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Sealing Records

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by

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Once upon a time a law and motion judge in a courthouse not far away walked me into his courtroom. We viewed acres of sealed manila envelopes, artfully arranged on the floor. These were the subjects of motions to seal, and dated back to the Stone Age. The judge was not eager to rip open the lodged originals and laboriously compare them to the proposed redactions and determine whether, in each case, there really was an overriding need to keep the data out of the public file.

The mountain of envelopes made us very sad.

Lawyers don't enjoy the process either, and they can make things worse by their efforts to comply with the sealing rules (CRC 2.550 et seq.) as much as by their ignorance of them.

Below I provide five ideas which may help.

The Rule

The idea behind the governing rule, if not the wording, is straightforward. The rule assumes one party wants to keep something secret, but either side might want to use the secret in a filing, say, a summary judgment motion. If the owning party is filing the underlying motion, it also files a motion or application to seal. If the other side is filing the underlying motion, it lodges the unredacted papers, files a redacted version, and notifies the other side that they have 10 days to file a motion to seal. No one can file a sealed document without a court order, and courts won't order it unless there's a strong showing that (i) the data has to be kept secret and (ii) the absolute minimum amount of data has been redacted. If the court denies the request to seal, the owning party can usually withdraw the data or in effect agree to have the data made public.

The judge doesn't much care if the parties agreed to designate the data as confidential in e.g., a stipulated protective order. The court is looking out for the public, ensuring the public knows the bases of the court's determination of the underlying motion. For how else to analyze and criticize a judge's rulings? How else to maintain the legitimacy of the courts? Ensuring *public* proceedings is the central interest here. That interest can be overcome, but it's a steep climb.

1. *Timing is everything*

Problems arise when the court decides the sealing motion *at the same time* as the underlying motion. It's tough to decide a summary judgment motion without first deciding the accompanying motion to seal, because no one knows what is in or out of the record. Whenever possible the sealing motion should be heard *before* the underlying motion.

2. *De-designate*

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Often pointless fights erupt when parties designate everything as confidential, requiring sealing motion for everything that follows. I know, I know, it's easier this way; no one wants to spend billable time marking up a million documents produced in discovery. But if you think the other side is seriously over-designating—is sloppy, lazy, onerous, or all of the above—consider a motion to de-designate. Do it long before the underlying motion is a twinkle in your eye. Make the owning party justify designating fast-food receipts and jokey emails as confidential.

3. Don't mess with the law

Parties send in protective orders for court endorsement. Often these have lousy sections on sealing, because the language is roughly-–but *not exactly*—the same as the rules of court. Judges often won't sign them because they seem to stray from the law. Don't fool with it. Just recite that the CRC governs sealing.

4. Leave out the secrets

Sometimes sealing really isn't necessary: no party to the underlying motion is actually asking the court to rely on secret data. In that case, just file the underlying papers with redacted data, without more. Source code is often designated as a trade secret, but it's unlikely the judge will need to parse it, even if it's discussed in a declaration. Leave it out. Perhaps an employer's handbook is an exhibit, but the only bit the court needs is the undesignated discussion of rest periods. Just provide the data the court needs to read. Forget the sealing motion.

5. Delta Force

May I introduce: the delta document. This saves a lot of time deciding sealing motions---and after all, wouldn't you rather the judge spend time on the underlying motion than on the minutiae of sealing? The delta document is just a redlined version of the original, showing the proposed redactions. Thus the judge can see the proposed redactions in context, without having to rip open envelopes and simultaneously flip through two versions of the same document. I ask counsel to send me the delta document directly (of course copied to the other side) and I toss it after I've decided the sealing motion.

Final Principles

Information is sealed only when admissible evidence (i.e., usually *not* attorney declarations) shows making specified data public will cause serious harm. Maybe it's a word, a number, or a paragraph, which needs redaction. Usually not more. Don't designate unless you must, don't ask for sealing unless there's absolutely no alternative.

Then spend your time on the merits of the underlying motion. Which is really what you want the judge to do.