THE SEDONA CONFERENCE® WORKING GROUP SERIES

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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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THE SEDONA GUIDELINES:
Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

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Dedication to H. Brent McKnight (1952-2004)

H. Brent McKnight, a member of the Steering Committee of this Working Group, passed away suddenly and unexpectedly in the year between the group's first meeting and the publication of its first draft Principles & Best Practices. Years before, Brent had been a Morehead Scholar who spent an internship working for Senator Sam Ervin, reading through 1,100 boxes of Watergate documents. As a Rhodes Scholar, studying religious philosophy under Bishop Stephen Neill at Oxford, Brent decided that justice was a true goal of religion and that justice would be his career. Prosecutor, state court judge, United States Magistrate Judge, United States District Judge, teacher, writer, scholar, husband, father, colleague and friend: through all this he infused his desire to see justice. And through all this, we were struck by the fact that he kept asking us to make sure he was getting it right. We were amazed at his humility wedded to intelligence; his sense of humor wedded to hard work. To you, Brent, we dedicate our work. May it help others advance the justice to which you devoted your life.

Alan Blakley

Foreword

The Sedona Conference® is a nonprofit law and policy think tank based in Sedona, Arizona, dedicated to the advanced study, and reasoned and just development, of law and policy in the areas of complex litigation, antitrust law and intellectual property rights. It established the Working Group Series (the "WGS^{SM}") to bring together some of the nation's finest lawyers, consultants, academics and jurists to address current issue areas that are either ripe for solution or in need of a "boost" to advance law and policy. (See Appendix A for further information about The Sedona Conference® in general and the WGS^{SM} in particular). This publication is the result of nearly two years of nationwide dialogue conducted by our Working Group Two (WG2), which is devoted to Best Practices and Guidelines Addressing Protective Orders, Confidentiality and Public Access in Civil Cases.

The impetus for the formation of WG2 came from members of the federal judiciary, court clerks, and practitioners concerned with the effect that nationwide electronic Case Management/Electronic Case Filing ("CM/ECF") would have on the patchwork of local filing rules and practices that had developed over the years. On the one hand, electronic access to traditionally public court records promised to help the courts realize their role as a co-equal branch of government, by making the courts transparent and accountable, and by educating the public as to the courts' role in a democratic society. On the other hand, the possibility that electronic court filings would immediately be accessible by the public via the Internet, without any intervening review by court personnel, meant that personal and proprietary information could suddenly enter the public domain without the cloak of "practical obscurity" provided by manual filing of, and access to, paper court documents physically located at the courthouse.

This question, and the larger ramifications for society as a whole, concerned United States Magistrate Judge Brent McKnight of North Carolina, a member of the Judicial Conference Advisory Committee on Civil Rules, who in 2004 was chairing a subcommittee discussing the much narrower issue of public access to settlement agreements filed with the federal courts. Together with members of the Litigation Section of the Federal Bar Association, he approached The Sedona Conference with the idea of establishing a Working Group to study this issue and develop a set of guidelines or best practices for courts and practitioners working through the complicated process of framing local rules and procedures to accommodate CM/ECF. The group first met in April of 2004 in Sedona. That initial meeting was unique in bringing together attorneys who primarily represented corporate defendants, attorneys who primarily represented individual plaintiffs, public interest groups, and news media. Each came with their own experiences and concerns, and each came with certain ideas of what they wanted. But in the process of dialogue, their divergent views came together, as they listened to each other and began the process of genuine accommodation of each others' interests.
A major blow was dealt to the efforts of WG2, and we all experienced deep personal loss, with the untimely death of Judge McKnight just a few months after that first meeting. But the group resolved to continue the dialogue and draft a document that reflected, as much as possible, the scholarship, balance, wisdom and practicality that Judge McKnight strove to achieve.

The resulting Public Comment Draft was published in May of 2005, and was circulated widely to judges, practitioners, academics, and other interested parties. With the assistance of the American Judicature Society, the Dallas Bar Association, the Samuel I. Newhouse Foundation and others, public "town hall" meetings were held in four major cities to present the Public Comment Draft and air a wide range of comments and responses. The projected six-month Public Comment Period was extended an additional six months, and a special effort was made to reach out to sectors of the legal profession who believed that their views were underrepresented in the initial effort. Dozens of constructive comments were received, and a second meeting of the Working Group was held in Sedona in April 2006. During that meeting, several significant revisions were agreed upon, and an editorial committee was established to integrate the revisions and comments into a final version for publication. In November of 2006, a revised version was presented to the Working Group for further comment. A special Editorial Advisory Committee was drawn from The Sedona Conference's Advisory Board, consisting of a federal judge and two distinguished legal academics not previously associated with WG2 to review the subsequent draft to make sure that it presented an accurate and balanced portrayal of the current law, and an unbiased set of recommended best practices. In February of 2007 the final version of this publication was completed, the

culmination of the longest public comment period and most extensive Working Group dialogue in the experience of The Sedona Conference.

This Working Group's efforts to work towards completion of a post-public comment draft were subjected to an orchestrated campaign to derail publication. A number of WG2 members ended up resigning from the Working Group, and a number told us they did not want their names, or their firm names, included in the roster we typically publish in Working Group Series publications, though their names do appear on the "Opposing Views" piece (see below). Indeed, after this work product was completed even one of the editorial team members who had devoted significant time and energy to this effort and to incorporate wherever consistent with the law the views of members who are now listed on the "Opposing Views" piece had to withdraw his and his firm's name from this work product. This "politization" of Working Group efforts was new to The Sedona Conference and is, frankly, quite distressing. This presented the editors with a conundrum, for while the publication now reflects significant constructive input from members who have resigned or are on the "Opposing Views" piece, since a number of (former) members have resigned or withdrawn their names from the roster, the resulting roster would leave the misimpression that the publication reflects only input from those listed, instead of reflecting all the efforts to reach accommodation and compromise through dialogue. Rather than publishing an unrepresentative roster, the Editorial Committee has opted to remove the roster of WG2 members from this publication in its entirety.

The authors of the "Opposing Views" piece* argue a lack of consensus "in this still controversial area" and, on Working Group calls, sought to delay publication to allow for further dialogue. It was the view of The Sedona Conference, however, that the authors of the Opposing Views simply have a different view of the role of the judiciary in our society and the need for public oversight of the core adjudicatory function that led to the formation of WG2 in the first place; no amount of dialogue or word-smithing would overcome this gap. While "controversy" developed within WG2 surrounding this issue, the Guidelines themselves are not, in the views of the Editorial Team and Advisory Editorial Board, "controversial;" they simply seek to clarify the law.

As noted above, The Sedona Conference Working Group Addressing Protective Orders, Confidentiality and Public Access was formed out of a desire 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. It is hoped that the result of the Working Group's robust dialogue, and the principles and commentary that follow, will be of immediate benefit to the bench and bar as they approach matters relating to confidentiality protective orders, sealing orders, and public access.

I want to thank the entire Working Group for all their hard work, and especially the Editorial Committee (including the unnamed member) who have guided this effort for the past year. A special thank-you is also in order to our Advisory Editorial Board who helped us to ensure the work product reflects the law and struck a proper balance. We also want to note that the Working Groups of The Sedona Conference could not accomplish their goals without the financial support of the annual sponsors of The Sedona Working Group Series listed at http://www.thesedonaconference.org/sponsorship.

To make suggestions or if you have any questions, or for further information about The Sedona Conference®, its Conferences or Working Groups, please go to http://www.thesedonaconference.org or contact us at tsc@sedona.net.

Richard G. Braman
Executive Director
The Sedona Conference®
March 2007

* *The "Opposing Views" piece is on our website under "Publications>WG2." It is worth noting that half of the signatories on the opposing views piece became members of WG2 after publication of the public comment version in May 2005, and more than a year after formation of the Working Group and its first face-to-face meeting. Two of the signatories never became WG2 members. It is more akin to a "public comment" than a WG2 effort.*

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

Chapter 1: Discovery

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.

Principle 2: Absent an agreement between the parties or a court order based on a showing of good cause, a litigant is not precluded from disclosing the fruits of discovery to non-parties.

Principle 3: A protective order entered under Fed. R. Civ. P 26(c) to facilitate the exchange of discovery materials does not substitute for the individualized judicial determination necessary for sealing such material, if filed with the court on a non-discovery matter.

Principle 4: On a proper showing, non-parties should be permitted to intervene to challenge a protective order.

Chapter 2: Pleadings, Court Orders, Substantive Motions & Dockets

Principle 1: In civil proceedings, the public has a qualified right of access to documents filed with a court that are relevant to adjudicating the merits of a controversy. In compelling circumstances, a court may exercise its discretion to deny public access to submitted documents to protect the privacy, confidentiality or other rights of the litigants.

Principle 2: The public has a qualified right of access to court dockets that can only be overcome in compelling circumstances.

Principle 3: There is a qualified right of access to judgments, judicial opinions and memoranda, and orders issued by a court that can only be overcome in compelling circumstances.

Principle 4: Notice of motions to seal and supporting materials should be reflected in the publicly accessible docket.

Principle 5: Non-parties may seek leave to intervene in a pending case to oppose a motion to seal, to have an existing sealing order modified or vacated, or to obtain a sealing order.

Chapter 3: Proceedings in Open Court

Principle 1: The public has a qualified right of access to trials that can only be overcome in compelling circumstances.

Principle 2: The public has a qualified right of access to the jury selection process.

Principle 3: Absent a compelling interest, the public should have access to trial exhibits.

Chapter 4: Settlements

Principle 1: There is no presumption in favor of public access to unfiled settlements, but the parties' ability to seal settlement information filed with the court may be restricted, due to the presumptively public nature of court filings in civil litigation.

Principle 2: Settlements filed with the court should not be sealed unless the court makes a particularized finding that sufficient cause exists to overcome the presumption of public access to judicial records.

Principle 3: Settlement discussions between parties and judges should not be subject to public access.

Principle 4: Absent exceptional circumstances, settlements with public entities should not be confidential.

Principle 5: An attorney's professional responsibilities may affect considerations of confidentiality in settlement agreements.

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

I. Four Basic Policy Approaches

1. Open electronic access, with minimal limits.
2. Generally open electronic access, coupled with more significant limits on remote electronic public access.
3. Electronic access only to documents produced by the courts.
4. Systematic reevaluation of the content of the public case file, combined with limited access to electronic files.

II. Common Features of Recently-Developed Court Rules and Policies on Public Access to Court Records

1. A statement of the overall purpose for the rule or policy.
2. Definitions of key terms used in the rule.
3. A procedure to inform litigants, attorneys, and the public that (a) every document in a court case file will be available to anyone upon request, unless sealed or otherwise protected; (b) case files may be posted on the Internet; and (c) the court does not monitor or limit how case files may be used for purposes unrelated to the legal system.
4. A statement affirming the court's inherent authority to protect the interests of litigants and third parties who may be affected by public disclosure of personal, confidential, or proprietary information..
5. A list of the types of court records that are presumptively excluded (sealed) from public access by statute or court rule.
6. A statement affirming that the public right to access court records and the court's authority to protect confidential information should not, as a general matter, vary based on the format in which the record is kept (e.g., in paper versus electronic format), or based on the place where the record is to be accessed (i.e., at the courthouse or by remote access).

7. As an exception to feature 6 above, a list of the types of court records that -- although not sealed -- will not be available by remote electronic public access.
8. A list of the types of information that either: a) must not be filed in an open court record, or b) if filed, must be redacted or truncated to protect personal privacy interests. These provisions mainly apply to personal identifiers such as the SSN, account numbers, and home addresses of parties.
9. Procedure for a court to collect and maintain sensitive data elements (such as SSN) on special forms (paper or electronic) that will be presumptively unavailable for public access. Such procedures generally build on technology to segregate sensitive information so that public access can be restricted in appropriate situations.
10. Procedure to petition for access to records that have been sealed or otherwise restricted from public access, and a statement of the elements required to overcome the presumption of non-disclosure.
11. Procedure to seal or otherwise restrict public access to records, and a statement of the burden that must be met to overcome the presumption of disclosure.
12. An affirmation that a rule on public access to court records does not alter the Court's obligation to decide, on a case-by-case basis, motions to seal or otherwise restrict public access to court records.
13. Guidance to the courts concerning data elements that are contained in electronic docketing systems that must (or must not) be routinely made available for public access.
14. Guidance for attorneys and/or litigants concerning: (a) the extent to which public case files will be made available electronically; and (b) the need to exercise caution before filing documents and information that contain sensitive private information, which is generally defined elsewhere in the rule.
15. An explanation of the limits, if any, on the availability of "bulk" and/or "compiled" data from public court records. Some rules specify that such data will only be made available to certain entities, for certain defined purposes, and pursuant to agreements to refrain from certain uses of the records obtained.
16. A statement concerning the fees that a court may charge for public access to court records.

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Introduction

We live in an open and democratic society that depends upon an informed citizenry and public participation in government. Open public meetings laws and federal and state freedom of information laws facilitate such participation by providing citizens with a right of access to information concerning their government. Indeed, the First Amendment protects "the stock of information from which members of the public may draw." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 576 (1980).

At the same time, our society places high premiums upon personal privacy, property rights, and individual autonomy. The United States Supreme Court has elevated some aspects of privacy to a constitutional (albeit rather amorphous) right. Our country has long valued entrepreneurial confidentiality as a key to social and material progress, promoting individual initiative, private enterprise, and technological innovation and the right to protect the property created by that enterprise. Courts have made clear in the civil litigation context that litigants may have privacy and proprietary rights in certain of the information produced during the discovery process. *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984). Nevertheless, the primary responsibility to protect those rights at each stage of the litigation rests on the attorney for the producing party.

This inherent tension between public access to information about government activities and the desire to protect personal privacy, intellectual property and confidential business information comes to a head in the debate concerning confidentiality in litigation. As with the legislative and executive branches of government, our democratic society depends upon public participation in and access to the judicial process. Access to the courts both improves the operation of the judicial system and fuels the informed discussion essential to democracy. Public access to judicial proceedings facilitates public monitoring of our publicly-created, staffed, and subsidized judicial system. Fair and open judicial proceedings and decisions encourage public confidence in and respect for the courts - a trust essential to continued support of the judiciary. A public eye on the litigation process can enhance prompt, fair and accurate fact-finding and decision-making. Perjury is deterred, witnesses may step forward, and judgments may be tempered with greater care and deliberation. A public trial also educates citizens about the justice system itself as well as its workings in a particular case.

Unlike the legislative and executive branches of government, however, the primary function of the courts is the resolution of the "cases and controversies" before them, and public access to certain stages of civil lawsuits casts light beyond the judicial process itself. Indeed, civil litigation most often involves disputes between private parties who are drawn into the courts reluctantly or even involuntarily. These court proceedings may require the disclosure of intimate personal or financial information or the disclosure of trade secrets or confidential marketing, research, or commercial information may be at stake. Public access to the pretrial, trial or settlement stages of those cases thus might jeopardize legitimate privacy or proprietary interests of the litigants. Moreover, public access may hamstring the litigants' ability to resolve their dispute in a mutually agreed manner.

Many threshold questions were addressed by WG2: 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 disputes? To what extent should court rules on protective orders, confidentiality and public access take into consideration the possibility that producing parties (or non-parties) did not voluntarily choose the dispute resolution forum?

How is a court to honor the right of public access to judicial proceedings while protecting privacy and property interests? In which cases must such privacy and proprietary interests bow to a broader public interest?

Virtually every federal circuit court of appeals and state court of last resort that has spoken on these matters has determined that courts are required to weigh the public interest in the particular proceeding or stage of the litigation against the private interest in maintaining the confidentiality of the material under consideration.[1]

On the public interest side, the general rule announced by the United States Supreme Court is that the public's right of access to material produced in connection with a particular pretrial or trial proceeding arises when (1) the proceeding has historically been open and (2) public access plays a significant role in the proper functioning of the process. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982). In doing so, the Court and the case law relying on this general rule have made distinctions between, for instance, discovery as historically private exchanges conducted by the parties, and trials as historically open proceedings in which the public has an interest, directly or as a matter of public accountability. *Baxter International v. Abbott Labs*, 297 F. 3d 544 (7th Cir. 2002).

On the private interest side, statutes and court rules have declared some types of proceedings (e.g., juvenile, child abuse, adoption, and guardianship) to be presumptively closed to the public, and certain types of information (e.g., the "personal identifiers" specified in proposed Fed. R. Civ. P. 5.2, http://www.uscourts.gov/rules/Rules_Publication_August_2005.pdf#page=55, including Social Security numbers, dates of birth, financial account numbers and names of minor children) to be presumptively eligible for exclusion from part or all or the court record available to the public. Case law has also given great weight to the private interest in protecting bona fide trade secrets and confidential proprietary information, such as marketing plans, employee training manuals, computer source code, and customer lists. Less weight has been given to unsupported claims of confidentiality for broadly designated business information. *Citizens First National Bank of Princeton v. Cincinnati Insurance Co*., 178 F. 3d 943 (7th Cir. 1999).

[1] "[T]he ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial. This dividing line may in some measure be an arbitrary one, but it accords with long-settled practice in this country separating the presumptively private phase of litigation from the presumptively public." *Poliquin v. Garden Way Inc*., 989 F.2d 527, 533 (1st Cir. 1993). *Compare Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994) (confidentiality order over unfiled settlement agreement); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-12 (9th Cir. 2002) (confidentiality order over unfiled settlement information) *with* In Re *Providence Journal*, 293 F.3d 1, 9-11 (1st Cir. 2002) (access to trial exhibits); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 119-20 (2d Cir. 2006) (access to summary judgment materials); *Hartford Courant Co. v. Pelligrino*, 380 F.3d 83, 90-96 (2d Cir. 2004) (access to dockets); In Re *Cendant Corp.*, 260 F.3d 183, 192-93 (3d Cir. 2001) (access to bids and bidding auction); *Leucadia v. Applied Extrusion Technologies*, 998 F.2d 157, 161-65 (3d Cir. 1993) (access to nondiscovery pretrial motions); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 574-77 (4th Cir. 2004) (access to summary judgment materials); *Second v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (access to transcript and final order of permanent injunction as part of settlement agreement); *Baxter Internat'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545-56 (7th Cir. 2002) (access to documents on appeal); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 983, 896-97 (7th Cir. 1994) (access to court files); In Re *Neal*, 461 F.3d 1048, 1052 (8th Cir. 2006) (access to creditor list in bankruptcy proceeding); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-81 (9th Cir. 2006) (access to summary judgment materials); *EEOC v. National Children's Center*, 98 F.3d 1406, 1409-10 (D.C. Cir. 1996) (access to consent decree).

Attorneys must regularly consider the differing levels of protection (or conversely, the levels of public access) that may be afforded to materials exchanged in the course of discovery, and materials filed with the court. Further, when considering materials to be filed, attorneys and courts must distinguish between the levels of protection (or conversely, the levels of public access) afforded to materials being filed in relation to a nondispositive matter and materials that relate to the merits of the case.

In the discovery context, there is no presumption of public access to unfiled discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). There is also no prohibition against a party disseminating information obtained through discovery. Attorneys may seek to enforce their clients' privacy and proprietary interests by agreement or may seek a protective order under Fed. R. Civ. P. 26(c) by showing "good cause." In the context of filing material with a court, a threshold presumption of public access exists. If the material relates to a nondispositive matter, a "good cause" determination by the court in issuing an order to seal is sufficient to overcome the presumption of public access. *Chicago Tribune Company v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304 (11th Cir. 2001). However, if the material relates to the merits of the case, an order to seal must be supported by a determination of compelling need that overcomes the presumption of public access. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F. 2d 157 (3d Cir. 1993). Thus, materials "designated as confidential under a protective order… will lose confidential status (absent a showing of 'most compelling' reasons) if introduced at trial or filed in connection with a motion for summary judgment." Manual for Complex Litigation, §11.432 (4th Edition 2004).

The relative strength of the public's interest in access versus a litigant's interest in privacy, property or confidentiality evolves with the stage of litigation, so that what constitutes "good cause" to restrict public access during discovery or non-dispositive stages of the proceeding does not equate to the "compelling need" necessary to restrict public access at another stage. This complexity appears to have generated widespread confusion in practice. The reported case law, supported by comments received by the Working Group in response to the Revised April 2005 Public Comment Version of this publication, demonstrates that litigants frequently move to seal docket entries, court filings, or whole proceedings, citing standards applicable only in the discovery or non-dispositive context. Likewise, judges across the country are routinely presented with stipulated discovery protective orders that the parties claim govern filings on the merits. Under the pressure of court workloads, some judges may be tempted to improperly forgo the individual determinations necessary to seal court documents, and instead issue orders in accordance with the parties' stipulations. *See, e.g., Citizens First National Bank of Princeton,* 178 F. 3rd 943, 944 (7th Cir., 1999) ("Instead of [making a determination] he granted a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal. This delegation was improper."). More recently, the process of modernizing and automating court filing and case management systems has revealed age-old informal practices under which court clerks or counsel themselves routinely sealed filings without any judicial determination whatsoever.

The electronic age and the requisite process of modernization has also led to a new concern. The conversion of presumptively public court records from paper-based filing systems accessible only at the courthouse itself, to electronic records potentially available via remote Intranet or Internet connections, has changed the analysis of the weight to be given to privacy concerns. While in the past, the likelihood that an individual or business would go to the effort of using court files to access personal information for private gain was remote, the automation of these records has made the harvesting of personal information for commercial use a viable, and

indeed quite profitable, business. This has given rise to a new legal dialectic which recognizes a responsibility on the part of government to protect the confidentiality of personal information, and perhaps confidential business information, that it requires citizens to provide as part of the civil and criminal justice systems.

For these reasons, the Working Group determined that the bench and bar would benefit from suggestions for "best practices" regarding public access to court files and proceedings in civil litigation, together with illustrations reflecting common situations that litigants and judges are likely to face.

Chapter One deals with discovery, and it is placed first because it is clearly distinct from other aspects of litigation, in that it is largely private and party-controlled – until the fruits of discovery are filed with the court for consideration of the merits of the case. Chapter Two deals with the important administrative functions of the court—the procedures for filing, maintaining the docket, and handling court-generated documents such as opinions and judgments. Here the applicable standards for sealing are different from the standards for discovery protective orders, due to the greatly increased public interest in the workings of the court and the greatly narrowed focus of the materials involved to those that deal with the merits of the case. Chapter Three goes to the core judicial function with the greatest public interest—the trial itself, including jury selection and the evidence presented. Chapter Four takes up the question of settlements, which was not a primary focus of the Working Group, but has been a lightning rod for press coverage and legislative attention. Here the analysis is extended to consider settlements as private agreements between parties until the parties choose, or feel compelled, to invoke the supervisory or enforcement powers of the courts. Finally, Chapter Five explores the implications of the transformation of the courts from repositories of largely paper-based information to managers of digital information. In particular, Chapter Five examines the increased attention given to protecting personal information as courts redesign their processes and explore novel questions of public access in an electronic age.

Chapter 1. Discovery

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.

The American federal civil litigation system is premised on the just, speedy and inexpensive resolution of disputes. Fed. R. Civ. P. 1. The scope of discovery under the Federal Rules of Civil Procedure is intended to be broad. Parties may obtain discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party," and for good cause shown, may obtain broader discovery relevant to the subject matter of the dispute. The information requested and produced during the discovery phase of civil litigation "need not be admissible at trial if [it] appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Unlike the civil law system in Europe and elsewhere, in the American civil litigation system the parties themselves develop the facts they need for trial through the discovery process outlined in the Federal Rules of Civil Procedure and state equivalents. These rules delegate to private parties the inquisitorial powers of the court, including the right to inspect and copy documents, the right to conduct depositions, and the right to compel non-parties to testify or produce documents. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) ("Thus, the [Federal Rules of Civil Procedure] often allow extensive intrusion into the affairs of both litigants and third parties." 467 U.S 20 at 30; "The Rules do not distinguish between public and private information." 467 U.S. 20 at 36) The court does not usually involve itself in the conduct of civil discovery, although it enforces procedural rules and may be called upon to decide discovery disputes. Generally, the fruits of discovery (documents, answers to interrogatories, deposition testimony, etc.) are not filed unless these are being used as evidence, either at trial or in connection with a discovery dispute or other pretrial proceeding, or unless the court orders that these be filed. Fed. R. Civ. P. 5(d).[2]

Pretrial discovery that is simply exchanged between the parties is not a public component of a civil trial. *See, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial . . . and, in general, they are conducted in private as a matter of modern practice"). There is thus no presumed right of public access to the discovery process or the fruits of discovery in the hands of a party. However, as discussed below, a party is not prohibited from voluntarily disclosing any information received during discovery unless the party has agreed otherwise or unless the court, upon a showing of good cause, enters a protective order pursuant to Fed. R. Civ. P. 26(c) or its state equivalents. A party's ability to enter into such agreements, and the court's ability to enter such orders, may be limited by statute or rule. *See e.g.*, Fla. Stat. Ann. §69.081; Texas R. Civ. P. 76a.

[2] It is sometimes argued that discovery requests are made to threaten the release of "sensitive" information and coerce settlement. This is a matter of professional responsibility within the scope of ethics rules and not addressed by the Working Group. See Model Rules of Professional Conduct (2001), Preamble: A Lawyer's Responsibilities (5) ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others"); Rule 3.4(d) ("A lawyer shall not… in pretrial procedure, make a frivolous discovery request…")

Best Practices

1. Attorneys should cooperate in efficiently exchanging information in civil litigation. Such cooperation includes an early, full discussion of the scope of discovery and the treatment of potentially discoverable materials that the parties deem confidential or private, to avoid later pretrial litigation of this issue.

2. A party may object to the discovery of otherwise relevant and non-privileged information it claims is confidential or private. Such an objection should be the basis for negotiation with the requesting party over the procedure for producing the requested discovery to protect legitimate privacy and confidentiality interests, If no agreement is reached, a party may apply to the court for a protective order under Fed. R. Civ. P. 26(c) or its state equivalents.

3. If the parties agree to produce information under the terms of a stipulated protective order, the court should enter such order upon a showing of good cause, subject to a later determination of the confidentiality of specific documents in the event of a challenge to the confidentiality designation.

Examples

1. The attorneys representing the parties in a class action race discrimination lawsuit against a large corporation confer pursuant to Fed. R. Civ. P. 26(f) and map out the discovery phase of the litigation. The lawsuit alleges discrimination in pay and promotions throughout the company. It is anticipated that the plaintiff will serve a broad discovery request seeking current and historical information regarding employee pay and promotions. It is also anticipated that the defendant will object to public disclosure of employee pay, citing employee morale and competitive interests. The attorneys negotiate a procedure for the production of the relevant information in bulk form, redacting any "personal identifiers" in the data, and enter into a confidentiality agreement or stipulate to a protective order that would permit large volumes of information to be reviewed and exchanged without compromising privacy and confidentiality interests.

2. Same facts as Example 1, but the attorneys were unable to reach agreement. The plaintiff serves its discovery request, as anticipated, and the defendant objects. Under the court's rules, the attorneys must attempt to resolve discovery disputes before filing any motions. During the required meeting, the defendant flatly refuses to produce the requested data, and the plaintiff threatens to obtain the data from other sources and publish it on the Internet. The plaintiff then moves to compel discovery and the defendant counter-moves for a protective order. Three months and several hundred billable hours later, the court grants both motions in part, fashioning a protective order similar to that reached voluntarily in Example 1.

Principle 2 Absent an agreement between the parties or a court order based on a showing of good cause, a litigant is not precluded from disclosing the fruits of discovery to non-parties.

Absent an agreement between the parties or an order to the contrary, a party is free to share the fruits of discovery obtained during litigation with others who are not parties to the lawsuit. *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985).

In some cases, a producing party has legitimate reasons to limit the dissemination of certain information exchanged in the normal course of discovery. Because broad discovery is generally allowed, and given the nature of certain disputes in the civil justice system, the rules of discovery often require disclosure of private, confidential information involving matrimonial, financial, medical or family matters, or in commercial cases, trade secrets and other confidential business information. In order to facilitate the efficient exchange of information during discovery, parties may enter into agreements or stipulations designed to maintain the confidentiality of material produced during discovery.

In the absence of an agreement between the parties, a producing party has the right to object to the production of particular material on the basis of "annoyance, embarrassment, oppression, or undue burden," and seek a protective order under Fed. R. Civ. P. 26(c). In appropriate cases, a party may seek an order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Fed. R. Civ. P. 26(c)(7). The court is required to make a finding of "good cause" to support a protective order.

To avoid a costly and time-consuming document-by-document determination of "good cause" by the court during the discovery, parties who anticipate that the scope of discovery will likely include private or confidential information often seek the court's *imprimatur* under Fed. R. Civ. P. 26(c) on a stipulated agreement regarding confidentiality. These "umbrella" protective orders, most often found in large or complex cases, are frequently entered without judicial assessment of the specific documents or information the disclosure of which will be limited by the protective order, although a more generalized finding of "good cause" is still required. Parties may demonstrate reliance on a protective order entered as a case management tool. However, such an order is insufficient justification by itself for the court to enter a sealing order if documents subject to the protective order are to be filed.

In determining whether good cause exists to issue or uphold a protective order under Fed. R. Civ. P. 26(c), a court is required to balance the parties' asserted interest in privacy or confidentiality against the public interest in disclosure of information of legitimate public concern. *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786 (3d Cir. 1994). Judicial restraints placed only upon the disclosure and use of information exchanged in discovery do not restrict "a traditionally public source of information," *Seattle Times Co. v. Rhinehart,* 467 U.S. at 33. "When directed solely at discovery materials, protective orders are not subject to the high level of scrutiny required by the Constitution to justify prior restraints; rather, courts have broad discretion at the discovery stage to decide when a protective order is appropriate and what degree of protection is required." Manual for Complex Litigation, at 11.432, p. 66 (4th Edition, 2004) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36–37). Therefore, given that the public shares the parties' interest in a judicial system that can efficiently resolve disputes, the good cause standard generally should be considered to be satisfied if the parties can articulate a legitimate and particularized need for privacy or confidentiality, in those instances where the protective order will apply only to the disclosure of information exchanged during discovery. If a challenge is

made, "good cause" must be shown based on the circumstances existing at the time of the challenge. *Leucadia, Inc. v. Applied Extrusion Techs., Inc.,* 998 F. 2d 157 (3d Cir. 1993). Because of the limited scope and provisional nature of the umbrella protective order, the court need not conduct a detailed inquiry into the nature of the information at issue, which courts are sometimes unwilling or often practically unable to do, where much or all of the information at issue may not be used in connection with the determination of the merits of the dispute.

Best Practices

1. Attorneys should counsel their clients that, absent an agreement or order issued upon a showing of good cause, there is no restriction on dissemination of documents and other information exchanged during discovery. A party desiring restrictions on dissemination of the fruits of discovery should approach the opposing party as soon as it becomes apparent that some type of restriction on dissemination is necessary.

2. Attorneys should assess in each case whether a protective order restricting dissemination of information produced during discovery is necessary.

3. An umbrella protective order or confidentiality agreement should provide a procedure for confirmation or challenge of the confidentiality designations made as to particular documents, including timely notice to the producing party that the designation is being challenged to enable the producing party to promptly seek protection and to prove that the particular information qualifies for judicial protection.

4. Attorneys should avoid excessive and unjustified designation of documents as "confidential" under a protective order.

Examples

1. Using the race discrimination lawsuit example outlined under Principle 1 above, at the same time the attorney representing the corporate defendant notifies the attorney representing the plaintiff that she is willing to produce her client's payroll and promotion database, she states that it contains private financial information on the employees of her client. She says she will only produce this database if the plaintiff's counsel is agreeable to enter a protective order. The plaintiff's attorney agrees and they negotiate a proposed protective order which:

    a. defines the information and documents it will protect, encompassing the type of information that could upon proof be the appropriate subject of a protective order;

    b. establishes a procedure whereby plaintiff's attorney may notify defendant's counsel if she believes that certain documents designated as "confidential" by the defendant should not be treated as such; and

    c. provides that within a specified period after being notified of plaintiff's counsel's objection to certain confidentiality designations, if defendant's counsel wishes to maintain the confidentiality of the challenged documents, the defendant's counsel must seek a protective order pursuant to Fed. R. Civ. P. 26(c). The protective order makes clear that if the confidentiality designation is challenged, the court is to make a *de novo* determination of whether there is good cause to restrict the dissemination of the challenged information.

Principle 3 A protective order entered under Fed. R. Civ. P 26(c) to facilitate the exchange of discovery materials does not substitute for the individualized judicial determination necessary for sealing such material, if filed with the court on a non-discovery matter.

Protective orders sometimes purport to do more than restrict the parties from sharing the fruits of discovery. They often include a provision allowing materials deemed "confidential" to be filed with the court under seal without any further order. Such an agreement between the parties may be appealing. Courts are understandably disinclined to interfere with a matter agreed upon by the parties, particularly considering the court's limited time and resources. However, no agreement between the parties should substitute for the individualized and particularized showing that must be made before any materials are filed under seal, at least for non-discovery purposes. Moreover, given the presumption of public access to filed materials, that showing must be made under the stricter standards described in Chapter 2 rather than the "good cause" standard of Fed. R. Civ. P. 26(c) used for the issuance of protective orders.

Although protective orders with "sealing" provisions appear to be common, federal circuit courts have questioned the enforceability of protective orders that serve to seal material filed with the court, primarily because such sealing implicates the public's qualified right of access to court records. For example, according to the Third Circuit, "[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head." *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993). Similarly, the Sixth Circuit held that protective orders under Fed. R. Civ. P. 26(c) authorizing the sealing of documents that either party "considers ... to be of a confidential nature" is facially overbroad. *Procter & Gamble Co. v. Bankers Trust Co*., 78 F. 3d 219, 227 (6th Cir. 1996).

Particularly in cases with large quantities of material to be produced in discovery, a threshold showing of "good cause" over broad categories of material may be sufficient for the issuance of a protective order under Fed. R. Civ. P. 26(c). The purpose of the order would be to facilitate the cooperative exchange of voluminous discovery. Protective orders must not confuse the confidentiality of material produced in discovery with the filing of such materials under seal. That issue is discussed in detail in Chapter 2.

Best Practices

1. Attorneys should advise their clients that a protective order entered without an evidentiary showing only restricts the dissemination of designated documents and information so long as the need for confidentiality is not successfully challenged by another party or by an intervening third party, and so long as the information does not need to be filed in court or used as evidence at trial. The party wishing to prevent the dissemination of information may eventually be required to prove the basis for protecting specific information, even if not required to do so at the time the information is produced.

2. Protective orders which purport to cover both the exchange of documents in discovery and the filing of documents with the court would better conform with the legal standard if such protective orders were: (1) narrowly drafted; (2) kept the burden on the designating party to demonstrate good cause whenever the need for confidentiality is questioned; and (3) provided a procedure to establish a proper basis for sealing at the time the material is actually filed with the court for any purpose other than a discovery dispute.

3. Protective orders entered without evidentiary findings should provide a mechanism to establish whether information designated as confidential should be sealed if filed with the court. For instance, such an order could provide that a party "lodge" a protected document with the court pending a motion to seal from the designating party.[3] If the designating party files a motion to seal the court record within a reasonable period of time, a determination is then made as to whether the particular information should remain under seal. The fact that information was designated as confidential pursuant to the protective order is not dispositive in determining that the information should be sealed in connection with a determination on the merits.

4. As an alternative to the practice outlined above, the parties could agree in the protective order to provide reasonable notice to the designating party that it intends to file documents designated as confidential in court. The designating party should move within a reasonable period of time to have the specific documents sealed. Again, a judicial determination must be made as to whether the sealing of the particular records is warranted.

Examples

1. In the class action race discrimination lawsuit outlined under Principle 1 above and the protective order discussed as an example under Principle 2 above, the plaintiff's counsel intends to file the payroll and promotion database which has been designated as confidential as an exhibit in opposition to a motion for summary judgment. Pursuant to the terms of the order, plaintiff's counsel notifies defendant's counsel in advance of the filing that the designation is challenged, triggering the defendant's obligation to file a motion for a sealing order with respect to the challenged information. Alternatively, plaintiff's counsel temporarily files the payroll and production database with the opposition papers, ensuring that the material is not made public and likewise triggering the defendant's obligation.

2. Using the above example, plaintiff's counsel also notifies defendant's counsel that pages from one of defendant's outdated employee handbooks will be filed in connection with a summary judgment motion. These pages had been designated as confidential pursuant to the protective order. Defendant's counsel decides that it is not necessary to seek to have this outdated information sealed. Plaintiff's counsel is permitted to file the information in open court, and the confidentiality designation with respect to that information is waived.

[3] A "lodged" document is a document submitted to the court in conjunction with the filing of a motion to allow the document to be filed under seal. The "lodged" document itself is not considered part of the filing. If the court denies the motion, the document is returned to the submitting party. *See*, *e.g.*, N D. Cal. Civ. L. R. 79-5(d). ("Sealed or Confidential Documents: Motion to File Under Seal")

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

A party involved in parallel or subsequent litigation should be permitted to present arguments that a protective order should be modified to allow it access to the allegedly confidential documents. A court deciding whether its protective order should be modified to allow a party to such litigation access to documents should consider the standards of relevance and efficiency articulated in Fed. R. Civ. P. 26, including considerations of annoyance, embarrassment, and oppression under Fed. R. Civ. P. 26(c). However, the public disclosure of information of a private or sensitive nature in one lawsuit should not necessarily subject a party to repeated disclosure of the same information in subsequent litigation, if there is good cause for protecting it from disclosure.

Most courts that have considered the question hold that the media, public interest groups, and other third-parties have standing to intervene in a civil case for the limited purposes of opposing or seeking modification or rescission of a protective order entered pursuant to Fed. Rule Civ. P. 26(c) when they assert that the public interest is served by disclosure. *See Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994); In re *Alexander Grant & Co. Litigation*, 820 F.2d 352, 354-55 (11th Cir. 1987); *CBS v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975). Courts have found standing without any showing that persons subject to an order limiting disclosure of discovery materials would be willing to disclose absent the protective order; rather, the cases presume that since the only practical effect of the protective order is to prevent an otherwise willing speaker from communicating to a willing listener, the party seeking to intervene meets the redressable injury requirement of standing simply because the order impedes "the news agencies' ability to discover newsworthy information from potential speakers." *Davis v. East Baton Rouge Parish School Board*, 78 F. 3d 920, 927 (5th Cir. 1996).

The courts are in disagreement as to the burden of proof when motions are made to modify or vacate an existing protective order. One standard provides that, assuming the order to have been validly entered in the first instance, the moving party must show sufficient reasons to release the protected information. *See Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). Another approach leaves the burden of proof on the party that sought the order in the first instance to justify continued confidentiality, but adds reliance on the existing order as a factor to be considered. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789-90 (3d Cir. 1994).

Best Practices

1. When intervention is allowed to oppose a motion for a protective order that has not yet been entered, or for purposes of challenging a general protective order, the court should consider and balance the public interest in the disclosure sought, the legitimate privacy interests that favor non-disclosure, and the extent to which the information is relevant to the controversy. The party seeking to limit disclosure has the burden of demonstrating that the balance of interests satisfies the "good cause" standard of Fed. R. Civ. P. 26(c).

2. If a protective order has already been entered after full consideration of the merits, including a review of the contents of the documents that are prohibited from disclosure under the order, the intervenor should be required to demonstrate circumstances or considerations not already considered by the court.

3. In entering into a confidentiality agreement or seeking a protective order, parties should anticipate non-party demands for discovery materials through subpoena, or that non-parties will object to producing information pursuant to subpoena because the requested information is claimed to be confidential. Agreements should also include provisions that expressly allow parties to provide materials to requesting regulatory agencies that offer appropriate protection for confidential materials.

4. When collateral litigants intervene, the issuing court "should satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided...." *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122, 1132 (9th Cir. 2003). The court should balance this policy of avoiding duplicative discovery against the countervailing interests of the parties opposing modification, including their reasonable reliance on the order's nondisclosure provisions. In many cases, any legitimate interest in continued secrecy can be accommodated by placing the collateral litigants under the use and non-disclosure restrictions of the original protective order. Modification merely removes the impediment of the protective order in the collateral litigation. The collateral court retains authority to determine the ultimate discoverability of, and the protection to be afforded to, specific materials in the collateral proceedings. *Foltz*, 331 F. 3d at 1133.

Examples

1. Using the example of the class action race discrimination lawsuit discussed under Chapter 1, Principle 1, a class member has opted out of the class and is pursuing an individual race discrimination lawsuit against the same defendant in another jurisdiction. The attorney for the opt-out plaintiff calls the attorney representing the plaintiff class and asks for a copy of the payroll and promotion database that defendant produced in the class action. However, this has been designated confidential, so class plaintiffs' counsel cannot provide the database to the attorney for the opt-out plaintiff.

2. In the same case as above, the attorney for the opt-out plaintiff serves a Fed. R. Civ. P. 45 subpoena on the attorney for the plaintiff class seeking production of all documents produced by defendant in the class action. But counsel for the plaintiff class is under a court order not to disseminate the confidential material produced by defendant. The protective order provides that class plaintiffs' counsel tenders the subpoena to defendant's counsel, who is obligated by the protective order to defend the protective order and oppose the subpoena, negotiate an extension of the protective order, or waive protection.

3. In the same case as above, because the opt-out plaintiff's lawsuit involves allegations similar to those involved in the class action, and direct discovery requests for the information would be inevitable, defendant's counsel agrees that the material can be produced to the opt-out plaintiff so long as he is willing to enter a similar protective order.

4. In a toxic tort case, a protective order is entered at the commencement of discovery. After significant discovery has taken place, a member of the news media moves to intervene, asserting that the general public has a legitimate interest in documents or information exchanged during discovery. If the court determines that a colorable public interest has been asserted, intervention should be allowed.

5. Assume the same facts as stated in Example 4, except that the parties fail to agree upon a stipulated protective order and one party moves for entry of a protective order pursuant to Fed. R. Civ. P. 26(c). The media, asserting the public interest, should be permitted to intervene and be heard in opposition to the motion. The party asserting confidentiality bears the burden of proving that an order should issue under Fed. R. Civ. P. 26(c).

6. Assume the same facts as stated in Example 4, except that the parties to the litigation failed to agree on a stipulated protective order and one party moved for the entry of a protective order pursuant to Fed, R. Civ. P. 26(c). The judge ruled on the motion and issued an order, making appropriate findings of fact and conclusions of law. At a later date, the news media intervene, seeking access to documents subject to the order. The intervenors bear the burden of coming forward with evidence sufficient to overcome the initial presumption that the existing order remain in place, although the original proponent bears the ultimate burden of persuasion that the order continues to be necessary and narrowly tailored to protect legitimate privacy and confidentiality interests.

Chapter 1
Selected Bibliography

Manual for Complex Litigation, Fourth (2004), Sec. 11.432 (discussing the use of "umbrella" and "particularized" protective orders in complex litigation).

Florida Statutes Annotated, §69.081 (describing the procedure for entry of an order "which has the purpose or effect of concealing a public hazard," etc.).

Texas Rule of Civil Procedure 76a (declaring that certain court records are presumed to be open and setting forth standards for sealing same).

Seattle Times v. Rhinehart, 467 U.S. 20 (1984) (no public right of access to unfiled discovery materials).

Poliquin v. Garden Way, 989 F.2d 527 (1st Cir. 1993) (showing of "good cause" sufficient to protect discovery materials from disclosure insufficient to bar access to evidence introduced at trial).

SEC v. TheStreet.com, 273 F.3d 222 (2d Cir. 2001) (transcripts of depositions of NYSE officers held not to be "judicial documents" but no presumption against public access as third parties had been present).

Leucadia v. Applied Extrusion Tech., Inc., 998 F.2d 157 (3d Cir. 1993) (recognizes distinction for purposes of access between discovery materials filed as exhibits to "merits" motions and those filed in support of discovery motions).

Shingara v. Skiles, 420 F 3d 301 (3d Cir. 2005) (reviewing standards for issuance of umbrella orders and concluding such an order was not warranted in a case that "is neither complex nor involves 'large-scale discovery'" and good cause showing not made).

Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004) (holds that party cannot object to sealing of materials when it had access to same and had agreed to sealing).

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (protective order cannot allow parties to control access to judicial records).

Baxter Internat'l v. Abbott Labs, 297 F.3d 544 (7th Cir. 2002) (distinguishes between broad procedural orders entered for purposes of discovery as opposed to those entered at later stages of litigation).

Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943 (7th Cir. 1999) (broad protective order granting parties "a virtual carte blanche" to seal records invalid under Fed. R. Civ. P. 26).

In re *Remington Arms Co.*, 952 F.2d 1029 (8th Cir. 1991) (sets forth procedure to determine whether information sought in discovery is trade secret for purposes of Fed. R. Civ. P. 26(c)(7) protective order).

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424 (10th Cir. 1990) (discusses access by collateral litigants to discovery materials subject to protective order).

Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122 (9th Cir. 2003) (discusses access by collateral litigants to discovery materials subject to protective order; establishes "mechanics of the relevance inquiry" and which court should do what).

United States v. Microsoft Corp., 165 F.3d 952 (D.C. Cir. 1999) (depositions in an antitrust action are open to public pursuant to the Publicity in Taking Evidence Act).

A full bibliography, updated periodically, may be found on The Sedona Conference web site at www.thesedonaconference.org starting in July 2007.

Chapter 2. Pleadings, Court Orders, Substantive Motions & Dockets

Principle 1 **In civil proceedings, the public has a qualified right of access to documents filed with a court that are relevant to adjudicating the merits of a controversy. In compelling circumstances, a court may exercise its discretion to deny public access to submitted documents to protect the privacy, confidentiality or other rights of the litigants.**

Chapter 1 dealt with discovery materials exchanged between the parties, for which there is no qualified right or presumption of public access. In Chapter 2 we start with the act of filing a document with the court, such as a pleading, response, motion, or an exhibit. We also deal with the documents and records created by the court in relation to civil litigation, such as dockets, docket entries, memoranda, orders, or judgments. When a document is filed or created by the court, a qualified right or presumption of public access arises. However, this is just the starting point of the public access analysis. The strength of the presumption, and the consequent burden that must be met to overcome it, depends on the relationship of the document to the adjudicative process. The more important the document is to the core judicial function of determining the facts and the law applicable to the case, the stronger the presumption and the higher the burden to overcome it. Thus, a qualified right or presumption of public access attaches to all documents filed with the court that are material to the adjudication of non-discovery matters. *See* In re *Cendant Corporation*, 260 F. 3d 183, 192-93 (3d Cir. 2001); *Chicago Tribune Co. v. Bridgestone/Firestone. Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

Courts have found the qualified right or presumption of public access from either of two sources, the Constitution or the common law. The United States Supreme Court has found a First Amendment right of public access in criminal cases. A constitutional right to public access arises if the proceedings or documents have historically been open to the general public and "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* That qualified right can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id. See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982) ("Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

Some federal courts have extended the First Amendment right of public access to court files and proceedings in civil cases. *See, e.g., Republic of Philippines v. Westinghouse, Elec. Corp*., 949 F.2d 653, 659 (3d Cir. 1991); *Rushford v. New Yorker Magazine, Inc.,* 846 F.2d 249, 252-53 (4th Cir. 1988). Other courts have found a common law presumption in favor of public access for documents and proceedings in civil cases. *See, e.g., FTC v. Standard Fin. Mgt.,* 830 F.2d 404, 408 n.4 (1st Cir. 1987); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Smith v. United States District Court*, 956 F.2d 647, 650 (7th Cir. 1992); *EEOC v. Erection Co*., 900 F.2d 168, 169 (9th Cir. 1990); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1178, 1217 (1999). Some courts have found both a First Amendment right and a common law presumption. *See e.g., Lugosch v. Pyramid Co. of Onandaga,* 435 F.3d 110 (2d Cir. 2006) (documents submitted to a court for its consideration in a summary judgment motion are "judicial documents" to which a presumption of immediate access applies under both the common law and the First Amendment).

Public access serves important public interests, including informing the public of the cases that are before the court. The essential benefit of access is to ensure accountability to the public. Public scrutiny brings about accountability, fostering public trust that the judicial system is functioning justly, properly and efficiently, and that participants in the system are properly and honestly performing their duties. Another benefit of public access is educating the public on the workings of the courts and the civil justice system, which promotes public confidence in the judicial system.

While important interests are served by the First Amendment right or common law presumption of public access, the right is not absolute and the presumption may be overcome in appropriate circumstances. If the documents in question have little or no relation to the merits of the case or have not historically been available to the public, the presumption of public access that arises from the mere fact that these have been filed with the court is quite weak. For instance, if the documents have been filed in relation to a discovery dispute, the court may seal them under the same "good cause" standard that would support a particularized protective order under Fed. R. Civ. P. 26(c). Likewise, the presumption of public access to filed settlement documents that merely recite the terms of settlement and do not purport to assign liability or otherwise "adjudicate" the case is weak. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143-44 (2d Cir. 2004) (distinguishing between settlement amount and summary judgment documents).

The presumption of public access is much stronger in relation to "judicial documents," that is, documents that relate to the merits of the case and assist the court in fulfilling its adjudicatory function. Courts have the discretion to seal court documents to protect rights of privacy or confidentiality, provided the court determines that an "overriding interest" exists that can only be protected by such an order. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1313 (11th Cir. 2001); In re *Cendant Corp*., 260 F.3d at 194; *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 166 (3rd Cir. 1993); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1178, 1217 (1999). A circumstance that might justify the exercise of the court's discretion is to protect the confidential proprietary interests in trade secrets or other commercially sensitive information. *See Leucadia*, 998 F.2d at 166; *Joint Stock Soc'y v. UDV North America*, 104 F. Supp. 2d 390, 396 (D. Del. 2000). Whether or not the requisite need for sealing has been demonstrated is a matter of courts' supervisory powers and is "best left to the sound discretion of the court, discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Communications,* 435 U.S. 589, 598-99 (1978).

During the 18 month period between the publication of the "public comment" draft of this document in April 2005 and the final draft at the end of 2006, several commentators put forward the proposition that all actions to restrict or deny public access to the documents and proceedings related to civil litigation should be subject to the same "good cause" showing to overcome the presumption in favor of public access. While this notion has simplicity and surface appeal, it is contradicted by the great weight of the case law and advanced in a limited circumstance by only one federal circuit court decision. *Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F. 3d 1304, 1313 (11th Cir. 2001) (holding that the "good cause" standard of Fed. R. Civ. P. 26(c) may also apply to restrict access to documents filed in relation to a failed summary judgment motion in a settled case). While all justifications for restricting public access must constitute "good cause" to be upheld, the requisite "good cause" will be dramatically different depending upon the particular documents and proceedings, and the particular stages of the litigation. The "good cause" needed to support an umbrella protective order under Fed. R. Civ. P. 26(c) will not suffice to support the sealing of those discovery documents when filed in court. To lump the varying expressions of burden under the common rubric of "good cause" creates confusion as to what standard actually applies, and does a disservice to attorneys and parties who may erroneously believe that the "good cause" that

supported an umbrella protective order in discovery will also support an order to seal a record on appeal. *See e.g. Baxter International v. Abbott Labs*, 297 F. 3d 544 (7th Cir. 2002).

Statutes and court rules recognize specific situations in which pleadings must be kept confidential. For example, under the qui tam provisions of the False Claims Act, 31 U.S.C. §3729 et seq., a complaint of a private person must be filed in camera and remain sealed for at least 60 days, and the government may move *in camera* for an extension of the sealing. 31 U.S.C. §§3730(b)(2) and (3). The purpose of the sealing requirement is to give the government an opportunity to review the complaint and determine whether to intervene. 31 U.S.C. §3130(b)(4) Similarly, the Trademark Counterfeiting Act of 1984, codified in relevant part at 15 U.S.C. Sec. 1116(d), provides that a court may, on *ex parte* application, issue a seizure order for goods and counterfeit marks, and that any such order, "together with the supporting documents," shall be filed under seal, "until the person against whom the order is directed has an opportunity to contest such order...." 15 U.S.C. §1116(d)(8). The purpose of the sealing is to avoid the loss or concealment of the items to be seized. 15 U.S.C. §1116(d)(4)(B)(vii). In both of these statutory examples, sealing is for a specific purpose and a limited time.

There are also categories of cases with records that invariably include information, the disclosure of which is discouraged as a matter of public policy. State legislatures have adopted statutes mandating that such categories of cases be closed to the public. *See, e.g.,* Indiana Code §31-39-1-2 (records in juvenile proceedings); Maryland Code, State Gov't. Art., §10-616(b) (records in adoption and guardianship proceedings); Maryland Code, Art., §10-616(b) (records in adoption and guardianship proceedings); Maryland Code, Art. 88A, §6(b) (records in child abuse or neglect proceedings); New York, Family Court Act, §166 (records of family court proceedings); New York, Domestic Relations Law, §235 (records in divorce, custody, and child support proceedings). Several state courts have, or are considering, court rules restricting remote access via the Internet in certain categories of cases. See, e.g., Indiana Administrative Rule 9(g); Maryland Rules 16-1006 and 16-1007; Vermont Rules for Public Access to Court Records, §6. The Judicial Conference of the United States has also determined that remote access via the Internet to at least one category of cases, Social Security appeals, should be restricted. *See* Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files, September 2001.

A court might also determine that sealing an entire document is not necessary because the protection of privacy or other interests can be achieved by redacting the private information or allowing the use of fictitious names. In such cases, redaction or use of a pseudonym can preserve the important privacy rights or property interests, while protecting the public's right to access. *See Doe v. City of Chicago*, 360 F. 3d 667, 669-670 (7th Cir. 2004). In other cases, sealing may be warranted only for a limited period of time. *See* E-Government Act of 2002, Public Law 107-347, and proposed Fed. R. Civ. P. 5.2, (implementing the E-Government Act, §205(c)(3), to provide privacy protection for filings electronically transmitted to a court), approved by the Civil Rules Advisory Committee of the U.S. Judicial Conference. See http://www.uscourts.gov/rules/Rules Publication_August_2005.pdf#page=55

Courts should adopt procedures to facilitate the orderly consideration of motions related to public access to filed documents. For example, a party may believe it has compelling reasons to request an order allowing it to file an entire document with the court under seal. The court may permit the party to "lodge" the document with the court (a step short of filing the document) and file an appropriate motion to have the document sealed upon filing. Under such a procedure, the court and opposing parties have access to the document while the motion is under consideration, and the public has notice of the pending motion to file the document under seal, but the document has not been made public through filing. *See, e.g.*, D.N.J. L. Civ. R. 5.3; Cal. R. Ct. 243.1 to 243.4

Best Practices

1. Courts should provide guidance to civil litigants regarding the procedures for seeking and the standards for obtaining protective orders and sealing orders through the promulgation of local rules, court-wide standing orders, and courtroom-specific standing orders.

2. In jurisdictions where lodging is permitted, litigants should temporarily file or "lodge" documents with the court awaiting a ruling on a motion to have the documents filed under seal. If the motion is granted, the documents will be filed under seal. If the motion is denied the documents will be returned to the party unfiled.

3. Whenever a party seeks to file documents previously subject to a protective order, appropriate notice should be given that would enable the producing party to move for protection of the documents.

4. In exercising its discretion to issue a sealing order, a court should consider the importance of the rights and interests (for instance, privacy rights, confidential information, or proprietary business information) that would be jeopardized by public access to the sealed material; whether the need for confidentiality outweighs the public's interest in disclosure; whether the sealing requested is broader than necessary to meet that need for sealing; and whether less restrictive alternatives might be available that would preserve the interest in confidentiality while permitting at least some public access such as redaction, limiting the duration of the sealing order or the use of pseudonyms. Absent extraordinary circumstances, sealing orders themselves should not be sealed.

5 Attorneys should counsel their clients regarding the standards for sealing party-filed documents, the risk that information may be made public, and measures that may be taken to minimize or avoid the compromise of such information.

6. Sealing requests should not be overly broad and attorneys should take reasonable steps to segregate material that should be filed under seal from material that may be filed without seal. For example, an entire document a party requests to file under seal should not be sealed if, as a practical matter, confidentiality can be adequately protected by more limited means, such as the redaction of specific information, the use of "Doe" pleadings, or the sealing of only a portion of the document, with the non-confidential material to be openly filed.

7. Orders granting or denying a motion to seal should be subject to immediate appellate review under the collateral order or other doctrine.

Examples

1. A plaintiff files a trademark infringement action alleging that the defendant is manufacturing "knock off" products. The plaintiff seeks an *ex parte* seizure order, pursuant to statute, based on a showing that the defendant intends to move or destroy the products. The complaint and the request for an immediate seizure order are temporarily filed along with a motion to have the documents filed under seal. The temporary filing is accompanied by a proposed order to be endorsed by the judge, also under seal, stating that the complaint will be unsealed upon either the execution or the denial of the requested seizure order.

2. The exclusive Midwestern distributor of a highly popular and profitable product of an East Coast manufacturer is engaged in a dispute with the manufacturer over the manufacturer's alleged shoddy accounting practices. For several months the parties engaged in unsuccessful settlement negotiations, until the distributor prepares to file suit. The plaintiff distributor requests that its attorney file the complaint under seal to avoid publicity and loss of good will. After review of the controlling law in the jurisdiction, the attorney determines that the plaintiff's generalized interest in avoiding publicity and losing goodwill will not provide the requisite showing to support a sealing order. The attorney so informs his client and counsels him regarding possible alternatives, including alternative dispute resolution.

3. The same facts as Example 2 above. The distributor files a motion for summary judgment supported by documents designated as "confidential" and produced under a Rule 26(c) protective order which detail proprietary and commercially sensitive information about the manufacturer's business. The distributor's attorney files the motion with the confidential information redacted and requests the court's permission to file an unredacted version under seal. The manufacturer's attorney promptly files a motion explaining the basis for sealing the unredacted version with an affidavit that establishes the significance of the information to the business, the competitive harm disclosure might cause, and the measures taken to date to keep the information confidential. The court grants the sealing motion and files an order, stating the grounds for sealing without revealing any of the information itself.

4. Several members of a wealthy family, all beneficiaries under a trust, file suit against another family member who is the trustee, alleging misappropriation of trust assets. In the complaint, the plaintiffs set forth sensitive family information, such as the value of the trust, their respective shares of the trust assets, and the holdings of the trust. The plaintiffs' attorney prepares two versions of the complaint: one version in which the paragraphs containing the sensitive family information have been redacted, to which the public would have access, and another version of the complaint to be the subject of a motion to seal.

5. A plaintiff who is HIV-positive brings suit against a dentist for refusal to treat him in violation of state law. The plaintiff is not known in his community as being HIV-positive. He files his complaint under the court's "Doe" procedure, in which information that would identify him personally is removed from the version of the pleading to which the public has access. The version of the complaint containing identifying information is filed under seal. The judge issues an order that information identifying the plaintiff in all subsequent pleadings is to be redacted from publicly accessible versions, with unredacted versions filed under seal.

6. A plaintiff intends to file a motion for summary judgment in fourteen days, which will be supported by documents it obtained from the defendant through discovery and designated by the defendant as confidential under a stipulated protective order. Pursuant to the terms of the particular protective order, the plaintiff informs the defendant of its intention to file, which permits the defendant to file a motion to seal the material in advance of the summary judgment filing date. The defendant files the motion to seal, and the plaintiff files a redacted version of its summary judgment motion and supporting information but separately files an unredacted version containing the confidential information with the court.

7. During the course of litigation, the court indicates it may impose sanctions on counsel for repeatedly missing court-imposed deadlines in the case. Counsel requests the court's permission to file a responsive brief and affidavit under seal simply explaining that "medical reasons" are detailed in its response regarding sanctions. The court exercises its discretion to seal the brief and affidavit, in part because the public's interest in access is weaker because the filings have no role in the determination of the merits of the case.

8. In the same matter, counsel files a dispositive summary judgment motion, and temporarily files select portions of the supporting evidence along with a motion to seal stating that "confidential and proprietary" business information is contained in the documents. The court indicates its initial intent to deny the sealing motion. Counsel then requests, and the court grants, permission for counsel to file a supplemental brief and affidavit establishing how the information in the documents is maintained in confidence, that it is not known to the public or business competitors, and how disclosure of the information may give competitors an unfair advantage. In light of the supplemental filings, the court assesses the strength of the presumption of public access, weighs it against the interests in confidentiality, and finds a compelling need to partially seal the documents.

Principle 2 The public has a qualified right of access to court dockets that can only be overcome in compelling circumstances.

The docket is the principal index of judicial proceedings. All the judicial business of the court should be noted on the docket. See Fed. R. Civ. P. 79(a). For each case, the individual docket should serve as a record of all activity and as an index of all documents, pleadings, appearances, the scheduling of hearings and trials, motions, orders, judgments, as well as miscellaneous items.

There is a presumption of public access to dockets. *See e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-94 (2nd Cir. 2004). Access to the docket is the primary means to determine if a particular case is being adjudicated or if a party is engaged in litigation. Access to individual case dockets is the primary means to monitor the course of any particular case. Access to the docket is also the primary means for the public (including the media, academics, and civic groups) to monitor the overall performance of the courts and the administration of justice. The effectiveness of particular laws or court rules is often measured by analysis of court dockets. Moreover, legislative decisions regarding the allocation of resources to the judicial branch of government are based in large part on statistical analysis of docket activity.

When permitted by law or statute, certain court documents may be sealed and certain proceedings may be closed to the public. However, it does not follow that corresponding dockets should be sealed, either in whole or in part. The existence of a case itself should never be kept secret, and whenever particular documents or proceedings are to be sealed, docket entries referencing that sealing should be made to give the public adequate notice.

On rare occasions, docket entries could reveal information that would jeopardize the privacy or confidentiality interests of parties involved. Statutes and court rules restrict public disclosure of particular types of information that might appear in docket entries, such as Social Security numbers or the names of minors. However, the restrictions imposed by such statutes and court rules do not justify the sealing of the docket itself.

Rare circumstances may justify the temporary redaction of particular information in docket entries to prevent the destruction of evidence or the loss of a remedy. When such redaction is required a judge should make appropriate findings of fact and conclusions of law in an order that should be noted on the docket and should expire by its own terms when the circumstances justifying the order have passed.

Many courts include narrative "minute entries" or summaries of proceedings directly on the docket when the proceeding generates no document. Clerks who compose such narrative entries should be careful not to include sensitive or confidential information explicitly restricted by statute, court rule, or order. A narrative entry that must be redacted or sealed should be composed as a separate document and placed in the case file, and an appropriate entry made on the docket.

Best Practices

1. The public should be given access to the docket except in the most compelling circumstances. Even if the merits of a case warrant issuance of a sealing order, the case must still be assigned a docket number and a docket index itself must be accessible to the public.

2. The identity of the judge to whom a case has been assigned should appear on the docket under all circumstances, as should the identity of counsel.

3. "Procedural" events should appear on the docket for public review. These include, for example, the nature of the case, the payment of the filing fee, and notations that motions have been made or affidavits filed.

4. There may be circumstances under which parts of individual docket entries should be sealed. If so, the existence of a sealing order based on findings of fact and conclusions of law should be reflected on the docket.

5. Care should be exercised to distinguish between situations in which a document or proceeding is sealed, and the extremely rare instances in which the corresponding docket entries should also be sealed.

Examples

1. A plaintiff seeks to file a trademark infringement action against a defendant and seeks an immediate *ex parte* seizure order. The plaintiff is aware that the defendant monitors the filing of suits against it. The plaintiff presents the complaint and the *ex parte* motion for a seizure order, arguing that if the defendant knows the existence of the litigation it will destroy or transfer the infringing products to an unknown location. Convinced that the standards for both the *ex parte* seizure order and a sealing order are met, the judge endorses the seizure order and dictates a temporary sealing order, reciting her findings of fact and conclusions of law. The complaint and orders are filed with the clerk, with instructions to assign the case a number and docket it with only the number, judge's name, entries for a complaint and seizure order under seal, and an entry for a temporary sealing order. The temporary sealing order is set to expire upon execution of the seizure order or after a reasonable period of time.

2. An infant plaintiff, by his guardian, commences a declaratory judgment action against an insurer that issued a homeowners' policy to the infant plaintiff's grandfather. The infant alleges that, while visiting his grandfather's home on various occasions, he was sexually assaulted by the grandfather. The infant seeks a declaration that the grandfather's acts fall within the policy coverage. The case is assigned a "John Doe" plaintiff name, in accordance with local practice regarding the identity of minors. The insurance company is named as defendant. The docket includes the names of counsel and of the judge and routine procedural entries. The complaint appears on the docket with the notation "Under Seal," followed by an entry for the sealing order. The sealing order, which is not itself under seal, states that the judge, after reviewing the complaint and hearing from counsel, finds that the allegations in the complaint involve a minor and include matters of a sensitive and private nature, which should be confidential and protected from public disclosure by the court and counsel, in the best interests of the child.

3. A plaintiff in a patent infringement action has moved for summary judgment against the defendant. As part of that motion, the plaintiff has submitted the affidavit of an expert economist containing financial information that is proprietary to the plaintiff and which, if made public, would have adverse competitive effects on the plaintiff. The motion for summary judgment is filed and the affidavit is filed separately under seal. Both filings are noted in the docket, including the name of the affiant expert.

Principle 3 There is a qualified right of access to judgments, judicial opinions and memoranda, and orders issued by a court that can only be overcome in compelling circumstances.

The public has a qualified right of access to judgments, judicial opinions and memoranda, and court orders. Public access to opinions and orders is essential to public understanding and monitoring of the judicial process. *See Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 663-64 (3d Cir. 1991); In re *Continental Illinois Securities Litigation*, 732 F.2d 1302 , 1308-09 (7th Cir. 1984). Access by the legal community to court opinions is essential to the development of the common law and *stare decisis*, which depends on the application of precedent as expressed in court orders, judgments, and the reasoning articulated in judicial opinions and memoranda. Absent a clear showing of a compelling interest that can only be protected by imposing confidentiality restrictions, access to judgments, judicial opinions and memoranda and court orders should not be restricted. If restrictions on access are found to be essential, those restrictions should be narrowly crafted so as to impose no greater restriction on public access than is necessary to protect the interest at stake.

Courts and attorneys must balance the need for access with the legitimate interests of the parties in privacy and confidentiality. Court documents should be written with the presumption of public access in mind, and with the understanding that *de facto* restrictions on access arising from the difficulties of retrieving physical files have been largely eliminated by technology. Consequently, judges and law clerks should not include unnecessary confidential information in filed documents. Attorneys who submit proposed orders for a judge's signature should also exercise similar editorial judgment.

When information restricted by a statute or court rule must be included in a document, or when courts are presented with confidential information that must be incorporated in rulings, an unredacted version should be filed under seal and made available to the attorneys and parties in the case. A redacted version should be filed for public access, with an explanation of the reason for the redactions. The sealing of an entire document, or the filing of a redacted document under circumstances not addressed by a statute or court rule, must be based on a finding by the judge, available in the public record, that the necessity for restricting public access to the document in question overcomes the presumption of public access to judicial decisions in that particular instance.

Best Practices

1. Judges should include in opinions and orders a full discussion of the facts relevant to their decisions, guided by the consideration that the purpose of opinions and orders is to provide to litigants, lawyers, the public, and appellate courts reasoned explanations for their decisions. Courts should avoid including information, the public disclosure of which may be harmful to a litigant or a third party. If there is a compelling reason to include such information in opinions or orders, courts should consider redacting or sealing the information the disclosure of which would be harmful to a litigant or third party.

2. When a court includes information restricted by statute, court rule, or an existing sealing order in an opinion or order, the court should issue both a redacted document, as to which there will be public access, and an unredacted document that will be filed under seal.

3. If an opinion, memorandum, order, or judgment is to be sealed in part or in whole, the judge should

set forth findings of fact and conclusions of law that will be available for public access, including a discussion of the right deemed to be threatened by public access to the full opinion, the lesser restrictive alternatives to sealing the court considered, and why these were rejected.

4. The court should review its decision to seal an opinion, memorandum, or order, upon request by the parties or a third party intervenor, or upon the occurrence of changed circumstances. The sealing order should be vacated if and when the grounds justifying the sealing order no longer exist.

Examples

1. A business entity commences an action against a competitor for the theft of information utilized by the plaintiff in a manufacturing process. The plaintiff's manufacturing process is proprietary and is a closely guarded secret. For the purpose of ruling on a motion for summary judgment, the judge must compare both parties' manufacturing processes in an opinion. The judge files a brief summary judgment order for public access, together with a finding that the manufacturing process constitutes a legally protected trade secret and that public access to the accompanying opinion would compromise the plaintiff's legal interest. The opinion is filed under seal.

2. Same facts as Example 1 above. The theft is alleged to have been committed by a former employee of the plaintiff who became employed by the defendant, and the defendant has not yet established its own manufacturing process. The relief sought by plaintiff is solely injunctive in nature. The judge, ruling on a motion for a preliminary injunction, addresses whether the former employee had access to the plaintiff's information and the likelihood of the plaintiff's success on the merits of the case, but carefully avoids describing the information in detail in the opinion and order.

3. Same facts as Example 1 above. The opinion issued by the judge totals thirty pages addressing a number of facts and legal issues, and the detailed comparison of the parties' manufacturing processes appears on only three pages. A sealing order covering all information about the manufacturing process, based on findings of fact and conclusions of law, is already in place in the case. The judge files the full opinion under seal and a redacted opinion, referencing the existing protective order, for public access.

4. An insurance broker brings an action against an insurer, alleging that she is owed commissions on the sale of the insurer's products, and that other brokers were paid at a higher rate than she was. During discovery, the parties stipulate to a protective order for the production of records of commissions paid by the defendant to other brokers. Both parties move for summary judgment and include in their papers the records of commissions paid to other brokers. In ruling on the motions, the judge does not treat the commission information as confidential, as the protective order applied only to non-filed discovery materials and no showing has been made to justify sealing.

Principle 4 Notice of motions to seal and supporting materials should be reflected in the publicly accessible docket.

The public has a qualified right of access to all papers, including briefs, submitted in support of and in opposition to motions filed with the court that address non-discovery matters. Consequently, motions to seal documents should be rare and made only when there is no feasible alternative. However, in some circumstances, papers filed with the court may contain information that implicates legitimate privacy or confidentiality interests, or otherwise warrants redaction or sealing, and may be proper subjects for a sealing order before filing. In the absence of court rules or orders specifying procedures for the filing of materials under seal, the parties themselves should agree to a procedure under which a party intending to publicly file papers or information which has been subject to a sealing or protective order, or intending to file under seal any new material, informs the other party in a timely manner of that intent, thus allowing the other party opportunity to object, consent, or confer on the appropriate confidentiality status of the material. A court is not required to give particularized notice to any specific constituency when deciding a motion to seal. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir. 1990).

Best Practices

1. As stated under Principle 1, attorneys should take reasonable steps to minimize the use of confidential information in motions, proposed orders, or briefs, so as to minimize the need to redact or seal such documents. The inclusion of attachments, such as discovery material produced under a protective order, should likewise be minimized, and when necessary, should be presented in such a manner as to facilitate the temporary filing of only the protected attachments, and not the whole document, pending resolution of a motion to seal.

2. Attorneys who intend to submit a motion discussing or attaching material designated by another as confidential or subject to seal should inform the designating party of their intent to file the material and ask the designating party to promptly respond and confirm whether that party continues to contend that the material merits confidentiality.

3. For cases in which the parties are unable to agree upon what, if any, information should be included in any public filing, and in all cases in which new pleadings, substantive motions, and accompanying materials are submitted with the intention of being filed under seal, the court should permit (by way of local rule, standing order, or in a protective order under Rule 26(c)) a party to temporarily file the material with the court under seal, thereby providing notice to all parties of the intended action without compromising the purported private or confidential nature of the material itself, pending a prompt ruling on confidentiality.

Examples

1. A plaintiff intends to file a motion for summary judgment in fourteen days, which will include documents obtained from the defendant through discovery and designated by the defendant as confidential under a stipulated protective order. The plaintiff may inform the defendant of its intention to include specified documents in an upcoming filing and request that the defendant file a motion to seal the material in advance of the filing date. If the defendant files the motion to seal, the plaintiff temporarily files its summary judgment motion and the accompanying documents with the court, pending a decision on the defendant's motion to seal. If the defendant does not move to seal in advance of the filing, the plaintiff still temporarily files its summary judgment motion and the accompanying documents but also files a motion seeking a court order that the summary judgment motion be filed publicly and that defendant's confidentiality designation be removed. If the defendant does not respond or object, defendant will be deemed to have waived the confidential designation, the designation will be removed, and the summary judgment motion with the supporting documents will be publicly filed.

2. The same facts as above, except that the plaintiff agrees that the documents merit sealing. The plaintiff drafts its summary judgment motion, brief, and supporting declarations, limiting its use of confidential material and reference to confidential facts. It temporarily files its motion and accompanying materials with the court along with a motion to seal, and submits a redacted copy of the summary judgment motion and brief intended for public filing. The court reviews the documents proposed to be sealed and the documents proposed to be redacted, and rules upon the motion to seal.

Principle 5 Non-parties may seek leave to intervene in a pending case to oppose a motion to seal, to have an existing sealing order modified or vacated, or to obtain a sealing order.

Courts have recognized that the members of the public have standing, and grounds to intervene, to obtain access to documents filed with a court under seal. So too, non-parties who have an interest in privacy and confidentiality of materials filed with the court and available to the public also have standing to independently seek to seal such materials. When the parties agree to secrecy or limitations on disclosure based upon interests that may be narrower than those of non-party intervenors, the court is not likely to have the benefit of the adversary process in making its decision. In such circumstances, courts have the discretion to grant non-parties permission to intervene for the purpose of opposing a pending motion to seal, or moving to have an existing sealing order modified or vacated. *Cf. Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). The proposed intervenor should demonstrate good cause for the intervention and that it has moved to intervene without undue delay.

The court issuing a sealing order retains jurisdiction to entertain motions to modify or vacate the order after a case is closed. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004) (court retains jurisdiction over its own records, and may modify or vacate a sealing order after a case is closed.).

Appellate review exists for a trial court order addressing a motion to intervene and to modify or vacate a sealing order, although federal courts are split as to whether the proper "vehicle" is a *mandamus* petition or an appeal under 28 U.S.C. § 1291. *See Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 574 n.4 (4th Cir. 2004); *United States v. McVeigh*, 119 F.3d 806, 809-810 (10th Cir. 1997); *Bank of America Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 341 n.2 (3d Cir. 1986). Whatever the vehicle, "all circuits that have considered the issue have found appellate jurisdiction ... under one doctrine or the other." *McVeigh*, 119 F.3d at 810.

Best Practices

1. The entry of a motion to seal on the docket reasonably in advance of a hearing or decision provides adequate public notice that the court may seal party filed documents,

2. Interested persons who make an appropriate showing under Fed. R. Civ. P. 24(b) should be permitted to intervene to oppose, seek modification of, or seek vacatur of a sealing order.

3. Orders regarding motions to intervene and motions to modify or vacate sealing orders should be subject to immediate appellate review under the collateral order doctrine or any other appropriate procedural mechanism.

Examples

1. Company A wishes to file a motion for summary judgment including financial materials it obtained through discovery pursuant to a protective order. Company A files a motion to seal in advance of or concurrently with its motion for summary judgment. The allegedly confidential material is temporarily filed under seal with the court pending a decision on the motion to seal. The motion to seal and the temporary filing under seal of the financial materials appear on the court docket. The local newspaper, which has been reporting on the case, moves to intervene to oppose Company A's motion to seal. The motion to intervene should be granted.

2. Same facts as in Example 1, and Company A obtains the order sealing material in connection with its summary judgment motion. Several months later a litigant in another action involving Company A discovers the sealing order and believes that the subject financial materials are relevant to the new action. The litigant's attorney moves to intervene and unseal the records. The court grants the motion to intervene. Subsequently, the court may, in its discretion, grant or deny the collateral litigant access to the sealed materials.

Chapter 2
Selected Bibliography

Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004) (addresses common law right of access to docket sheets).

In re *Application of Dow Jones & Co., Inc.*, 842 F 2d 603 (2d Cir), *cert. denied, sub nom.* Dow Jones ? Co. v. Simon, 488 U.S. 948 (1988) (entry of a protective order may give rise to redressable injury).

North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (analyzes media claim of access to "special interest" deportation proceedings under "experience and logic" test of *Richmond Newspapers*, 448 U.S. 555 (1980), and denies access; notes that some courts of appeals have extended First Amendment right to civil trials).

Virginia Dept. of State Police v. Washington Post, 386 F.3d 567 (4th Cir. 2004) (discusses distinction between First Amendment and common law rights of access and between summary judgment and discovery materials for purposes of access; discusses criminal investigation as compelling interest).

In re *Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (extends common law right of access to documents submitted with regard to proceedings that fall within that right; reminds district courts to follow "procedural requirements" set out in earlier circuit decision).

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (conducts same analysis as *North Jersey Media Group*, cited above; reaches opposite conclusion).

Webster Grove School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8th Cir. 1990) (upholds limitation on access to civil proceeding involving juveniles; does not decide whether First Amendment right of access extends to civil proceedings, but applies common law standards; holds that procedural information on docket should not have been sealed).

Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001) (discusses right of access to sealed materials under First Amendment, common law and Rule 26(c); distinguishes between discovery motions and "merits" motions for purposes of access).

United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) (affirms authority of district court to seal bench conference and articulate reasons later to satisfy a compelling interest; holds "dual-docketing system" unconstitutional).

Rule 5(d), Federal Rules of Civil Procedure (discovery materials not to be filed until "used in the proceeding" or until the court orders filing).

Rule 79, Federal Rules of Civil Procedure (requires maintenance of "civil docket" and chronological listing of entries thereon).

Rule 412(c), Federal Rules of Evidence (provides for sealing of documents and *in camera* hearing on requests to use sexual conduct evidence).

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A full bibliography, updated periodically, may be found on The Sedona Conference® web site at www.thesedonaconference.org starting in July 2007.

Chapter 3. Proceedings in Open Court

Principle 1 The public has a qualified right of access to trials that can only be overcome in compelling circumstances.

Public access to trials[4] on the merits reflects a long tradition in the United States. Trials have long been considered open to the public. Public access to trials is essential to the monitoring and oversight of the judicial process. Public access also allows the public to share the "communal" experience of the trial. Constitutional and common law rights of access compel the conclusion that trials are at the heart of the right of public access both for historical reasons and to vindicate concerns for the legitimacy and accountability of the judicial system.

Legitimate interests exist that may justify narrow restrictions on public access to trials. For example, governmental interests exist in protecting certain types of information, such as those pertaining to classified national security information, undercover operations, and confidential informants. Privacy interests, such as those related to juveniles and to sensitive medical information, may justify limited trial closure in some contexts. Property interests also exist which may warrant restrictions, such as those related to trade secrets. Moreover, the judicial system itself may, as an institution, require a limited restriction on immediate public access for purposes of, for example, "sidebar" conferences.

The United States Supreme Court has established a right of public access to criminal trials derived from the First Amendment. The Court has also established standards that govern any restriction of public access to criminal trials. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982). Similar considerations apply to civil trials. A party seeking to restrict public access to a civil trial should demonstrate a substantial likelihood that a compelling interest will be prejudiced by allowing public access and that no alternative other than closure can adequately protect the threatened interest. Any restriction on public access ordered by the court should be narrowly tailored. The trial court should also make findings of fact and conclusions of law adequate to justify the closure.

Best Practices

1. Closure of a civil trial on the merits is extraordinary and should be permitted only in rare circumstances where compelling interests leave no alternative.

2. Any closure must be no broader than absolutely necessary, and should be strictly limited to that portion of the trial that requires closure.

3. Alternatives to complete closure should be employed whenever possible. For example, counsel and witnesses may be directed to avoid references to particular facts or subjects (if such a direction will not deprive a party of the right to a fair trial) or, if a witness has a legitimate privacy interest justifying protection of his or her identity, testimony may be taken anonymously.

4. If closure is necessary, the court should consider providing access through other means (such as providing the public with a prompt transcript) if this can be done without compromising the compelling interest that required closure.

[4] As used herein, "trials" encompasses jury and nonjury trials as well as any judicial proceeding in court or on the record, except those conducted *in camera*.

5. Courts should require parties who contend that closure of a portion of a trial will be necessary to raise the issue through a written motion in advance of trial, to allow the court ample time for consideration, and to permit the full exploration of alternatives to closure (such as orders precluding references to certain matters and/or providing for substitutes for evidence that implicates confidentiality concerns). Such a closure motion should be heard at a hearing duly noticed and open to the public. The hearing on the motion should be recorded or transcribed.

6. Any order of closure should be based on a complete statement of the reasons for closure and of the findings of fact that support the closure order in sufficient detail to allow appellate review. The order should include express findings identifying the compelling interest that requires closure and the reasons why less restrictive alternatives are insufficient.

7. If the interest that led to closure loses its compelling importance with the passage of time, the transcript of the closed portion of the trial should be made available to the public.

8. The need to hold certain brief discussions during the course of a trial outside the hearing of the jury under circumstances where it is impractical to excuse the jury from the courtroom justifies the use of "sidebar" conferences that are inaudible to the jury and the public. Because such conferences involve the discussion and resolution of procedural and substantive issues integral to the conduct of the trial, however, these should remain subject to the right of public access and, absent compelling justification, transcripts of such proceedings should be promptly made available to the public (subject to whatever protections are necessary to keep matters from coming to the attention of the jury).

9. Conferences in chambers are occasionally used to address issues that arise in the course of a trial. Because it is not practical to admit the public to in-chambers conferences, the use of such conferences to address the merits of procedural and substantive issues (as opposed to, for example, scheduling matters or other routine discussions of no genuine public interest) should be avoided unless there are compelling circumstances that justify exclusion of the public (for example, where the subject under discussion involves a jury issue that implicates protected privacy rights of a juror). If procedural or substantive issues are discussed in chambers, the proceedings should be recorded and transcripts promptly made available to the public (unless, again, compelling circumstances justify confidentiality).

10. In-chambers proceedings should never be used to prevent public access to trial proceedings that could not be closed to the public if they took place in a courtroom.

11. Any closed trial proceedings must be transcribed or recorded in the same manner as open proceedings, so that access may be provided if the closure order is later reversed, or if the interests that require closure are later waived or no longer require protection.

Examples

1. On the first day of trial, the attorney for the plaintiff makes an oral application to the court to seal the trial, contending that his client might be embarrassed by public disclosure of "private facts." No notice of this motion appears on the public docket. The attorney presents no facts to support the likelihood, nature, or extent of the damage his client would suffer by the public disclosure of the "private facts," and the attorney does not present any reasons why a less restrictive alternative to sealing the trial would not satisfy the concern (for instance, sealing only particular testimony or evidence). Based on these deficiencies, the court denies the application.

2. Consistent with the local rules of the court, a plaintiff files a motion to seal expert testimony that will be offered by both parties in a patent infringement trial. The experts will testify on the damages sought by the plaintiff, and their testimony will be premised on financial data held confidential by the plaintiff. The plaintiff submits an affidavit with its motion, which explains the nature of the data and why it is confidential. The affidavit also explains the competitive harm that will be visited on the plaintiff if the data becomes public. The court hears the motion, makes findings of fact and conclusions of law, and holds that specified portions of the experts' testimony revealing the financial data will be sealed. The court's ruling is filed for public review.

Principle 2 The public has a qualified right of access to the jury selection process.

Public access to the jury selection process promotes fairness by allowing the public to verify the impartiality of jurors, who are key participants in the administration of justice. Moreover, public access enhances public confidence in the outcome of a trial because public access assures those who are not attending that others may observe the trial. Public access also vindicates the societal concern that wrongdoers are brought to justice by individuals who are fairly selected to be jurors. Consistent with these interests, courts should not conceal from the public information that might bear on the ability of jurors to decide the matter before them impartially. Public access fosters discussion of government affairs by protecting the full and free flow of information to the public.

There may be circumstances in which some restriction to public access is necessary to ensure the safety or well-being of individual jurors, or to address personal privacy concerns.[5] In certain civil cases, courts may order that access to juror identities be limited or deferred to protect the safety of jurors, or to ensure their verdict is a product of the evidence admitted at trial rather than outside interference. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *In re Globe Newspaper*, 920 F.2d at 94; *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988); *Sullivan v. National Football League*, 839 F. Supp. 6 (D. Mass. 1993).

Various interests are cited in opposition to public access to the juror selection process. These interests include juror privacy, ensuring that an adequate number of persons are willing to serve as jurors, protection of the integrity of the jury system and avoiding a circus-like atmosphere. But the difficulty in attracting qualified jurors, or the fact that a trial may be the subject of intense media coverage, are insufficient reasons to deny public access to the jury selection process. These reasons would render the right of access meaningless— the very demand for openness would defeat its availability. Thus, personal preferences of jurors, a judge's unwillingness to expose jurors to press interviews, or a judge's concern that jurors may disclose what transpired during deliberations do not, by themselves, warrant anonymous juries or restrictions on public access.

The qualified right of public access to the jury selection process does not extend to the deliberations of jurors, which traditionally occur in secret. In the case of jury deliberations, that secrecy is reinforced by substantive evidentiary rules that prevent jury verdicts from being impeached by testimony concerning the jury's internal deliberations in most instances.

However, in cases in which the conduct (or misconduct) of the jury itself becomes an issue that is the subject of testimony and/or other proceedings before a court, such proceedings, like other trial proceedings, are subject to the right of public access and should remain confidential only if compelling reasons (such as legitimate interests in juror privacy or in protecting a criminal investigation) justify confidentiality. Concealing a juror's misconduct is not by itself a legitimate privacy concern. While a court may take steps to prevent remaining jurors from being tainted by such proceedings, that is not in itself a reason for denying public access; rather, the steps to be taken should be similar to those used by the court to prevent jurors from having access to other possibly prejudicial information about a case (*i.e.*, instructions to avoid news coverage or, in some cases, sequestration). *See United States v. Edwards*, 823 F. 2d 111 (5th Cir. 1987).

[5] Proposed Fed. R. Civ. P. 5.2 would mandate that certain personal identifiers be redacted from documents filed with the United States Courts. Neither the text of the proposed rule nor the Advisory Committee Notes explicitly address documents created or filed by the courts themselves, such as juror information. While redaction of personal identifiers from juror information may be considered consistent with the overall intent of the proposed rule, redaction of such information by court personnel is inconsistent with the intent of the Advisory Committee to place such duties on litigants and counsel.

Courts may limit an attorney's or party litigant's ability to interview jurors regarding their verdict or deliberations, or may require a showing of good cause before allowing such post-verdict interviews. Such orders do not themselves implicate the public's right of access to any public information, but only limit the behavior of lawyers and litigants. However, courts ordinarily should not limit the public's ability to interview jurors after the conclusion of a trial. *Compare* In re *Baltimore Sun Co.*, 841 F.2d at 75-76; *State v. Neulander*, 801 A.2d 255 (N.J. 2002), *and* In re *Express News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982); *United States v. Antar*, 38 F.3d 1348, 1364 (3rd Cir. 1994).

Best Practices

1. Empanelling an anonymous jury or closing jury *voir dire* ("jury secrecy" procedures) are extraordinary and should be undertaken only in rare circumstances where exceptionally important interests leave a trial court with no practical alternative. Although such circumstances have sometimes been found to exist in criminal cases (especially ones involving organized crime), it would be extremely rare for such circumstances to be present in a civil case. If initial questioning of jurors is conducted through written questionnaires, these should be available to the public.

2. Before answering oral or written questions from the court or the parties, potential jurors should be informed about whether and how the court will protect the confidentiality of any information provided. Such procedures help alleviate concerns that the government will compel them to disclose personal or confidential information without adequate privacy protections and thereby ensure that sufficient numbers of citizens will agree to serve and will not avoid service because of privacy concerns.

3. Any jury secrecy order should be no broader than absolutely necessary, should be strictly limited to highly personal juror information that requires protection, and should be entered only on the affirmative request of an individual juror. Alternatives to jury secrecy should be employed whenever possible.

4. If jury secrecy is necessary, a trial court should provide access through other means (*i.e.*, a transcript) if this could be done without compromising the overriding interest that required secrecy in the first place.

5. If the interest that led to jury secrecy loses its overriding importance with the passage of time, a transcript of the closed portion of the jury proceeding or the names of anonymous jurors could be made available to the public upon application to the court by an interested party. Stronger reasons to withhold juror names and addresses (such as jury tampering) normally arise during trial rather than after a verdict is rendered.

6 Trial courts should require parties who anticipate that jury secrecy may be necessary to raise the issue through written motions, to allow a trial court ample time for consideration and to permit the full exploration of alternatives to secrecy (such as change of venue). Such motions should be heard at a hearing duly noticed and open to the public.

7. Courts should freely allow nonparties who oppose jury secrecy to submit papers and make arguments addressing any secrecy motion. Intervention should be liberally granted for this purpose.

8. Any order of jury secrecy should be based on findings of fact that support the secrecy order, including express findings identifying the compelling interests that require secrecy and the reasons why less restrictive alternatives are insufficient.

9. Jury secrecy orders, while appearing to be interlocutory in nature, should be appealable by mandamus or under the collateral order doctrine.

10. Any closed jury proceeding should be recorded and transcribed, so that access may be provided if the secrecy order is later reversed, or if the interests that require secrecy are later waived or no longer require protection.

Examples

1. In a civil action brought by a government agency against a well-known entertainer, the defendant approaches the court on the first day of trial and requests that the *voir dire* be sealed. The defendant's argument is that juror candor in answering questions will be compromised by the attendance of the press. In deciding the motion, the court considers if adequate public notice was given that the request would be made. Second, the court considers the proposition that candor might be compromised, noting that the application is solely premised on the defendant's celebrity status and press coverage. In the absence of a showing of facts supporting the proposition, the court denies the motion.

2. During the jury selection process in a civil action arising out of the sexual abuse of minors, the court advises the prospective jurors that they will be asked during *voir dire* if they ever experienced or witnessed sexual abuse. Given the nature of such questions and the (presumably) private nature of "yes" answers, the court gives jurors an opportunity to answer at sidebar in the presence of counsel. The sidebar conferences are transcribed. Two jurors state that parents or other relatives sexually abused them. One of these jurors testified about the abuse at a criminal trial. The other never reported the abuse. The judge releases the transcript of the *voir dire* of the first prospective juror but, after determining that the second juror would suffer psychological harm if the abuse became public, seals the transcript as to her. The judge puts findings of fact and conclusions of law on the record to justify the sealing.

Principle 3 Absent a compelling interest, the public should have access to trial exhibits.

The right of public access to trial proceedings includes the right of public access to evidence admitted during a trial, including the testimony that is memorialized in the transcript. *See Nixon v. Warner Communications,* 435 U.S. 589, 609 (1978). Admitted evidence should be fully available to the public on a contemporaneous basis, and the standard for sealing evidence should be the same as that for closing a courtroom: That is, only compelling interests may justify sealing, and any order denying access must be based on findings of fact and conclusions of law demonstrating such an interest.[6]

It must be recognized, however, that logistical problems may foreclose contemporaneous access to trial exhibits in particular cases. This may simply be a question of practicality. *See e.g,* In re *Application of National Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980). In such circumstances, the court, the parties, and the person seeking access should confer in an attempt to arrive at a procedure acceptable to all. When circumstances warrant, the public interest may be satisfied by providing access to the trial proceedings when the exhibit is admitted, rather than access to the exhibit itself. When access is sought to evidence introduced through means of novel technology such as computer generated or enhanced imagery, the court may be vested with wider discretion in deciding whether and how access may be allowed. *See* In re *Providence Journal Co.*, 293 F.3d l (1st Cir. 2002). Moreover, public access to trial exhibits is inhibited by a prevailing practice in most American trial courts to return trial exhibits to the parties after the time for filing an appeal has expired, or an appeal has been taken and resolved. Because the physical exhibits are not maintained as public records, these are no longer subject to enforceable public access rights. *See Littlejohn v. Bic Corp.*, 851 F.2d 683 (3rd Cir. 1988).

Best Practices

1. Courts should reasonably and promptly accommodate requests for access to exhibits admitted at trial and not under seal.

2. Providing access to trial evidence so that copies, recordings and/or photographs can be made of the evidence should be routine. Access should be denied only in rare circumstances where compelling interests leave the court with no practical alternative. Any denial of access to trial exhibits should be no broader than absolutely necessary and should be strictly limited to evidence that requires protection. Alternatives to denial of access should be employed whenever possible.

3. A party that intends to request that the court seal evidence it expects to be admitted at trial should make its request by written motion before trial. The court should hear and decide motions to seal admitted trial exhibits after other parties have had time to oppose the request, or non-parties have had time to request leave to intervene to oppose the request. Absent the most exigent circumstances, trial courts should deny any request for denial of access that is not made in time to allow such notice.

4. The hearing on the motion should be recorded.

[6] The Working Group reached no consensus on a right of public access to excluded evidence. On the one hand, such evidence, by its very exclusion, has been deemed by the judge to be irrelevant to the jury function. On the other hand, access to excluded evidence may allow the evaluation of the judge's role as "gatekeeper" and the overall fairness of the trial. In addition, evidence marked during trial becomes part of the record on appeal, even if excluded, indicating that appellate courts consider excluded evidence to be part of the adjudicative process.

5. If denial of access is necessary, a trial court should consider providing access through other means (i.e., providing access at the conclusion of the trial) if this can be done without compromising the overriding interest that required denial of access. If the interest that led to denial of access loses its overriding importance with the passage of time, access to trial evidence should be granted at the earliest possible time.

6. Any order denying access to evidence should be based on a complete statement of the reasons for denial and of the findings of fact that support the order denying access, including express findings identifying the compelling interests that require denial of access and the reasons why less restrictive alternatives are insufficient.

Examples

1. A plaintiff receives documents in discovery from the defendant in a product liability case. Prior to trial, the documents are marked confidential pursuant to a protective order entered in the case, and the plaintiff is prohibited from disseminating them publicly. Plaintiff identifies the documents on an exhibit list exchanged before trial, and during the trial these are marked and admitted in evidence. At no time does the defendant move to have the trial exhibit sealed. The exhibits are available to the public.

2. Same facts as above, except that the trial has ended and the exhibits have been returned to the parties who introduced the exhibits, and the press seeks to obtain copies of the admitted exhibits from the plaintiff. Although the protective order once protected the documents from disclosure, the plaintiffs' attorney provides the exhibits to the press because they were admitted in open court. The defendant learns of the press's request and seeks to enforce the protective order to bar the plaintiff from providing the exhibits to the press. The court rejects the defendant's effort to invoke the protective order because the documents, having been received in evidence in open court, are no longer properly subject to protection.

3. A plaintiff receives documents in discovery from the defendant in a product liability case. The documents are marked "confidential" pursuant to a protective order entered in the case and the plaintiff is prohibited from disseminating them publicly. Plaintiff identifies the documents on an exhibit list exchanged before trial and the defendant requests that the documents only be admitted under seal. The defendant moves before trial to seal the exhibits on the basis that the exhibits contain proprietary information and trade secrets. The court holds a hearing and grants the motion, protecting genuinely proprietary information from disclosure. The court admits exhibits for which no compelling need for protection has been established.

Chapter 3
Selected Bibliography

In re *Providence Journal Co.*, 293 F.3d 1 (1st Cir. 2002) (right of access to attend criminal trial and pretrial proceedings extends to "documents and kindred materials;" defendants' right to fair trial constitutes compelling interest sufficient to allow restriction of access; common law, but not First Amendment, right of access held to encompass duplication of evidence, but where "cutting-edge technology" in issue, trial court given discretion to accommodate access).

ABC, Inc. v. Stewart , 360 F. 3d 90 (2d Cir. 2004) (vacating in part order closing *voir dire* examination of potential jurors; recognizes that after-the-fact release of transcript no substitute for presence; trial court failed to demonstrate interest in assuring juror candor sufficient to seal and failed to use available alternatives to sealing).

Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (First Amendment and common law rights of access extended to civil proceedings).

In re *Application of National Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (common law right of access to inspect and copy judicial records extends to evidence introduced at trial, whether documentary or of other nature, under reasonable procedures to be determined by the court).

United States v. Antar, 38 F.3d 1348 (3d Cir. 1994) (presumptive right of access applies to voir dire of examination of potential jurors; concludes that trial court erred in sealing transcript without adequate notice and findings of fact; modifies trial court restrictions on post verdict interviews of jurors by press).

United States v. Simone, 14 F.3d 833 (3d Cir. 1994) (presumptive right of access applies to post verdict examination of jurors into possible misconduct; strikes down closure of examination given failure of trial court to articulate "overriding interest;" after-the-fact receipt of transcripts not equivalent to actual presence).

Little John v. BIC Corp., 851 F.2d 673 (3d Cir. 1988) (common law presumption of access applies to documents initially produced in discovery pursuant to protective order and later admitted into evidence at trial, but exhibits returned to party after trial are no longer judicial records and disclosure cannot be compelled).

In re *Perrigo Co.*, 128 F.3d 430 (6th Cir. 1997) (injunction prohibiting magazine from publishing materials filed under seal violated First Amendment; umbrella protective order pursuant to which documents filed under seal without good cause determination invalid).

United States v. McDougal, 103 F.3d 651 (8th Cir. 1996) (affirms refusal to allow media access to videotaped depositions of President Clinton, although introduced at criminal trial and transcript released; concludes that, under circumstances presented, videotape itself not a "judicial record;" rejects "strong" presumption of access recognized by other circuits and defers to sound discretion of trial court).

United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (First Amendment right of access does not extend to suppressed evidence or evidence inadmissible at trial).

Goff v. Graves, 362 F.3d 543 (8th Cir. 2004) (affirms sealing of depositions of confidential prison informants in Section 1983 action; preservation of institutional security and protecting against retaliation are compelling interests to issue protective order and to seal portion of record).

28 C.F.R. Sec. 509 (sets out U.S. Department of Justice policy with regard to open judicial proceedings, civil and criminal).

A full bibliography, updated periodically, may be found on The Sedona Conference web site at www.thesedonaconference.org starting in July 2007.

Chapter 4. Settlements

Principle 1 There is no presumption in favor of public access to unfiled settlements, but the parties' ability to seal settlement information filed with the court may be restricted, due to the presumptively public nature of court filings in civil litigation.

A dichotomy currently exists between open courts and private alternative dispute resolution such as arbitration and mediation. In many cases, parties may be willing or able to waive litigation in favor of such private dispute resolution, where the confidentiality of both the process and its outcome can be contractually assured. Similarly, litigants possess broad discretion to contract privately for confidentiality as a condition to settling even litigated disputes. In such cases, confidentiality, like other settlement terms, becomes a matter of private agreement to be enforced pursuant to applicable contract law.

There is a strong public policy in favor of settlement. Confidentiality of settlement terms is generally believed to encourage such settlements, and in the majority of cases, the parties need not make their settlement public by filing it with the court. Courts will generally enforce private confidentiality agreements so long as they merely restrict the voluntary disclosure of information and do not prohibit disclosures required by law or court order. Because the agreements can be reached without any judicial involvement, and the settlement itself is rarely filed with the court, these confidential settlements do not implicate any right of public access. *See Gambale v. Deutsche Bank AG,* 377 F.3d 133, 143 (2d Cir. 2004); *Herrnretier v. Chicago Housing Authority,* 281 F.3d 634, 636-37 (7th Cir. 2002); *Pansy v. Borough of Stroudsberg,* 23 F.3d 772, 781, 788-89 (3d Cir. 1994); Laurie K. Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. Rev. 791, 799-800 (2004).

In many cases, however, a confidential alternative to litigation may not be available to disputing parties. Likewise, settling parties may not wish to rely solely upon private agreement to ensure confidentiality and may choose instead to more deeply involve the court in their confidential compromise. *See* Laurie K. Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements,* 55 S.C. L. Rev. 791, 801-04 (2004). In utilizing a public court to resolve their dispute or enforce its confidential settlement, the litigants invoke the jurisdiction of a forum that is subject to public oversight and monitoring. As such, confidentiality may no longer be a matter within the exclusive control of the parties. Confidentiality agreements between the parties regarding settlement do not bind the court, and if the parties wish to file their settlement agreement under seal, the court must exercise independent judgment and comply with applicable legislative and judicial standards[7] before issuing any sealing order incident to a settlement. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139-42 (2d Cir. 2004).

Although contract doctrine in some jurisdictions may invalidate confidentiality clauses that are illegal, unconscionable, or contrary to public policy, a strong and well-established public policy favors alternative dispute resolution (ADR) and the private settlement of disputes. Thus, notwithstanding the potential public interest in the resolution of disputes involving statutory or public rights (*i.e.*, consumer or employee claims) or public health and safety, little public oversight of confidentiality in alternative dispute resolution or private settlement currently exists. Attorneys should thus ensure that their clients are fully aware of all available public and private dispute resolution processes and advised that confidentiality cannot be expected or assured in a public forum.

[7] See Chapter 4, Principle 2 below.

Best Practices

1. At or before the commencement of litigation, attorneys should confer with their clients to determine whether private dispute resolution is available and would be preferable to traditional litigation in the courts. Among other things, attorneys should present these options to clients in the context of the clients' needs or desires to maintain confidentiality.

2. Attorney should discuss with clients that certain disputes present "classic" matters for private resolution, such as breach of a commercial contract between business entities. In contrast, other disputes, such as those brought by individual consumers or employees to vindicate statutory rights or involving public entities or officials, may not be appropriate for private dispute resolution given the public interest in their resolution.

3. In discussing the above options with clients, attorneys should also discuss the available mechanisms for enforcement of any breach of confidentiality by adversaries.

Examples

1. Two parties to a commercial agreement include in that agreement a provision for mandatory arbitration or mediation. The agreement provides for a sale of goods by one party to the other. No public health or safety concerns are implicated. Under these circumstances, there is no need for public oversight of the dispute resolution process and the parties may ensure confidentiality through contract. Enforcement of any settlement would be through contract law principles.

2. An individual receives telecommunications services from a large business entity. The consumer, under the terms of a standard agreement that was mailed to him, is required to arbitrate any future dispute that he has with the business entity. Under the terms of a confidentiality provision in the arbitration agreement, no public access is available to the facts or nature of the dispute, the arbitration proceedings, the terms of any award or settlement, or the services rendered by the arbitrator in this particular case. This dispute, which may implicate the rights of similarly situated consumers, involves statutory claims that have both remedial and deterrent objectives and that arguably implicate a public interest broader than the immediate parties. The confidentiality of this alternative forum raises policy concerns absent from example 1 and not addressed by the Working Group.

3. A business entity intends to commence an antitrust action against a competitor. Rather than proceed to litigation, the parties agree to arbitrate or mediate. A settlement is reached under which the competitors agree to divide markets on a geographic basis, in violation of antitrust laws. A startup company formed by former employees with knowledge of the confidential settlement agreement files suit, alleging that the settlement violates antitrust laws. The settling parties should not have any expectation that the confidentiality of the settlement will be maintained, inasmuch as the legality of the settlement itself has been questioned and is relevant to the action.

Principle 2 Settlements filed with the court should not be sealed unless the court makes a particularized finding that sufficient cause exists to overcome the presumption of public access to judicial records.

Parties that resort to a public forum and that enter into a settlement thereafter may have legitimate interests that warrant confidentiality. However, given the public right of access to public forums, sealed settlements should be the exception and not the norm. Courts should assure that settlements that are filed with the court are not sealed unless good cause exists; and unless specific findings of fact and conclusions of law are made and are available for public review. Attorneys who choose to file a settlement with the court should not seek to seal that settlement unless they are satisfied that such a showing can be made.

Courts are public forums. As discussed in Chapter 2, there is a presumption of access to courts and to information filed with courts, including settlement agreements. Thus, information considered to be confidential by parties and filed with courts may, by the act of filing, become public records subject to public access. *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002); *Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.3d 339 (3d Cir. 1986). This presumption of public access, however, is arguably weaker (and thus more easily rebutted) for "settlement facts" that relate to the specific terms, amounts, and conditions of a settlement involving non-governmental, private litigants than the presumption that attaches to information more central to the adjudicatory function of courts. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143-44 (2d Cir. 2004) (distinguishing between settlement amount and summary judgment documents). In considering whether to seal a settlement, then, a court might appropriately distinguish between settlement information that would not exist but for the settlement and "adjudicative" facts that may be relevant to the underlying merits of the settled controversy.

Parties may have legitimate interests in the confidentiality of all or part of a settlement. Parties may also have justifiably relied on a promise of confidentiality in entering into a settlement. At the same time, however, a sealed settlement may affect the interests of the general public and collateral litigants. To overcome the presumption of public access, then, parties must establish sufficient cause and satisfy applicable tests established by legislatures and courts to govern the sealing of a settlement, in whole or in part. In addition, the judge should make specific findings of fact and conclusions of law on any application to seal a settlement to determine whether the presumption of public access has been overcome.

Despite resort to a public forum, the parties may elect to avoid any question of access to the terms of a settlement by choosing not to file it. For example, parties may enter into a settlement agreement and then file a voluntary dismissal under Fed. R. Civ. P. 41(a)(1). Such a dismissal requires no judicial action and the settlement agreement would not be submitted to the court. Alternatively, a party could move for dismissal under Fed. R. Civ. P. 41(a)(2), the resolution of which does not require approval of any settlement agreement. Under either procedure (or their state equivalents), the settlement agreement does not become a public record. The unfiled settlement will not trigger any presumption of public access and will instead have the status of any other private contract. *Compare SmithKline Beecham Corp. v. Pentuch Group*, P.L.C., 261 F. Supp. 2d 1002, 1004-08 (N.D. Ill. 2003) (Posner, C.J., sitting by designation) (alleged illegality of settlement agreement not subject to review under either procedure) *with Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1374-75 (Fed. Cir. 2001) (declining *sua sponte* to enforce confidential settlement agreement as contrary to public policy).

Settlements that are both filed and sealed appear to be infrequent, at least in federal courts. R. T. Reagan, *et al.*, *Sealed Settlement Agreements in Federal District Court* (Federal Judicial Center, 2004). Confidential settlements,

however, are more common and of broader concern. Parties are largely free to agree between themselves to confidentiality provisions in settlements. If the parties enlist the court's assistance concerning the settlement, however, the court should independently scrutinize any confidentiality provision. For example, the parties may request that the court retain enforcement jurisdiction to oversee the fulfillment of the settlement terms, or they may file a separate action for specific performance of the settlement or to recover damages for its breach. In such cases, the court should not enforce any non-disclosure or confidentiality provision that is not supported by a specific and sufficient showing of good cause.

Best Practices

1. Before attempting to seal a settlement, attorneys should confer with their clients to ensure that legitimate privacy, commercial or similar confidences exist that warrant confidentiality.

2. When negotiating the terms of a settlement, attorneys should confer among themselves with regard to any need for confidentiality and attempt to reach agreement on legitimate grounds for confidentiality.

3. Attorneys should not seek to seal settlements unless they are satisfied that grounds exist for a sealing order.

4. In considering whether to seal a settlement or enter a confidentiality order incident to a settlement, courts should distinguish between "settlement facts," such as the amount, terms and conditions of a compromise, and "adjudicative facts" that are relevant to the merits of the underlying controversy. The former, which arise out of the settlement process itself, might warrant a sealing order. Care should be taken in extending any such order to the latter so as to avoid suppressing information relevant to other cases, public health or safety, or other legitimate public interest.

5. In negotiating a confidential settlement agreement, attorneys should incorporate into any confidentiality provision an explicit exception for disclosures required by law or court order.

Examples

1. An individual plaintiff and a corporate defendant have entered into a settlement of a personal injury action. The defendant, as a matter of corporate practice, does not reveal the monetary amount of any settlements. The defendant insists, and the plaintiff agrees, on a confidential settlement. The parties do not contemplate filing the settlement with the court, as there is no basis for a sealing order.

2. An individual plaintiff and a corporate defendant have entered into a settlement of a personal injury action. The defendant settled to avoid the publication of internal documents at trial and on the express condition that the amount of the settlement would be confidential. The parties want the terms of the settlement embodied in an order by which the court retains jurisdiction to enforce the settlement. They move to seal the settlement. While the settlement itself would be presumed to be a public document if filed, the presumption of public access is weak as to the amount of the settlement. The court seals only the amount of the settlement.

3. An individual plaintiff who developed certain software is in litigation with a corporate defendant. The litigation arises out of the corporate defendant's alleged failure to develop and market new applications arising out of the software. The parties enter into a settlement agreement. The terms of the settlement provide for the parties to share source codes of the defendant's applications. Both parties, who are in a very competitive field of business, deem the source codes highly confidential. The parties agree that the settlement should be confidential. Neither party trusts the other and both contemplate injunctive relief and contempt should the source codes be misused. They agree to file a motion to seal the settlement. The source codes are described in detail so that there can be no misunderstanding of the scope of the settlement in any future enforcement action. The court issues an order sealing only that part of the settlement that reveals the source codes.

Principle 3 Settlement discussions between parties and judges should not be subject to public access.

Courts primarily exist to resolve disputes. Disputes may be resolved in a number of ways, including settlement. A strong public policy supports settlement and the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Thus, judges should be expected to encourage settlement and to participate in settlement discussions.

Judges are public officials, however, and, as such, are subject to oversight and monitoring by the public. Thus, when a judge participates in settlement discussions between the parties or is otherwise "injected" into the settlement process, the judge's actions are arguably subject to public monitoring and oversight. The desire or need for such oversight and monitoring may be heightened when settlement discussions affect public health and safety.

However, several factors argue against public access to settlement negotiations even when they may involve the court. First, settlement negotiations require candor, and public access might discourage a party from revealing information necessary for self-evaluation and compromise. Second, settlement discussions are often conducted on an *ex parte* basis, where information is exchanged with the judge for settlement purposes only and is never shared with the adversary. Third, and most significantly, in promoting settlement, the judge acts as a facilitator, rather than as an adjudicator. Because the judge is not engaged in "decision-making," the rationale for public oversight and monitoring is significantly diminished.

Indeed, in many cases, the parties may privately settle their dispute without filing their settlement or submitting it for approval or other action by the court. In these cases, the case is dismissed on stipulation. No judicial record exists and the judge has neither the need nor the power to approve or disapprove of the settlement. In such cases, where the judge has no approval role and serves merely as a mediator or facilitator for the parties' private negotiations, any presumption of public access is weak, if not non-existent.

If public access is to be denied on this premise, however, the judge should take care not to step into a judicial role concerning the settlement. To protect the confidentiality of their settlement, the parties should not file their agreement with the court or seek judicial "approval" of their compromise. If parties voluntarily elect to file their settlement agreement in order to facilitate its subsequent enforcement, their action may create a judicial record, trigger a presumption of public access, and forfeit the confidentiality of the settlement.

Best Practices

1. A judge may act as an intermediary or facilitator in settlement negotiations between the parties to a case. Alternatively, the judge may refer the case for confidential, court-annexed alternative dispute resolution such as mediation. So long as the court does not step into an adjudicatory role and the settlement agreement is not filed with the court, no presumption of public access to the settlement discussions or to any settlement agreement will result.

2. Absent a statute or rule which requires otherwise, attorneys should not ask a judge to "approve" a settlement that they wish to keep confidential, file that settlement with the court or request that the terms of the confidential agreement be entered as orders of the court. A judge should not seek to approve a private settlement unless required or requested to do so.

3. In cases where judicial approval of a settlement is legally required (*e.g.*, class actions), or in cases where the parties seek the court's *imprimatur* on their settlement so that it can be entered as a consent decree enforceable through injunction, contempt or summary judgment, the settlement must be filed and submitted to the court. In such cases, the settlement agreement becomes a presumptively public judicial record, and proceedings leading to its formal approval are subject to a qualified right of public access.

4. A judge should not *sua sponte* suggest to the parties that a settlement might be kept confidential. In a case pending in federal court, however, a judge might appropriately suggest, as an alternative, that the court retain jurisdiction to enforce a settlement.

5. If the terms of a settlement are presented to a judge, the judge may express concern about any term that might arguably be illegal, unethical or unenforceable. However, it may be difficult for a judge to independently "police" the provisions of a settlement in this manner, as there will be no adversarial development of any issue.

Examples

1. The parties to a commercial dispute appear before a judge for a settlement conference. The judge conducts the conference in chambers and engages in *ex parte* discussions with the parties in an attempt to facilitate a settlement. A settlement is reached. The terms of the settlement are not put on the record and the settlement agreement is never filed. The settlement is private and there is no right of public access.

2. The same facts as (1) above, but the settlement is submitted to the court as a stipulation, with a motion that it be adopted by the court as an order. If the judge grants the motion, the judge gives the settlement a public *imprimatur* and the settlement becomes a public record.

3. The same facts as (1) above, but the settlement includes a provision whereby the parties agree to divide their state into districts and not compete with each other in certain districts. The judge cautions the parties of the possible illegality of the settlement and refuses to approve or otherwise facilitate the settlement.

Principle 4 Absent exceptional circumstances, settlements with public entities should not be confidential.

Public entities and officials, whether at the federal, state or local level, are public actors. By definition, their actions affect the public, whom they represent. The public thus possesses a significant interest in the monitoring and oversight of public officials and entities, even in litigation. Public entities are generally subject to open public meeting and/or open public record laws. Such laws, which seek to facilitate public monitoring and government accountability, may require disclosure of settlements involving the government or other public entities. Thus, when a public entity enters into a settlement, no expectation of confidentiality should exist, whether or not the settlement is filed with the court.

For these reasons, there should be a strong presumption against the confidentiality of any settlement entered into with a public entity or of any information otherwise disclosable under a public records law. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 792 (3d Cir. 1994). A particularly strong presumption of public access exists with regard to any monies paid by public entities in settlement. Only exceptional circumstances (such as those involving intimate personal information, the privacy of minors, or law enforcement needs) should warrant the confidentiality of these types of settlements. *See generally* Laurie K. Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. Rev. 791, 809-10 (2004).

Best Practices

1. An attorney representing an individual or entity in litigation against a public agency should, before entering into settlement negotiations with the agency, consult with his or her client to determine whether the client has any proprietary or privacy interest in the terms of the settlement for which protections should be sought under applicable public records law or a court order. Absent any such protection, the attorney should caution his or her client against any expectation of confidentiality

2. An attorney representing a public agency should, in the course of settlement negotiations with an adversary, caution the adversary against expecting any confidentiality of a settlement agreement, absent specific exemptions in the public records laws or a court order

3. In determining whether to seal a settlement of a matter involving a public entity or official, a court should carefully consider relevant federal or state law. On the one hand, judges should be hesitant to seal a settlement if the information would be otherwise disclosable under a federal or state freedom of information or open public records statute. On the other hand, information that would be exempt from disclosure under such a law or separate privacy-related statute might merit a confidentiality order.

Examples

1. A business entity sues a state agency for breach of contract. The action arises out of alleged delay damages incurred by the plaintiff after the defendant agency failed to accept goods on a certain date. The settlement agreed to by the parties includes, at plaintiff's insistence, a confidentiality provision. No legitimate basis for confidentiality exists.

2. An individual sues a state agency for wrongful disclosure of her private medical information. The defendant agency admits that it erred in disclosing the information. The parties enter into a settlement which, at plaintiffs' insistence, seals all facts relevant to the suit, including plaintiffs' medical information. The plaintiffs' information may be sufficiently confidential to justify sealing the settlement or issuing a confidentiality order.

Principle 5 An attorney's professional responsibilities may affect considerations of confidentiality in settlement agreements.

The obligation of an attorney to maintain a client's confidences is fundamental to the attorney-client relationship. An attorney must thus take steps to arrive at a settlement that protects a client's confidential information. Consistent with this obligation, an attorney must take client confidences into account during settlement negotiations and may seek an agreement to limit the voluntary disclosure of confidential information as a condition of settlement.

In all settlement negotiations, however, an attorney should consider and adhere to all applicable standards of professional responsibility. For example, certain nondisclosure provisions may violate ethical rules that prohibit restrictions on another attorney's practice of law. The ethical rules of a jurisdiction may similarly prohibit a settlement that purports to restrict an attorney from using information gained in one case in other related cases. Additionally, a confidential settlement should not prohibit the disclosure of information required by law or court order.

An attorney should also recognize that confidential information may concern public health and safety or may affect specific individuals (such as collateral litigants). Depending upon the ethical rules of a jurisdiction, attorneys may have limited discretion to reveal confidences when death, serious bodily injury or financial harm is imminent. *See Model Rules of Professional Responsibility*, Rule 1.6(b). Little guidance exists, however, concerning the factors that an attorney should consider in deciding to exercise this discretion. *See id.*, Rule 1.6, Comment 6. Moreover, unless otherwise required (*See, e.g.*, 17 C.F.R. 205, "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the [Securities and Exchange] Commission in the Representation of an Issuer"), no mandatory duty to disclose exists.

Best Practices

1. Attorneys should familiarize themselves with applicable ethical rules and substantive law to determine what limitations exist on their negotiating confidential settlements that might include unethical, illegal, or otherwise unenforceable terms.

2. Attorneys should familiarize themselves with applicable ethical rules and substantive law to determine which circumstances may permit disclosure of otherwise confidential information.

3. Regardless of whether ethical rules prohibit a nondisclosure provision or whether an attorney has discretion to disclose a confidence, an attorney should discuss and attempt to resolve any concerns concerning confidentiality with his client.

Example

1. The parties to a products liability action are engaged in settlement negotiations. The product at issue is a widely distributed and well-known kitchen appliance. Through study of the defendant's highly confidential design documents, obtained during discovery under a protective order, the plaintiff learns of the existence of a design defect in the product's control panel that might cause a fire like that in plaintiff's case. Plaintiff's attorney knows of at least four other cases involving fires in the appliance. The defendant insists that it will not settle without a confidentiality agreement.

The attorney confers with his client about the proposed settlement and the defendant's confidentiality demand. The client decides to agree to the settlement and confidentiality demand. Absent an ethical rule or substantive law to the contrary in the jurisdiction, the information would be considered a "client confidence." The attorney may not voluntarily reveal any information covered by the confidentiality clauses of the settlement agreement.

Chapter 4
Selected Bibliography

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Gambale v. Deutsche Bank, 377 F. 3d 133 (2d Cir. 2004) (recognizing "weak" presumption of access to settlement amount given reliance on confidentiality and lack of public interest concerning amount).

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Lynch, Inc. v. Samatamson, Inc., 279 F.3d 487 (7th Cir. 2002) ("No one supposes that there is any impropriety in a judge's conducting settlement discussions off the record").

Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002) (reversing district court's denial of newspaper's motion to unseal settlement agreement in Section 1983 action because filed settlement agreement was a judicial record subject to public right of access).

Union Oil Company of California v. Leavell, 220 F.3d 562 (7th Cir. 2000) (finding order sealing virtually all judicial documents in case file unjustified; when the parties "call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials . . . . only genuine trade secretes, or information within the scope of a requirement such as Fed. R. Crim. P. 6(e)(2) . . . may be held in long-term confidence").

Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122 (9th Cir. 2003) (discussing right of collateral litigants to obtain discovery, motions, and judicial records filed under seal in settled case).

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Chicago Tribune Co. v. Bridgestone/ Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001) (remanding for Firestone to demonstrate need for confidentiality of discovery filed under seal in settled case).

EEOC v. Nat. Children's Ctr., Inc., 98 F.3d 1406 (D.C. Cir. 1996) (holding that trial court abused its discretion in sealing consent decree in EEOC action and remanding for further explanation of decision to seal portions of the record and determination of good cause to support protective order governing deposition transcripts).

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A full bibliography, updated periodically, may be found on The Sedona Conference web site at www.thesedonaconference.org starting in July 2007.

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

Introduction

The growing use of electronic filing and imaging technology makes it possible for courts to offer broader public access to case files through remote electronic access. There is increasing awareness, however, of the implications such broad public access to case files, especially through the Internet, has for personal privacy, and proprietary business information. In the United States court community, many have suggested that case files - long presumed to be open for public inspection and copying unless sealed by court order - contain private or sensitive information, trade secrets, and proprietary information that should be protected from unlimited public disclosure and dissemination in the new electronic environment.[8] Others maintain that electronic case files should be treated the same as paper files in terms of public access and that existing court practices are adequate to protect privacy, confidentiality, and intellectual property interests.

Potential Privacy, Confidentiality, and Proprietary Implications of Public Access to Electronic Case Files

Before the advent of electronic case files, the right to "inspect and copy" court files depended on one's physical presence at the courthouse. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from any harm — actual or perceived — which could result from misuse of private or proprietary information provided in connection with a court proceeding. The Supreme Court has referred to this relative difficulty of gathering paper files as "practical obscurity." *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770-71, 780 (1989) (recognizing "the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information").

Case files may contain private, sensitive or proprietary information such as medical records, employment records, financial information, tax returns, Social Security numbers and other personal identifying information, as well as customer lists, business plans, research data, and other proprietary business information. Allowing access to case files through the Internet, depending on how it is accomplished, can make such information available easily and almost instantly to anyone who seeks it. Personal, sensitive, or proprietary information, unless sealed or otherwise protected from disclosure, can be downloaded, stored, printed, and distributed.

[8] Congress has expressed this viewpoint in the E-Government Act of 2002, Public Law No. 107-357. Section 205(c)(3) of the Act requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Proposed Fed. R. Civ. P. 5.2 has been promulgated in response to this mandate. It should be noted that the E-Government Act and Proposed Fed. R. Civ. P. 5.2 address only issues of personal privacy and do not extend similar rule-based protections to business confidences or proprietary information. Strong concern for the protection of such information was expressed by many members of this Working Group, and this is reflected throughout these Guidelines. However, we acknowledge that there is a special role for rulemaking in the area of personal privacy, as well-developed common law doctrines of business confidentiality and proprietary information are often unknown or unavailable to private citizens.

The information contained in court records, particularly the personal information, is highly valued by data-mining companies that cull public records and integrate public record data with other sources of data and sell the information for profit. Because there are few, if any, legal limitations on how public court records may be used by those who obtain them, data-mining companies are able to freely exploit the information in court records for commercial purposes as marketing information or "competitive intelligence."

These circumstances place into conflict two important policy considerations. First, public court records must easily be available to allow for effective public monitoring of the judicial system; and second, private or sensitive information in court files that is not germane to the public oversight role may require protection from indiscriminate public disclosure.

In different jurisdictions, two primary positions appear to be emerging with respect to the privacy issues relating to electronic case files. The first is sometimes referred to by the shorthand expression, "public is public." This position assumes that the medium in which case files are stored does not affect the presumption that there is a right of public access. By this analysis, current mechanisms for protecting privacy and confidentiality - primarily through protective orders and motions to seal - are adequate even in the new electronic environment. Some have also suggested that the focus for access policies should be on determining whether information should be deemed "public" in any format - electronic or paper - rather than on limiting access to electronic case files.

Advocates of this position suggest that litigants do not have the same expectation of privacy in court records that may apply to other information divulged to the government. The judicial process depends on the disclosure, voluntarily or involuntarily, of all relevant facts, to allow a judge or jury to make informed decisions. In bankruptcy cases, for example, a debtor must disclose a Social Security number or taxpayer identification number and detailed financial information that the bankruptcy trustee needs to administer the case and that creditors need to fully assert their rights. Similarly, in many types of civil cases - for example, those involving personal injuries, criminal allegations, or the right to certain public benefits - case files often must contain sensitive personal information. To a certain extent, then, advocates of this position expect private litigants to abandon a measure of their personal privacy at the courthouse door.

A second position on the privacy issue focuses on the relative obscurity of paper as compared to electronic files. Advocates of this position observe that unrestricted Internet access undoubtedly would compromise privacy and, in some situations, could increase the risk of personal harm to litigants or others whose private information appears in case files. In other cases, proprietary, financial, marketing, or trade secret information must be disclosed. In these cases, advocates for this position urge that the reasons and justification for public assess be balanced against the legitimate needs of corporate litigants to have access to the courts for resolution of disputes without having to forfeit valuable proprietary information to the public and competitors.

The combination of electronic filing and remote access magnifies the potentially dire consequences of mistaken exposure of sensitive information. The accidental disclosure of such information cannot be reversed - mistaken dissemination on the Internet is fundamentally different from an inadvertent disclosure on paper in a courthouse. This reality increases the burden on attorneys and courts to carefully guard against such mistakes. It also has been noted that case files contain information on third parties who often are not able - or not aware how - to protect their personal privacy or to protect valuable proprietary information by seeking to seal or otherwise restrict access to sensitive information filed in litigation.

Advocates of the second position acknowledge that it is difficult to predict how often court files may be used for "improper" purposes in the new electronic environment. They suggest that the key to developing electronic access policies is not the ability to predict the frequency of abuse, but rather the assumption that even a few incidents could cause great personal or competitive harm. Advocates of this position also note that the judicial branch, like other branches of government, has an obligation to protect personal and proprietary information entrusted to it.

They argue that there is a "public interest in privacy" because of the compulsory nature of information disclosure in the context of litigation. That is to say, confidential information often is disclosed in litigation not by choice but by compulsion. On this view, the courts should explicitly recognize, in rules and policies on public access to court records, that although there may not be an expectation of privacy in case file information when there is no protective order, statutory right, or established court procedure that provides such protection, there has been an expectation of practical obscurity that will be eroded through the development of electronic case files. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.

Emerging Themes in the Development of Electronic Access Policy and Procedures

In efforts to analyze the issues of privacy, confidentiality, and access to electronic court records, the courts are engaging in a debate that in many ways mirrors the broader societal debate over privacy in the Internet era. In the policy development process, courts are addressing two related questions. First, what is the appropriate role of the courts in collecting and maintaining public records? Second, have those courts that allow Internet access to case files changed their role from being passive "custodians" of court records to being active "publishers" of information? These key questions have motivated courts at both the federal and state levels to begin the development of new access policies in the context of electronic case files.

In addition, court policy-making committees also have begun to ask whether the reliance on a case-by-case approach to access issues should be reexamined in the context of Internet publication of court records: Is it prudent to rely on litigants as the primary means of protecting privacy and confidentiality in the context of case files? Judges, as a general matter, do not raise privacy or confidentiality issues on their own. Instead, privacy and confidentiality issues that might be asserted in the course of litigation historically have been addressed on a case-by-case basis, so that if a litigant does not challenge the entry of sensitive information into the record, it will be entered without further inquiry.

Many courts appear to be searching for an alternative to the case-by-case approach, crafting restrictions on remote public access to preserve an element of the practical obscurity of paper files while allowing the public to take advantage of rapid advances in technology to provide easier and cheaper ways to monitor the courts and particular cases. This search for an alternative has led several courts to propose or implement new "categorical" restrictions on access, in effect reversing the common law presumption of access either by presumptively sealing certain types of cases or categories of information or by maintaining open access at the courthouse but restricting remote access on the Internet. In the federal courts, for example, the Judicial Conference of the United States has developed a privacy policy that allows unlimited public access to Social Security case files only at the courthouse, but prohibits remote public access over the Internet. Minnesota has proposed a twist on "courthouse only" access, providing remote public access only to documents and information created or maintained by the courts themselves. Under the Minnesota proposal, documents created by litigants would only be accessible from the courthouse. Other new state court rules on public access - such at those from

California, Maryland, and Vermont - carve out limited categories of cases or information for presumptive sealing, adding new categories to existing statutory sealing requirements.

Finally, courts are increasingly focused on "logistics" issues such as data security, the proliferation of electronic documents, and the mechanics of implementing new sealing requirements or access restrictions in the context of electronic case files.

Sedona Working Group Assessment of the Main Approaches to Public Access Rules and the Most Common Rule and Policy Features

Recently-developed rules and policies on public access to court records appear to follow four basic policy approaches. In addition, a preliminary review reveals several issues that each court system seeks to address in developing these rules and policies. Although the Working Group has concluded that it is too soon to identify "best practices" in this area, it is helpful to assess how the new public access rules are consistent – or not – with the principles articulated in these guidelines.

The Four Basic Policy Approaches

1. Open electronic access, with minimal limits.

   Some court systems have developed rules or implemented new public access policies affirming that the existing public access system for paper records will continue to apply to electronic court records. This group, which includes the New York state courts and the U.S. federal courts, draws few distinctions between access to electronic and paper files. As a general matter, these court systems only restrict public access to certain personal identifying information in court records that may be used to facilitate the crime of identity theft, but they allow electronic public access to almost all unsealed court records.

   Under this approach, the litigant has the obligation to protect private or confidential information by seeking to seal court records or by other self-help mechanisms such as redaction or refraining from filing such information unless absolutely necessary.

   This approach, while consistent with the law as it developed before the advent of electronic case filing and potential Internet access to court records, does not take into account the shifting role of courts from "custodians" of records to "publishers," and engages in no examination of its consequences or desirability. With only minimal restrictions on electronic pubic access, this shift in the role of the courts role may not provide adequate protections for private or proprietary information in court records, and may not be necessary to fulfill the courts' role in providing appropriate public access to court records.

2. Generally open electronic access, coupled with more significant limits on remote electronic public access.

   A second group has adopted a middle ground that generally allows remote electronic public access, but at the same time places significant limits on the types of cases — or categories of information — that courts may make available electronically. These courts recognize that there are practical and policy reasons to be cautious about electronic public access, especially in the short-term future during the period of transition from paper to electronic court files. The California and Indiana access rules provide examples of this approach. As with approach #1 above, the obligation to protect personal privacy, confidentiality, or proprietary information will be largely left to individual litigants with little or no independent assistance of the court.

The Working Group views this approach as more balanced than approach #1, but suggests that it may still fall short of providing appropriate protections for private and confidential information in court records. One expects the court to take a more active role, recognizing that public access to court records should be restricted where forfeiture of privacy or proprietary rights would likely result from disclosure.

3. Electronic access only to documents produced by the courts.

   A third group of courts permits remote access to documents created by the court, such as dockets and court orders, but does not permit remote access to documents created by the parties. This approach is adopted in the Minnesota and Vermont access rules.

   The Working Group notes that while this approach appears to provide significant protections for private and confidential information submitted by the litigants as part of the court record, this approach does not appear to allow the public to conduct sufficient oversight of the courts. In many cases, it is important to review pleadings and other litigant-filed elements of the case file in order to effectively evaluate a court's decision and orders.

4. Systematic reevaluation of the content of the public case file, combined with limited access to electronic files.

   A fourth broad policy approach is to systematically review the elements of the public case file with the policy goal of better accommodating personal privacy interests in the context of electronic court records. These courts seek to limit the filing of extraneous personal or confidential information in public court files, a strategy referred to as "minimization." Where such information must be filed, these courts would provide expanded protections before moving forward with electronic public access systems. The Florida court system has issued a report outlining this approach.

   The Working Group views this as a promising approach because it focuses on limiting the filing of information that arguably should not be in the public case file, and on sealing or otherwise limiting public access to information that is truly private or confidential, yet also necessary for the adjudication of the dispute.

List of Common Features of Recently-Developed Court Rules and Policies on Public Access to Court Records

The Working Group concludes that, as a general matter, the common features of public access rule outlined below are consistent with the Principles in Chapter 2 on "Pleadings, Court Orders, Substantive Motions, and Dockets," and Chapter 3 on "Trials." As noted in those chapters, it is clear that there are some categories of cases that invariably involve information that should be subject to limited public disclosure. State law often mandates that such categories of cases be closed to the public. In addition, many cases involve personal information, the public disclosure of which may violate recognized privacy rights or expose litigants to identity theft or other abuse. In those cases, exclusion of such information from pleadings – or the redaction of such information as mandated in several court rules – will be necessary to protect litigants' privacy interests while minimally intruding upon the public's qualified right of access to judicial records.

1. A statement of the overall purpose for the rule or policy.

2. Definitions of key terms used in the rule.

3. A procedure to inform litigants, attorneys, and the public that (a) every document in a court case file will be available to anyone upon request, unless sealed or otherwise protected; (b) case files may be posted on the Internet; and (c) the court does not monitor or limit how case files may be used for purposes unrelated to the legal system.

4. A statement affirming the court's inherent authority to protect the interests of litigants and third parties who may be affected by public disclosure of personal, confidential, or proprietary information..

5. A list of the types of court records that are presumptively excluded (sealed) from public access by statute or court rule.

6. A statement affirming that the public right to access court records and the court's authority to protect confidential information should not, as a general matter, vary based on the format in which the record is kept (e.g., in paper versus electronic format), or based on the place where the record is to be accessed (i.e., at the courthouse or by remote access).

7. As an exception to feature 6 above, a list of the types of court records that — although not sealed — will not be available by remote electronic public access.

8. A list of the types of information that either: a) must not be filed in an open court record, or b) if filed, must be redacted or truncated to protect personal privacy interests. These provisions mainly apply to personal identifiers such as the SSN, account numbers, and home addresses of parties.

9. Procedure for a court to collect and maintain sensitive data elements (such as SSN) on special forms (paper or electronic) that will be presumptively unavailable for public access. Such procedures generally build on technology to segregate sensitive information so that public access can be restricted in appropriate situations.

10. Procedure to petition for access to records that have been sealed or otherwise restricted from public access, and a statement of the elements required to overcome the presumption of non-disclosure.

11. Procedure to seal or otherwise restrict public access to records, and a statement of the burden that must be met to overcome the presumption of disclosure.

12. An affirmation that a rule on public access to court records does not alter the Court's obligation to decide, on a case-by-case basis, motions to seal or otherwise restrict public access to court records.

13. Guidance to the courts concerning data elements that are contained in electronic docketing systems that must (or must not) be routinely made available for public access.

14. Guidance for attorneys and/or litigants concerning: (a) the extent to which public case files will be made available electronically; and (b) the need to exercise caution before filing documents and information that contain sensitive private information, which is generally defined elsewhere in the rule.

15. An explanation of the limits, if any, on the availability of "bulk" and/or "compiled" data from public court records. Some rules specify that such data will only be made available to certain entities, for certain defined purposes, and pursuant to agreements to refrain from certain uses of the records obtained.

16. A statement concerning the fees that a court may charge for public access to court records.

Conclusion

Courts have begun to address privacy and confidentiality issues that arise as court files are made accessible on the Internet. The federal courts and a growing number of state court systems have developed policies or court rules to balance the competing interests of public access and personal privacy. These policies and rules recognize that case files may contain sensitive personal, confidential or proprietary information that may require special protection in the context of Internet access. Through changes in rules, court policies - and likely also in case law - it is clear that the law in this area will continue to develop to respond to the fundamentally changed context of public access to court records in the Internet era.

It is also clear that the era of "practical obscurity" has past. Litigants and attorneys must be aware of the possible consequences of filing any private or confidential information.

Chapter 5
Selected Bibliography

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Rules Governing Dissemination of Electronic Case Records, available at
http://www.vermontjudiciary.org/rules/proposed/ruleselectronic.htm

Cases

United States Supreme Court

U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (interpreting the FOIA, recognizing a privacy interest in information that is publicly available through other means, but is "practically obscure").

United States District Courts

Holland v. GMAC Mortgage Corp., 2004 WL 1534179 (D. Kan. Jun 30, 2004) (noting that filing documents under seal in court which employs electronic filing will be burdensome because sealed filing must be in paper format).

Eldaghar v. City of N.Y. Dep't of Citywide Admin. Servs., 2004 U.S. Dist. LEXIS 3503 (S.D.N.Y. 2004) (denying motion for protective order, observing there is no protectable privacy interest in personal identifiers that are already available on Internet).

Websites

National Center for State Courts

http://www.courtaccess.org/

Reporters' Committee for Freedom of the Press

http://www.rcfp.org/courtaccess/viewstates.php

A full bibliography, updated periodically, may be found on The Sedona Conference web site at www.thesedonaconference.org starting in July 2007.

Appendix A: The Sedona Conference® Working Group Series & WGS℠ Membership Program

The Sedona Conference® Working Group Series ("WGS℠") represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today.

Working Groups in the WGS℠ begin with the same high caliber of participants as our regular season conferences. The total, active group, however, is limited to 30-35 instead of 60. Further, in lieu of finished papers being posted on the website in advance of the Conference, thought pieces and other ideas are exchanged ahead of time, and the Working Group meeting becomes the opportunity to create a set of recommendations, guidelines or other position piece designed to be of immediate benefit to the bench and bar, and to move the law forward in a reasoned and just way. Working Group output, when complete, is then put through a peer review process, including where possible critique at one of our regular season conferences, hopefully resulting in authoritative, meaningful and balanced final papers for publication and distribution.

The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles; Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the SDNY less than a month after that. As noted in the June 2003 issue of Pike & Fischer's *Digital Discovery and E-Evidence, "The Principles*...influence is already becoming evident."

The WGS℠ Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic or consultant to participate in Working Group activities. Membership provides access to advance drafts of Working Group output with the opportunity for early input, and to a Bulletin Board where reference materials are posted and current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for special Project Team assignment, and a Member's Roster is included in Working Group publications. The annual cost of membership is only $295, and includes access to the Member's Only area for one Working Group; additional Working Groups can be joined for $100/Group.

We currently have active Working Groups in the areas of 1) electronic document retention and production; and 2) protective orders, confidentiality, and public access; 3) the role of economics in antitrust; 4) the intersection of the patent and antitrust laws; (5) *Markman* hearings and claim construction in patent litigation; (6) international issues in e-disclosure and privacy; and (7) Sedona Canada—electronic document production in Canada. *See* the "Working Group Series" area of our website for further details on our Working Group Series and the Membership Program.

> "DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED AND JUST WAY."