

DUCivR 5-2 FILING CASES AND DOCUMENTS UNDER COURT SEAL

Reporter's Note: This rule is amended to provide additional requirements for filing material under seal emphasizing the need to minimize sealed filings in order to promote public access to court documents. The rule provides for subsequent filings of redacted versions of sealed documents. Privacy concerns are to be balanced against the presumption of open courts.

Approved by the Committee on July 10, 2012.

(a) General Rule.

The records of the court are presumptively open to the public. The court has observed that counsel are increasingly and improperly overdesignating sealed materials in pleadings and documents filed with the court. In order to prevent such overdesignating, the court is now requiring counsel to be highly selective in filing documents under seal. A portion of a document or portion of a pleading shall be filed under seal only if the document or pleading, or portions thereof, are privileged or protectable as a trade secret or otherwise entitled to protection under the law (hereinafter "Sealed Material"). A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal. To prevent the overdesignating of sealed materials in the court record, counsel shall:

- (1) Refrain from filing memoranda under seal merely because the attached exhibits contain confidential information;
- (2) Redact personal identifiers, discussed in DuCivR 5.2-1, and not use the presence of personal identifiers as a basis for sealing an entire document; and
- (3) Redact documents when the confidential portions are not directly pertinent to the issues before the court and publicly file the documents.

The court recognizes that on rare occasions, statutes, rules, and orders in specific cases may require restriction of public access. On motion of ~~one or more parties~~ a party and a showing of good cause, ~~the court or, upon referral, a magistrate judge may order all or a portion of the documents filed in a civil case to be sealed~~ a judge may order a case, a document, or a portion of a document filed in a civil case to be sealed.

(b) Sealing of New Cases.

(1) On Ex Parte Motion. ~~A case may be sealed at the time it is filed upon ex parte motion of the plaintiff or petitioner and execution by the court of a written order. In extraordinary circumstances, and upon a judge's order granting an ex parte motion of the plaintiff or petitioner, an entire case may be sealed at the time it is filed. The case will be listed on the clerk's case index as *Sealed Plaintiff vs. Sealed Defendant.*~~

(2) Civil Actions for False Claims. When an individual files a civil action on behalf of the individual and the government ~~alleging violation of~~ pursuant to 31 U.S.C. § 3729, the clerk will seal the complaint for a minimum of sixty (60) days. Extensions may be approved by the court on motion of the government.

(c) Sealing of Pending Cases.

A pending case may be sealed at any time upon ~~motion of either party and execution by the court of a written order.~~ a judge's sua sponte order or the granting of a motion by any party. Unless the court otherwise orders, neither the clerk's automated case index nor the existing case docket will be modified.

(d) Procedure for Filing Documents Under Seal.

~~Documents ordered sealed by the court or otherwise required to be sealed by statute must be placed unfolded in an envelope with a copy of the cover page of the document affixed to the outside of the envelope. The pleading caption on the cover page must include a notation that the document is being filed under court seal. The sealed document, together with a judge's copy prepared in the same manner, must be filed with the clerk. No document may be designated by any party as *Filed under Seal* or *Confidential* unless:-~~

- ~~(1) it is accompanied by a court order sealing the document;~~
- ~~(2) it is being filed in a case that the court has ordered sealed; or~~
- ~~(3) it contains material that is the subject of a protective order entered by the court.~~ Documents ordered sealed by the court or otherwise required to be sealed by statute must be delivered to the court for filing in the following manner:

(1) Original Document. The original document must be unfolded in an envelope with a copy of the document's cover page affixed to the outside of the envelope. The cover page must include a notation that the document is being filed under court seal and must indicate one of the following reasons why the document has been filed under seal:

- (A) it is accompanied by a court order sealing the document;
- (B) it is being filed in a case that the court has ordered sealed; or
- (C) the document contains Sealed Material.

Any exhibits filed must include a paper index to the exhibits, including the title (description) of the exhibit and the exhibit number.

(2) CD-ROM. The sealed filing must be accompanied by a CD-ROM (or other tangible electronic media) containing a PDF version of each document filed, including exhibits and the index of exhibits. The CD-ROM shall be placed in the same envelope as the original document and shall be marked with the case name, case number, and the date of delivery,

(3) Courtesy Copies. Courtesy copies of both the document and the CD-ROM, prepared in the manner described above, shall be delivered at the same time as the originals. Individual chambers may also notify counsel that an electronic version of the sealed document shall be delivered to chambers via email or other method of secured electronic delivery.

(4) Notice of Conventional Filing. When a sealed document is delivered to the court, the filer shall electronically file a “Notice of Conventional Filing.”

(e) Filing Memoranda That Contain Sealed Material

(1) Two Versions of Memorandum Must Be Filed. If a party refers in a memorandum to Sealed Material, two versions of the memorandum must be filed with the court: a confidential, sealed memorandum and a nonconfidential, redacted memorandum.

(A) Sealed Memorandum. One memorandum shall be labeled “FILED UNDER SEAL.” The specific confidential material must be highlighted, put in brackets, or otherwise designated as confidential. This memorandum shall be filed as set forth above in 5.2(d).

(B) Nonconfidential, Redacted Memorandum. A memorandum from which confidential matter has been redacted shall be labeled “REDACTED-NONCONFIDENTIAL” and electronically filed with the court. The caption of the redacted version of each sealed document and the docket entry created when the document is filed shall identify the title of the sealed document, its docket number, and the date on which the sealed version was filed. The redacted version of the memorandum must be filed within fourteen (14) days of filing the sealed version. Failure to file a redacted version within the time prescribed may result in the court’s unsealing the memorandum.

(2) Exceptions. Subsection (e)(1) does not apply to:

(A) Filings in cases that have been sealed pursuant to statute or court order; or

(B) A memorandum that contains such an abundance of confidential information that filing a redacted version of the memorandum would not be meaningful. In this situation, counsel shall file a declaration pursuant to Section(e)(3) below so stating.

(3) Declaration Required. The lead attorney on the case shall file a declaration certifying that the sealed exhibits, memoranda, and/or other documents are

privileged or protectable as a trade secret or otherwise entitled to protection under the law and that the sealed filing has been narrowly tailored to protect only the specific information truly deserving of protection.

(4) Resolutions of Disputes; Party Seeking Protection Bears Burden.

(A) If a party intends to refer to and file Sealed Material, and the filing party is unable to ascertain what information was intended to be protected, the filing party shall notify the designating party of the uncertainty, and the parties shall meet and confer so that the protected information may be highlighted as confidential as required in 5.2(e)(1)(A) and then redacted in the publicly filed version as required in 5.2(e)(1)(B).

(i) If the uncertainty is not resolved by the time the filing is made, the filing party shall:

(a) file the document(s) under seal;

(b) file a certification that the parties attempted to confer in good faith and that a Declaration, as required by 5.2(e)(3), cannot be filed; and

(c) file a notice to opposing counsel to prepare a redacted version for the filing party to file in the public docket within fourteen (14) days.

(ii) If the party seeking protection does not provide to the filing party a redacted version of the memorandum within fourteen (14) days of the filing of the sealed document, the filing party shall file, within seven (7) days, a notice that the court may unseal the document.

(B) A party who contends that a document was improperly filed under seal may notify the filing party of the contention. The parties shall then meet and confer. If conferral does not result in agreement, the party challenging the designation may file a Notice of Dispute Regarding Sealed Document(s).

(i) The party to whom the Notice of Dispute is directed must file, within fourteen (14) days of filing date of the notice, a motion to preserve the seal. If no such motion is timely filed, the other party may file a brief motion to remove the seal, attaching the notice given. The motion to remove the seal shall be summarily granted without briefing or hearing. If a motion is timely filed, the

opposing side need not respond, unless ordered to do so by the court.

(f) Access to Sealed Cases and Documents.

Unless otherwise ordered by the court, the clerk will provide access to cases and documents under court seal only on court order. Unless otherwise ordered by the court, the clerk will make no copies of sealed case files or documents.