

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



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Joint Report of:
Patent Litigation Committee
Trade Secret Law Committee

Subcommittee Working Members:

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- Roderick Thompson
- Maureen Toohey
- Howard Walthall
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Chapter 1

Pleadings, Court Orders, Substantive Motions, and Dockets

- The public has a qualified right of access to pleadings, motions, and any other papers submitted to a court on matters that effect the merits of a controversy that can only be overcome by compelling circumstances.
- The public has a qualified right of access to court dockets as the principal indices to judicial proceedings and documents that can only be overcome by compelling circumstances.
- The public has a qualified right of access to judgments, judicial opinions in the memoranda, and orders issued by a court that can only be overcome in compelling circumstances.
- The public should have appropriate notice of all motions to seal.
- Any interested person should be permitted to intervene to obtain access to documents filed with a court.

Chapter 2

Discovery

- 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.
- A litigant has the right to disclose the fruits of discovery to non-parties, absent an agreement between the parties or an order based on a showing of good cause.
- A broad 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.
- On a proper showing, non-parties should be permitted to intervene to challenge a protective order that limits disclosure of otherwise discoverable information.

Chapter 3

Trials

1. The public has a qualified right of access to trials that can only be overcome in compelling circumstances.
2. The public has a qualified right of access to jury selection.
3. Absent a compelling interest, the public should have access to trial exhibits.

Chapter 4

Settlements

- In choosing a public forum to resolve a dispute rather than a public dispute resolution process, the parties limit their ability to keep information confidential.
- An attorney's professional responsibilities, both to the client and to the public, effect considerations of confidentiality in settlement agreements.
- Settlement discussions between parties and judges should not be subject to public access.
- Sealed settlements should be the exception and not the norm.
- Absent exceptional circumstances, settlements with public entities should never be confidential.

The Patent Litigation Committee's and Trade Secret Law Committee's Information Gathering Process

The Patent Litigation and Trade Secret Law Committees each sent **emails** to their membership requesting input on the draft Sedona Guidelines. A few emails were received by committee but overall, committee member participation was nonexistent.

A **subcommittee** was formed to review the comments from other organizations and people related to the draft guidelines. These comments included:

- Letter of Arthur R. Miller, Harvard Law School
- Comments by Stephen G. Morrison, Nelson Mullins Riley and Scarborough
- Comments by Lawyers for Civil Justice, Defense Research Institute, Federation of Defense and Corporate Counsel, and International Association of Defense Counsel

The subcommittee determined that given the short time frame, the most effective approach to commenting on the Draft Guidelines would be to focus AIPLA's comments on the **unique nature of IP** disputes and the **problems** that might be created by the Draft Guidelines.

The subcommittee also agreed that the comments of Arthur Miller and Stephen Morrison were well written and coincided with the views of subcommittee members.

The subcommittee **drafted a letter** to the Sedona Conference for Board consideration. It is included in your Board materials. The comments from Arthur Miller and Stephen Morrison also are included because they are referenced in the draft letter.

Talking Points of the Proposed Letter

- Confidentiality matters do not appear to be a significant problem in IP disputes
- The policies embraced by the Draft Guidelines do not take into account the public policy surrounding IP, notably the importance and value of confidential information to businesses and the economy
- An item-by-item adjudication of the confidentiality of documents produced in discovery would be expensive and laborious

Talking Points of the Proposed Letter

- Uncertainty about the ability to keep materials confidential in litigation will likely manifest itself in less willingness to provide discovery in the first instance
- A item-by-item adjudication of documents for confidentiality may be wasteful of judicial resources because, during the course of the lawsuit, documents originally designated as confidential may become non-confidential without further action
- Litigants in IP disputes rarely have a choice of a private forum over a public forum. It is disingenuous to suggest that a party wishing to maintain its information as confidential should not use the Federal Courts.

