.

Many of the comments opposing the public discussion draft of the WG2 Guidelines suggest that the provisions permitting the press and the public the opportunity to be heard with respect to protective orders and sealing orders will create a deluge of new collateral jurisprudence beyond the reasonable capabilities of our already burdened court systems. However, the proposed Best Practices of the WG2 Guidelines reflect practices that have been in effect in numerous federal districts throughout the nation without imposing any novel or undue burdens upon those courts.

A number of commentators suggest that the Guidelines unduly threaten legitimate privacy and property interests, particularly with respect to trade secrets and proprietary business information. To the contrary, we find that the Guidelines very clearly and appropriately recognize that these are interests that merit protection through all phases of civil litigation. The Guidelines and Best Practices, if followed, would discourage the practice of some courts of allowing the parties to agree to broad protective orders that secrete documents that are not trade secrets, and do not implicate legitimate privacy interests. It is true that parties that "over-designate" documents as "confidential" face the risk that

such documents will be ruled unprotectable under the "good cause standard" applicable to discovery protective orders, or the higher standard applicable to sealing of court files, but that is certainly as it should be and as required under the current Fed. R. Civ. P. 26(c) and the prevailing view of the federal circuit courts of appeal. Moreover, contrary to the views expressed by some opposing commentators, the proposed Best Practices accommodate concerns of non-filing parties for protection of their trade secrets and legitimate privacy interests.

Comments from the defense bar that have been posted on the Sedona Conference website concerning the public discussion draft urge that the Sedona Conference reconsider its position because no changes in current law or statements of best practices will be necessary or useful, and suggest that the draft does not reflect the correct balance between affording the opportunity to the public to observe the court system and protecting confidentiality interests of parties.

The Forum believes these comments are mistaken on both counts. We do not believe the principles and best practices stated in the draft reflect a "change in the law," nor do we agree that a statement of best practices reflecting current law and trends is unnecessary. Indeed, the need for such a statement is evidenced by the apparent view of many commentators that these principles represent something new and revolutionary, when they in fact represent a reasonably pervasive existing consensus among the federal circuit courts of appeal. The experience of our membership is that the realities of civil litigation under modern rules for balancing public access and confidentiality interests are not well understood by parties, attorneys, and, unfortunately, sometimes the judges presiding over civil cases. We believe an accurate, balanced, and appropriately nuanced restatement of current law and trends would be of the utmost utility to parties, counsel, and courts involved in civil litigation in the United States. We believe the public discussion draft has achieved just that.

The Forum also submits the following comments addressed to some specific chapters of the draft.

Chapter 1, Principle 1 The public has a qualified right of access to pleadings, motions, and any other papers submitted to a court on matters that affect the merits of a controversy that can only be overcome in compelling circumstances

The Forum agrees with this statement of principle. However, the comments that follow indicate a bright light distinction between documents filed in connection with "non-discovery matters" and those filed with discovery motions. We believe that a more nuanced approach, consistent with the Supreme Court's decision in *Press Enterprises, Inc. v. Superior Court*, 478 U.S. 1, 8-9 (1986), would be appropriate. Under this standard, the more a court document is involved in or is the functional equivalent of an adjudication on the merits of any controversy, the stronger the presumption of public access. All documents filed and used in proceedings that are at or near the core of trial-like functions of the court are subject to the "compelling interest" standard. It should be noted that the latter category could easily include a discovery motion in which critical determinations of the relevance of evidence and/or materiality of issues are made. The same is true with respect to motions for summary judgment that are denied, and motions *in limine* that are granted or denied.

The Forum would also suggest, at p. 2, instead of the general citation to *In re Cendant Corp.*, 260 F.3d 183, 192-93 (3d Cir. 2001), which is correctly cited, but which involves a convoluted fact situation, could well be replaced by citations to other key circuit court decisions that support the stated principle, which we understand are being compiled for an appendix to the Guidelines. In addition, the draft should note the split among federal circuit courts holding that the qualified right of access is guaranteed by the First Amendment, those holding that the rule springs from the common law but nonetheless imposes the same test as recognized under the First Amendment cases, and those that recognize that presumption under the common law and indicate differences between the common law rule and the First Amendment guarantee.

The Forum also takes issue with the statement beginning at the bottom of p. 2, suggesting that some categories of cases may warrant complete denial of public access, such as matrimonial litigation. Court decisions in many states recognize that while there may be little public interest in routine divorce files, there remains a qualified right of access to such files that may trump privacy interests when the case involves a matter of legitimate interest to the public, as would be the case with at least portions of the divorce file of a

candidate for public office. Moreover, the need for monitoring domestic relations courts is no less important than it is with respect to other courts. The Supreme Court has indicated considerable disapprobation of blanket closure of any category of court proceedings, even when limited to sensitive phases of the proceedings. *See Globe Newspapers, Inc. v. Superior Court*, 449 U.S. 894 (1980). This portion of the comment should note the countervailing public policy considerations and First Amendment limitations on complete denials of access to categories of cases.

In the example at page 7, the draft seems to assume that a "John Doe" procedure is appropriate in any case where the case involves sensitive private affairs of a party. There is good authority that John Doe status should be disallowed when there are disputed allegations between the parties that turn upon the credibility of the party seeking John Doe status. The public interest in providing parties with equal opportunity to confront an opponent, as well as public confidence in the court system's resolution of those issues, may well weigh in favor of denial of John Doe status either at the outset (as recently decided by Judge Matsch of the District of Colorado in *Katelyn Faber v. Kobe Bryant*, Case No. 04-M-1638, U.S. District Court (D. Colo., Oct. 6, 2004), or as the issues develop.

Chapter 2, Discovery

Please note the comments made concerning this chapter in "Introduction" above.

In general, the Forum believes that this chapter does a fair job of accommodating the interests of the various competing stakeholders in a fashion that best serves all.

However, we are concerned that there is no principle that delineates what is required to make a showing of good cause when the issue is contested and submitted to a court for adjudication. The Principles and Best Practices should embody the requirement that a party seeking a protective order under the good cause standard of Rule 26(c) "must show that disclosure will result in a clearly defined and serious injury" to a party seeking protection, and that an agreement of the parties can never substitute for this finding when the issue is contested. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

Chapter 2, Principle 2 A litigant has the right to disclose the fruits of discovery to non-parties, absent an agreement between the parties or an order based on a showing of good cause

This principle has been attacked by opposition commentators on several grounds. The Forum agrees with and embraces the comments submitted by WG2 participant Thomas B. Kelley on April 19, 2006 on this particular point.

In addition, several commentators have expressed concern over the following statement in the comments to Principle 2:

> However, a protective order entered as a discovery management tool, without specific consideration of the material at issue, should be considered to be provisional in that it is subject to future challenge by any party, including an intervenor, and subject to modification by the court.

This statement simply embodies the current requirement that before a protective order be entered, the material subject to an order of non-disclosure must be of such a legitimately private or proprietary nature as to meet the good cause standard articulated in *Pansy* and similar decisions of the federal circuit courts of appeal. A protective order entered on the basis of stipulation, without an adjudication of the good cause issue, should be provisional in nature, and reliance by the parties upon such an order should not be a factor when the issue of "good cause" is determined. We note that the Federal Rules Advisory Committee recently considered but failed to recommend an amendment to Rule 26(c) to permit protective orders "for good cause shown or on stipulation of the parties."

Chapter 2, Principle 4 On a proper showing, non-parties should be permitted to intervene to challenge a protective order that limits disclosure of otherwise discoverable information

The Forum agrees with the position taken with respect to standing for intervention by the media, principally for the grounds stated in the paper submitted by Thomas B. Kelley, dated December 2, 2005, addressing the subject.

On the same subject, in the examples provided on pages 22-23, we note that with Example 4, the hypothetical shifts from a class action race

discrimination lawsuit to a toxic tort case, suggesting that something as dire as a toxic tort case is required before a member of the news media should be permitted to intervene or succeed in challenging a protective order. To the contrary, intervention and successful opposition to a Rule 26 protective order have been achieved by the media in employment discrimination suits, be they class actions or not. We suggest that there is no reason for the switch in the subject matter of the hypothetical, which may convey unintended significance.

Chapter 3 Trials

The Forum believes that the Principles and Best Practices of this chapter are well stated and accurately reflect current law.

A number of comments have attacked the position the public discussion draft takes with respect to access to trial exhibits. There is ample precedent in the circuit courts for the position taken, but perhaps it would be appropriate to mention with greater specificity the countervailing views of courts that recognize the need for flexibility and discretion on the part of trial judges in addressing practical impediments of public access to exhibits during the trial.

In addition, comments have attacked the draft's position providing that there should be public access to juror questionnaires. The Forum believes that juror questionnaires, when used as a substitute for or as the functional equivalent of *voir dire*, are, in effect, part of the trial and should be subject to the strong presumption of public access that applies to trials. In some cases, there may be certain aspects of *voir dire*, including questions to individual jurors concerning inherently private and potentially embarrassing matters, that should not be open to public view, either in the courtroom, or through jury questionnaire responses. However, to the extent the questionnaire responses reflect the *voir dire* process as it would occur in an open courtroom, they should be available to the public.

It has been suggested by some that making the responses available in written form would facilitate mass dissemination of the information. However, given that access to real-time transcripts of court proceedings, and the availability of courtroom observers to describe on the Internet what they see and hear transpire in the courtroom, the distinction between *voir dire* in written form and that which occurs in open court is relatively meaningless.

Chapter 4, Principle 1 In choosing a public forum to resolve a dispute rather than a private dispute resolution process, parties limit their ability to keep information confidential

In general, the Forum believes that this Chapter as a whole is accurate as to the law, forward-looking, and embodies good public policy. The Forum's only comment is to suggest that this particular statement principle has no application to many parties, principally defendants, who become involved in civil litigation involuntarily. Moreover, the "choice" assumption is not in any sense the principal rationale for providing public access to civil proceedings, and limiting the ability to maintain confidentiality, which is correctly explicated in the comments to Chapter 1.

Chapter 5 Privacy and Public Access to the Courts in an Electronic World

Because the Forum understands that this particular chapter is undergoing substantial revision, we will withhold comment at this time.

Thank you again for your consideration.

Sincerely yours,

Jerry S. Birenz
Chair, ABA Forum on Communications Law

AIPLA
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May 14, 2006

Richard Braman
Executive Director
The Sedona Conference

Dear Mr. Braman:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to offer more substantive comments on the "Revised April 2005 Public Comment Draft" of *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (the "Draft Guidelines"). This letter augments the initial concerns we expressed to you and the Editors-in-Chief in our letters of March 10, 2006.

AIPLA is a national bar association whose 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both patent owners and users of intellectual property. They also represent both small and large clients and they represent both plaintiffs and defendants.

AIPLA has reviewed the draft Sedona Guidelines, and has solicited comments from its members. Although a complete study of all of the issues presented by the Draft Guidelines would take much more time, at this point AIPLA has the following overall positions on the Draft Guidelines.

AIPLA appreciates the effort expended by the Sedona Conference Working Group 2 in formulating the Draft Guidelines. We do not believe, however, that there is any demonstrated need for the Draft Guidelines. Our practitioners routinely handle cases involving a very large number of confidential documents, and yet they do not report any significant difficulties with the present system of handling confidential documents and information. The flexibility offered by the current system can and does offer tailored solutions to the complex situations and competing interests posed by many cases involving intellectual property. Specifically, current law allows information filed with the court to be sealed on a showing of "good cause" pursuant to Rule 26. If a non-party to the litigation wants access to the information, in most cases the burden will remain with the proponent of sealing to justify its continued confidentiality, because it was originally sealed by stipulation.[1] In cases where the court originally made a fact-based determination of good cause, the normal rule is that the third party must make a showing of compelling need for access.[2] These rules can be adjusted when the nature of the case justifies placing a heavier burden on the proponent of secrecy and a lesser burden on the third party (for example, when matters of public health or safety are involved).[3]

[1] *See, e.g. San Jose Mercury News, Inc. v. U.S. District Court*, 187 F3d 1096, 1103 (9th Cir. 1999).
[2] *Phillips v. General Motors Corp.*, 289 F.3d 1117, 1124 (9th Cir. 2002).
[3] *See Hammock v. Hoffman La Roche, Inc.*, 142 N.J. 356, 379, 662 A.2d 546, 558 (N.J. 1995) and *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D. 2d 1, 711 N.Y.S. 2d 419 (N.Y. App. 2000).

We are not aware of any empirical evidence that these standards – or the various state and federal laws or rules regulating the sealing of confidential information – are not working. Moreover, AIPLA is concerned that the Draft Guidelines call for a profound change in current law, by placing a new and unjustifiably high burden ("compelling circumstances") on a litigant that wishes to protect its trade secrets.[4] The Draft Guidelines appear to be biased in favor of public dissemination of information that is valuable precisely because it is confidential – including trade secrets and other business confidential information – and that is at the core of intellectual property rights and disputes.

There is a key public policy underlying our comments. This is that intellectual property rights are important enough to be recognized in the United States Constitution and by a variety of federal and state laws.[5] The purpose of these rights is to encourage useful innovation by allowing innovators to reap the benefits of their labors for a limited time[6]. In our information-based economy, trade secret laws are particularly important. Studies show that the vast majority of information assets in this country are protected exclusively as trade secrets.[7] Trade secrets have been recognized by the U.S. Supreme Court as protectable property rights.[8] Congress has deemed misappropriation of secret business information so important that it imposed substantial criminal penalties through the Economic Espionage Act of 1996.[9] And it is widely recognized that this extremely valuable property right is also fragile, because it can be damaged or destroyed by unauthorized disclosure or use.[10]

Many private commercial disputes require that the parties submit trade secret information to the court. Such evidence comes in a variety of forms, ranging from computer source code, to secret formulas, designs or manufacturing processes, to information about undisclosed business plans or financial information. Although the Draft Guidelines state that parties to litigation should expect that their information might be disclosed, the implied assumption that all litigants voluntarily accept this risk is not grounded in fact. Defendants who are sued typically have no choice but to submit to the procedures of the court. They are entitled to a process that recognizes and protects the integrity of their property, including their trade secrets. And the public is also entitled to a court system that respects such important rights.

Resolving disputes involving trade secrets, therefore, involves a careful balancing of the public's interest in protecting intellectual property, and the right of each of the parties to a fair hearing, against the public's interest in access to dispute-related information. Courts have traditionally taken great care to avoid unnecessarily exposing a private party's legitimate trade

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[4] The cases cited in the Draft Guidelines to justify this change all appear to deal with class action fraud or criminal matters, where the public has an obvious and special interest. AIPLA believes that it is inappropriate to generalize from those exceptional situations to create a general rule that would presumptively apply in all cases.

[5] State protection is provided primarily through the Uniform Trade Secrets Act (which requires that courts "preserve the secrecy of an alleged trade secret by reasonable means"), and by common law as described in the Restatement (Third) of Unfair Competition §§ 39-45.

[6] In the case of trade secrets, the length of protection is only bounded by the owner's ability to keep the information confidential.

[7] Cohen, W.M., R.R. Nelson, and J.P. Walsh, "Protecting Their Intellectual Assets; Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)", NBER Working Paper 7552 (2000).

[8] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

[9] 18 U.S.C. §§ 1831-1839.

[10] *See, e.g., Wearly v. FTC*, 462 F.Supp. 589, 603 (D.N.J. 1978), *vacated on other grounds* 616 F.2d 662 (3d Cir. 1980): trade secrets are "a peculiar form of property that can vanish by evanescence, sublimation or osmosis. It is in that class of personality, like the heirloom, the original manuscript of 'Look Homeward, Angel', the Mona Lisa, the Venus de Milo, and other like items for which equity historically has provided the suitable remedy of specific reparation."

secrets. They also have not been constrained by rigid rules in fashioning an approach that balances the competing policies and interests presented under the facts of a particular case.

Disputes involving intellectual property often have associated with them enormous amounts of highly technical data that require specialized knowledge to comprehend. This means that in many cases the determination of whether, for example, a particular document, interrogatory answer, or deposition excerpt deserves confidential protection may involve a significant investment of time simply to understand the technology and develop an accurate perspective placing it in proper context. Current protective order practice has evolved to avoid the crushing burden that an item-by-item confidentiality adjudication would impose on both the courts and private litigants. This burden is avoided in initial discovery through the use of "blanket" protective orders, which permit the exchange of thousands or millions of documents between counsel, without the need for argument about the trade secret status of specific documents.[11] And there is good reason to provide strong protection to trade secrets submitted in connection with substantive motions. Many summary judgment motions, for example, must be supported with hundreds or even thousands of pages of exhibits, much of this being extremely confidential. The cost of demonstrating document-by-document (as opposed to categorical[12]) support for sealing, and especially the cost of redaction of individual documents, would dramatically increase the already burdensome expense of civil litigation.[13]

This problem of litigation expense has been exacerbated by the recent dramatic increase in electronic discovery. As your organization is aware from its work on this issue, the cost of electronic discovery is the number one concern of inside counsel at U.S. corporations. We were therefore surprised to find that the Draft Guidelines do not address, in some empirical way, the added burdens involved in document-by-document analysis and redaction.

AIPLA recognizes that in certain cases involving matters of special public interests such as health and safety or the conduct of public officials, sealing of information filed with the courts is a matter deserving especially close scrutiny and the imposition of high standards on the proponent of secrecy. However, the courts have over time developed methods for protecting intellectual property rights while providing a fair forum for resolving disputes and taking into account the public's right to transparency in the litigation arena. AIPLA believes that great care should be taken in making major changes to current practice, such as those proposed in the Draft Guidelines, at least where legitimate trade secrets are concerned.

AIPLA also understands that courts face difficulties in handling and storing documents filed under seal, and that this burden is increased with electronic case filings, where documents may be stored in a completely different format than the rest of the case record. Nonetheless, this is not a compelling reason for a broad restriction on confidential filings in court cases. We believe that the burden of handling sealed documents would be eclipsed by the increased burden on the courts resulting from the Draft Guidelines. This increased burden will take the form of numerous determinations of confidentiality on an item-by-item basis, as well as more motions to compel discovery when clients resist producing their confidential documents in the first instance.

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[11] *See, e.g., Leucadia Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993).

[12] For an example of "declassification" by category of documents, see Joint Stock Society v. UDV North America, Inc., 104 F.Supp.2d 390, 397 (D.Del. 2000).

[13] The monitoring requirements of Principle 1, Best Practice 6 would also add significant cost in complex cases, and this consequence, like the cost of across-the-board redaction, should be examined in some empirical way, so that these costs can be measured against their perceived benefit. It also bears noting that many if not most trade secrets continue to derive value from secrecy indefinitely, while BP6 seems to assume that all trade secrets have a limited life.

The focus of the Draft Guidelines is to provide the public with greater access to litigation-related information. Public access is presumed to be in the public interest and the burden of justifying continued confidentiality is shifted to the party seeking to maintain it, under a "compelling circumstances" test, rather than the "good cause" standard of existing rules. While this may be appropriate for some types of civil litigation, in almost all instances it is not so for disputes involving intellectual property. Insofar as the Draft Guidelines are applicable to such disputes, they appear to discount or completely disregard not only the valuable and vulnerable rights of trade secret holders, but also the public interest in protecting intellectual property. Moreover, in a great many cases involving trade secrets, the beneficiary of 'public access' would not be the public at large, but rather a relatively small group of competitors.

If the Draft Guidelines are adopted in cases involving trade secrets, they may actually discourage enforcement of intellectual property rights, and less enforcement would encourage more violations. Disputes over whether confidential documents should be produced in the first instance are likely to increase because of client uncertainty over whether commercially valuable records and testimony can be maintained confidential later in the case. Current practice gives some assurance that information produced as confidential during discovery will remain confidential. This, in turn, allows clients to be more forthcoming in providing full discovery, and gives lawyers a good reason to encourage their clients to cooperate, mitigating the costs and burdens of litigation for litigants and courts.

It would be profoundly ironic for the law to explicitly protect trade secrets while the courts discourage suits for their misappropriation by threatening even wider dissemination of the trade secret information to the general public, thereby putting at risk the right that is supposed to be protected. And the same dangers are present in other forms of commercial and intellectual property litigation. Although patents involve public disclosure of the invention contained in the patent, patent litigation often requires the selective disclosure of other information that is still confidential and valuable to its owner. Such information typically includes related but unpublished technical data (including invention records and patent applications), as well as financial and market share data underlying damage calculations and research into next generation or still undeveloped products. Discovery also may include the trade secrets of non-parties. It is no exaggeration to state that in a significant number of patent cases, a patent infringer may gain more by publicly disseminating its competitor's information than it would lose in an adverse judgment.

It is little comfort to trade secret owners that they will be permitted to attempt to show that their confidential information should not be made public under a new "compelling circumstances" standard. The risks of public dissemination may be so great that disputes over confidentiality may be shifted to resisting discovery in the first instance. This would greatly increase the burden on courts due to increased motion practice related to discovery, and it would slow down what is already often a very slow process.

Access to the courts is a necessary component of our system of intellectual property law. In many cases, there is no other practical way to enforce these rights. Moreover, in the intellectual property arena, there usually are advantages to be gained by one party or the other from the threat that information may not remain confidential, thereby destroying its value. These parties are unlikely to surrender that advantage. Therefore, trade secret owners in litigation need the protection afforded by the current regime, with its presumptive "good cause" standard.

The Draft Guidelines may create new ethical obligations on attorneys involving the production and use of confidential information. AIPLA cautions against such an approach without a more careful understanding of the implications of those obligations. Each state bar has its own established rules and precedent regarding the ethical obligations of their members. How the ethical obligations imposed by the Draft Guidelines would affect these various state codes or rules of conduct is not clear and, certainly, has not been studied. AIPLA does not approve of such a marked change when there has been no apparent analysis of its impact.

AIPLA strongly urges that the Draft Guidelines be revised to properly take into account 1) the strong public policy of protecting trade secret rights and 2) the severe and irreversible damage that can be inflicted on a litigant without protections against public disclosure of its commercial secrets. At a minimum, the Guidelines should include one or more of the following

- Establish an exception for trade secrets that preserves the "good cause" standard of FRCP 26 and comparable state laws.

- Include a statement that preserving the trade secret property right presents a "compelling circumstance".

- Extend procedural deadlines involved in confidentiality determinations to accommodate cases with large numbers of technical documents, confirming the courts' ability to address these issues by categories of information when appropriate, rather than on a document-by-document basis.

AIPLA also notes the well articulated and detailed contributions to this discussion by Arthur R. Miller (March 17, 2006) and Stephen G. Morrison (March 31, 2006). AIPLA generally agrees with the points made by these authors, who also seek to highlight the impact of the Draft Guidelines specifically on litigation involving trade secrets.

AIPLA is prepared to meet with the Working Group to provide further comments and assistance in improving the Draft Guidelines to better meet the concerns of the intellectual property community. AIPLA agrees with the notion that the public should have access to all court proceedings except those which overriding interests require be private. But we disagree that, where sealing is concerned, the public has only an interest in unsealing. The public also has an interest in robust protection of intellectual property rights, including trade secrets. The current system accommodates these interests fairly well. AIPLA believes that the Draft Guidelines, in their current form, would put a thumb on the scale in favor of disclosure, changing time-tested rules without evidence that change is needed, and imperiling one of the most important modern property rights as a cost of being involved in litigation.

Sincerely,

Michael K. Kirk
Executive Director
AIPLA