Planning for Sealing of Information in Federal Court

by Michael N. Rhinehart

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The discovery process in most federal cases today commences only after the parties have negotiated the terms of an agreed protective order. Such order normally governs, among other things, the labeling, exchange, and handling of certain sensitive or confidential materials produced throughout the discovery process.

Oftentimes, in negotiating the terms of a protective order, the parties contemplate the future filing with the court of documents designated as confidential in discovery and, therefore, propose a term that requires information designated as confidential in discovery to be filed under seal if submitted to the court. Ultimately then, in seeking leave to file materials under seal, counsel may sometimes support such a request by pointing only to the fact that such documents were marked confidential pursuant to the terms of an agreed protective order.[1] At least within the Sixth Circuit, seeking leave to file documents under seal solely because the subject documents were marked confidential in discovery is an insufficient basis for such relief.

In June 2016, the U.S. Court of Appeals for the Sixth Circuit held in *Shane Group Inc. v. Blue Cross Blue Shield of Michigan* that standards for permitting confidentiality during the discovery phase pursuant to a protective order and the standard for keeping such confidential information from public view on the court record are different.[2] Within two months following issuance of the decision in *Shane Group*, the Sixth Circuit reiterated its holding twice: *Beauchamp v. Federal Home Loan Mortgage Corp.*[3] and *Rudd Equipment Co. Inc. v. John Deere Construction & Forestry Co*.[4] This string of decisions should signal to practitioners the seriousness with which they must approach seeking leave to file information under seal—a distinct process in the litigation timeline that requires an adequately supported motion and equally detailed order from the court.

In each of those three opinions, the Sixth Circuit noted that, in seeking a protective order, parties need only demonstrate good cause for keeping information limited to the parties' eyes only during discovery.[5] However, once a party seeks to use any such information before the court for its consideration in adjudicating a dispute, a different standard applies.[6] Specifically, to support the sealing of documents on the court's record, the proponent of sealing bears a "heavy" burden of showing "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary."[7] To properly demonstrate that the requested seal is sufficiently narrowly tailored, the proponent of sealing "must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'"[8] Thereafter, to grant a motion to seal, courts must independently review the information and set forth, on the record, a specific explanation for permitting the seal.[9] Absent specific findings as to why sealing information outweighs the public's right to access, a summary grant of leave is subject to being vacated.[10]

Time Needed to Meet 'Heavy' Burden

In many federal cases, meeting the "heavy" burden required for a seal of court records necessitates a lengthy, detailed, and thoroughly researched motion, even where all parties to the litigation agree to, or at least do not object to, the requested seal ("[a] court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody").[11] In other words, significant time may be required for the preparation of such a motion.

Further, the court's independent review of the documents at issue and preparation of an order setting forth a specific explanation is likely to require more than a few hours or, given the court's calendar, a few days or weeks.[12] Thus, if counsel waits until the eve of the summary judgment deadline to prepare or file a motion requesting to seal records, counsel runs a significant risk of being unable to timely file their summary judgment motion.

To avoid significant heartburn when the summary judgment deadline approaches, counsel may be best served by seeking leave to file sealed materials well in advance of the deadline so that the court has ample time to consider the motion and prepare an order

explaining why the interests in nondisclosure outweigh the public's right to access. In addition, where the attorneys anticipate a substantial exchange of confidential information in discovery, counsel may wish to consider, as early as possible, conferring and negotiating procedures for presenting confidential information to the court and advising the court of such proposed procedure as part of their Rule 26(f) report or their joint proposed protective order.

Conferring Benefits More Than Timing

In so conferring, it may benefit counsel to discuss and address more than just the timing of motions seeking leave to file information under seal. For example, this circumstance occurs frequently in litigation: The filing party seeks to support a summary judgment motion with a document produced and marked confidential by another party to the litigation. In such circumstance, the filing party may have little to no interest in keeping the purportedly confidential information hidden from public view on the court's docket or may lack the information necessary to show the court why compelling reasons justify a seal. In these instances, it may make more sense for the producing party (i.e., the party actually interested in preserving the confidentiality of the document) to request leave of court for filing under seal.

Thus, when conferring under Rule 26(f) or negotiating the terms of a proposed protective order, counsel may consider discussing which party is required to seek leave to file confidential information under seal, such as the party seeking to file the confidential information in support of a motion for summary judgment (i.e., the filing party) or the party that produced the information in discovery and designated it as confidential (i.e., the producing party).

If the producing party is the party required to seek leave, the parties may also consider discussing the timing and procedure for each party to identify and notify the other parties of the confidential information it intends to rely upon at the summary judgment stage. For instance, the parties might consider meeting and conferring soon after the close of discovery (and sufficiently in advance of the summary judgment deadline) to identify the confidential information they intend to use at summary judgment. In such a scenario, the parties may also consider proposing a date in advance of the summary judgment deadline for the filing of all motions for leave to seal information (as well as other dates if the parties anticipate such motions being opposed).

Finally, should the parties anticipate complicated issues with regard to the sealing of information, such as a significant number of confidential documents or disputes regarding the presence of compelling reasons justifying a seal, the parties, in conferring to prepare their report under Rule 26(f), may wish to propose a lengthier gap between the close of discovery and the summary judgment deadline to ensure that all issues are fully addressed before risking either a missed deadline or confidential information becoming part of the public record.

Conclusion

Too often, practitioners fail to think through the issues discussed above and, instead, rely blindly on boilerplate protective orders. In light of what may be at stake for your clients, proper time and attention should be given to these portions of a protective order. Indeed, thinking through these issues in advance, and discussing them with your clients and opposing counsel, may alleviate future headaches for you and the court. ⊙

Endnotes

[1]*Beauchamp v. Federal Home Loan Mortg. Corp.*, 658 F. App'x 202 (6th Cir. 2016).
[2]*Shane Grp. Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016).
[3]*Beauchamp,* 658 F. App'x 202.
[4]*Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016).
[5]*Shane,* 825 F.3d at 305.
[6]*Id.*; *Beauchamp*, 658 F. App'x at 207; *Rudd Equip. Co.*, 834 F.3d at 593.
[7]*Shane,* 825 F.3d at 305-06.
[8]*Id.* at 305 (quoting *Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002)).
[9]*Id.* at 306.
[10]*Id.* (holding that "grounds to vacate an order to seal" exist where a court fails "to set forth … reasons … why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary").
[11]*Id.* at 307.
[12]*Id.* at 306.

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