

## Considerations for Filing a Motion to Seal

**IMAGINE FOR A MOMENT THE BUSY TRIAL JUDGE** with a case load that stretches into the hundreds, with dozens of pending substantive motions at any given time, many of them case-dispositive. The imagination need not be taxed, as this description applies to virtually every superior court judge in the more populous counties of California. Budget cuts to the judiciary have increased the workload exponentially while reducing the number of law clerks to which judges may turn for assistance with legal research. Across a busy judge's desk comes a motion that seeks to seal the entirety of a simultaneously filed motion for summary judgment, along with all of its supporting exhibits. The motion is obviously boilerplate and has been submitted previously—in cases of every description—by the lawyer filing it. The accompanying memorandum does not articulate the proper legal standard and lacks an analysis of the factual basis for the request to seal. The counsel's argument also fails to identify the specific sections of the summary judgment motion and supporting exhibits that are the subject of the request to seal.

The opposing counsel's failure to contest the motion further burdens the court's resolution of the sealing request. If the client's interests are not impacted by the proposed order to seal, the opposing counsel likely cannot justify the time and expense involved in challenging the proposed order. The lack of opposition or the parties' stipulation to the requested sealing order, however, does not obviate the court's duty to weigh the competing interests and analyze the impact of less restrictive alternatives to sealing—a time-consuming process that often proves to be a waste of judicial resources, which are already taxed by matters of far greater significance.

This scenario is repeated many times a week in the superior courts of California and illustrates why ruling on motions to seal is the bane of many a trial judge. These types of motions must satisfy stringent standards in order to overcome the preference of American jurisprudence for open courts. Public access to judicial records is the bedrock legal principle that requires a court to resolve the motion to seal independent of the litigants' views. The lawyer who fails to marshal an analysis of the evidence and the applicable legal standard loses the opportunity to convince the court that the motion should prevail.

Thus, it is important to have a thorough understanding of the rules and mechanics of the sealing process. To that end, there are certain practice pointers on motions to seal that lawyers may employ to avoid damaging a client's case by bringing a meritless motion that may require excessive time on the part of counsel—not to mention the court that has to resolve the matter. The formal procedures are found in the California Rules of Court, which

govern motions to seal and provide the basis for the practical mechanics of sealing, i.e., how a motion to seal is properly presented to a California state court.

In general, the First Amendment provides a right to access to civil litigation documents filed in court as a basis of adjudication.<sup>1</sup> The First Amendment right to access does not extend to “discovery material that are neither used at trial nor submitted as a basis for adjudication.”<sup>2</sup> In *Estate of Hearst*, the California Court of Appeals noted that when parties engage in civil litigation, they “employ the public powers of the state courts to accomplish private ends”

**The lawyer who fails to marshal an analysis of the evidence and the applicable legal standard loses the opportunity to convince the court that the motion should prevail.**

and the “possibly disadvantageous circumstance that the documents and records filed” will be publically disclosed.<sup>3</sup>

California Rules of Court 2.550 and 2.551 govern records sealed or proposed to be sealed by court order. These rules do not apply to records that are required to be kept confidential by law, such as the records of family conciliation court, in forma pauperis applications, juvenile court records, and sealed search warrant affidavits. Parties submitting sealed materials in connection with discovery motions still need to follow the same general processes that are used to clearly label and protect confidential information when a sealing order is required. They must seek to redact the least amount of information necessary. Furthermore, they must always remember to concurrently submit for filing in the public file a redacted counterpart to the item filed under seal.

When considering whether to seal records, courts start with the presumption of public access.<sup>4</sup> This presumption justifies the narrow construction courts typically give to the sealing rules and that makes sealing an extraordinary remedy. To ensure that a meritorious motion to seal will be granted, attorneys should

**The Honorable William F. Highberger is a judge in the Los Angeles Superior Court of California assigned to the Los Angeles Complex Civil Litigation Program. Manuel Cachán is a partner at the Los Angeles office of Proskauer Rose LLP who specializes in commercial litigation, white collar defense and investigations, sports law, and employment litigation and arbitration. Jennifer Roche is an associate in Proskauer's Los Angeles office, specializing in commercial and securities litigation, financial services, antitrust, and appellate matters.**

pay attention to the special, narrow circumstances that permit sealing before deciding to bring such a motion.

Records may only be sealed by a court order that 1) makes specific factual findings showing why sealing is justified and 2) limits the material sealed to necessary documents only, or their relevant parts.<sup>5</sup> An agreement among the parties to seal, or the fact that a motion to seal is unopposed, is not enough.<sup>6</sup> Courts maintain an independent duty to ascertain whether the standards demonstrating the necessity of sealing have been satisfied. This requires a court to find, before it can grant a sealing motion, that 1) there is an overriding interest to overcome the right of public access and 2) the proposed sealing is narrowly tailored and no less restrictive means exist to achieve the moving party's interest.<sup>7</sup> Essentially, the party seeking to have records sealed must establish that the information should be kept secret and that the absolute minimum amount of data has been redacted. These twin showings must be made on the basis of admissible evidence—allegations alone, without facts, are insufficient.

### Information that May Be Sealed

What types of materials meet these requirements? An individual's confidential medical information and financial information may be suitable for filing under seal. Other sensitive identifying information, such as bank account numbers and social security numbers, are also covered. So are actual trade secrets, as defined in Civil Code Section 3426.1, with emphasis on the word "actual." The terms "trade secret" and "confidential business information" are some of the most abused bases upon which sealing is sought, since the exception only applies to information that is the subject of reasonable efforts to maintain its secrecy and that derives independent economic value from the fact it is actually kept secret.

Legitimate examples of trade secrets include computer source code and certain sensitive client information, like stock positions.<sup>8</sup> Trade secrets do not include, however, nonspecific financial or business information, regardless of whether the party seeking to protect the information maintains the material is in some general sense "commercially sensitive" or "proprietary." When business information has already been disclosed in a different context, the argument that it is a trade secret loses its force, and the information cannot properly be sealed.<sup>9</sup>

Confidential settlement agreements may come within the protection of the sealing

rules. Nonconfidential portions of those agreements, however, must remain open and accessible to the public once the confidential data has been redacted.<sup>10</sup> Lawyers therefore need to be judicious in their sealing requests and should attempt to seal no more than is necessary. It is an unusual case when sealing entire documents, or even whole pages, is justified. Unsealed documents from separate court proceedings—which are by definition already publicly available—are not protected by the sealing rules at all.<sup>11</sup> Admissions of wrongdoing and information regarding the identity of witnesses are also generally not subject to sealing.<sup>12</sup>

### The Mechanics of Sealing

How is the issue of sealing properly presented to a court? California Rule of Court 2.551, which lays out the procedure, is the rule to look to. A party requesting that a record be filed under seal must file a motion or application, accompanied by a supporting memorandum and declaration, justifying the request.<sup>13</sup> All parties must be served with a copy of the motion. Unless ordered otherwise, any party that already has access to the records must be served with a complete, unredacted version of all the moving papers as well as a redacted version. Any other parties to the suit should be served with only the public, redacted version of the motion.<sup>14</sup>

A nondesignating party that intends to file with the court records subject to a confidentiality agreement or protective order without seeking to have the records sealed must lodge unredacted copies of the records and any moving or supporting papers that disclose the purportedly confidential information. Simultaneously, the nondesignating party must file publicly redacted versions of the same documents as well as a notice that the designating party has 10 days (plus additional time if service is to be made via mail, electronic service, or overnight delivery) to file a motion to seal to protect the information before it will be made public.<sup>15</sup> The provision of such notice is especially important (though often overlooked) since it starts the 10-day clock running. While it would be helpful if there were an official Judicial Council form for providing such notice, no such form presently exists. Consequently, counsel needs to draft his or her own notice document.

Until the court rules on a motion to seal, lodged records are maintained conditionally under seal. Sealed records must be securely filed and kept separate from the public file in the case,<sup>16</sup> a process that imposes significant burdens on the court

personnel on whom this task falls. Once sealed, a record may not be unsealed except by a court order following a party's motion, a motion by a member of the public, or on the court's own motion.<sup>17</sup> Further details describing the procedure to seek to seal or unseal records are found in Rule of Court 2.551.

### Practice Pointers

In light of the burden inherent in attempting to seal records and the narrow circumstances under which such motions may be granted, here are some important tips to avoid the need to file a motion to seal or, when sealing is appropriate, to increase the likelihood that the motion will be granted:

- At the outset of a case, any proposed protective order should recite that the California Rules of Court govern sealing. This not only makes it more likely the court will grant the protective order but also puts all parties on notice that any motions to seal will need to meet the strict requirements those rules impose.
- It is important to be judicious in the provision of confidentiality designations. Rather than designating a whole page or document as confidential, consideration should be given as to whether only a word, number, sentence, or paragraph should be protected. When appropriate, a party should be challenged and forced to justify the designations provided. This should be done well enough in advance that the validity of the designations is determined before the material is needed in a filing.
- If the specific material to be protected is unnecessary to the substantive motion or other issue pending before the court, it should not be included with the motion to seal. For instance, if not germane to the issue before the court, the confidential part of the information should be omitted from the brief and redacted from any supporting exhibits. Sealed or not, irrelevant evidence is of no value. A classic example is the inclusion of a social security number on a form in which the number itself is of no evidentiary value to the issues before the court.
- When filing a motion to seal, it is also important to be thoughtful in drafting the request. For example, counsel should seek to seal only the type of information that is protectable under the law. A "Delta Document"—that is, a redlined comparison between the redacted and unredacted versions of documents—should be lodged with the court (for the court's use only) so the court can consider any proposed redactions in context and without having to physically compare the two versions.

• With respect to the timing of the request, a motion to seal, whenever possible, should be heard before the underlying motion to which the documents at issue are relevant. It will be difficult, if not impossible, for the court to decide the substantive motion without first deciding the accompanying motion to seal. Until the sealing motion has been ruled on, it will be unclear what evidence can be included in the record.

By reviewing carefully the sealing rules and following these few simple pointers, various pitfalls commonly faced by practitioners may be avoided. In particular, these involve issues that arise from counsel's filing motions to seal without marshaling the requisite evidence, articulating the proper legal standard, or thinking carefully about which discrete portions of a motion (or its supporting documents) satisfy that standard.

Clients will be grateful when they discover that more prudent counsel has saved them money by getting the motion right the first time. Although they may be displeased at the inability to have the entirety of a particular document sealed by court order, an explanation to them about the reasons why the court would be certain to deny such a request should suffice. Also, the judge will appreciate the care taken in preparing the sealing submission, which will likely be in stark contrast to the many defective motions to seal he or she is likely to encounter routinely. The efficiency of California's legal system will be increased by not wasting the time of busy bench officers and court personnel, leaving them free to concentrate on more pressing matters—such as deciding the case-dispositive motion that has concurrently been filed on behalf of the client. ■

<sup>1</sup> Copley Press, Inc. v. Superior Ct., 6 Cal. App. 4th 106, 111 (1992), *cited with approval* in NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct., 20 Cal.4th 1178, 1208-1209 n.25 (1999).

<sup>2</sup> NBC Subsidiary, 20 Cal. 4th at 1208-09 (citations omitted).

<sup>3</sup> Estate of Hearst, 67 Cal. App. 3d 777, 783 (1977).

<sup>4</sup> See Cal. R. Ct. 2.550(c).

<sup>5</sup> See Cal. R. Ct. 2.550(e).

<sup>6</sup> See Cal. R. Ct. 2.551(a).

<sup>7</sup> See Cal. R. Ct. 2.550(d).

<sup>8</sup> See Overstock.Com, Inc. v. Goldman Sachs Group, Inc., 231 Cal. App. 4th 471, 505 (2014).

<sup>9</sup> In re Provident Credit Card Cases, 96 Cal. App. 4th 292, 304 (2002).

<sup>10</sup> See Universal City Studios, Inc. v. Superior Ct., 100 Cal. App. 4th 1273, 1285-1286 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> See Huffy Corp. v. Superior Ct. (Winterthur Swiss Ins. Co.), 112 Cal. App. 4th 97, 108 (2003).

<sup>13</sup> See Cal. R. Ct. 2.551(b).

<sup>14</sup> *Id.*

<sup>15</sup> See Cal. R. Ct. 2.551(b).

<sup>16</sup> See Cal. R. Ct. 2.551(f).

<sup>17</sup> See Cal. R. Ct. 2.551(h).

## DO YOU KNOW THIS GUY?

**If Your Office Lease Expires  
In The Next 24 Months, You Will  
Benefit From Knowing Him**

Because you'll need to:

- Find a new location or work with your present space
- Relentlessly negotiate favorable lease terms
- Design/Redesign your space
- Oversee construction
- Annually audit the landlord's expense bill and
- A hundred other details

**Who is going to handle these details for you?**

**The Only Guy That  
Provides these Services at  
NO ADDITIONAL COSTS.**

**JEFF TABOR**

**26 Years Exclusively Representing Tenants  
In Los Angeles and Orange County**

**213-674-4340**



*"Be Represented...  
Not Brokered!"<sup>SM</sup>*

LOS ANGELES AND ORANGE COUNTY