A Personal Response to the Opposing Views

Submitted by David A. Schulz

I feel compelled to respond briefly to the Opposing Views submitted by some members, who characterize the Guidelines as "aspirational," suggest the Guidelines fail to embody "accepted legal or practice principles," and claim they do not reflect "a true consensus." While there is always room for improvement, these criticisms are largely unfounded— distorting the Guidelines, the existing law, and the efforts of the Working Group over the past three years.

The Opposing Views' fundamental disagreement with the Guidelines is over the nature of any common law or constitutional limits on a court's discretion to seal documents in various situations. A common law right of access to certain court papers has long been recognized, and a First Amendment right of access to a variety of court filings has been recognized by courts across the nation since the Supreme Court first declared in *Richmond Newspapers, Inc. v. Virginia* that an implied constitutional right of access exists. 448 U.S. 555 (1980). This authority is carefully laid out in the extensive bibliography that accompanies the Guidelines. Yet, the positions put forward in the Opposing Views would deny virtually any First Amendment or common law protection of public access to court records.

A central topic of research and discussion pursued in the early days of the Working Group was specifically the interplay of the constitutional access right and the "good cause" standard for the entry of protective orders provided in the rules of civil procedure. The Guidelines and best practices that grew out of these deliberations seek to reconcile differences between the "good cause" standard of the rules and the heightened standards of the common law and the constitution that must be met before various court papers can be sealed, and to do so in a manner that promotes the efficiency of civil litigation. The Guidelines propose practical steps to

make civil litigation less burdensome, less expensive and less time consuming within a framework that recognizes the *existing* legal rights of both the litigants and the public.

Unwilling to acknowledge any constitutional constraint, the Opposing Views repeatedly object that the Guidelines would limit historic notions of what constitutes "good cause" for sealing information. They variously object that the Guidelines "seek to restate the concept of good cause [for documents filed in court] . . . by imposing a compelling need standard" (at 5); "ensconce a new 'compelling circumstances' standard into the law" governing access to court dockets (at 6); and, put "a similarly unsupported twist on the compelling interests standard with regard to access to trial exhibits" (*id.*). The Opposing Views would prefer to "reiterate the traditional good cause standard as applied to the facts in particular cases and the stage of proceedings" (*id.*), but this misses the very point of the exercise. It blinks away any constitutional or common law limitation at all, ignoring a mountain of contrary precedent with no acknowledgement that it even exists.

Given the result-oriented approach adopted in the Opposing Views, it is disheartening that the dissenters advocate for their positions by questioning the good faith of the Working Group itself, accusing the participants of adopting the "aspirational" positions of the media and plaintiff lawyers.[1] These objections appear to reflect the concerted efforts of a few late comers to the process, who did not participate in the months of research, dialogue, debate and compromise that led up to the Working Group meeting in March 2004 where the basic concepts embodied in the Guidelines were agreed upon. Fully three quarters of signers of the Opposing

[1] It is also unfortunate that the dissenters have advanced their views in such an internally inconsistent document. The Opposing Views, for example, argue that there was no evidence of "systemic problems" needing to be addressed, while simultaneously protesting that the Guidelines wade into an ongoing debate that has been "raging" for years and address concerns that "have been hotly contested in the courts and legislatures" (*at 2*). Similarly, the Guidelines object that there was no "emerging technology" creating any gap to existing procedures that needed to be filled, but then underscore that "'access' to information (and the prospects for broad dissemination of that information) mean something entirely different" in an "internet age" than they did before. *Id.*

Views—fifteen out of twenty—were not part of that original effort.[2] They did not participate in the lengthy Sedona workshop, or in the many subcommittee meetings, telephone conferences and email discussions leading up to it, through which members struggled to understand the current state of the law in this area, and to cull from the collective experiences of practitioners and experts across the country a set of guidelines and best practices that would promote litigation efficiency in a manner that comports with the requirements of both due process *and* openness.

Having participated actively throughout, I reject the notion that no significant consensus developed behind the principles presented in the Guidelines. The Guidelines resulted from compromises made and agreements reached in open and respectful deliberations that were conducted in what has come to be called the "Sedona Way." A hallmark of this process was the commitment we each made to approach the issues with an open mind, to grapple honestly with the law and facts, and to leave at the door any self interest, bias or political agenda.

The Guidelines, I believe, will be recognized more broadly as a significant contribution to this area of the law, synthesizing as they do the evolving constitutional right of access into the existing rules of procedure, and proposing methods to meet the practical needs of litigants within the framework of our open system of justice.

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[2] Five of the signers of the Opposing Views only "joined" the Working Group in recent months after the draft Guidelines were circulated for public comment— apparently recruited specifically to oppose final publication of the Guidelines —and three other signers are not members of the Working Group at all, just public commenters.