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Courts, Intellectual Property, and the Internet
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Jodi Munn Schebel
Bowman and Brooke LLP
Co-Managing Partner – Detroit Office
Author “Protecting the Record: Sealing Confidential Documents” ABA Practice Points (2017)

## I. Introduction

Thank you Chairman Nadler and Ranking Member Collins, as well as Sub-Committee Chairman Johnson and Ranking Member Roby, and the rest of the Sub-Committee for the opportunity to testify at this hearing.

I am the Co-Managing Partner of Bowman and Brooke LLP's Detroit office, which is a national products liability defense firm. Over the past 20 years, I have focused my practice on products liability defense, with an emphasis on discovery and e-discovery and act as national discovery counsel for several automobile and medical device manufacturers.

I am also a Barrister of the Detroit Chapter of the American Inn of Court, where I work with other Detroit area attorneys to educate and train new lawyers in the practice of law. I also serve on several discovery related national committees, speak regularly on the subjects of discovery and e-discovery, and am admitted to practice law in the Eastern and Western Districts of Michigan, as well as in the Sixth Circuit Court of Appeals.

In my work as defense counsel for companies that maintain proprietary and confidential information, I have developed an expertise in protecting my clients' data from unnecessary public exposure during litigation. The need to protect proprietary information arises in all phases of litigation, but is most prevalent during the discovery phase.

## II. Summary

When corporations or other business entities are named as parties in a lawsuit or served with a subpoena for documents, confidential, but relevant discoverable information maintained by the entity may be disclosed in the litigation. If the information sought constitutes a trade secret, intellectually property or other type of confidential business information, the disclosing party will need to protect that information from public dissemination to maintain that party's protected property interest. The main recourse that a party has to protect the confidentiality of its business information during litigation is to seek the entry of a protective order under Federal Rules of Civil Procedure 26.

Protective orders should be entered as a matter of course to protect a party's intellectual and other property interests in the confidential information contained in its documents or other material. A party should not lose those rights merely because it is involved in litigation. As a practical matter, that can happen when confidential documents are used to support or oppose a ruling on the merits of the case. This should not happen.

When a party to litigation asks the court to take some action or provide some relief on a case, the party files a motion with the court and supports that motion with record evidence. Sometimes, that record evidence contains documents that a party has designated as confidential, and which the parties are collectively restricted from filing publicly in order to protect one of the party's property interests in the documents or information. If a party files the confidential documents in the court's public case record system, that party may be in violation of a confidentiality order. However, if the party does not file the information, their position may not be fully supported to obtain the relief they seek from the court. To equalize these considerations, courts permit parties

to request permission to file confidential documents under seal. If granted, a sealing order permits the court to see the documents but shields them from public disclosure.

Courts apply different standards when determining whether to grant a sealing request. For a non-dispositive motion, a party need only show good cause, which rebuts the public's right of access to court filings, to seal a confidential document. This good cause standard is set by Fed. R. Civ. P. 26. The policy behind the rule is that the public's interest in full access to information that is not dispositive of the case's outcome is either not significant or is outweighed by a party's right to maintain the confidentiality of its documents.

Conversely, if a confidential document is filed with a dispositive motion (such as a motion for summary judgment under Fed. R. Civ. P. 56) or is used at trial, the public's interest in full access to the filing is greater. For dispositive motions, federal courts generally hold that the public has a presumption of right to access, which can only be overcome when a party articulates "compelling reasons" why the document or information is deserving of continued protection despite its use on the merits of the case.

Because the showing of a "compelling reason" may turn on the specific use of a document filed in support of a motion, courts regularly permit a party to seal confidential documents appended to a motion for summary judgment under Fed. R. Civ. P. 56 or to any other dispositive or merits-based motion that relies on a party's confidential information. This is generally true because the universe of such confidential documents is defined: The parties select and attach to their motion papers only those documents that support their respective positions. The party whose confidential information is among those documents can then move to seal from the public record, in accordance with applicable local court rules, only those specific documents over which they have a claim of confidentiality.

The use of confidential documents at trial, however, is another matter. When preparing for trial, the parties file and serve exhibit lists which identify documents that the parties may use during trial. In complex litigation, these lists often contain thousands of documents. In such cases, the effort to substantiate the need to seal each and every confidential document on a trial exhibit list would be extraordinary. Moreover, when filed before the trial even begins, the parties are left without context for the specific use to which the documents might be put, if they are even used during the trial at all.

To rectify this, courts should permit the conditional sealing of confidential documents before trial. Such a conditional sealing order should permit a party's confidential documents to remain sealed until a reasonable time after the conclusion of the trial. Then, after trial, the proponent of the sealing order should be required to file a request for sealing that is supported by record evidence, including affidavits or testimony substantiating compelling reasons why the documents or information should remain sealed. If no motion is filed, the conditional seal is then lifted and the documents become public. If a motion to seal is filed but denied by the court, the conditional seal is similarly lifted and the documents become public. However, if the motion is granted as to some or all of the confidential documents used at trial, such documents should remained sealed, thereby ensuring that the confidential information contained in the documents is protected from public disclosure. This will promote judicial economy in the spirit of Fed. R. Civ. P. 1, will afford parties the benefit of a court's decision on the merits in connection with their request to

seal, and will provide the proponent of sealing the most extensive opportunity to maintain confidentiality over its documents without chilling the public's right to access.

## III. Entry of a Protective Order

A confidentiality or protective order under Fed. R. Civ. P. 26(c) should be entered in any case in which a party's confidential documents will be produced. Such an order protects a party's confidential information from public disclosure and sets specific parameters for the dissemination or sharing of such information. Fed. R. Civ. P. 26(c)(1)(G) governs the entry of such protective orders. Under this Rule, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specific way." Fed. R. Civ. P. 26(c)(1)(G). The entry of a protective order is predicated upon a showing of good cause. Fed. R. Civ. P. 26(c)(1)(G). *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1130 (9th Cir. 2003) (requiring showing of good cause and specific prejudice or harm); *McCarthy v. Barnett Bank of Polk Cty.,* 876 F.2d 89, 91 (11th Cir. 1989) (party seeking protective order has burden of showing good cause); *Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986) (allowing non-sharing protective order for good cause shown).

The trial court has complete discretion over the entry of document protective orders. *Seattle Times v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209 (1984) (Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.")

While a protective order entered under Fed. R. Civ. P. 26 generally governs the *exchange* of confidential information during discovery, it does not typically protect confidential information from being filed in the public record. A party seeking to file confidential material in the public record at virtually any phase of litigation, including during discovery must demonstrate that the material is deserving of sealing.

In this regard, having a protective order that governs the parties' use of confidential documents exchanged in the case does not automatically create a sufficient legal basis for a court to place documents under seal. *Shane Group, Inc v. Blue Cross Blue Shield of MI*, 825 F3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other . . . Secrecy is fine at the discovery stage, before the material enters the judicial record . . . At the adjudication stage, however, very different considerations apply."); *Beauchamp v. Federal Home Loan Mortgage Corp*, No 15-6067, 2016 WL 3671629, at *4 (6th Cir. July 11, 2016) ("During discovery, courts often issue blanket protective orders that empower the parties themselves to designate which documents contain confidential information. Once the parties place a document in the record, however, very different considerations apply.").

## IV. Sealing Documents from the Public Record

### A. The Public's Interest in Filed Documents

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *The Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016). However, this general right of access to court records is not absolute. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978). Rather, it requires balancing the public interest in the document against the interest of the party in maintaining the confidential nature of its business information. *See Healey*, 282 F.R.D. at 214. The presumption of access to court records may be overcome by the need to keep order and dignity in the courtroom or by a particularized special need for confidentiality, such as when trade secrets, national security, or certain privacy rights of trial participants or third parties are implicated. *See Brown & Williamson Tobacco Corp v. FTC*, 710 F2d 1165, 1179 (6th Cir. 1983).

### B. The Standard for Sealing

The mechanism to shield court documents from the public is to have the court seal the information. Different sealing standards apply depending on whether confidential information to be withheld from public disclosure relates to a non-dispositive motion unrelated to the merits of the case or to a dispositive decision impacting the parties' substantive rights.

With respect to confidential information related to non-dispositive motions, the same good cause that is shown to identify materials as confidential and subject to a protective order under Rule 26 will generally be sufficient to allow a litigant to shield its confidential documents and information from public dissemination through a request for sealing.

On the other hand, documents supporting merits-based decisions, which are generally referred to as "court records" or "judicial records," are governed by a different standard given the public's long standing interest in access to such court records. The party seeking to seal documents related to a dispositive or merits-based decision by the court has the burden to show compelling reasons why sealing should be permitted. "The burden is on the party seeking to restrict access on a dispositive motion to show 'some significant interest that outweighs' the presumption of public access." *Colony Ins*, 698 F.3d at 1241 (quoting *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007)). That is, if the public has a right of access to a court proceeding or record, then sealing the proceeding or record to preserve confidentiality must be narrowly tailored to meet the party's compelling interest.[1] *United States v. McVeigh,* 119 F3d 806, 814 (10th Cir. 1997).

[1] *See also IDT Corp. v. Ebay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (a confidential document used at trial does not automatically become public because the common law right of access to judicial records is not absolute); *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (same); *In re Applications of Kansas City Star*, 666 F.2d 1168, 1176 (8th Cir. 1981) (same). "The court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *IDT Corp.*, 709 F.3d at 1223. Whether court records should be sealed "requires a weighing of competing interests" exercised in light of the relevant facts and circumstances of the particular case. *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990); *Independent Sch. Dist. No. 283, St. Louis Park, Minn. v. S. D.*, 948 F. Supp. 892, 898

The presumption in favor of access is particularly strong "where the district court used the sealed documents 'to determine litigants' substantive legal rights.'" *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (quoting *Colony Ins Co v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012)). "The strongest arguments for access apply to materials used as the basis for a judicial decision of the merits of the case, as by summary judgment." *Lucero v. Sandia Corp*, 2012 WL 3667449 at *7 (10th Cir. 2012) (quoting 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2042, at 234 (3d ed 2010).

In the Ninth Circuit's decision in *The Center for Auto Safety*, the court discussed the different standards that apply to a request for sealing confidential information. There, the court held that the burden to seal documents from the court's records turns on whether the filing relates to the merits of the case.[2] 809 F.3d 1092. If not, the proponent of sealing must only meet a good cause standard for restricting the public's right to access the information. Conversely, if the filing is directly related to the merits of the case or is determinative of the litigant's substantive rights then a party must meet a higher burden of showing that compelling reasons exist to overcome the presumption of the public's right of access. *See also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (the presumption in favor of access is particularly strong "where the district court used the sealed documents 'to determine litigants' substantive legal rights."). As such, the standard to be applied—good faith or a compelling interest—to a request to seal documents is generally dependent upon whether the underlying issue considered by the court is dispositive of the party's rights.

In order to substantiate that a party has a compelling interest sufficient to outweigh the public's right of access, the proponent of sealing must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Shane Grp.,* 825 F3d at 305-06.[3] Further, "even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason." *See also*

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(D. Minn. 1996). Moreover, the property rights of the party seeking to maintain confidentiality must also be considered.

[2] The Second, Eighth and Tenth Circuits follow a dispositive versus non-dispositive analysis for sealing, but which predicated on the common law in determining whether the public has a right of access to documents filed with the court. Under the common law, the public only has a right to access "judicial documents." A "judicial document" is one that is relevant to the performance of the court's function and useful to the judicial process. To determine if documents must be accessible to the public, courts employ a three part test, considering: 1) whether the document a judicial document; 2) the importance of the information to the merits of the case; and 3) the importance of the competing considerations, including the privacy interests of those who oppose disclosure, when weighed against the presumption of access. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)*; see also IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013) (following the common law balancing test to determine whether the public's right of access to "judicial records" outweighs the interests served by maintaining the confidentiality of the sealed information based on the specific facts of the case).

[3] The Sixth Circuit concluded that it was improper to file the documents under seal based on the district court's protective order. The Sixth Circuit also rejected the party's post hoc justifications—the parties had argued that the documents contained "competitively-sensitive financial and negotiating information." The Sixth Circuit pointed out that such "platitudes" did not allow the sealing proponent to meet its burden, particularly since the proponent never even argued that the financial information at issue was a trade secret.

*Beauchamp*, 2016 WL 3671620 at *4 (holding that the district court's order permitting sealing of certain records was not justified because the court had not satisfied its independent duty, "to set forth specific findings and conclusions which justify nondisclosure to the public"); *Rudd Equip Co, Inc v. John Deere Constr & Forestry Co.*, No. 16-5055, 2016 WL 4410575 at *4 (6th Cir. 2016) ("[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.") "A court's failure to set forth those findings and conclusions is itself grounds to vacate an order to seal." *Id.*

V. Requests to Seal Court Documents

When a party makes a motion to seal documents related to non-dispositive matters, the sealing motion is typically made at or near the time that the substantive motion is filed, and is supported with an affidavit or other testimonial evidence to establish a good faith basis to seal, i.e., that the documents and information at issue are confidential and deserving of protection from public review. This is generally a time sensitive (and consuming) effort, but is otherwise a rather straight forward process. As a practitioner in many courts around the country, I have not experienced significant concerns with respect to the filing of a motion to seal documents for non-dispositive motions.

The same is true when making a motion to seal documents on a dispositive motion. Although the standard is higher and generally requires a showing of a compelling interest as set forth above, the process is still fairly straight forward. It requires a document by document analysis as to the need for confidentiality and a showing of the (non-speculative) harm that may result if the information is publicly filed, weighed against the public's interest in the documents and information. At the preliminary injunction or summary judgment phase, motions to seal are filed at or near the time that the underlying motion is filed, and are typically ruled on concurrently with the motion on the merits.

The difficulty arises with respect to trial. A party potentially has three opportunities to move to seal confidential documents and information that may be used at trial: (1) before trial begins; (2) at the time the evidence is introduced; or (3) after the trial concludes. While it is necessary to raise the issue of sealing before trial begins, it is often impractical to require the proponent of sealing to substantiate its claim of confidentiality before the evidence has been introduced or otherwise used at trial.

The best time to require a fulsome motion to seal is a reasonable time after the trial has concluded and trial transcripts have been prepared. Then, and only then, will the party seeking to seal documents be in the proper position to determine which documents, if any, are deserving of continued confidentiality, particularly considering the specific use to which the documents were put in the case. Similarly, if sealing is considered after the conclusion of the case, the court has the benefit of the jury's verdict (or the court's own opinion) and can assess the importance of the public's right to access the documents against the property rights of the movant.[4]

[4] If a party's confidential documents are admitted or otherwise used at trial and testimony was offered in the record quoting or discussing those exhibits, a presumption may exist that such documents and testimony are public. *Healey,* 282 F.R.D. at 214.

If a party is required to file a motion to seal every confidential document identified on any of the party's exhibit lists because there is an outside chance the document might be used at trial and the party does not want to risk waiving confidentiality, that party would likely put significant effort into requesting that the court permit the sealing of documents that are never actually used, much less introduced, into evidence.[5] The court might similarly expend significant time and effort considering the party's request to seal each and every identified document. Requiring a party to file and support a motion in advance of trial to seal documents that are never shown to the jury is contrary to the tenants of Rule 1, which requires the just, speedy and inexpensive adjudication of litigation.

Furthermore, requiring a party to move to seal documents concurrently with their introduction into evidence or at the time of their use at trial is also untenable for several reasons. First, it interrupts the flow of the evidence. Second, it requires the parties to preemptively prepare the same document by document support for a sealing request as discussed above with respect to pre-trial motions to seal, so that the party is armed to substantiate their claim of continue confidentiality if and when any document from a party's exhibit list is used or introduced at trial. Third, making the motion at the time the document is introduced does not permit the court to take advantage of the full testimony (or lack thereof) that may be proffered for each individual document, thereby hamstringing the court's ability to properly weigh the facts.

The *Jochims* case is particularly instructive with respect to the proper timing of a motion to seal documents used at trial. *See Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338 (S.D. Iowa 1993). There, Isuzu Motors was sued on a claim that its Isuzu Trooper was defective. The parties exchanged documents during trial, some of which related to Isuzu's engineering of the Trooper vehicle, which were subject to a protective order entered in the case. At the time of trial, the parties had contemplated the use of Isuzu's confidential documents at trial because the protective order provided that certain documents and testimony used at trial would be sealed. *Jochims,* 151 F.R.D. at 341. After trial, Isuzu communicated with the court regarding those documents that were subject to the sealing provision of the protective order. *Id*. Three lawyers prosecuting different cases against Isuzu moved to intervene and sought to unseal the record. *Id*. at 339. In overturning the magistrate's ruling to unseal the record, the court "balanced the competing interests involved," took into consideration "the confidential nature of the documents and the potential risk to Isuzu's competitive interests by dissemination," and held that the "public's interest in access to these specific documents does not override Isuzu's interest in maintaining the confidentiality of these proprietary confidential documents." *Id*. at 341-342.

As permitted in *Jochims*, instead of requiring preemptive filings, federal courts should permit confidential documents that are used or introduced at trial to be conditionally sealed. A *pro forma* motion to conditionally seal the documents could be made before trial by the proponent of sealing, with the full motion to seal made after trial concludes, so that the party seeking the sealing order can assess the viability of its request to seal against the outcome of the case, the use of the document(s) at trial, the testimony taken, and the general importance of the document to

[5] Worse yet, a party might decide not to substantiate a request to seal every confidential document identified on a trial exhibit list given the time and effort that would be necessary to file a properly supported motion, thereby waiving their property rights because of the inequity of litigation and the parties respective burdens on sealing.

the resolution of the litigants' claims.[6]

## IV. Conclusion

Over the past 23 years, I have employed various means to protect my clients' rights to maintain confidentiality over their intellectual property, trade secrets and otherwise confidential information.

I have proposed and entered into stipulations with opposing counsel regarding confidential information that is used, introduced or admitted into evidence during trial, in which the parties agree that either party's use, introduction or admission of such documents at trial does not constitute a waiver of either party's claim of confidentiality and that whether documents claimed by a party as confidential can retain their confidentiality after use in a judicial proceeding is a question of fact to be decided by the court after receiving the evidence at trial.

I have also obtained orders to conditionally seal documents pending the conclusion of the case, after which the proponent of sealing will have a reasonable time (such as 30 days after certified trial transcripts are lodged) to file a properly supported motion to seal documents *and* testimony. This allows the court to consider the documents and testimony together, aiding judicial economy.

It is my experience that courts are generally willing to enter orders consistent with the parties' stipulation regarding sealing and document confidentiality, which provides the added benefit of having the court's approval of the process before trial commences and ensures that no one—neither the court nor the parties—are surprised when a motion to seal is made after the trial has ended. While there are likely other ways to protect the record and ensure that a party with an interest in confidential documents has an opportunity to file materials under seal after the conclusion of trial, the main goal is to prevent a waiver of confidentiality, while preserving both parties' rights vis-à-vis sealing.

[6] As set forth in *Schedin v. Ortho–McNeil–Janssen Pharms., Inc.,* Civ. No. 08–5743(JRT), 2011 WL 1831597, at *1–2 (D. Minn. May 12, 2011), whether a confidential document can maintain its confidentiality after use in a judicial proceeding requires consideration of the following factors: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. These six factors are also known as the "*Hubbard*" factors, as they were first articulated in *United States v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980).