

**OPPOSING VIEWS of the UNDERSIGNED MEMBERS of the
SEDONA CONFERENCE WORKING GROUP on PROTECTIVE
ORDERS, CONFIDENTIALITY & PUBLIC ACCESS (WG2)**
to
**The Sedona Guidelines on Protective Orders, Confidentiality & Public
Access in Civil Cases**

April 6, 2007

Preliminary Statement

After two years of review, it is clear that the Sedona Working Group (WG2) has not developed a true consensus on issues related to protective orders, confidentiality & public access. Quite simply, none exists. The large number of signatories to these Opposing Views in itself suggests that the Sedona Guidelines do NOT represent a consensus view of the law or the practice in this still controversial area.

Over the course of the work, a threshold dispute arose concerning whether courts properly employ their discretion to achieve the appropriate balance in each specific case between facilitating public access to civil litigation proceedings and protecting litigants' privacy, property and confidentiality, or whether courts (presumably at the behest of litigants) routinely circumvent applicable rules to enter protective orders and sealing orders in contravention of established legal principles. The numerous thoughtful public comments received by WG2 on an earlier public comment draft reflect diverging views on this and other key issues.

The failure to reach consensus stems not from any lack of effort of WG2, but from the Working Group's inability to bridge the gaps in legal and practice principles that are presumed by some in the Group but rejected by many others. For example, several organizations, academics, and practitioners questioned the need for and the possibility of developing any guidelines in the area that would represent a real consensus, pointing out, *inter alia*, that:

(1) They were not encountering difficulty in dealing with confidential documents in litigation;¹

¹ "Our practitioners routinely handle cases involving a very large number of confidential documents, and yet they do not report any significant difficulties with the present system of handling confidential documents and information. The flexibility offered by the current system can and does offer tailored solutions to the complex situations and competing interests posed by many cases involving intellectual property." Comments by the American Intellectual Property Law Association (AIPLA), May 14, 2006 at 1, www.thosedonaconference.org/dltForm?did=WG2_Public_Comment_Compilation.pdf at 63.

(2) There did not appear to be any evidence of systemic problems, in that courts were exercising balanced, case-by-case discretion to protect confidential information and permit access where appropriate;² and

(3) It was not appropriate or desirable for Sedona to revive the court confidentiality debate that had been raging off and on since 1989 between pro access advocates (primarily media and plaintiff lawyers) and those seeking to protect their privacy and property rights in confidential information at risk of disclosure in litigation (defense and corporate lawyers and litigants).³

Despite the absence of consensus in the Sedona Working Group on whether or not problems exist in this area of the law and a first “public” draft that appeared to advocate positions favoring access that were purely aspirational rather than a distillation of accepted legal or practice principles, we who subscribe to these Opposing Views have made a good faith effort within Sedona to develop balanced guidelines or “best practices” that hopefully will benefit the bench and bar in dealing with these issues.

The Sedona tradition of generating consensus best practices began with the first Sedona Working Group on Electronic Document Retention and Production. That Working Group sought to assist the legal system in responding to myriad emerging issues raised by the electronic age and to propose guidelines and best practices to fill the undeniable gap in existing procedural rules. In the area studied by WG2, however, there is no emerging technology or event that precipitates our work. Debates concerning public access to various aspects of judicial proceedings have been waged for years, although the stakes are much higher in an internet age in which “access” to information (and the prospects for broad dissemination of that information) mean something entirely different than historical common law notions of access to judicial proceedings.

In the area studied by WG2 we acknowledge that how one articulates best practices necessarily traces back to policy-laden issues such as the proper role of courts in

² “I have observed and commented on the court confidentiality debate for many years, including writing a comprehensive law review article and many shorter written commentaries. My views continue to be the same: as applied to your project, I believe that the current system that empowers the courts to use balanced discretion to protect litigants’ privacy, property, and confidentiality in appropriate cases works well and does not need to be changed. *** Do you have evidence that there are serious problems in practice that these guidelines are designed to address? Or, as I have said before, is this a solution in search of a problem?” Comment by Prof. Arthur R. Miller, March 17, 2006 at 1 (footnotes omitted), *op.cit. supra* at 5.

³ “...our members report encountering few problems in protective or sealing order practice that would require a complete set of practice guidelines or a call for all courts, state and federal, to adopt local rules or standing orders regulating the practice. *** The ongoing campaign to shift this decision-making authority away from judges has gained little traction because quite simply, no problem has been proven to exist. We therefore question whether it is worthwhile to attempt to resurrect this debate in the guise of practice guidelines after so much of the country’s bench and bar already has spoken.” Comments by LCJ, DRI, FDCC, and IADC, March 15, 2006 at 3-4 (footnotes omitted), *op. cit. supra* at 13.

our society, the scope of privacy and property rights for individuals and corporations, and the existence and scope of any First Amendment right of access to various stages of judicial proceedings, and the impact of such access on the judiciary and the judicial system. See, e.g., R. L. Marcus, *The Discovery Confidentiality Controversy*, 1991 Univ. Ill. L. Rev. 457. This tension is at the heart of our opposition to the Sedona Guidelines, because it still remains unclear what the Guidelines actually are -- do they summarize the prevailing best practices or the editors' view of what the law should be? The Guidelines purport to be the former, but in many sections, having failed to achieve consensus -- as the sheer number of signatories to these Opposing Views demonstrates -- the Guidelines assert the latter. More important, in too many areas the professed restatement of the law is skewed in a manner inappropriate for practice guidelines.

A substantial number of WG2 participants (and others), including the signatories to these Opposing Views, have provided comments on earlier drafts. Although we recognize the labor of the editors, those comments have not been sufficiently addressed in our view. However, these opposing views are submitted in an effort to outline our concerns within the time constraints imposed by Sedona. Subsequently, we intend to prepare and submit a restatement of the Guidelines that we regard to be a fair, balanced, and accurate statement of current practice in this area that will be a more practical tool for practitioners and that we will urge is a preferred alternative to the current Sedona Guidelines.

The inability of WG2 members to coalesce around one viewpoint partially explains our dissent, but there are other considerations that may account for the fact that the process itself could not produce a consensus. The Working Group was formed to study and discuss issues regarding public access to the civil litigation process. As we point out above these are issues that have been hotly contested in courts and legislatures for many years. As a result, although there has been some improvement in the Pre-Publication Draft, the proposed Guidelines recommend policy shifts in prevailing law and practice, without acknowledging them as such, and many of them still read as if they are a summary of well-accepted law and practice. Because there is no agreement on these issues even among the members of WG2, Sedona cannot properly contend that the Guidelines represent a consensus. Therefore, we have no alternative but to submit these Opposing Views. 4

4 It is unfortunate, but not unexpected, that dialogue was unable to overcome the deep divisions among constituent groups that have the strongest stake in the outcome of this project. Indeed, media and plaintiff organizations have been working together since 1989 to undermine judges' discretion to protect confidential information in litigation from public disclosure and, of course, have been opposed by corporate and defense counsel. In microcosm, that history was rehearsed within Sedona. See R. L. Marcus, *The Discovery Confidentiality Controversy*, 1991 Univ. Ill. L. Rev. 457; A. W. Cortese, *ATLA's Protective Order Campaign: Undermining Confidence in the Courts*, 18 Prod. Safe. & Liab. Rptr. (BNA) 465 (April 19, 1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to The Courts*, 105 HARV. L. REV. 427, 429 (1991) ("...confidentiality is deemed essential to accomplish fundamental goals of the justice system that are far more important than the public's need to know every detail of a given case. However, an intense nationwide campaign is underway to create a "presumption of public access" to all information produced in litigation that would seriously restrict the courts' traditional discretion to issue protective and sealing orders shielding the litigants' documents from view.") (Footnote omitted.)

Principal Areas of Concern

The principal areas of concern that we have with the Sedona Guidelines are as follows:

Introduction

The Introduction most clearly reflects the somewhat improved but still overall pro-access bias of the Guidelines and the elevation of the media/plaintiff lawyer interest in access to confidential information in court files over constitutionally protected property and privacy rights. There is soaring rhetoric about an “open and democratic society” depending “upon an informed citizenry and public participation in government” designed to justify access to private, personal, proprietary, and confidential information in court files. At the same time the rhetoric masks the primary purpose of public participation in government -- observation of the workings of the branches of government. Confidential and top secret information in court files may be interesting. It may sell newspapers and space on the nightly news. But it is not necessary to achieve the purpose for which public access to the courts exists.

In the discussion regarding the good cause required for sealing documents filed with the court, the Introduction draws a distinction between material relating to a nondispositive matter and material that relates to the merits of a case, in which instance a “determination of compelling need” is required to “overcome the presumption of public access.” With the use of the elastic word “relating,” the Introduction lays the foundation for principles expounded in Chapters 1 and 2 that would emasculate the meaning of good cause in this context and create an unjustifiable super standard (compelling need) that would make it much more difficult and time consuming to protect litigants privacy and property rights.

These Opposing Views recognize that: “in daily application, the relative strength of a litigant’s interest in confidentiality versus the public’s interest in access evolves with the stage of litigation, so that what constitutes ‘good cause’ for maintaining confidentiality at one stage of the proceeding may not suffice at another.” However, we do not attempt a restatement of the law that introduces new concepts of “compelling need”, “particularly strong presumptions”, and “exceptional circumstances”, trusting that an informed judiciary will exercise a balanced discretion to apply the traditional standard of good cause to the myriad facts of particular cases in determining whether or not the interests in protecting privacy, property, and confidentiality outweigh the media’s interest in publishing the information in court files.

Chapter 1, Discovery.

1. Principle 1 says there is "no presumed right" of the public to participate in discovery. There either is a right or there is no right. *Seattle Times* establishes that the public has no right of access to the discovery process or the fruits of discovery in the hands of a party. "No presumed right" obfuscates the issue and is inconsistent with straightforward guidance. These Opposing Views state the principle in a clear declarative sentence: "*The public does not have a right to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court.*" This principle does not mean that courts must bar all access in every case. Given the breadth of discovery, the empowerment of private parties to range through the files of their opponents, and the minimal judicial supervision, it simply means that access to the fruits of that process is not a public entitlement.

2. Principle 2 says that a litigant "is not precluded from disclosing the fruits of discovery." While this is a slight improvement over earlier drafts, *Seattle Times* also says that information exchanged in discovery ordinarily should be used only in the litigation in which it is produced. Therefore, we restate Principle 2 as follows: *In the absence of a protective order (stipulated or contested) or agreement limiting disclosure, and so long as the party acts for a proper purpose and consistently with other laws, there may be some circumstances in which a party may disclose information received during discovery.* And, Best Practice 1 incorrectly states that "there is no restriction on dissemination of documents and other information exchanged during discovery", which we have revised to make the statement of the "practice" consistent with the "principle", as follows: *"...absent an agreement, a protective order, or other legal or ethical limitations, a party may, for a proper purpose, disseminate documents and other information exchanged during discovery."*

3. Under Principle 4, the second paragraph says that "most courts" hold that the media has standing to intervene, but it only cites the cases supporting intervention rights. This section is an early example of the pro-media predisposition that permeates the whole document. Ignoring the recommendation of many WG2 members that the fact intensive law of intervention was not an appropriate subject for practice guidelines and should be dropped from the guidelines because that there was no consensus on the issue, the document states the principle as established law.

Chapter 2, Court Records.

1. Principle 1 says that "in compelling circumstances," a court may deny public access to documents submitted to the courts which are "relevant to adjudicating the merits." The discussion on the next page says that the presumption of access is weak as to documents not related to the merits, e.g., related to discovery disputes. That is not stated in any principle. Moreover, the text says that the presumption of access is much stronger for documents "that relate to the merits of the case and assist the court in fulfilling its adjudicatory function." The choice of the word "relevant," with its encompassing connotation in the context of discovery rules, suggests a broader reach than the textual discussion. Most important, this is another instance in which the guidelines seek to restate

the concept of good cause that varies depending on the circumstances in particular cases into a nearly insuperable presumption of access by imposing a compelling need standard.

2. Principle 2 attempts to ensconce a new “compelling circumstances” standard into the law concerning access to court dockets, which we believe is neither an appropriate standard nor a proper subject for practice guidelines. Moreover, at minimum, any guidelines on this subject should reference the increasing importance of privacy considerations in the computer age as discussed in Chapter 5. The issues discussed in Chapter 5 are not separate topics from this one. They directly affect the litigants’ privacy and property interests that must be weighed in the balance in making a sealing decision.

Chapter 3, Proceedings in Open Court.

1. Principle 1, again overriding the comments of many WG2 members, creates a rule of law stating that “The public has a qualified right of access to trials that can only be overcome in compelling circumstances.” No cases are cited to support the “compelling circumstances” standard in this context. On the contrary, these Opposing Views state the accepted rule that courts have discretion to limit public access to various stages of court proceedings when competing interests outweigh the qualified public interest in access. (Case citations omitted.)

2. Sedona Principle 2 incorrectly emphasizes the benefits of public access to the jury selection process, while these Opposing Views, recognizing a qualified public interest in juror identities and jury selection, stresses the need for broad judicial discretion to control court proceedings and protect the privacy and confidentiality interests of jurors. Many WG2 members expressed the view that juror identities should be protected, but those opinions are not adequately reflected in the Guidelines.

3. Principle 3 offers a similarly unsupported twist on the “compelling interest” standard with regard to access to trial exhibits. These Opposing Views reiterate the traditional good cause standard as applied to the facts in particular cases and the stage of proceedings.

Chapter 4, Settlements.

1. Principle 1, although conceding that there is no presumption in favor of public access to “unfiled” settlements, wrongly emphasizes the interest in public access to settlements “due to the presumptively public nature of court filings in civil litigation.” These opposing views deemphasize artificial “presumptions” and focus on practical suggestions for lawyers.

2. Principle 2 would require a court to make a "particularized finding" before sealing a settlement filed with the court. This requirement finds no support in the law or in the discussion accompanying it. These Opposing Views state the traditional rule: *“In determining whether or not to seal a settlement agreement to be filed in court, the court evenly balances the privacy and confidentiality interests of the parties to the agreement, and the public's qualified right of access to court records and proceedings.”* And again, the issues discussed in Chapter 5 affect the privacy and confidentiality interests of the

parties.

3. While conceding that settlement discussions should not be subject to public access, the discussion accompanying Principle 3 suggests, without support or justification, that a judge as a public official may be subject to oversight and monitoring when “‘injected’ into the settlement process”, the need for which is “heightened when settlement discussions affect public health and safety.” Such contentions, at the heart of the controversy surrounding the public access debate, have been regularly rejected. And, recognizing that reality, these Opposing Views correctly point out that “...*settlement discussions, negotiations, and draft agreements are subject, at most, to a negligible right of public access and the settlement process itself is rarely, if ever, subject to public review.*” (Citations omitted.)

4. Principle 4 is another example of the pro-access tilt of the guidelines in an area where consensus should easily be achieved – settlements with public entities. However, with unsupported overstatement, the principle contends that “*Absent exceptional circumstances, settlements with public entities should not be confidential.*”(Italics added.) What could be the justification for reducing to “exceptional circumstances” important interests such as protecting “...intimate personal information, the privacy of minors, or law enforcement needs”...? Public access does not trump all other interests. These opposing views eliminate the exaggeration: “*There is a presumption that settlements with public entities should not be confidential.*” And, these Views reduce the confusion caused by the Sedona discussion’s varying description of the “presumption” as “strong” or “particularly strong”, or requiring “exceptional circumstances” to overcome it. A presumption is a presumption. The interests weighed in the balance will vary with the circumstances. Judges have the ability and the discretion to undertake that exercise.

5. Principle 5 speaks of the lawyer's ethical obligations regarding settlement. It refers to the obligation to maintain a client's "confidences." The ethical rules distinguish between "confidences," i.e., privileged information, and "secrets," non-public information of the client that is not privileged. A lawyer has an obligation of confidentiality as to both. It appears that the discussion here uses the word "confidences" loosely, or if not, it should discuss the obligation as to secrets.

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

While our restatement of the Guidelines will make some suggestions for further revisions in Chapter 5, we think that on the whole it is a balanced presentation of the need to be especially vigilant to protect litigants’ confidential information in the electronic age. In fact, this is the one Chapter of the Sedona Guidelines where there is a genuine consensus that there is a need for guidelines and that publishing them would provide useful guidance to bench and bar.

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