

The Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal (December 2021 Public Comment Version)

The intent of the *Commentary on the Need for Guidance and Uniformity in Filing ESI and Record Under Seal* (“*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).

For example, the district courts have different rules governing when a motion to seal must be filed, whether Electronic Case Filing (“ECF”) can, should, or must be used, and how long sealed ESI and records will remain sealed. Moreover, the *Commentary* recognized an inequity inherent in the sealing processes used by nearly every court. Namely, that the burden to seal ESI and records is placed on the party that did not designate such material as confidential, and in many instances, disagrees with the confidential designation and hence the request to seal. This results in an impracticable situation in which, by application of local sealing rules, the filing party must file a motion to seal documents that it may actually oppose. As a result, the filed motion to seal is oftentimes perfunctory and lacking in meaningful content.

So that the court can properly weigh whether the confidential documents meet the requirements to be sealed, this *Commentary* posits that it should be the designating party’s burden to file a declaration in support of sealing, because the designating party is uniquely situated and appropriately motivated to describe the nature and basis of each confidential document. Only upon such proper foundation can the court determine whether the documents or information at issue should be sealed from public view.

The *Commentary* includes a Proposed Model Rule designed to make the process for sealing confidential ESI and records uniform across all federal jurisdictions. The Proposed Model Rule does not provide any guidelines or guidance for what ESI is properly sealed or redacted. Rather, the *Commentary* and Proposed Model Rule are intended to provide guidance as to the *procedures* for sealing ESI and records, as well as suggestions to avoid potential pitfalls that may be encountered when moving to seal ESI and records.

The Proposed Model Rule also addresses other inconsistencies and differences between the local sealing rules, including setting a uniform and reasonable time frame to file a motion to seal, proper notice to be provided to non-parties whose confidential documents are subject to a Notice of Proposed Sealed Record, and how sealed and redacted records are to be filed by the parties and disposed of by the court.



The changes proposed in this *Commentary* are 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 full text of *The Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal* is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/Commentary_on_Need_for_Uniformity_in_Filing_ESI_Under_Seal.pdf.

©2021 The Sedona Conference.
Reprinted courtesy of The Sedona Conference.