



# DO YOU WANT TO KEEP IT SECRET?

## Things to Consider When Applying to Have Court Records Sealed

By Dennis Gleason

**I**n the course of a litigation, parties often agree that as part of discovery certain sensitive documents and testimony should be treated as confidential, and not disclosed beyond those associated with the case.

Especially in commercial litigation, the parties may ask the court to enter a confidentiality or protective order, to restrict the disclosure of such things as a party's financial information, trade secrets, confidential research, business plans or other commercially sensitive information.<sup>1</sup> Because discovery and discovery-related matters are not subject to public access, they are ordinarily protected from disclosure to the public.<sup>2</sup>

And while the parties can agree or be ordered not to disclose confidential information obtained in discovery, a confidentiality order does not guarantee that the same material designated "confidential" in discovery will be protected from disclosure if used in connection with or as part of a trial.<sup>3</sup>

By contrast, a trial is a public proceeding.<sup>4</sup> Accordingly, the public, under the First Amendment<sup>5</sup> and common law,<sup>6</sup> has a right of access to civil trials and trial-related court filings. Stated differently, where it comes to restricting access to court proceedings, the thumb is on the scale favoring disclosure of trial-related documents and testimony based on the right of public access.<sup>7</sup>

In the face of the presumption that the public is entitled to access to court proceedings, both New Jersey state and federal courts recognize that there may be a legitimate need to restrict the public from access to certain materials, including those



**DENNIS F. GLEASON** is a partner at *Jardim, Meisner & Susser, P.C.* in Florham Park, where his focus is on business litigation.

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related to a trial. However, it is up to the party who seeks to protect the disclosure of confidential information to ask a court to seal that information. The moving party “must show that the ‘material is the kind of information that courts will protect and that the disclosure will work a clearly defined and serious injury to the party seeking closure.’”<sup>8</sup>

In determining whether to restrict public access, the courts engage in a flexible balancing test, depending on the circumstances of the case, to determine if the nondisclosure sought outweighs the public’s presumptive right to access.<sup>9</sup>

Against that background, courts look to seal only that specific passage of a document, or portion of testimony that may warrant protection from disclosure.

The party seeking to prevent disclosure must demonstrate why each document or other trial evidence overcomes the presumption of openness at trial. It is then up to the court to issue detailed findings granting or denying the application to seal.

In the context of trial-related matters, all applications to seal take advance planning and cooperation between counsel. It is a tedious and time-consuming activity, to say the least. Planning includes early identification of what specific evidence a party seeks to protect from disclosure at trial, timely raising the issue with the court.

As discussed below, there are some similarities and some differences in the procedures of state and district Courts regarding sealing.

### New Jersey State Courts

State Courts address the sealing of court records by way of Court Rule 1:38-

11. The state rule allows for the sealing of court records upon a showing of good cause.<sup>10</sup>

As to what constitutes good cause, that is a two-part analysis. First, the sealing party must demonstrate that the disclosure will likely cause a clearly-defined and serious injury to a person or entity. Second, that affected person or entity’s interest in privacy must substantially outweigh the presumption that court records are open to public inspection.<sup>11</sup> In the end, the party seeking to seal bears the burden demonstrating by a preponderance of the evidence why the records should be shielded.<sup>12</sup>

While there is no specific guidance as what should be included in a State Court motion to seal, it is clear that the trial judge “must review each document individually and make findings with regard to why the presumption of public access has been overcome.”<sup>13</sup>

To assist in that effort, the motion should include at the very least the documents to be protected from disclosure and an affidavit by one or more persons wherein they describe, among other things, the efforts to keep information protected and detail what specific injury would likely befall the party should the confidential information be disclosed.

Where a party believes there is a need to seal particular pretrial and trial materials or trial testimony, an early pretrial conference should be requested. At that time, the parties can discuss with the trial judge the need to seal and suggest a plan and procedure for doing so.

It is important to note that notwithstanding a sealing order, it is not necessarily permanent. Any person or entity may move to unseal.<sup>14</sup> In such a circum-

stance, although not the moving party, it remains the burden of the party who seeks to prevent the disclosure to prove by a preponderance of the evidence that good cause continues to exist for the sealing.<sup>15</sup>

### New Jersey District Court

The District Court employs a more robust and detailed procedure for the sealing of judicial proceedings and records under Local Civil Rule 5.3.

And like the State Court, the District Court has an obligation to ensure the balance between the presumption of public accessibility and protection of legitimate confidential information of a party.<sup>16</sup>

An advantage in the District Court is each civil action is assigned to a magistrate judge with whom the parties periodically meet. This, in turn, enhances the opportunity to alert the court of a forthcoming motion to seal materials as part of the mandatory final pretrial conference under Fed. R. Civ. P. 16 and as part of the joint final pretrial order.<sup>17</sup>

In contrast to the State Court process, the local rule sets out in great detail the procedures for sealing.

To begin with, no documents may be filed under seal unless a confidentiality order has been entered.<sup>18</sup> Thus, in the absence of a confidentiality order, the District Court may reject the temporary sealing of documents or any applications to seal.

Next, the underlying document or documents that a party seeks to file under seal, *i.e.*, brief, exhibit, or affidavit, is filed via the District Court’s Case Management/Electronic Case Filings system, in unredacted form.<sup>19</sup>

## Keep in mind that the motion to seal and supporting papers will be publicly available and specially posted in court's Public Access to Court Electronic Records system. Consequently, references to the confidential material which are sought be protected should be carefully stated in general terms.

As part of the ECF filing, there will be a prompt asking if the materials are being filed under seal. When this prompt is checked, the filed materials, in unredacted form, will be temporarily sealed and not publicly available, pending a decision on the motion to seal. Importantly, if the prompt is not checked, the filing will become available for immediate public review. Later efforts to claw back the public filing and re-file may not be successful as it ordinarily requires a court order.

Once those papers are electronically filed, it triggers the obligation to file a separate motion to seal.<sup>20</sup>

Unlike other motions in the District Court, no supporting brief is necessary, unless a party believes that it would assist the court.<sup>21</sup>

While the motion to seal does not require a brief, it does require other filings. The first is an affidavit or its equivalent, based on personal knowledge that sets out for each document (or group of similar documents) the nature of the materials; the legitimate private or public interest which warrants the relief sought; the clearly-defined and serious injury that would result if the relief sought is not granted; why a less restrictive alternative to the relief sought is not available; any prior order sealing the same materials in the pending action; and the identity of any party or nonparty known to be objecting to the sealing request.<sup>22</sup>

What is more, the index must include for each objection to seal, materials to which there is an objection, the basis for the objection, and if the material or information was previously sealed by the court in the pending action, why

the materials should not be maintained under seal.<sup>23</sup> Appendix U to the Local Rules provides a template index.<sup>24</sup>

The detailed affidavit and index serve as the foundation for the court's acceptance, denial or modification of the application to seal. This facilitates the court's review, as the Third Circuit has instructed District Courts that they must conduct a document-by-document review to determine if material should be sealed.<sup>25</sup>

The motion to seal must include proposed findings of fact and conclusions of law in a proposed order to seal.<sup>26</sup> This proposed order serves to further assist the court who is required to articulate specific findings which serve to overcome the presumption of disclosure.<sup>27</sup>

Additionally, the motion to seal is not filed until 14 days after the completion of briefing of the underlying motion. The timing of the motion to seal is intended to allow the parties to marshal all references to the same confidential information by all parties. By way of illustration, where one party moves *in limine* to bar an expert and the *in limine* motion references "trade secrets," the motion to seal is filed not later than 14 days after the last motion papers for the *in limine* motion, *e.g.* reply brief.<sup>28</sup> Moreover, the application to seal is a single consolidated motion by all the parties.<sup>29</sup> Again, all references to same confidential information are culled for consideration regardless of which party referenced the confidential information.

Keep in mind that the motion to seal and supporting papers will be publicly available and specially posted in court's Public Access to Court Electronic

Records system.<sup>30</sup> Consequently, references to the confidential material which are sought be protected should be carefully stated in general terms.

Should a motion to seal not be filed within the 14-day deadline, the court, without notice, may direct that the temporarily sealed filing in unredacted form be publicly available.<sup>31</sup> Thus, attention to timely filing the motion to seal should be of paramount concern.

Not later than 14 days after the court issues its order and renders its findings and conclusions on the motion to seal, an amended redacted copy of underlying papers conforming to the order must be filed.<sup>32</sup> The public then has access, albeit limited, to the unprivileged portion of the judicial record.

Like State Court, the local rule further provides that a litigant who is not an original party to an action may challenge the motion to seal at the time it is filed, or later.<sup>33</sup> The burden of proof remains on the party who seeks to protect from disclosure to demonstrate why the materials should be restricted from public disclosure.

### Conclusion

In sum, there are several takeaways regarding the sealing of court records in the context of trial.

First, the mere fact that a discovery confidentiality order is in place restricting the disclosure of confidential information does not ensure that a court will agree to seal that same material when used at trial. The court applies a more rigorous standard to sealing confidential materials, *i.e.*, a presumption of disclosure. This is so because the public has a well-settled right to access to the court-

room and related judicial records.

Second, a party who seeks to restrict access to documents or testimony at trial always bears the burden of demonstrating, by competent evidence, that the protection of legitimate confidential information of a party outweighs the public's right to access.

Third, after a document-by-document review, a court in ruling to seal materials must detail, usually as findings of fact and conclusions of law, the reasons for sealing.

Lastly, a litigant or non-party—before, during or after trial—has the right to challenge the sealing of documents or testimony. And the burden remains on the party who looks to seal to show why sealing is warranted. ♣

to the sealing of items in the context of a trial. It does not address the sealing of materials required by law, or redactions of information required by law, or court rule. For instance, both New Jersey State Court and New Jersey District Court require that certain personal identifiers be masked, such as names of minors, bank accounts. See *e.g.*, N.J. Ct. R. 1:38-7. Likewise, sealing of a complaint is required in state and federal *qui tam* actions. N.J.S.A. 2A:32C-5(c) and 2A:32C-5(f); 31 U.S.C. section 3729, *et seq.*

- 4 See N.J. Ct. R. 1:2-1; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780-81 (3d Cir. 1994).
- 5 *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).
- 6 *In re Cendant*, 260 F.3d 183, 192 (3d Cir. 2001).
- 7 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 676 (3d Cir. 2019).
- 8 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677-78 (3d Cir. 2019).
- 9 *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 381 (1995).
- 10 N.J. Ct. R. 1:38-11.
- 11 N.J. Ct. R. 1:38-11(b).
- 12 N.J. Ct. R. 1:38-11(a).
- 13 *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 382 (1995); see also *In re*

*Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677 (3d Cir. 2019) *citing Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994).

- 14 N.J. Ct. R. 1:38-12.
- 15 N.J. Ct. R. 1:38-12.
- 16 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677 (3d Cir. 2019).
- 17 See Fed. R. Civ. P. 16 and L. Civ. R. 16.1.
- 18 L. Civ. R. 5.3(b)(6).
- 19 L. Civ. R. 5.3(c)(4).
- 20 L. Civ. R. 5.3(c)(1).
- 21 L. Civ. R. 5.3(c)(1).
- 22 L. Civ. R. 5.3(c)(3)(a).
- 23 L. Civ. R. 5.3(c)(3)(a).
- 24 See <https://www.njd.uscourts.gov/sites/njd/files/APPU.pdf> (last visited April 26, 2021).
- 25 *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167 (3d Cir. 1993).
- 26 L. Civ. R. 5.3(c)(3).
- 27 *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001).
- 28 L. Civ. R. 5.3(c)(2)(ii).
- 29 L. Civ. R. 5.3(c)(1).
- 30 L. Civ. R. 5.3(c)(1).
- 31 L. Civ. R. 5.3(c)(10).
- 32 L. Civ. R. 5.3(c)(7).
- 33 L. Civ. R. 5.3(c)(5).

## Endnotes

- 1 See, N.J. Ct. R. 4:10-3; District of New Jersey Local Civil Rule (“Local Rule”) 5.3(a)(2) and Appendix S to Local Rules <https://www.njd.uscourts.gov/sites/njd/files/APPS.pdf> (last visited April 26, 2021).
- 2 N.J. Ct. R. 1:38-2(b)(2); See also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 379 (1995).
- 3 The scope of this article is limited

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