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THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES (APRIL 2005 PUBLIC COMMENT VERSION)

The Sedona Conference® Working Group on Protective Orders, Confidentiality & Public Access (WG2)
Co-Edited by The Hon. U.S.M.J. Ronald J. Hedges (D NJ) and Kenneth J. Withers,
Federal Judicial Center, Washington, DC

Editor's Note
This is the public comment version of this document, which is also posted on our website (www.thesedonaconference.org), complete with a piece containing some alternative view points, all the appendices, and a public comment form. Comments may be sent to us at tsc@sedona.net on or before 1/31/06. This is the work product of the Working Group as a whole, and does not necessarily represent the views of any of the individual participants or observers or their employers, clients, or any other organizations to which any belong nor does it necessarily represent official positions of The Sedona Conference®.

DEDICATION TO H. BRENT MCKNIGHT (1952-2004)

H. Brent McKnight, a member of the Steering Committee of this Working Group, passed away in the year between the group's first meeting and the publication of its first draft Principles. 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.

I first met Brent when he was a United States Magistrate Judge in the Western District of North Carolina. A group had gathered in Charlotte to record courtroom vignettes to teach attorneys about electronic discovery. He took the role of the judge in the vignettes. We were all 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.

The last time I saw Brent, we were discussing privacy in litigation while shopping in Sedona for gifts for his wife and children. He quoted poetry to underscore his thoughts, interspersed with tales of his sons' accomplishments. Prosecutor, state court judge, United States Magistrate Judge, United States District Judge, teacher, writer, scholar, husband, father, colleague, friend. Through all this he infused his desire to see justice.

To you, Brent, we dedicate our work. May it help others advance the justice to which you devoted your life.

Alan Blakley

FOREWORD

Welcome to the first publication of our second Working Group, this one devoted to Best Practices and Guidelines Addressing Protective Orders, Confidentiality and Public Access in Civil Cases. 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 the law in the areas of complex litigation, antitrust law and intellectual property rights. It established the Working Group Series (the "WGS℠") 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 B for further information about The Sedona Conference® in general, and the WGS℠ in particular). WGS℠ output is first published in draft form and widely distributed for review, critique and comment, including, where possible, in-depth analysis at one of our dialogue-based Regular Season conferences. Following this public comment period, the draft is reviewed and revised, taking into consideration what has been learned during the peer review process. The Sedona Conference® hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law and policy, both as these are and ought to be.

The Sedona Conference® Working Group Addressing Protective Orders, Confidentiality and Public Access (POPA) 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 principles and commentary that follow will be of immediate benefit to the bench and bar as they approach matters relating to protective orders and public access. It is our expectation that we will benefit greatly from the public comment process. At various points throughout the document you will notice footnotes referencing opposing views set forth in a companion piece posted on our website. We are especially interested in your comments on these points.

I want to thank the entire Working Group for all their hard work, and especially the Co-Editors and Steering Committee who have guided this effort for the past year. We also want to note that the Working Groups of The Sedona Conference could not accomplish their goals without the financial support of their sponsors. This Working Group has been supported by the following sponsors for the last year - Founding Sponsor: Federal Bar Association Civil Litigation Section. Supporting Sponsors: Alston & Bird, Bingham McCutchen, Lockridge Grindal & Nauen, Mayer Brown Rowe & Maw, and Robinson & Cole.

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 www.thesedonaconference.org or contact us at tsc@sedona.net.

Richard G. Braman
Executive Director
The Sedona Conference®
April 2005

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INTRODUCTION

In creating this document, the Working Group on Protective Orders, Confidentiality, and Public Access has wrestled with the inherent tensions that underlie the issue of public access to civil litigation. 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, for example, facilitate such participation by providing citizens with a right of access to information concerning their government. Indeed, the First Amendment protects the freedom to assemble, listen, and receive information and thus "prohibits government from limiting the stock of information from which members of the public may draw." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575-80 (1980).

At the same time, our society places a high premium upon personal privacy and individual autonomy. Our Supreme Court has elevated some aspects of privacy to a constitutional (albeit rather amorphous) right. Our legislatures, both state and federal, struggle to protect privacy in this increasingly electronic information age. Moreover, our country has long valued entrepreneurial confidentiality as a key to social and material progress, promoting a "go west, young man" mind-set that values individual initiative, private enterprise, and technological innovation.

This inherent tension between public access to information about government activities and the desire to protect personal privacy and confidential information comes to a head in the debate concerning litigation confidentiality. As with the legislative and executive branches of government, our democratic society depends upon public participation in and access to the judicial process. 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 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. Access to the courts both improves the operation of the judicial system and fuels the informed discussion essential to democracy.

Public access to civil lawsuits, however, casts light beyond the judicial process itself. Civil litigation frequently involves private disputes between non-governmental parties. Resolution or settlement of those disputes may entail disclosure of intimate personal or financial information. 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' autonomy to resolve their dispute in a mutually agreed manner.

Do litigants give up a measure of their privacy and autonomy when they enter the doors of the public courthouse in order to resolve their dispute? How is a court to honor the right of public access to judicial proceedings while protecting privacy interests? In which cases must such private interests bow to a broader public interest? These are just some of the difficult questions considered by the Working Group in creating these Guidelines. Because resolution may hinge on the role public access plays in the functioning of the particular judicial process in question, *see Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8-9 (1986), our analysis of access and confidentiality is organized around the varying stages of the litigation process.

CHAPTER 1.
PLEADINGS, COURT ORDERS, SUBSTANTIVE MOTIONS AND DOCKETS

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

A qualified right or presumption of public access attaches to all documents filed with the court and material to the adjudication of all non-discovery matters. *See* In re *Cendant Corporation,* 260 F. 3d 183, 192-93 (3d Cir. 2001). To overcome the presumption, the proponent of any motion to seal documents or court proceedings to which the presumption attaches must demonstrate that there are compelling reasons for denying public access and no reasonable alternative.

Access to pleadings is essential to a public understanding of the nature of a case and issues raised therein. Pleadings provide the public with information on what is before the courts and allows the public to decide what cases to monitor. Courts of most jurisdictions recognize a right of access to other papers filed in civil proceedings as well, either under the common law or the First Amendment to the Constitution of the United States. Public access confers numerous benefits, including: (1) subjecting the judicial system to contemporaneous public scrutiny and rendering it more accountable; (2) encouraging better performance of their duties by participants in the system who are subject to such monitoring; (3) educating the public on the workings of the courts and the civil justice system; and (4) promoting public confidence in the system as a result of public knowledge that the system is subject to scrutiny and that any member of the public can have access to all information pertinent to adjudication.

Statutes and court rules recognize narrow situations in which pleadings must be kept confidential, at least for limited times and purposes. For example, under the *qui tam* provisions of the False Claims Act, 31 U.S.C. Sec. 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. Sec. 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. See *United States* ex rel. *Fine v. University of California,* 821 F. Supp. 1356, 1358 (N.D. Cal. 1993), *rev'd sub nom., United States ex rel. Chevron U.S.A. Inc.,* 39 F. 3d 957 (9th Cir. 1994), *vacated en banc,* 60 F. 3d 525 (9th Cir 1995), *cert. denied,* 517 U.S. 1233 (1996). 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. Sec. 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. Sec. 1116(d)(4)(B)(vii). In both statutory examples, sealing is for a specific purpose and a limited time.

There are some categories of cases that invariably involve 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 Sec. 31-39-1-2 (records in juvenile proceedings); Maryland Code, State Gov't. Art., Sec. 10-616(b) (records in adoption and guardianship proceedings); Maryland Code, Art. 88A, Sec. 6(b) (records in child abuse or negligence proceedings); New York, Family Court Act, Sec. 166 (records of family court proceedings); New York, Domestic Relations Law, Sec. 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, Sec. 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. Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files, September 2001.

In some situations, a viable alternative to the sealing of pleadings may be the use of fictitious names when there is a legitimate reason to litigate anonymously. However, like the sealing of pleadings, the use of fictitious names is disfavored and exceptional circumstances must be shown to do so. *See, Doe v. City of Chicago,* 360 F. 3d 667, 669-670 (7th Cir. 2004).

Many cases incidentally involve personal information, the public disclosure of which may violate recognized privacy rights or possibly expose litigants to identity theft or other abuse. In these cases, redaction of the personal identifiers from pleadings and other court papers protects the litigants' privacy interests while minimally affecting the public's qualified right of access to judicial records. Many courts, both state and federal, have adopted rules requiring that such personal identifiers be redacted from publicly accessible files.

Parties may have additional confidentiality interests that warrant redaction of particular information in otherwise public filings. Examples include property interests such as trade secrets and legally protected privacy interests such as medical or financial information. Such redaction cannot be made unilaterally by the litigant. A motion to allow redaction of information from otherwise public filings must be supported by the same compelling interest required for the sealing of a pleading.

A party may also believe it has compelling reasons to request an order allowing it to file an entire document with the court under seal. The party may be permitted 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 by virtue of filing.

No document should be filed under seal without statutory authority or express court permission, either by rule or order. Whenever a document has been filed under seal or information has been redacted beyond the requirements of a statute or rule, the court has an obligation to review the document at the earliest opportunity to determine whether continued confidentiality is justified. Any decision by the court to continue the confidentiality of the pleading must be based on specific findings that the interest in confidentiality overcomes the presumption of public access.

While private parties may utilize the courts to settle private disputes, the courts' business is public, with very narrow exceptions authorized by statute or rule. Before filing any pleading, an attorney should inform his or her client of the extent to which personal information will likely be made public, measures that can be taken to minimize the compromise of personal information, and possible alternatives to litigation.

Best Practices

1. Courts should promulgate or issue local rules, court-wide standing orders, or courtroom-specific standing orders to facilitate and expedite public access to all pleadings, substantive motions, orders, judgments, and supporting documents, and to provide for prompt determinations of motions to seal.

2. Before filing a pleading, an attorney should consult the law of the jurisdiction to determine what information may be recognized as confidential. At or before the commencement of litigation, the attorney should confer with his or her client to

determine whether any information that the attorney or the client considers to be confidential must be incorporated into the pleading, and should inform the client of what measures may be taken to maintain the confidentiality of that information.

3. An attorney should not attempt to seal a pleading, motion, or any supporting material unless he or she is satisfied (consistent with Fed. R. Civ. P. 11 or its state equivalents) that the attorney can demonstrate grounds for a sealing order.

4. Before attempting to seal a pleading, substantive motion, or any supporting material, an attorney should consider whether there is a legitimate and narrower alternative to sealing. For example, an attorney might consider the redaction of specific information, the use of "John Doe" pleadings, or the use of a sealed attachment containing the allegedly confidential information, allowing the non-confidential material to be openly filed.

5. Any sealing order should include written findings of fact and conclusions of law demonstrating what interests would be jeopardized by public access to the sealed material, the compelling need for confidentiality which outweighs the public's interest in disclosure, that the sealing requested is no broader than necessary to meet that need effectively, the lesser restrictive alternatives considered by the court and why these were rejected. Absent the most extraordinary circumstances, sealing orders themselves should not be sealed.

6. In the event that a pleading or other document is filed under seal, the attorney who secures a sealing order and the judge who issues it should determine whether sealing is necessary only on a temporary basis. Whenever practicable, the sealing order should be framed to expire at the end of a specified period of time or the occurrence of a specified event. In the absence of a self-executing expiration, the attorney and the judge should monitor the litigation to ensure that the sealing order is vacated when the circumstances justifying the sealing order have changed.

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 transfer the products in issue to an unknown location or to destroy the products. The complaint, including the request for immediate relief, is filed under seal. The filing is accompanied by a proposed order to be endorsed by the judge, also filed 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 high value (and high profit) 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 finally filed 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 interest in avoiding publicity would not overcome the presumption of public access to the pleadings. The attorney informs the plaintiff that filing

under seal would not be advisable and reviews alternatives, including alternative dispute resolution.

3. Several members of a wealthy family, all beneficiaries under a trust, file suit against another family member who is the trustee. The plaintiffs allege that the defendant misappropriated 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 version 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 lodged with the court with a motion to seal.[1]

4. 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 "John 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.

Principle 2 **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 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. For each case, the individual docket should serve as a register 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. Access to the docket is the only effective means to determine if a particular case is being adjudicated. Access to individual case dockets is the only effective 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.

Consistent with the law, certain court documents may be sealed and certain proceedings may be closed to the public. It does not follow, however, 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.

Docket entries on rare occasions 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

1 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

or the names of minors. However, the restrictions imposed by such statutes and court rules should not necessitate 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. A judge should state appropriate findings of fact and conclusions of law in a temporary order. Any such order 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 existence of a docket or a case should never be secret. Even if the merits of a case warrant confidentiality, the case must be assigned a docket number and a docket must be available to public access.

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. In conference with the judge, 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 **The public has 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 (3d Cir. 1991); *In re Continental Illinois Securities Litigation, 732* F.2d 1303 (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. This right cannot be overcome absent a showing that some compelling interest requires confidentiality. Any restriction on access must be as narrow as possible 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 knowledge that the safety net of "practical obscurity" has, for all intents and purposes, been removed by technology. Judges and law clerks should not include unnecessary confidential information in their 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.

Best Practices

1. Judges and law clerks 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. While courts should avoid including information that is superfluous and the publication of which may be harmful to a litigant or a third party, courts should redact or seal information properly included in opinions and orders only where there is a compelling reason to do so.

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.[2]

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 should be available for public access, including 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, in part or in whole, periodically or upon the occurrence of specified events in the case to ensure that the sealing order is vacated if and when the circumstances justifying the sealing order have changed.

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, but 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 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, but the opinion issued by the judge totals thirty pages addressing a number of facts and legal issues, and the detailed comparison

2 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

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 commissions paid by the defendant to other brokers. Both parties move for summary judgment and include in their papers the 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 The public should have appropriate notice of all motions to seal.

The public has a qualified right of access to all papers, including briefs, submitted in support of and in opposition to motions and filed with the court that address non-discovery matters. These papers may contain information that implicate legitimate privacy or confidentiality interests, or otherwise warrant redaction or sealing, and may be proper subjects for a protective or 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.

Some courts allow a procedure under which pleadings, motions, proposed orders, privileged documents, disputed evidence, or other material may be temporarily lodged (but not filed) with the court, providing a mechanism for making a docket entry notifying the court, other parties in the case, and the public of the existence of the material and the motion for a protective order or seal, without making the material itself subject to public access. The clerk's office and the court treat "lodged" material as though it has been filed under seal, but the court expeditiously determines whether the confidentiality interests asserted by any of the parties are sufficient to overcome the presumption that the material should be filed for public access.

Motions to seal documents should be rare and made only when there is no feasible alternative. As stated under Principle 1 above, 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 lodging of only the protected attachments, and not the whole document, pending resolution of a motion to seal. Care must be taken in doing so, however, as clerks' offices may encounter problems in segregating documents to be filed from those to be lodged.

Best Practices

1. Attorneys should minimize the number of papers requiring consideration of sealing or redaction by eliminating non-essential references to privileged, private, or confidential information and by segregating attachments or exhibits that may be subject to a protective or sealing order, and lodging these separately

from pleadings, substantive motions, and briefs that can otherwise be filed for public access.

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 discuss or file the material and ask the designating party to promptly respond and confirm whether that party continues to contend the material merits confidentiality. Discovery management agreements or protective orders should contain a provision for giving such notice and include a time limit to respond before such confidentiality designations will be deemed waived.

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 lodge the material with the court, 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.

4. Attorneys should take care to minimize the need for sealing by segregating the confidential material into an attachment or appendix or portion of a declaration. Every document sought to be sealed should be lodged in a format that highlights or otherwise indicates the specific information proposed to be redacted. In this fashion, the parties and the court can focus their attention on the confidential details and more efficiently determine what information, if any, merits sealing.

5. Attorneys should lodge, as an attachment to any motion to seal, unredacted and proposed redacted versions of all documents sought to be sealed. In the event a motion to seal is granted, the judge should consider the parties' proposed redactions and consider whether these are appropriate and within the narrow scope of the order. The court should order the approved redacted versions to be filed and subject to routine public access.

6. A judicial determination on a document-by-document basis is required for sealing.

7. If the volume of documents upon which the parties fail to agree is extraordinary, the court may refer the dispute to a special master under Fed. R. Civ. P. 53(b) or its state equivalents, and order the parties to defray the expense of that process.

Examples

1. A plaintiff intends to file a motion for summary judgment in fourteen days, which will include documents it obtained from the defendant through discovery and designated by the defendant as confidential under a stipulated protective order. The plaintiff informs the defendant of its intention to include specified documents in an upcoming filing and advises the defendant to file a motion to seal the material in advance of the filing date. If the defendant files the motion to seal, the plaintiff lodges 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

publicly files its summary judgment motion with the supporting documents, deeming the confidential designation to be waived.

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 lodges 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, the proposed redacted documents, and following a hearing, rules upon the motion to seal.

Principle 5 Any interested person should be permitted to intervene to obtain access to documents filed with a court.

Courts have recognized that the public has standing, and has 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 may 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 third-party intervenors, the court is not likely to have the benefit of the adversary process in making its decision. Intervention should therefore be liberally granted, and non-parties should be afforded the opportunity to be heard on whether the presumption of access to filed documents has been overcome.

Motions to intervene raise distinct jurisdictional issues in two situations–first, involving the original trial court after a case has closed and second, involving an appellate court. The first situation assumes that the motion is made after the close of the litigation in which a sealing order was issued. The question is, does the issuing court retain jurisdiction to hear the motion and modify or vacate the order? In federal court, the answer is yes, as the court always retains jurisdiction over its own records. *See Gambale v. Deutsche Bank AG,* 377 F.3d 133 (2d Cir. 2004). In the second situation the question is, does an appellate court have jurisdiction to hear an appeal from a trial court order addressing a motion to intervene and to modify or vacate an order? There is a split of authority among the federal courts as to whether the proper "vehicle" for bringing such an appeal is a mandamus petition or an appeal under 28 U.S.C. Sec. 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). However, as the Tenth Circuit observed in *McVeigh,* whatever the vehicle employed, "all circuits that have considered the issue have found appellate jurisdiction ... under one doctrine or the other." 119 F.3d at 810.

Best Practices

1. Courts should establish reasonable procedures to give adequate notice to the public of motions to file documents under seal. The entry of the motion on the docket reasonably in advance of the hearing or decision provides adequate public notice. Courts in which the filings are made and the docket is managed electronically might elect to give notice on a public Web site.

2. Interested persons should be granted the right to intervene to oppose a sealing motion, and to revisit a sealing decision in a proceeding to which they had not been afforded notice and an opportunity to participate, or when changed circumstances merit modification.

3. Orders denying motions to intervene and denying motions to modify or vacate protective orders should be subject to immediate appellate review under the collateral order doctrine.

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 lodged with the court pending a decision on the motion to seal. The motion to seal and the lodging 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 motion to intervene should be granted.

CHAPTER 1
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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).

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

CHAPTER 2. 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. 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 pre-trial proceeding, or unless the court orders that these be filed. Fed. R. Civ. P. 5(d).

Pretrial discovery that is 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 has the right to disclose voluntarily any information received during discovery unless the party has agreed otherwise or the court, upon a showing of good cause, enters a protective order pursuant to Fed. R. Civ. P. 26(c) or its state equivalents.

Best Practices

1. Attorneys should cooperate in efficiently exchanging discovery 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 pre-trial 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, but such objection should be the basis for negotiation with the requesting party over the procedure for producing the requested discovery to protect legitimate confidentiality and privacy interests, or a prompt application to the court for a protective order under Fed. R. Civ. P. 26(c) or its state equivalents.[3]

3. Likewise, while a party has the right to disclose information freely obtained during discovery, a party should not use the threat of exposure of confidential or private information obtained during discovery as leverage in a lawsuit.[4]

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3 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

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Examples

1. The attorneys representing the parties in a class action race discrimination lawsuit against a large corporation meet 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.

2. Same facts as Example 1, but the attorneys did not meet or enter into any confidentiality 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 the data 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 **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.**

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. *Harris v. Amoco Prod. Co.,* 768 F.2d 669, 683-84 (5th Cir. 1985).

In some cases, however, a 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 sensitive, 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. Because of practical limitations on the enforcement of such private agreements, parties often seek the court's *imprimatur* on such agreements through the use of protective orders under Fed. R. Civ. P. 26(c). By practical necessity, these orders are often entered without judicial assessment of the specific documents or information the disclosure of which will be limited by the protective order.

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. 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 as long as the parties can articulate a legitimate need for privacy or confidentiality, in those instances where the protective order will apply only to the disclosure of information exchanged during discovery. Because of the limited scope and provisional nature of the protective order, the court need not conduct a detailed evidentiary 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 ever be used in connection with the determination of the merits of the dispute. However, a protective order entered as a discovery management tool, without specific consideration of the material at issue, should be considered to be provisional in that it is subject to future challenge by any party, including an intervenor, and subject to modification by the court.[5]

Best Practices

1. Attorneys and parties should be aware 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. If this *status quo* is not acceptable, the party seeking 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. A protective order restricting dissemination of information produced during discovery should not be the default position for all litigation. Attorneys should assess in each case whether an order is truly necessary.

3. Attorneys should avoid excessive and unjustified designation of documents as "confidential" under a protective order. The common practice of designating entire document productions as "confidential" should be discouraged.

4. A protective order entered without a specific evidentiary determination by the court should permit the party receiving the "confidential" information to challenge that designation at any time through notice to the producing party that the designation is challenged as to particular information as to particular documents or information. Receipt of such notice should require the producing party to promptly seek protection and to prove that the particular information qualifies for judicial protection, or the designation is waived.

5. Attorneys and parties should periodically re-examine confidentiality designations made during discovery and determine whether such designations remain necessary for the documents and material upon which these were imposed.

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 protective order which:

5 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

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 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 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.**

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. Court 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 able to be made under the stricter standards described in Principle 1 above 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, virtually all of the Circuits 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." *Laucadia, 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. *Proctor & Gamble Co. v. Bankers Trust Co.,* 78 F. 3d 219, 227 (6th Cir. 1996).

Protective orders must not confuse the confidentiality of material produced in discovery with the filing of such materials under seal for non-discovery purposes. 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. The question that must then be addressed is how the court treats this material when a party attempts to file it for non-discovery purposes (for example, as an attachment to a summary judgment motion).

The common practice of drafting protective orders 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.

Best Practices 2 and 3 below describe procedures that may be employed in protective orders to reconcile the presumption of a public right of access with the conservation of party and judicial resources. No procedures, however, should provide for the mass filing of whole categories of material under seal, as the court must make a document-by-document determination.

Best Practices

1. Attorneys should advise their clients at the outset that a protective order entered without a specific evidentiary showing only restricts the dissemination of documents and information so long as the need for confidentiality is not 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. In other words, 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 entered without specific 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. If the designating party files a motion to seal the court record within a reasonable period of time, an evidentiary 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 should not be considered in determining that the information should be sealed in connection with a determination on the merits. Failure by the designating party to file a motion to seal or otherwise oppose the filing of a protected document should constitute a waiver.

3. 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 must 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 plaintiffs' counsel intends to file the payroll and promotion database which has been designated as confidential as an exhibit to her papers 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 protective order with respect to the challenged information. Alternatively, plaintiff's counsel simply lodges the payroll and production database with the opposition papers, likewise triggering such obligation.

2. Using the above example, plaintiff's counsel also notifies defendant's counsel that she will be filing pages from one of defendant's outdated employee handbooks in connection with his opposition to the 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.

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

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 redressible 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).[6]

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.

The courts are in disagreement as to the burden of proof, when motions to modify or vacate an existing protective order are made. 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 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

6 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

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.[7]

3. In situations where third party intervention can reasonably be anticipated, confidentiality agreements between the parties, whether or not they are framed as court orders, should contemplate procedures to follow if a party receives a subpoena or order to compel production of protected information from parallel or subsequent litigation. 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 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 him to send 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.

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7 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference web site at www.TheSedonaConference.com.

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 above in Example 4, except that the parties fail to agree upon a stipulated protective order and one party moves for entry of such an 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 failed to agree on a stipulated protective order and one party moved for the entry of an order pursuant to Fed, R. Civ. P. 26(c). The judge ruled on the motion and issues 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 2
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A full bibliography, updated periodically, may be found on The Sedona Conference® web site at www.thesedonaconference.org

CHAPTER 3. TRIALS

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

Public access to trials on the merits, both jury and nonjury, 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 do exist that can 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 to 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). The same considerations should apply to civil trials. A party seeking to restrict public access to a trial should demonstrate a substantial likelihood that a compelling interest will be prejudiced by allowing public access and also show 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-no broader than necessary to protect the compelling interest-and effective. 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.

5. Courts should require parties who anticipate that closure of a portion of a trial may 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 including express findings identifying the compelling interest that requires closure and the reasons that 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. Courts should provide as much advance public notice of consideration of a motion to close a trial as practicable, in order to allow opposition to closure. Absent the most exigent circumstances, courts should deny any request for closure that is not made in time to allow such notice.

9. Courts should freely allow nonparties who oppose closure to submit papers and make arguments responding to any closure motion. Intervention should be liberally granted for this purpose.

10. 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 also inaudible to 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).

11. Conferences in chambers are occasionally used to address matters that arise in the course of a trial. Because it is not practical to admit the public to in-chambers conferences, their use 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 should be promptly made available to the public (unless, again, compelling circumstances justify confidentiality). 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.

12. 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 jury selection.

There is a presumption of public 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 concerns, courts should not conceal from the public sensitive information that might bear on the ability of jurors to impartially decide the matter before them. Thus, public access fosters discussion of government affairs by protecting the full and free flow of information to the public.

There has been a trend in recent years for trial courts to close the jury selection process, deny access to juror questionnaires, empanel anonymous juries, and prohibit post-verdict interviews, particularly in high profile criminal cases that attract intense public scrutiny. This trend has been accelerated with increasing public interest in all trials, civil or criminal, evidenced by phenomena such as television networks that are devoted to broadcasting judicial proceedings.

Various interests are cited in opposition to public access to juror selection. These interests include juror privacy, protection of the integrity of the jury system, and avoiding a circus-like atmosphere. These interests are problematical. There may well be circumstances where some restriction to public access is necessary to ensure the safety or well-being of individual jurors, but the mere fact that a trial may be the subject of intense media coverage in insufficient to justify deny public access to of the jury selection process. This 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, and the judge's fear that jurors may disclose what transpired during the deliberations do not, in themselves, warrant anonymous juries or restrictions on public access.

Beyond the scope of jury selection, but relevant to the subject of juries and public access, the qualified right of public access 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).

Courts may limit an attorney's or party litigant's ability to interview jurors regarding their verdict or deliberations. In addition, courts may require a showing of good cause before allowing post-verdict interviews of jurors by attorneys or litigants. Such orders do not themselves implicate the public's right of access to any public information, but only constrain the behavior of lawyers and litigants. However, the court should not limit a juror's right to speak to the media or other members of the public after the conclusion of a trial.

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. 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 depend on the affirmative request of an individual juror.

3. 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 should be made available to the public at the earliest possible time. Stronger reasons to withhold juror names and addresses (such as jury tampering) normally exist during trial 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 that less restrictive alternatives are insufficient.

9. Jury secrecy orders, while appearing to be interlocutory in nature, should be appealable 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. During the jury selection process in a civil action brought by a government agency against a well-known entertainer, the defendant approaches the court 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. The court denies the motion for several reasons. First, no advance (and public) notice was given that the request would be made. Second, the court rejects the proposition that candor might be compromised, noting that the application is solely premised on the defendant's celebrity status and press coverage. Neither fact gives rise *per se* to a legitimate concern about candor.

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.

It follows from the right of public access to trial proceedings that there is similarly a right of public access to evidence admitted during a trial, including not only testimony that is memorialized in the transcript, but also exhibits that are offered or admitted in evidence. Admitted evidence should be fully available to the public, 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.

These principles are not controversial. It should be recognized, however, that logistical problems may foreclose contemporaneous access to trial exhibits in particular cases. 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. In re *Application of National Broadcasting Co.,* 635 F.2d 945 (2d

Cir. 1980). When access is sought to evidence introduced through means of novel technology, the court may be vested with wider discretion in deciding whether and how access may be allowed. In re *Providence Journal Co.,* 293 F.3d (1st Cir. 2002). Moreover, public access to trial exhibits is inhibited by a practical concern: The prevailing practice in most American trial courts is that, after the time for filing an appeal has expired (or an appeal has been taken and resolved), trial exhibits are returned to the parties. Because the physical exhibits are no longer public records, these are no longer subject to enforceable public access rights.

Nonetheless, the fact that the materials have been part of the public record of a judicial proceeding is not without lasting significance once the exhibits have been returned. For example, any confidentiality to which discovery materials in a case may have been subject under a protective order should be lost once they have been introduced as exhibits. Thus, exhibits that have been returned to the propounding party should be available from an opposing party. Similarly, the fact that materials have been introduced in open court in a previous case should in most instances prevent these from being properly designated as confidential under protective orders applicable to discovery in subsequent litigation.

Best Practices

1. 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.

2. Courts should require parties who anticipate that denial of access to trial evidence may be necessary to raise the issue through written motion, to allow the court ample time for consideration and to permit the full exploration of alternatives to denial of access (such as providing for access at the conclusion of the trial). Courts should freely allow nonparties who seek access to trial evidence to submit papers and argue against any motion to deny access. Intervention should be liberally granted for this purpose. The hearing on the motion should be recorded or transcribed. 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.

3. 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.

4. 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 that less restrictive alternatives are insufficient.

Examples

1. 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. In her pretrial statement, the plaintiff discloses her intent to use the documents as exhibits at trial, and during the trial these are marked and introduced in evidence without objection from the defendant in open court. A reporter seeks to obtain copies of the documents from the court, and the defendant objects, citing the protective order. The court orders that the reporter be permitted to obtain copies because the materials, having been used in open court, are freely 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 reporter seeks to obtain copies from the plaintiff. The defendant learns of the reporter's request and seeks to enforce the protective order to bar the plaintiff from providing the exhibits to the reporter. 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.

CHAPTER 3.
SELECTED BIBLIOGRAPHY

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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).

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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 postverdict interviews of jurors by press).

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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 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).

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CHAPTER 4. SETTLEMENTS

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

Parties may resort either to private dispute resolution or courts to resolve their disputes. As a general proposition, parties can assure confidentiality by opting for private dispute resolution, examples of which include arbitration and mediation. However, there may be circumstances when one or more parties opt for a public forum. Should a party do so, it is questionable whether confidentiality can be assured. Therefore, attorneys must make certain that their clients are fully aware of the available public and private dispute resolution processes and the possibility that confidentiality cannot be expected or assured in a public forum.

Under our judicial system, parties may resolve their disputes in a private rather than a public forum. Resort to a private dispute resolution process is a matter of contract, and the contracting parties can negotiate and agree to confidentiality, both of the process and any resulting settlement. Under these circumstances, parties have broad discretion to contract privately for confidentiality, can protect privacy interests, and can be reasonably assured that any settlement will be kept confidential. Injunctive relief may also be available to compel specific performance of a contractual confidentiality provision. Confidentiality becomes a matter of contract to be enforced pursuant to contract law. *See Herrnreiter v. Chicago Housing Authority,* 281 F.3d 634, 636-37 (7th Cir. 2002); *Pansy v. Borough of Stroudsberg,* 23 F.3d 772, 788-89 (3d Cir. 1994); L. K. Dore, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Documents,* 55 S. C. L. Rev. 791, 799-800 (2004). Parties need not meet standards imposed by legislatures or courts for the issuance of confidentiality orders. Parties must recognize, however, that confidentiality provisions may be void as against public policy if such provisions are incorporated in a private settlement agreement that affects health and safety or contains illegal terms.

Despite the above, a party or parties may prefer a public forum to resolve a dispute. By doing so, the party invokes the jurisdiction of a forum that is subject to oversight and monitoring by the general public. This makes confidentiality problematical for several reasons. First, the dispute between the parties will presumably be a matter of public record. Second, the role of the court in the settlement (and any enforcement) process may be subject to public review. Nevertheless, a party or parties may resort to a public forum to avail themselves of judicial remedies in the settlement process.

Private dispute resolution may also raise societal concerns. *See, e.g.,* Note, *Deadly Secrecy: The Erosion of Public Information Under Private Justice,* 19 Ohio St. J. on Disp. Resol. 679 (2004). There is little or no public oversight of the private dispute resolution process itself, and this lack of oversight exists at a time of increasing resort to private dispute resolution processes in the consumer and individual employee areas. Moreover, there is little or no public oversight of private settlements that may affect the public interest. On the other hand, public oversight of private dispute resolution might discourage resort to it.

Best Practices

1. At or before the commencement of litigation, attorneys should confer with their clients to determine whether private dispute resolution would be preferable to traditional litigation (assuming both options exist). Among other things, the attorney should present these options to his client in the context of the latter's desire (or need) to maintain confidentiality.

2. In discussing the above options with his client, the attorney should also discuss with his client the mechanism for enforcement of any breach of confidentiality by an adversary.

3. In discussing (1) and (2) above with his client, the attorney should recognize that certain disputes represent "classic" matters for private resolution, such as breach of a commercial contract between business entities. The attorney should also recognize that certain matters, such as those brought by individual plaintiffs to vindicate statutory rights or brought by or against public entities, may not be appropriate for private dispute resolution given the public interest in the resolution of such disputes.

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 proceed to arbitration or mediation of any dispute he has with the business entity. Under the terms of a confidentiality provision, no public access is available to the facts or nature of the dispute, the terms of any award or settlement, or the services rendered by the arbitrator or mediator. However, the agreement itself would not prohibit access to the "procedural aspects" of the dispute resolution process by a government investigator or litigant in a subsequent civil action. Procedural aspects might include the number of arbitrations or mediations performed by a neutral or the fees received by the neutral from the business entity.[8]

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 in arbitration or mediation as a result of which the competitors agree to divide markets on a geographic basis, in conscious 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 brought into question and is highly relevant to the action.

Principle 2 **An attorney's professional responsibilities, both to the client and to the public, affect considerations of confidentiality in settlement agreements.**

A basic responsibility of an attorney is to maintain the confidences of a client. Not only must confidences be maintained, but attorneys must take steps to arrive at a settlement and ensure that a client's confidential information is protected. Nevertheless, under very limited circumstances, an

8 An alternative viewpoint on this issue has been submitted by a member of the Working Group. Alternative viewpoints and public commentary are posted and periodically updated on The Sedona Conference® web site at www.thesedonaconference.org.

attorney may have discretion to reveal confidences when death, serious bodily injury or financial harm is imminent. In choosing whether to exercise that discretion, the interests of both the public and collateral litigants in securing otherwise confidential information should be considered.

The obligation of an attorney to maintain a client's confidences is fundamental to the attorney-client relationship. Consistent with that obligation, an attorney must take client confidences into account during settlement negotiations and may agree to limit the disclosure of confidential information as a condition of settlement. Attorneys must recognize, however, that confidential information may impact on, among other things, public health and safety. Depending on the ethical rules of the jurisdiction, attorneys may have discretion to reveal otherwise confidential information under such circumstances. *See Model Rules of Professional Responsibility,* Rule 1.6(b)(1). However, except in very limited circumstances, *e.g.,* 17 C.F.R. Part 205 ("Standards of Professional Conduct for Attorneys Appearing and Practicing Before the [Securities Exchange] Commission in the Representation of an Issuer"), no *mandatory* duty to disclose exists.

The ethical obligation to maintain confidences and the confidential nature of a settlement negotiated by an attorney may also affect specific individuals (such as collateral litigants). These individuals may have a legitimate desire for access to confidential information. There is little guidance on the factors that an attorney should consider in deciding the exercise the discretion referred to in Model Rule 1.6. *See Model Rules of Professional Responsibility,* Rule 1.6, Comment 6.

Finally, attorneys need to familiarize themselves with ethical rules that prohibit restrictions on another attorney's practice of law. A settlement that purports to restrict an attorney from using information gained in one case in other related cases may violate the ethical rules of the jurisdiction.

Best Practices

1. Attorneys should familiarize themselves with applicable ethical rules to determine which circumstances may warrant disclosure of otherwise confidential material.

2. Attorneys should familiarize themselves with applicable ethical rules to determine what limitations exist on their negotiating agreements that might contain unethical or illegal terms.

3. Regardless of whether an attorney has discretion to disclose a confidence, he should discuss with his client his concern and attempt to resolve that concern.

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 learned that there was a design defect in the product's control panel that might lead to a fire, as happened in the case. Plaintiff's attorney knows of at least four other cases involving fires in the product. 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 to the contrary in the jurisdiction, the information would be considered a "client confidence." The attorney may not reveal any information covered by the confidentiality clauses of the settlement agreement.

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

Courts exist to resolve disputes. Disputes may be resolved in a number of ways, one of which is settlement. Thus, judges should be expected to encourage settlement and to participate in settlement discussions.

Judges are public actors. Judges are subject to oversight and monitoring by the public. When a judge participates in settlement discussions between the parties, the judge is "injected" into the settlement process and the judge's actions presumably have some significance. Thus, it can be argued that there should be public monitoring and oversight when a judge participates in settlement discussions. The desire or need for such oversight and monitoring may be heightened when settlement discussions affect public health and safety.

There are, however, factors that argue against public access to settlement negotiations. First, settlement negotiations require candor, and public access might discourage a party from revealing information. Second, settlement discussions are often conducted on an *ex parte* basis and information is exchanged with the judge which, for settlement purposes, is not shared with the adversary. Third, the judge is not engaged in "decision-making" in the settlement process, thus limiting the basis for public oversight and monitoring. Indeed, in most cases the parties are free to settle on whatever terms they wish without submitting their agreement to the court, and the judge has neither the need nor the power to approve or disapprove of their agreements. Therefore, in cases where the judge has no approval role and serves merely as a mediator or facilitator for the parties' private negotiations, the presumption of access to settlement discussions, if it exists at all, is a weak one. If public access is to be denied on this premise, however, the judge should take care not to step into a judicial role; thus, the parties should not seek "approval" of a settlement, and the judge should not purport to give it, and the settlement agreement should not be filed with the court.

Best Practices

1. A judge may play the role of an intermediary or facilitator in settlement negotiations between the parties to a case. Alternatively, the judge may refer the case for confidential, court-annexed mediation. In neither case is there a presumption of public access to the settlement discussions or to any settlement agreement that results, if the court does not step into an adjudicatory role and the settlement agreement is not filed with the court.

2. Absent a statute or rule which requires otherwise, attorneys should not ask a judge to "approve" a settlement, and a judge should not do so; nor should settlements be filed with the court if these do not require approval or the terms of the settlement are not intended to be entered as orders of the court.
3. In cases where approval is required, such as class actions, and 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 submitted to the court. In such cases, the settlement agreement becomes a presumptively public record of the court, and proceedings leading to formal approval are subject to the right of public access.

4. A judge should not *sua sponte* suggest to the parties that a settlement might be kept confidential. It might be appropriate, however, in a case pending in federal court for a judge to 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 be arguably illegal. To do so, however, may impose an obligation on the judge to independently "police" the provisions of a settlement that might be difficult to fulfill, 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 reach a settlement. A settlement is reached. The terms of the settlement are not put on the record. The settlement is private and there is no right of public access.

2. The same facts as (1) above, but the settlement is lodged with 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 pursuant to which 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 facilitate it further.

Principle 4 Sealed settlements should be the exception and not the norm.

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 are *not* sealed unless specific findings of fact and conclusions of law are made, and are available for public review. Attorneys should not seek to seal a settlement unless they are satisfied that such a showing can be made.

Courts are public forums. There is a presumption of access to courts and to information filed with courts, including settlement agreements. Indeed, information considered to be confidential by parties and filed with courts may, by the act of filing, become public records and 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). But the presumption of public access 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 that is central to the adjudicatory function of courts. Parties may have legitimate interests in the confidentiality of all or part of a settlement. Parties may also have justifiably relied on confidentiality in entering into a settlement. To overcome the presumption of public access, parties must be prepared to satisfy the tests established by legislatures and courts which govern the sealing a settlement, either in whole or in part. The judge should make specific findings of fact and conclusions of law on any application to seal a settlement, as the presumption of public access must be overcome and the interests of the general public and collateral litigants may be affected.

Despite resort to a public forum, the parties may elect to avoid any question of access to the terms of a settlement by simply not filing 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 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. These procedures foreclose the ability of courts to determine whether any terms of the settlement offend public policy. *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).

Sealed settlements are infrequent, at least in federal courts. R. T. Reagan, et al., *Sealed Settlement Agreements in Federal District Court* (Federal Judicial Center, 2004). However, of broader concern are confidentiality provisions of settlements. While parties are free to agree between themselves to confidentiality provisions in settlements, if the parties enlist the court to enforce the settlement by requesting that the court retain jurisdiction to oversee the fulfillment of the settlement terms, filing a separate action to enforce the settlement, or filing a separate action for damages for breach of the settlement, the courts should deny judicial enforcement of any non-disclosure provision that goes beyond "settlement facts" and attempts to suppress "adjudicative facts" relevant to the underlying merits of the settled case.

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 (consistent with Fed. R. Civ. P. 11 or its State equivalents) that grounds exist for a sealing order.

4. In considering whether to seal a settlement, courts should distinguish between "facts" related to the settlement, such as amount, terms and conditions, and "facts" related to the litigation process, such as pleadings and the fruits of discovery. 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.

5. In negotiating a confidential settlement agreement, attorneys should incorporate into any confidentiality provision an explicit exception for judicially compelled disclosures.

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 lodge the settlement with the court and file a motion to seal. As the presumption of public access is weak and there is no public interest in the amount of the settlement, the court seals the settlement as to the amount only.

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 new applications arising out of the software and market those applications. 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 lodge the settlement with the court and file a motion to seal. 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 the settlement in part, only to the extent that the settlement reveals the source codes.

Principle 5 **Absent exceptional circumstances, settlements with public entities should never be confidential.**

Public entities, at the federal, state and local levels, are public actors and, by definition, their actions affect the public interest. Moreover, public entities are, as a general rule, subject to open public meeting and/or open public record laws of their respective jurisdictions. Thus, there should never be an expectation of confidentiality when a public entity enters into a settlement. There may, however, be exceptional circumstances that warrant some degree of confidentiality.

As are courts, public entities are public actors. The public has an interest in the monitoring and oversight of public entities. Moreover, open public meetings and open public records laws are widespread (if not universal). For these reasons, there should be a strong presumption against any settlement entered into by or with a public entity being kept confidential. This presumption should be particularly strong with regard to any monies paid by public entities in settlement. Despite this, there may be extraordinary circumstances that warrant some degree of confidentiality. These may include matters that implicate legitimate privacy interests of individuals, such as juveniles.

Best Practices

1. An attorney representing an individual or entity in litigation against a public agency should caution his or her client against any expectation of privacy.

2. 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 legitimate interest in confidentiality.

3. 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.

4. Any court that has before it an application to seal a settlement of a matter involving a public entity should give careful consideration to relevant federal or State law in considering any such application. Specifically, judges should be especially 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 under some other privacy-related law might merit a confidentiality order.

Examples

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

2. Two individual plaintiffs brought suit against a state agency for wrongful disclosure of their private medical information. The defendant agency admitted that it erred in disclosing the information. The parties entered into a settlement, at plaintiffs' insistence, which sealed all facts relevant to the suit, including plaintiff's medical information. The plaintiff's information is confidential and that alone may warrant confidentiality.

CHAPTER 4
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Northern District of Oklahoma, Local Rule 79.1(D) (provides that an order is required for sealing)

Middle District of Pennsylvania, Local Rule 79.5 (establishes temporal limitation on sealing)

District of South Carolina, Local Civil Rule 5.03 (establishes procedure for motions to seal and bars sealed settlements.

Eastern District of Tennessee, Local Rule 26.1 (establishes procedure for filing under seal)

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Geller v. Branic Int'l Realty Corp., 212 F.3d 734 (2d Cir. 2000) (district court "so ordered" a stipulated settlement of a sexual harassment case, which included a provision requiring the court to seal the entire file. After the settlement, the district court sealed only the settlement agreement, not the entire file. The Court of Appeals held that the trial court was required to seal the case file. The district court initially had wide latitude in determining whether or not good cause existed to seal the file. However, after ordering the stipulated settlement, any modifications to the sealing order could only be justified by extraordinary circumstances or compelling need).

United States v. Glens Falls Newspapers, Inc., 160 F.3d 853 (2d Cir. 1998) (newspaper was not entitled to intervene to challenge protective order covering settlement negotiation information because settlement discussions and documents were not subject to presumption of public access, and disclosure would impede the court's role in encouraging and facilitating private settlements; "the trial judge has the power to prevent access to settlement negotiations when necessary to encourage the amicable resolution of disputes").

City of Hartford v. Chase, 942 F.2d 130 (2d Cir. 1991) (a confidentiality order preventing access to all settlement documents, although broad, was not improper because it was entered for the compelling reason that the parties would not have settled without it and where, *inter alia,* intervenors had notice and an opportunity to challenge the confidentiality order before it was adopted).
Palmieri v. State of New York, 779 F. 2d 861 (2d Cir. 1985) (enforcing protective order in antitrust litigation that was not shown to have been improvidently granted or subject to the extraordinary circumstance or compelling need exception, and referring to the "unreasonable burden on the reviewing judge" that might result from a requirement that he or she scrutinize a settlement for possible violation of the antitrust law or other result contrary to public policy).

3D CIRCUIT

In re *Kensington Industries Ltd.,* 368 F.3d 289 (3d Cir. 2004) (Recusal of district judge who appointed and engaged in ex parte discussions with "advisors" who had conflicts of interest; court notes that ex parte settlement discussions permitted under the Code of Judicial Conduct if consented to by parties.

Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) (settlement agreement between police chief and borough was not filed with, interpreted or enforced by the district court and was therefore not a judicial record subject to right of access doctrine, but newspaper would be permitted to intervene to challenge propriety of confidentiality order under state Right to Know Act and Rule 26; "Simply because a court has entered a confidentiality order over documents does not automatically convert those documents into 'judicial records' accessible under the right of access doctrine.").

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5TH CIRCUIT

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Daines v. Harrison, 838 F. Supp. 1406 (D. Colo. 1993) (newspaper had standing to challenge magistrate judge's order sealing terms of settlement reached during settlement conference before magistrate judge, and public right of access required vacatur of confidentiality order; but because settlement agreement was never part of court record, ruling could not mandate disclosure of the agreement; confidentiality was still one of the terms of the settlement agreement, and if one party chose to disclose the terms of the agreement, the other party would still have a cause of action for breach of the agreement).

11TH CIRCUIT

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CHAPTER 5.
PRIVACY AND 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 personal privacy implications of public access to case files, especially through the Internet. In the United States court community, it has been suggested that case files - long presumed to be open for public inspection and copying unless sealed by court order - contain private or sensitive information that should be protected from unlimited public disclosure and dissemination in the new electronic environment. 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 interests.

Potential Privacy 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 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 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 or sensitive information such as medical records, employment records, detailed financial information, tax returns, Social Security numbers, and other personal identifying information. Allowing access to case files through the Internet, depending on how it is accomplished, can make such personal information available easily and almost instantly to anyone who seeks it out. Sensitive information, unless sealed or otherwise protected from disclosure, can be downloaded, stored, printed, and distributed. This information often is highly valued by data-mining companies that cull public records and integrate public record data with other sources of data on individuals.

These circumstances place into conflict two important government obligations:

1. Information should be available to allow for effective public monitoring of government functions; and

2. Private or sensitive information in government files may require protection from indiscriminate disclosure.

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 - 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, litigants must expect 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. 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 paper filing 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 privacy 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 harm. Thus, although there is no expectation of privacy in case file information, there is 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 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 several related questions. First, what is the proper role of the courts in collecting and maintaining public records in electronic form? Are the courts - by allowing Internet access to case files- changing their role from being passive "custodians" to a more active role of "publishers" or "disseminators" of court records? This is a key question that has motivated courts at both the federal and state levels to begin the development of new access policies in the context of electronic case files. A second, related, question is whether the courts should undertake this policy inquiry before placing electronic case files on the Internet.

Third, 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 in the context of case files? Judges, as a general matter, do not raise privacy issues on their own. Instead, privacy 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 enquiry.

Courts are 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.

Several common themes have emerged in access policy development at both the federal and state court level. These include:

- Rules or policies, in general, provide specific lists of what is, and is not, presumptively subject to public access.

- Many of the new rules affirm the primary role of judges and judicial discretion. Decisions to close files continue to be left to judges on a case-by-case basis.

- As an alternative to the traditional case-by-case approach, rules or policies allow unlimited public access at the courthouse to a particular case type, while remote public access is either restricted or prohibited.

- Many of the new rules require partial or full redaction of personal identifying information such as Social Security numbers, financial account numbers, home addresses, and birthdates.

- Rules include a new approach - one that builds on the technology - to segregate sensitive information on special forms, whether paper or electronic, so that public access can be restricted in appropriate situations.

- Courts are emphasizing the importance of informing litigants that case files may be available on the Internet, and of educating attorneys on these issues. This emphasis recognizes that the participants in the litigation process must understand how court records are maintained on the Internet and how to protect private information if necessary.

- Courts, as administrative entities that collect information, have a role to play in protecting the privacy interests of litigants. Some state court rules, for example, list data elements that must not appear on the public docket, even if the court needs to collect additional information to process a case.

- Courts are addressing the concept of "bulk access" to electronic case files. Several state court rules attempt to restrict electronic access to bulk information by allowing access to only one case at a time. Others permit bulk access, but only subject to contractual terms that may include an agreement not to use bulk data for commercial purposes.

- Litigants are being made responsible for considering what they file from an access/privacy perspective. Some rules direct litigants either to refrain from filing sensitive personal information or, if it must be filed, to file under seal.

Conclusion

Courts have begun to address privacy 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 contain sensitive personal and other information that may require special privacy protection in the context of the Internet. 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.

CHAPTER 5.
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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

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Bingham McCutchen LLP
Participant

John J. Barnhardt III
Alston & Bird, LLP
Participant

Helen Bergman Moure
Preston Gates & Ellis
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Alan F. Blakley
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Executive Director, The Sedona Conference
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Member

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Bingham McCutchen
Participant

Lucy A. Dalglish
Executive Director
Reporters Committee for
Freedom of the Press
Participant

Daniel T. DeFeo, Esquire
The DeFeo Law Firm, PC
Member

Robert Deyling
Administrative Office of the U.S. Courts
Observer

Jonathan R. Donellan
The Hearst Corporation
Participant

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Drake University Law School
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Davis Wright Tremaine LLP
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Honigman Miller Schwartz and Cohn, LLP
Participant

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Assistant United States Attorney
District of Maryland
Participant

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Greenberg Traurig
Participant

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Faegre & Benson
Participant

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Monica W. Latin
Carrington Coleman
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Scott Nelson
Public Citizen
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Center for Constitutional Litigation
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