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Filing under seal in federal court: A suggestion for reform

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Imagine that you are an associate at a law firm assigned to work on a summary judgment brief in a large consumer class action pending in federal district court in the Northern District of Illinois. The motion is complex, not only because of the extensive factual record and difficult legal arguments, but also because the facts of the case involve details about your client's business operations that would be of great interest to its competitors if made public. From the beginning of the case your client has instructed you that these details must be kept out of the public record if at all possible.

All of the discovery materials discussing the confidential business operations have of course been marked confidential pursuant to a standard protective order, but as a good associate you know that will not be enough. The protective order entered in your case tracks the Northern District's Model Confidentiality Order, which provides that "[t]his Order does not, by itself, authorize the filing of any document under seal." Instead, you must bring a motion under Local Rule 26.2 to get permission to seal any document or to redact any confidential information from the brief.

You are also aware that under Local Rule 26.2, you are allowed to provisionally file a document under seal, but only if "[t]he sealing motion [is] filed before or simultaneously with the provisional filing of the document under seal, and [is] noticed for presentment promptly thereafter."[1]

Finally, you know that under Seventh Circuit law, a boilerplate motion to seal merely asserting that your submission includes sensitive information will not be enough. Instead, you must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations."[2] This standard means that your motion will be denied unless you can prove that the documents to be protected contain trade secrets or are otherwise privileged.[3] You also know that convincing the court that the sensitive information rises to the level of a trade secret will require an affidavit from your client swearing to the relevant facts.

Because of the complexity of the motion, you work diligently with your team to get it done early. By a week or so before the motion's due date, all of the key individuals have signed off on the motion—the senior partner, in-house counsel, and the key business contacts at your client. Then, working with your paralegal, you catalogue all of the evidence cited in the motion and figure out which documents need to be sealed. Based on the list, you draft the Local Rule 26.2 Motion to Seal and an accompanying affidavit from the key fact witness—a senior employee at your client in charge of product development—explaining in detail why the sensitive information should be kept under seal. The witness signs the affidavit and sends it back to you, with a note indicating that he will be out of the office for the next few weeks on vacation. That should not matter, you think, because you now have the affidavit you need. You are ready to file the motion to seal, as the rule requires, "before or simultaneously with" the filing of your summary judgment motion.

Then, disaster strikes. Three days before the motion deadline, the senior partner and in-house counsel decide they want to add a new legal argument to the summary judgment motion. "We've got three days," the senior partner says as she hands you a draft of the new section. "That should be plenty of time to find the evidence we need to support this new argument."

You feverishly get to work, but as you read through the new argument, a pit starts to form in the bottom of your stomach. The new argument relies on *additional* facts about your client's confidential business practices that you do not remember citing before. You quickly scan your paralegal's list of exhibits to be filed under seal. Can you establish any of the necessary new facts from those documents? Maybe you can establish some of the facts, you think, but establishing others will require you to submit additional

confidential documents that you were not previously planning to file. And that will require you to amend the motion to seal, along with the affidavit supporting it.

Questions race through your mind. Can you identify all of the new evidence you need in time? Will your witness be available to sign a new affidavit? What if he is not responsive while he is on vacation? Can you support your argument to file the new documents under seal with some other witness? Will that person be available? Will you be able to handle this new problem on top of your already lengthy to-do list to finalize the long and complex brief?

And so the race is on.

The situation described above is common in litigation in federal courts in Illinois, but is it necessary? What interests are served by requiring that a motion to seal be filed "before or simultaneously with" the main filing to which it relates? Is there a different set of rules that might avoid the difficulties associated with eleventh-hour changes in a brief, while still protecting the interests of all parties and the public in keeping court records as open as possible?

The United States District Court for the District of Colorado uses a different procedure, one that is stated simply in Local Rule 7.2(e) of that court:

> **Filing Restricted Documents.** A document subject to a motion to restrict[4] shall be filed as a restricted document and shall be subject to restriction until the motion is determined by the court. If a document is filed as a restricted document without an accompanying motion to restrict, it shall retain a Level 1 restriction for 14 days. If no motion to restrict is filed within such time period, the restriction shall expire and the document shall be open to public inspection.

The effect of this rule is that a party seeking to file confidential documents under seal has up to 14 days *after* filing the primary documents to explain to the court why those documents should remain sealed. During that 14-day period and up to the point at which the court rules on the motion to restrict, the documents are protected.

The benefits of such a rule are obvious. Counsel are now free to focus on the substance of their filings, and can put off until after the filing the task of justifying the sealing of certain information. This dramatically reduces the scramble that often accompanies complex filings, and makes last-minute mistakes less likely.

Moreover, the additional time allows counsel and the parties to more carefully deliberate about what documents and information *actually* need to be under seal. In a last-minute rush to file a motion, counsel's default position will be to put *more* under seal, not less. "I have not had a chance to discuss the need to keep X document under seal with my client," a lawyer's thought process might go, "so I will move to keep it under seal out of an abundance of caution." With additional time to consider, the number of "just in case" efforts to seal documents should be reduced, generating benefits for not only the parties, but also the public (who will be able to access more information) and the court (which will not have to rule on as many frivolous requests to seal).

One potential downside to the District of Colorado's procedure is that, if a party's request to maintain a document under seal is denied, the public will have to wait up to two weeks longer to access the documents. In most cases, however, this delay is not significant. The primary rationale for granting public access to court records is "to enable interested members of the public, including lawyers, journalists, and government officials, to know who's using the courts, to understand judicial decisions, and to monitor the judiciary's performance of its duties."[5] Generally, the public will be able to monitor judicial performance just as effectively even if it must wait an additional two weeks to see certain specific information.

To be sure, cases generating intense public interest might come along that require a different procedure. But the District of Colorado's procedure can accommodate these situations, as individual judges can always implement a different protocol if needed in a particular case, thus allowing for the more immediate release of documents unnecessarily filed under seal.

In sum, the District of Colorado procedure affording parties 14 days to file a motion to seal provides a more rational framework for parties and the court to determine what documents need to remain out of the public eye. Federal district courts in Illinois would be wise to consider it.■

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1. The Central District of Illinois similarly requires that motions to seal be filed "contemporaneously" with the documents to be sealed. C.D. Ill. Local Rule 5.10(A)(2). The Southern District of Illinois does not explicitly require a motion to seal to be filed contemporaneously with the documents to be sealed, but one judge on the court has stated that parties filing documents under seal prior to obtaining leave of court is "a concerning practice." *Lemaster v. S.A. Gear Co.*, No. 3:15-cv-365-SMY-DGW, 2017 U.S. Dist. LEXIS 145738, at *4 (S.D. Ill. Sept. 8, 2017)
2. *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002).
3. *Id*.
4. A "motion to restrict" in the District of Colorado is equivalent to a "motion to seal" in the Illinois federal courts.
5. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013).

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