Protecting Confidential Information By Filing In Court "Under Seal"

KEVIN J. O'BRIEN
KRISTEN E. BROWN

When prosecuting or defending a civil lawsuit, litigants often must use sensitive corporate documents to support pleadings or as evidence. However, in some instances, filing confidential trade secrets, employment records, or financial information with a court - so that the information goes into a file available to the public - can be embarrassing or even damaging. Moreover, litigants may have an affirmative obligation to limit the disclosure of documents obtained from others under confidentiality agreements.

So, how can litigants navigate the judicial system without compromising confidentiality? By filing confidential documents "under seal," separated from the public court file until there is an affirmative decision (by consent of the information's owner or by order of the court) to publicize it. However, the judiciary's support for the public's right to access all court materials is growing, and many of those materials are now ending up on freely-available electronic court file databases. As a result, neither in-house nor outside counsel should assume that a court will automatically grant its request to shield sensitive materials from public view.

Common circumstances in the civil context under which litigants seek to file under seal

There are various types of confidential information that litigants may seek to file under seal. For example, in the commercial context, the courts address requests concerning documents or information that would divulge the "secret" aspects of intellectual property, such as patent filings or proprietary business processes. For individual litigants, social security numbers, home addresses, and performance reviews are the hot buttons. In bankruptcy cases, the code actually mandates the protection of certain types of information. One of these, "confidential commercial information," is information that does not rise to the level of "trade secret," but that would give an unfair advantage to competitors by providing them with information as to the commercial operations of the debtor.

Privacy issues often arise where litigants have previously availed themselves of private dispute resolution forums such as arbitration. Many arbitration proceedings are governed by confidentiality agreements that impose a restriction on disclosure of any information provided in the course of the proceeding. Some of these confidentiality agreements expressly require the parties to seek an order sealing the proceedings in the event any information acquired during the arbitration is to be used in a subsequent court action.

Balancing of Interests

Although some jurisdictions have codified the common law right of public access to court files (e.g., filings with an Illinois court clerk "shall be deemed public records"), other jurisdictions have worded the right of public access as a presumption (e.g., in Connecticut "[t]here shall be a presumption that documents filed with the court shall be available to the public."). Courts have explained the public policy behind the presumption of public access as stemming from a need for judicial accountability: in order for the public to have confidence in the administration of justice, the public should be able to see what information that actually forms the basis of the court's decision. In deciding whether to rebut the presumption favoring public access and seal a record, the courts balance the bona fide privacy interests against the interest in public access. Based on this analysis, courts may allow all or a portion of a court file to be sealed, thus protecting "only the particular information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality." *Pabst v. Maxtor Corp*., No. C 05-80042 JSW, 2005 WL 578107 (N.D. Cal. March 10, 2005). *See also A.P. et al. v. M.E.E. et al.*, 821 N.E.2d 1238 (Ill. Ct. App. 2004) (requiring trial court to make specific findings on sealing based upon proposed lists of individual documents and passages within documents).

When balancing the public and private interests, courts also consider the fact that sealed records present a significant administrative problem. In the federal court system, case files are disposed of pursuant to the *Guide to Judiciary Policies & Procedures*, Vol. XIII, Ch. XVII (2001) ("Records Management Policies" or "RMP"). The Records Management Policies provide that, 20 years after being sent to an archive facility (such as a Federal Records Center), most civil case files dated 1970 or later are to be destroyed.

Sealed case files, however, are not subject to these rules. Sealed files must be boxed separately, taped shut, and marked as "sealed records." Further, the boxes containing sealed records must bear "instructions limiting access solely to court personnel." RMP at A.6(J). And, "whenever court personnel retrieve sealed records from an FRC they must be returned to the FRC in a new, sealed box." *Id.* Most critically, there are no provisions allowing for eventual destruction of these sealed records. Because of these rules sealed records consume storage space indefinitely and require special attention from court personnel - a situation that at least one court has described as "particularly agonizing." *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 184 F.Supp.2d 1353, 1361 (N.D. Ga. 2002).

If sealing is allowed, how do you do it?

A party who needs to use confidential information in court should start with the court's local rules. Although these rules vary from jurisdiction to jurisdiction, there are three basic steps:

1. Prepare a motion that explains the reasons for seeking leave to file under seal. This motion will identify the pleadings or documents that the party wishes to file under seal, but will not describe them with such particularity that the motion itself would need to be filed under seal.

2. File the motion as per the usual procedures, but *lodge* the "pending seal" materials in a sealed manila envelope or other appropriate container. A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.

3. If the court grants the motion, an order will issue to the clerk. If the court denies the motion to seal, the party is entitled to retrieve the lodged record from the clerk without risk the documents will be made available to the public.

What about electronic filing?

Electronic filing procedures, such as those now used in most federal district courts, complicate the process. For example, in the U.S. District Court for the Northern District of Illinois, a motion to file documents under seal "may" be filed electronically, unless the "motion itself contains all or part of the proposed restricted or sealed materials," in which case, it may be filed in paper form. *General Order on Electronic Case Filing*, Sec. VIII(B) (N.D. Ill., July 1, 2005). The U.S. District Court for the District of Columbia requires under Local Rule 5.4(e)(2) that a motion "for leave to file a document under seal shall be filed by electronic means, but sealed documents accompanying such a motion shall be filed in paper form together with the notice of filing required by subsection (e)(1)." In short, when a jurisdiction has transitioned to electronic filing, a litigant who wishes to file under seal will have to use both the traditional paper system AND the new paperless system.

Conclusion

In light of the judiciary's desire to allow public access to court records and the significant administrative burdens that sealed records create, courts are requiring a compelling demonstration from litigants who seek to file documents under seal. There is a cost associated with the effort to convince a court that information is sensitive enough to merit special handling. Perhaps more critically, counsel and clients must consider what happens if the court is not convinced. Any litigation cost-benefit analysis must include assessment of the damage to the litigant of potential public disclosure of sensitive material.

Kevin J. O'Brien is a partner and Kristen E. Brown is an associate with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. They specialize in general commercial litigation, including reinsurance disputes. In addition, Mr. O'Brien specializes in environmental counseling and litigation. The views expressed are personal to the authors.