



AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

2001 JEFFERSON DAVIS HIGHWAY ■ SUITE 203 ■ ARLINGTON, Virginia 22202

March 10, 2006

Richard Braman
Executive Director
The Sedona Conference

Dear Mr. Braman:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the "Revised April 2005 Public Comment Draft" of *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (the "Draft Guidelines").

AIPLA is a national bar association of more than 17,000 members with interests and practices primarily in the areas of patent, trademark, copyright, trade secret, and other aspects of intellectual property law. Our members are both in-house and outside counsel. Unlike areas of practice in which separate and distinct plaintiffs' and defendants' bars exist, most intellectual property law attorneys represent both intellectual property owners and alleged infringers. Typically, our members participate in litigations involving highly confidential business information, and so protective orders and confidentiality standards are very important to them. AIPLA has no interest other than promoting a sound judicial system that is fair and equitable to all concerned.

It is obvious from reviewing the Draft Guidelines that the authors put in an enormous effort, and those involved with the Sedona Working Group are to be commended. Nonetheless, AIPLA believes that the Principles and Best Practices in the Draft Guidelines do not adequately take into account the broader issues arising from cases in the intellectual property field that involve confidential information.

The Examples set out in the Draft Guidelines attempt to address these concerns, but our initial review leads us to believe that there may still be significant issues that have not been addressed or that do not sufficiently address the concerns that arise in, for instance, patent and trade secret litigation.

We do not believe that our concerns are procedural or academic. For instance, while we are still reviewing the materials, some of the questions that have initially arisen include:

- Whether the guidelines adequately consider the impact of internet access to court records on traditional protective order law and policy;
- Whether the current Draft Guidelines will significantly increase the costs and risks of litigation;
- Whether the Guidelines' presumption of a qualified right of public access to all documents filed with the court and material to the adjudication of all non-discovery

matters is too broad in view of the wide variations in confidentiality requirements pertaining to different types of litigation and documents;

- Whether requiring written findings of fact and conclusions of law as a basis for sealing each document containing confidential information will further unnecessarily burden courts;
- Whether the proper balance is struck in the Draft Guidelines between the rights of public access and the use of confidential information;
- Whether the Draft Guidelines impose upon attorneys added ethical requirements, *i.e.* to the public at large, in addition to their obligations to represent a client vigorously;
- Whether there should be any presumptive right of a litigant to disclose discovery materials to third parties;
- Whether there are sufficiently serious problems in practice that require development of "best practices"; and,
- Whether the Draft Guidelines adequately protect third party trade secrets, such as those that may be uncovered from non-litigants.

It may be that these issues are adequately addressed in the Draft Guidelines, but AIPLA believes upon preliminary review that the interests of the owners of trade secret, business confidential and other intellectual property rights may not have been fully represented in the discussion to date. As noted, however, these concerns are based on a preliminary review. AIPLA believes that a conscientious review is required in order to properly respond.

AIPLA's members have a depth of experience with commercial intellectual property litigation that is unparalleled. The Draft Guidelines require serious and detailed review from their perspectives and AIPLA is undertaking such a review. However, we cannot meet the published deadlines set out by the Sedona Conference and the Working Group, and we believe that any attempt to do so would prevent us from making a complete and proper response. Accordingly, we think it appropriate to adopt, and request the Sedona Conference adopt, a revised timetable for comments that will allow us an adequate opportunity for thorough and thoughtful review.

Should you wish to discuss this matter, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink that reads "Michael K. Kirk". The signature is written in a cursive, flowing style.

Michael K. Kirk
Executive Director
AIPLA