

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)

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 nonparties.

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 nondiscovery matter.

Principle 4: On a proper showing, nonparties 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: Nonparties 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 nondisclosure.
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.