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

Alternative Viewpoints

The following are stongly held viewpoints of individual Working Group members and others that differ from the Working Group's draft. We publish these to encourage further public dialogue on issues raised. If you have an alternative viewpoint you wish to contribute, please submit it to <email address>. Be sure to include the chapter number, principle number, and if applicaable, the "best practice" or "example" number most closely related to your alternative viewpoint.

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.

Alternative viewpoint on Example 3 submitted by Working Group member Scott Nelson:

The types of information that this example indicates are subject to legitimate confidentiality interests that could support a sealing order are overbroad. The example states that sealing would be appropriate for such items as "the value of the trust, … respective shares of the trust assets, and the holdings of the trust" on the grounds that this would be "sensitive family information." Such garden-variety information about financial disputes, however, is routinely discussed publicly in opinions (*e.g.*, *In re Estate of Cavin*, 728 A.2d 92 (D.C. 1999), to cite just one example). If such innocuous and general financial information qualifies for sealing, then much private civil litigation can be conducted under a cloak of secrecy. Moreover, the fact that financial interests are held through "family" entities as opposed to other fiduciary arrangements, such as partnerships, close corporations, or non-family trusts, does not increase the need for protection of such information. The example should be rewritten to refer, perhaps, to particular bank account numbers and details of individual financial transactions as types of financial information that may justify sealing because of the possible harm that their disclosures may cause to the parties. The overall value of trust assets, shares of ownership, and identity of property held by a trust are routine and not particularly sensitive financial information that ordinarily would not justify sealing in a court system that is presumptively open to public access.

Principle 2: The public has a qualified right of access to court dockets as the principal indexes to judicial proceedings and documents that can only be overcome in compelling circumstances.

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.

> *Alternative viewpoint on Best Practice 2 submitted by Working Group member Scott Nelson:*
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> This best practice asserts that when a court includes information restricted by "an existing sealing order" in an opinion or order, it should seal that information and issue a redacted opinion. The reference to "an existing sealing order" is too broad and should be deleted. Most existing sealing orders apply to information filed by parties, not to the court's own opinion. Second, sometimes information is filed under seal pursuant to a preexisting protective order and is not carefully scrutinized at the time; and even when a court attempts to use care in scrutinizing all items submitted for filing under seal, it is less likely to be able to focus its attention as carefully on each particular item in, say, a voluminous summary judgment filing than it can on the more limited number of items it includes in its own opinions. Third, sealing orders are often entered at a time when a court may not be fully aware of the importance particular information has to its ultimate decision on the merits, which in turn affects the balance as to disclosure. For all these reasons, an existing sealing order should not be sufficient to authorize sealing of information in an opinion without further analysis. Rather, before sealing any part of an opinion, the court should conduct a new analysis (consistent with best practice 3) of whether the information merits sealing in light of the fact that the court is now relying on it as part of the explanation for its decision. The existence of an earlier sealing order, while it might possibly play a role in considering whether litigants had a reasonable expectation of confidentiality, should not be dispositive. In explaining its decision about whether or not to seal part of its opinion, however, the court may, of course, refer to the balance drawn in an earlier sealing order if it remains convinced that the considerations that justified that order are also applicable to information included in the court's opinion. *See, e.g.*, *McConnell v. FEC*, 251 F. Supp. 919 (D.D.C. 2003) (conducting new analysis at time of opinion to determine whether information previously filed under seal should remain sealed, and generally unsealing information relied on in court's opinion even though it was previously accepted for filing under seal).

Principle 4: The public should have appropriate notice of all motions to seal.

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

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.

Alternative viewpoint on Best Practice 2 submitted by Working Group member Scott Nelson:

This best practice states that a party may use alleged confidentiality as a ground for "objection" to discovery of otherwise discoverable information. To say that a party has a permissible ground for "objection," however, usually means that the party can rest on objection and let the other side bear the burden of moving to compel. A claim of confidentiality for otherwise discoverable and unprivileged information should not provide a ground for "objection" to discovery. Rather, a party who seeks protection for material it thinks is confidential should bear the burden of either negotiating agreement to some form of confidentiality or, if agreement is not possible, promptly moving for a protective order.

Alternative viewpoint on Best Practice 2 submitted by Working Group member Laurie Dore:

I wonder whether the "good cause" standard in Rule 26(c) requires that the parties do more than simply "articulate a legitimate need for privacy or confidentiality." Although perhaps encompassed in the term "need," parties should be required to demonstrate that a specific, clearly defined harm will result from disclosure of the confidential materials. Moreover, parties should define or describe the protected materials in a reasonably specific, non-conclusory manner.

Alternative viewpoint on Best Practice 3 submitted by Working Group member Scott Nelson:

This best practice states that a party "may not use the threat of exposure of confidential or private information obtained during discovery as leverage in a lawsuit." While this sentiment may seem laudable on its face, it seems overbroad. It is generally not "improper" to use even an explicit threat of publicity over a non-frivolous lawsuit to try to prompt someone to settle with you before you have

to sue them, *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995). It follows that it is also not improper to take advantage of whatever "leverage" is inherent in the notion that litigation is generally a public process. That the publicity attending litigation might concern information a party's opponent might regard as "private" or "confidential" doesn't seem very material as long as the party would have a right to disclose it in the lawsuit (that is, it is not legally protected from disclosure). A party who is concerned about exposure of its information has the recourse of seeking a protective order if protection is justified.

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 issued based on a showing of good cause.

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.

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.

Alternative viewpoint on the introductory text submitted by Working Group member Fran Fox:

In *Oklahoma Hosp. Ass'n v. Oklahoma Publ'g Co.*, 748 F.2d 1421, 1425-26 (10th Cir. 1984), the court denied standing because the would-be intervenor had not shown that the relief sought would redress its alleged injury, as the parties neither objected to nor appealed the order nor otherwise exhibited a desire to disseminate information. *Oklahoma Hospital* applies the test of standing found in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Standing is appropriate where there is harm to a plaintiff from a defendant's putative illegal conduct and a favorable decision is likely to redress the harm. In our context, where the parties have agreed to confidentiality and where it serves a useful purpose (obviating the need for time-consuming review by a court), it seems appropriate for the court to inquire as to whether the protective order is the bar to the requested disclosure, or whether it is likely that the disclosure would not be forthcoming even if the bar were lifted. If none of the parties expresses an interest in disclosure, then the court would be entitled to view intervention as not warranted. Conversely, if a party has repented of its earlier position and is now willing to make disclosure if it were permitted, then intervention would be granted and the court may address the merits. The *Oklahoma Hospital* court found that, since the parties had stipulated to

confidentiality, as since it was considered useful by the parties, it was unlikely that removing the order would achieve redress for the petitioner. Thus, the second prong of the *Valley Forge* test was not met and intervention was denied on standing grounds. The Working Group as a whole has recognized, in Principle 2 of Chapter 2, that private agreements are valid. Difficulties in enforcement often lead these parties, although essentially in agreement, to seek the court's imprimatur. Yet the underlying agreement remains in place and presumably still reflects the parties' views. Therefore, some members of the Working Group believe the *Oklahoma Hospital* analysis is logical, consistent with familiar legal precepts, and practical.

Alternative viewpoint on Best Practice 2 submitted by Working Group member Scott Nelson:

There is a debate over whether, as asserted in this best practice, a challenger to a protective order bears some burden of proving that it should be lifted or modified. Even if there are circumstances where such a burden is appropriate (a proposition this commenter questions), it should not be imposed unless the protective order resulted from "*adversary proceedings* involving full consideration of the merits." Even a conscientious court is hampered in its ability to consider the merits of confidentiality when the issue has not been actually litigated, but has instead resulted from the agreement of the parties. Moreover, parties have less substantial reliance interests in broad protective orders that have been entered as a result of agreement than in orders that have genuinely been arrived at through the full consideration of issues that the adversary process ensures. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). As a more general matter, moreover, principles of preclusion and law of the case are only applicable to issues that have been litigated. Placement of a burden on an intervenor who is challenging an order that has never been subject to adversary testing is inappropriate.

Chapter 3. Trials

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

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

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

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.

Alternative viewpoint on Example 2 submitted by Working Group member Laurie Dore:

This example concerns an arbitration between a consumer and a large telecommunications company. Do we assume that that dispute does not affect the public interest? If the dispute concerns a company-wide practice or policy affecting many more customers, it may well implicate a broader public interest. Yet, current doctrine would not impede the parties' private agreement to arbitrate and privately resolve the matter without judicial interference. The example illustrates the lack of public oversight of private, alternative dispute resolution.

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

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

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

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

Chapter 5. Privacy And Public Access To The Courts In An Electronic World