*The Sedona Conference*
*Commentary on Protecting Trade Secrets in Litigation About Them*
(June 2021 public comment version)

Trade secrets are a property interest that can be destroyed by disclosure. This makes litigation of trade secrets unique; by bringing claims seeking to remedy misappropriation, a trade secret owner puts these secret information assets at issue in the public litigation process. Without the ability to protect the secrecy of trade secrets in litigation, the law of trade secrets would disappear, as it would be impossible to enforce trade secret rights in the face of misappropriation. Both the Uniform Trade Secrets Act and the Defend Trade Secrets Act explicitly acknowledge the need to protect trade secrets in litigation.

But this issue of protection runs into competing policy objectives: First, defendants need information about the claims to mount an effective defense, and second, the public generally has a constitutional right to access judicial proceedings. In this *Commentary on Protecting Trade Secrets in Litigation About Them*, Working Group 12 attempts to reconcile these important objectives with the need to protect trade secrets when litigating misappropriation claims. This *Commentary* offers consensus recommendations to parties and courts for addressing these thorny issues in various contexts, including access to trade secret information by in-house counsel, experts, employees, and attorneys who prosecute patents, as well as providing consensus guidance to parties and courts about balancing the right to public access with the trade secret owner's right to maintain the secrecy of its trade secrets.

This *Commentary* also addresses logistical issues that often arise in trade secret cases. In virtually all such cases, discovery is governed by a protective order. This working group provides guidance around how these orders should be drafted and how parties should exchange information pursuant to a protective order. The goal is to avoid unnecessary overdesignation, which burdens parties and the court, while allowing for efficient exchange of information.

This *Commentary* presents six Principles for protecting trade secrets in litigation about them:

**Principle 1** Whether a party's in-house attorneys, experts, or employees should be permitted to have access to the trade secrets of another party should be determined by balancing the risk of disclosure and harm to the producing party with the need for the other party to have the information in order to properly prepare its case.

**Principle 2** In civil proceedings, the public has a qualified right of access to documents filed with a court that are relevant to adjudicating the merits of a controversy. In compelling circumstances, a court may exercise its discretion to deny public access to submitted documents to protect the privacy, confidentiality or other rights of the litigants.

**Principle 3** Because public disclosure of a trade secret in litigation could destroy its value, if the trade secret owner establishes that certain information reveals all or a meaningful part of a trade secret, such information should be restricted from public disclosure, in both filings and open court. Restrictions should be as narrowly tailored as necessary to protect the trade secrets at issue.

**Principle 4** In cases to be tried before a jury, restrictions on disclosure of a trade secret at trial should be implemented in a manner that minimizes any prejudicial effects of the restrictions.

**Principle 5** A court does not need to make a conclusive determination as to whether a party's information qualifies as a trade secret before ordering appropriate protections. Instead, the court should determine whether that party has credibly identified the existence of a trade secret, making a particularized finding regarding the specific information that is subject to protection.

**Principle 6** The parties should cooperate in good faith to develop and implement a protective order that balances: (a) the need to protect trade secret information; (b) the right of both parties to receive timely disclosures and discovery responses; and (c) the right to have specified nonattorney representatives also timely review the other party's discovery responses.

The full text of *The Sedona Conference Commentary on Protecting Trade Secrets in Litigation About Them*, June 2021 public comment version, is available free for individual download from The Sedona Conference website at:
https://thesedonaconference.org/publication/Commentary_on_Protecting_Trade_Secrets_in_Litigation_About_Them