

Secrets? What Secrets? Protecting the Client's Confidential Information From Complaint Through Appeal

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1. PowerPoint Presentation

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Topics

- **Current Tensions and Conflicting Interests**
- **Issues in Discovery**
- **Sealing Procedures**
- **Protection from Subpoenas**
- **Motions to Unseal**
- **The Reality of Breaches**
- **Trial and Appeals: Now What?**

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Commercial Secrecy vs. Public's Right to Know—Conflicting Interests

The case for strong privacy protections:

- Maintain valuable commercial secrets, particularly in frivolous lawsuits
- Maintain privacy of personal information
- Protect parties and non-parties from exploitation, improper use of information, injury, intrusion
- Ability to seek relief in court in cases of commercial espionage

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Commercial Secrecy vs. Public's Right to Know—Conflicting Interests

The case for open information:

- First Amendment right of access to courts
- Access critical to maintaining trust in court system
- Sealing prevents the public from learning about issues of public concern, basis for courts' decisions
- Practical challenges for judges and court staff in dealing with sealed information

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Commercial Secrecy vs. Public's Right to Know—Conflicting Interests

- ***Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978)**
 - “[T]he right to inspect and copy judicial records is not absolute.”
- ***IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th. Cir. 2013)**
 - Identifying “modern trend” to treat non-discovery pleadings as “presumptively public” and applying a balancing test
- **Other Circuits use different tests**
 - Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits consider whether a motion is dispositive or non-dispositive

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Issues in Discovery

- **Public's right to know at the discovery phase is limited**
 - There is no presumption of public access to unfiled discovery materials. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)
 - *IDT Corp.* extends this to discovery motions and exhibits

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Issues in Discovery

- **Protective orders**
 - FRCP 26(c) requires only “good cause” to protect information such as “trade secret or other confidential research, development, or commercial information”
- **Limits on protections afforded by a protective order**
 - Information designated under a protective order will not necessarily qualify for filing under seal

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Issues in Discovery

- **Challenges of maintaining confidentiality in an ESI environment**
 - As discovery volume increases, the cost and complexity of screening confidential information goes up
- **Practice suggestions:**
 - Understand your organization’s data
 - Leverage technology

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Sealing

- **Recent trends**
 - New Local Rule 5.6 in the District of Minnesota
 - Other Federal Courts with Local Rules include DNJ, ND Cal
 - Appellate Court decisions emphasizing high bar for sealing. *E.g. Shane Grp., Inc. v. BCBS*, 825 F.3d 299 (6th Cir. 2016)

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Sealing

- **Pleadings and motions**
- **Differences between State and Federal Courts**
 - State courts tend to be more permissive in allowing filings under seal

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Practice Suggestions–Plaintiffs

- **Before initiating suit, consider ramifications of potential disclosure**
- **Consider alternative forums, such as arbitration**
- **Draft pleadings in a way that will limit filing of confidential information**

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Practice Suggestions–Defendants

- **Consider motion to strike**
 - FRCP 12(f)
- **Rule 26(f) conference**
- **Don't include unnecessary material in motions**
- **Pretrial Order**

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Practice Suggestions–All Parties

- **Meet and confer with opposing party, preferably before filing**
- **Limit information required to be filed**
- **Include detailed information supporting motion to seal**
- **Take extra care with filings that may include personal and/or medical information**
- **Use the forms provided by the court where applicable**
- **Don't forget non-parties**

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Subpoenas

- **How can non-parties protect information subject to subpoena?**
 - Motion to quash or modify subpoena under FRCP 45
 - Designation of information as confidential under parties' existing protective order
 - Understand local rules
 - Be prepared to defend confidentiality on short notice

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Subpoenas

- **What are the risks of production for non-parties?**
 - Inadvertent disclosure
 - Failure of parties to adequately protect non-party's interests in subsequent motion practice and filings

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Motions to Unseal

- **Parties**
 - Burden on party trying to maintain seal to establish need for protection
- **Media**
 - “[R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion.” *Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982)
- **Competitors**
- **Court**
 - In some cases, courts have unsealed records after merely receiving informal letter requests from reporters

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Breaches

- **Parties**
 - Breach of a protective order can be sanctioned under FRCP 37(b)
 - *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 630 (8th Cir. 1984) (affirming sanctions for violations of protective order even where disclosure was not willful)
- **The Court**
 - What are the Court's procedures for protection of sealed information?

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Breaches

- **How common are breaches?**
 - Attorneys-eyes-only violations
 - Disclosure to non-parties
 - Use in serial litigations or for non-litigation purposes
 - Remedial measures
 - Sanctions
 - Injunctions on use and further disclosure
 - Remedies outlined in the protective order

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Trial and Appeals

- **Often not covered by protective order**
- **Limits on closed courtrooms**
 - The public has a general right of access to attend court proceedings. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).
 - Litigants are more likely to get approval to seal the court for particular witnesses.

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Trial and Appeals

- **Record on appeal**
 - Party seeking protection must move Court of Appeals to maintain sealed status
- **Courts can order unsealing**
 - The 2011 Judicial Conference Policy on Sealed Cases calls for seals to be lifted once the reason for sealing has ended

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Questions?