March 22, 2022

To: the Supreme Court Advisory Committee

From: Subcommittee on Rules 15-165a
Richard Orsinger, Subcommittee Chair

Focus: Proposed Federal rule counterpart to Tex. R. Civ. P. 76a

Memo: On the Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal (December, 2021)

1. The Sedona Conference. The Sedona Conference is a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The Sedona Conference has different Working Groups, one of which is Working Group 1 on Electronic Document Retention and Production.

2. Commentary on Need for Uniformity in Filing ESI & Records in Federal Courts. There is no uniform rule governing the filing of ESI (electronically-stored information) and records under seal in Federal courts. In December 2021, Working Group 1 on Electronic Document Retention and Production released its public comment version of its *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal.* [A copy of this 54-page document is attached.] The stated intent of the Commentary "is to minimize the burden on litigants and courts created by the lack of uniformity in United States district court procedures for sealing confidential documents and electronically stored information (ESI)." To this end, the *Commentary* "offers a Proposed Model Rule designed both to bring uniformity to the process of filing under seal and to create a fair and efficient method to deal with the sealing and redacting of ESI, so that the parties can focus on the litigation while conserving the resources of the court. The Proposed Model Rule does not provide any guidelines or guidance for what ESI is properly sealed or redacted; it only provides a procedure for doing so." [p. iii]

3. Personal Information Redacted Under FRCP 5.2. Federal Rule of Civil Procedure (FRCP) 5.2, Privacy Protection For Filings Made with the Court, *permits* a filing party to redact portions of an individual's "social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number...." There are certain exemptions. A problem with Rule 5.2 is that the filing party is not *required* to redact the personal information of another party or

a non-party, and in that instance the individual whose personal information is involved has no control over whether the filing is or is not redacted. Rule 5.2(e) allows the filing of a motion for a "protective order." Rule 5.2(e) says: "For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court."

4. Fixing Misplaced Burden. The *Commentary* notes that under many of the Federal court local rules the Filing Party must move to seal the record even if it is not that party's information and the Filing Party may not have the incentive to seal and may in fact oppose sealing. [p. 1] The *Commentary* proposes to place the burden to seek a sealing order on the Designating Party – the party who has designated information produced in pretrial discovery as confidential. [p. 1] To allow this, the *Commentary* suggests that a filing party intending to file "confidential information" must issue a "Notice of Proposed Sealed Record," to be filed along with the accompanying motion, pleading, or response, identifying the confidential information it is intends to file. [p. 1-2] "The Notice, proposed in this Commentary to be a standardized and simple form for consistency and efficiency, then triggers the obligation of the designating party to file a properly supported motion to seal. This process change not only eases the burden on the filing party, but also places the burden to seal on the proper party – the party that produced the documents with a confidential designation." [p. 2]

5. Proposed Model Rule. The *Commentary* sets out four proposed model rules for sealing and redacting information filed with a Federal court, with a proposed form of notice. [pp. 3-9]

1. Presumptively Protected Information. The proposed Rule 1.0 contains definitions, describing "Presumptively Protected Information" ("PPI") as (i) Personally Identifiable Information (Social Security No., etc.); (ii) Protected Individually Identifiable Health Information (HIPAA-protected, etc.); (iii) other information protected from disclosure by Federal, state, local law and regulations or rules; and (iv) other personal information not covered by Rule 5.2, such as passport numbers, taxpayer ID numbers, military ID numbers, driver's license number, etc. [p. 3] "Confidential Information" is information that a Filing Party or Designating Party contends is "confidential or proprietary," including information designated as confidential or proprietary under a protective order or nondisclosure agreement, or information "entitled to protection from disclosure" by statute, rule, order, or other legal authority. [p. 3]

2. Sealing Presumptively Protected Information. Under proposed Rule 2.01(A),

information governed by FRCP 5.2 continues to be covered by that rule. For other PPI, the Filing Party *may* redact, without prior court approval, provided the redactions are no greater than required to protect disclosure of the PPI. Information other than PPI is governed by proposed Rule 3.0. Under proposed Rule 2.01(B), a Filing Party is not required by "this section" to redact information that was received from a Designating Party without redaction. However, proposed Rule 2.01 does not supersede a contrary court order, law, regulation, or rule that imposes an affirmative requirement to redact prior to filing. Under proposed Rule 2.01(C), the Filing Party is not required to defend redactions made by a Designating Party, and may in fact object to or challenge such redactions. Proposed Rule 2.01(D) said that redactions "should be no more extensive than required to maintain the confidentiality of the Presumptively Protected Information, and should not, where feasible, obscure the type of information being redacted, if the nature of the type of information is indicated on the original document; for example, 'D.O.B. ____.'" Proposed Rule 2.01(E) requires that redactions apprise viewers of the bases for redaction, such a by overwriting with the words "PHI/PH Redacted" or "Personal Protected Information Redacted." [pp. 4-5]

3. All Other Sealing. Proposed Rule 3.0 relates to sealing information other than PPI.

Proposed Rule 3.0(A) requires prior approval by the court before filing any record under seal or redacted, except in connection with a Notice of Proposed Sealed Record or a record containing PPI. A record filed in connection with a Notice is temporarily sealed until an order is entered. Thereafter, the record remains sealed until further order of the court. [p. 5]

Proposed Rule 3.0(B) gives instructions on filing electronically with restricted access using the court's Case Management/Electronic Case Filing (CM/ECF) system. [pp. 5-6]

Proposed Rule 3.0(C) gives particulars about the Notice of Proposed Sealing of Record. Under Rule 3.0(C)(1), the requirement to file the Notice applies to any Filing Party, even a Designating Party. Under Rule 3.0(C)(2), the Notice must identify each record that is proposed to be sealed or redacted, or must "generally identify" the Confidential Information that was redacted, without disclosing the Confidential Information. The Notice must identify the Designating Party. Under Rule 3.0(C)(3), for records filed before the Rule became effective, the Filing Party must file a Notice. If previously sealed by court order, no new motion to

seal is required to maintain sealed status. Under Rule 3.0(C)(4), the Notice must be filed "immediately after" the motion, pleading, or response to which the proposed sealed information is *referenced* or *attached*. Examples listed is a motion to compel, motion for summary judgment, or motion in limine. Under Rule 3.0(C)(5), if the records in question were produced by a non-party to the litigation, the Filing Party must give notice of the Notice to the non-party. [p. 7]

Proposed Rule 3.0(D) relates to the Motion to Seal. Under Rule 3.0(D)(1), a Designating Party who wishes to seal must file and serve a Motion to Seal. Under Rule 3.0(D)(2), the Motion to Seal must be accompanied with a nonconfidential supporting memorandum, describing each record to be sealed, the basis for sealing, and how the standards for sealing are met for each record. Under Rule 3.0(D)(3), the Motion to Seal must include a nonconfidential declaration in support of sealing, setting forth the legal basis for sealing each record, referencing the CM/ECF docket numbers. Under Rule 3.0(D)(4), the Designating Party must file its Motion to Seal and supporting declaration within the period for responding to the motion that references or attaches the designated confidential information. Absent a deadline for the responsive pleading, the deadline is seven days after filing. Under Rule 3.0(D)(5), failure to file a compliant Motion to Seal waves the right to seal. [pp. 7-8]

Proposed Rule 3.0(E) requires that a proposed order be served with the Motion to Seal. [p. 8]

Proposed Rule 3.0(F) governs disposition of Proposed Sealed Records. [p. 8]

Proposed Rule 3.0(F)(1) says that if a Designating Party fails to file a motion to seal after receiving a Notice, the Filing Party must file the record without redaction and unsealed within seven days of the deadline expiring.

Proposed Rule 3.0(F)(2) says that, if the court grants the Motion to Seal, the sealed record will be deemed filed as of the date the Notice was filed unless the court directs otherwise.

Proposed Rule 3.0(F)(3) says that, if the court denies the Motion to Seal, the Filing Party shall filed the record without redaction and unsealed within seven days after the order denying sealing or other action by the court.

6. Disposition of Proposed Sealed Records. Proposed Rule 4.0 governs the disposition

of sealed and redacted records at the conclusion of the case. Proposed Rule 4.01 says that, unless otherwise ordered by the court, a sealed or redacted record will "remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served upon all parties in the case and upon any Designating Party that is a non-party in accordance with the service requirements in this Rule."

7. Proposed Form Notice of Proposed Sealing Order. The proposed Rule provides a form Notice of Proposed Sealed Record. [p. 10] It is in tabular form, asking for the CM/ECF No., Designating Party, Objection Anticipated, Prior ECF No., and Prior Order date.

8. Annotated Rule. The *Commentary* then sets out an annotated proposed Rule [pp. 12-31] followed by a flow chart of the procedure [pp. 32].

9. Appendix: Standards for Sealing in Federal Court. The Appendix to the *Commentary* is legal briefing on the "presumptive right to access to judicial records." [p. 33] They quote *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978): "The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." The right to access is based on the public's "desire to keep a watchful eye on the workings of public agencies." [Footnotes omitted] The *Commentary* continues that the right to access to court records derives from common law, the First Amendment, or both. The *Commentary* distinguishes the right to access to court records from the right access discovery, citing FRCP 26(c), "which permits courts to protect documents and information exchanged during discovery." [p. 33]

9.1 Common Law Right of Access. The *Commentary* says that the common law right of public access to court records starts with a presumption in favor of public access. [p. 33] The common law right to access predates the U.S. Constitution, and applies to both criminal and civil proceedings. The right is not absolute, and the court has discretion in the matter. The *Commentary* says: "Because every court has inherent, supervisory power over its own records and files, even where a right of public access exists, a court may deny access where it determines that the court-filed documents may be used for improper purposes. Examples include the use of records 'to gratify private spite or promote public scandal' or to circulate libelous statements or release trade secrets." [p. 34, footnote omitted]

9.2 First Amendment Right of Access. The *Commentary* says that the U.S. Supreme Court has declared the public right of access to criminal trials rests in the First

Amendment. Citing an 11th Circuit case, the *Commentary* says that the right to access is more limited in scope in civil proceedings. [p. 34] Citing a 3rd Circuit case, the *Commentary* says that "there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." [p. 33] The *Commentary* continues: "A party seeking the removal of a document from the public eye bears the burden of establishing that there is good cause that disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity."

9.3 Federal Rule 26(c). The *Commentary* says that "Federal Rule of Civil Procedure 26(c) permits a court upon a motion of a party to enter into a protective order to shield a party from 'annoyance, embarrassment, undue oppression, or undue burden or expense.' Rule 26(c)'s procedures 'replace[] the need to litigate the claim to protection document by document,' and instead 'postpones the necessary showing of "good cause" required for entry of a protective order until the confidential designation is challenged.' The trial court has complete discretion over the entry of document protective orders." [p. 35] The *Commentary* goes on to note that a party wishing to obtain a protective order over information produced in discovery must show that "good cause" exists for a protective order. Good cause means a "showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity." [p. 35, footnote omitted] The *Commentary* says: "Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement, requiring courts to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." [p. 35, footnote omitted] The *Commentary* notes that a protective order at the discovery stage does not typically protect information from being filed as a public record, as that public filing is a separate determination. [p. 35]

9.4 Overview of Circuit Case Law. The *Commentary* discussed the decisions by the various Federal Courts of Appeals regarding the public's right to access to court records. [pp. 36-50] These standards are summarized on pp. 51-54.

POSSIBLE DISCUSSION POINTS FOR THE SCAC

1. The Sedona Conference did not propose a standard for sealing. Possible standards include "particularized need," "good cause," "clear and compelling reasons," "legally protected interest," "no less restrictive alternatives." TRCP 76a.1(a) permits sealing only upon a showing of:

(a) a specific, serious, and substantial interest which clearly outweighs (i) the presumption of openness and (ii) any probably adverse effect that sealing will have upon the public general health or safety; and

(b) no less restrictive means than sealing will adequately and effectively protect the specific interest asserted.

2. The *Commentary* does not include case law discussing the common law and constitutional right to privacy, which are often to be balanced against public disclosure. That case law should be presented to achieve better balance.

3. Under the proposed Rule, the parties cannot seal a court record by agreement and without meeting the requirements of the proposed Rule and obtaining court approval Proposed Rule 3.0(A). [p. 5].

4. The Local Rules of the Western and Eastern Districts of Arkansas have a similar procedure requiring the parties first to consult, then the filing party must file an application for leave to file under seal, after which the designating party has four days to file a declaration in support of sealing, showing good cause or compelling reasons why the strong presumption of public access in civil cases should be overcome, with citations to the applicable legal standard. The Eastern District of California provides for a request to seal documents, but it is framed for a party seeking to file its own confidential information under seal, not the opposing party's information. The Northern District of California provides for a party wishing to file information designated by the opposing party or a non-party to file an "administrative motion to file under seal," and to give notice to the party or non-party in question, and that party or non-party has four days to file a response.

5. TRCP 76a does not give a non-filing party an opportunity to request that the court seal its confidential information before the other party files it as a public record. In that situation, the party whose confidential information has been filed is trying to get the horse back in the barn. TRCP 76a.5 permits a party to seek an emergency sealing order with notice to all parties who have appeared in the case. But in a high-profile case, confidential or private information may be disseminated by the media before the court has a chance to rule on the non-filing party's request to seal the record.

6. The proposed Rule does not mention notice to the world or the participation of non-parties in the sealing or unsealing decision. TRCP 76a provides for public notice of a motion to seal or unseal, or an order sealing or unsealing. The proposed Rule does

not say that members of the public have standing to file a motion to unseal, in contrast to TRCP 76a.3 & .8 give the public standing to participate in the sealing hearing and appeal from an order. However, proposed Rule 4.0 mentions "[a]nyone seeking to unseal or unredact a Record may petition the court by motion." Anyone is pretty broad.

7. Should the content of the information affect the standard for sealing? In TRCP 76a(2)(b)(c), the Rule's procedures, presumptions, and standards apply to unfiled settlement agreements that seek to restrict disclosure of, and unfiled discovery concerning, matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of the government. Is a different standard used for sealing information that is irrelevant to the proceeding, or is embarrassing private information filed in court for malicious or other improper purpose, or to gratify private spite or promote public scandal, or to circulate libelous statements, etc.? FRCP 26(c) permits a protective order relating to depositions to protect against annoyance and embarrassment. The Federal District of Hawaii permits sealing of "confidential, restricted, or graphic" information or images. L.R 83.12(a). The Southern District of Indiana permits filing parties to redact, without prior court permission, confidential information that is "irrelevant or immaterial to the resolution of the matter at issue." But an unredacted copy must be served on other parties. L.R. 5-11(c)(2).

8. The proposed Rule treats redacting the same as sealing an entire record. The proposed Rule provides for a redacted version for the public and an unredacted version for the court and litigants. The Southern District of Alabama provides that "portions of a document cannot be filed or placed under seal - only the entire document may be sealed." L.R 5.2(a). Under the proposed Rule, redacting is preferred to sealing the entire document.

9. What is the difference in purpose under the proposed Rule between the nonconfidential memorandum in support and the nonconfidential declaration in support? [Proposed Rule 3.0(D), pp. 7-8] The Federal District Court of Arizona requires the motion to "set forth a clear statement of the facts and legal authority" that justify sealing. TRCP 76a does not provide what the motion to seal must contain.

10. Under the proposed Rule 3.0(F)(3), if the court declines to seal the record the Filing Party must file the record, unredacted and unsealed, within seven days of the order, "or take other action ordered by the court." [p. 8] It is unsaid but may go without saying that a Filing Party who is a Designating Party can elect not to file the

document containing the confidential information. The Eastern District of California requires the clerk to return the court record to the submitting party if the request to seal is denied. L.R. 141(e)(1). The Central District of Illinois provides that where a motion to seal is denied, the document remains sealed, unless the court orders it unsealed because it was filed in disregard of legal standards or because it so intricately connected to a pending matter that the interests of justice would be served by unsealing. L.R. 5.10(A)(4).

11. The Local Rules for the Northern District of California permit sealing when the proponent establishes that the document is privileged, protectable as a trade secret, or is otherwise entitled to protection under the law. L.R. 79-5.b. The proposed Rule does not mention documents that are privileged. Neither does TRCP 76a. Should evidentiary privilege be listed as a ground that automatically warrants sealing?

12. Proposed Rule 3.0(B)(7) prohibits sealing an order disposing of a motion to seal, but does not address sealing other court orders. Can other orders be sealed? Some Federal court local rules provide for the sealing of court orders. TRCP 76a.1 says that "[n]o court order or opinion issued in the adjudication of a case may be sealed." Does that include interlocutory orders, or just orders that dispose of the case? TRCP 76a.6 provides that an order sealing or unsealing court records cannot be sealed.

13. The proposed Rule does not apply to unfiled settlement agreements or unfiled discovery, while TRCP 76a does. The Local Rules for the Middle District of Delaware says that "[n]o settlement agreement shall be sealed absent extraordinary circumstances, such as preservation of national security, protection of trade secrets, or other valuable proprietary information, protection of especially vulnerable persons including minors and persons with disabilities, or the protection of non-parties without either the opportunity or the ability to protect themselves." LR 1.09(a).

14. The proposed Rule's mechanism does not work if the confidential information is obtained outside the discovery process, and no party or non-party has the opportunity to designate the information as confidential.

15. The proposed Rule contains no requirement that a sealing order contain particularized findings, or a clear statement of the facts and legal authority, etc. The annotation to the rule explains that this was because "district courts have widely differing standards on the substantive requirements that must be met for a court to justify removing a document, or a portion of a document, from public view." [p. 29] Some Federal court local rules require specific findings or recitals in an order

granting or denying a sealing request. TRCP 76a.6 requires an order sealing or unsealing to state "the specific reasons for finding and concluding whether the standard for sealing has been met."

16. The proposed Rule does not address the transmittal of sealed or redacted records from trial to appellate court, nor the procedures for filing in the appellate court.

17. The proposed Rule does not limit the duration of a sealing order after the case is closed. Rule 4.0 [p. 8] However, "anyone seeking to unseal or unredact" may petition the court by motion, which must be served upon all parties and any Designating Party that is a non-party. [pp. 8-9] The Local Rules for the Northern District of California says that any sealed record will be opened upon request made ten year or more after the case was closed. L.R. 79-5(g). The Southern District of California provides for the clerk to return all sealed documents to the filing party, upon entry of final judgment or termination of the appeal. L.R. 79.2. The Middle District of Delaware limits the duration of a sealing order to one year, subject to renewal. L.R 1.09(c). The Northern District of Illinois provides that, after the case is concluded, the party filing a sealed document must retrieve it within 30 days of notice from the clerk, failing which the sealed record is destroyed. L.R. 26.2(h). The Northern District of Iowa's clerk may destroy sealed records one year after the judgment became final, unless someone files an objection within one year. L.R. 5.c. TRCP 76a.7 has no automatic termination date, but allows any person to intervene after judgment to seal or unseal records. If the party already lost a sealing hearing, s/he must show changed circumstances. Even when a motion to unseal is filed, the burden remains on the party seeking to maintain sealing to justify continued sealing. TRCP 76a.7.

END