

# Litigation

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## Filing Under Seal

New York procedures and pitfalls.

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**T**HE BRIEF IS WRITTEN. The exhibits accompanying it have been assembled with care. The phone rings. The client advises that Exhibit #12 contains sensitive information that it does not want to be made public as a result of the filing. Your only option is to get the document filed under seal.

This scenario is not uncommon in New York practice. Corporate litigants increasingly want to protect commercially sensitive documents from being released into the public domain as part of a court filing. Accordingly, New York state and federal courts provide for the filing of documents under seal, the mechanism by which commercially sensitive materials may remain non-public.

The substantive legal standard applied has been explored at length.<sup>1</sup> This article takes a step-by-step look at the procedure for filing under seal in both state and federal courts in New York, while also highlighting some of the potential pitfalls for practitioners to avoid.

A party cannot seal any court record in New York Supreme Court without prior court permission.

Procedurally, the party wishing to file a sealed record must first obtain a signed protective order (a "sealing order") from a justice or a so-ordered letter request. The substantive standard the court will apply is provided in §216.1 of the Uniform Rules for the New York State Trial Courts. That section provides that a court record may not be sealed absent "a written finding of good cause," which requires the court to "consider the interests of the public as well as of the parties."<sup>2</sup>

The typical method for obtaining a sealing order is to file an order to show cause requesting a

protective order. These papers should include (i) the order to show cause itself; (ii) an affidavit supporting the motion; and (iii) a brief discussing the legal standard. If a justice has not been assigned to a case, counsel must also submit a Request for Judicial Intervention (RJI), to have a justice assigned.<sup>3</sup>

The order to show cause should include language specifically directing that the county clerk (i) seal the file upon service of a copy of the court's order with notice of entry; and (ii) deny access to anyone except for a party or the counsel of record to any party to the case. The affidavit in support of the order to show cause must state the result of prior motions for similar relief, if any, and specify any new facts that were not previously shown.<sup>4</sup>

When the papers are ready, the first stop is the Ex Parte Office of the court for a preliminary review. Once the Ex Parte Office certifies that the papers are in proper procedural form, the movant pays a filing fee to the cashier's office. After payment, the original documents are returned to the Ex Parte Office, which will then submit them to the appropriate justice for review. The court will set a return date for the order, when it will hear argument as to whether "good cause" for sealing exists.<sup>5</sup>

Upon a finding that good cause exists for the filing of the document under seal, the court will sign the sealing order directing the county clerk to seal the record only as to the specific documents requested sealed.<sup>6</sup> The movant must promptly submit the signed order to the county clerk with notice of entry of the order. Once the county clerk is given the sealing order, the documents referenced therein will be withheld from public disclosure.

The procedure for filing documents under seal in cases before the Commercial Division of the New York Supreme Court for New York County is substantially similar to the procedure for non-commercial cases. The only difference is that the Commercial Division Support Office, not the Ex-Parte Office, handles orders to show cause requesting the filing of documents under seal in the Commercial Division.<sup>7</sup>



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### Commencing an Action Under Seal

Occasionally, a plaintiff may wish to commence an action that involves confidential information.

To seal all or part of the file at the inception of an action, practitioners are advised first to consult with the Chief Clerk of Law and Equity, or the Chief Deputy County Clerk, concerning the desire to seal.<sup>8</sup>

After this consultation, prepare to file the following documents: (i) a summons and complaint with the commercially sensitive material redacted or omitted; (ii) an index number request form; and (iii) an RJI request form.

Upon submission of the proper papers as discussed above, and payment of the index number and RJI fees, the county clerk will issue an index number but refrain from processing the filing for two to three days.<sup>9</sup> This coordinated delay with the county clerk provides practitioners with additional time to obtain two orders that will protect the sensitive material:

- (i) a sealing order (as outlined above); and
- (ii) a temporary restraining order sealing the file pending the decision on the sealing order request. The TRO seeks to bridge the gap in time between when the action is commenced and when the sealing request is heard.

If the TRO request is granted by the court, then that order, sealing the file pending the decision on the request for the sealing order, should immediately be brought to the county clerk's office, where the file for the case will be sealed pending decision on the sealing request.<sup>10</sup>

What happens if the court denies the initial TRO request to seal the file, destroying the temporal bridge between the commencement of the action and the hearing on the sealing order request? The client's commercially sensitive information is still protected if the summons and complaint omitted

it. On the other hand, if the TRO request to seal is subsequently granted, the party can then amend the complaint pursuant to CPLR 3025 to add the commercially sensitive information.

The failure to take these additional steps may result in the disclosure of the commercially sensitive information included in the summons and complaint. For example, if a sealing request is submitted with a TRO request to seal, and the court proceeds to deny the request for the TRO, the county clerk will file the summons and complaint pursuant to the normal procedures, which means they will be disclosed to the public, defeating the purpose of the exercise altogether.

### On the Federal Side

Rule 26(c) of the Federal Rules of Civil Procedure governs sealing in federal court.

As in the New York state courts, commercially sensitive information may be protected from public disclosure "for good cause shown."<sup>11</sup> While the legal standard used by the Southern and Eastern districts is the same, the two courts each have distinct procedures.

**Southern District of New York.** With very limited exceptions, all documents to be filed under seal in the Southern District must be accompanied by either a copy of a protective order signed by a judge or a letter request granted by a judge.<sup>12</sup> Thus, the first step in filing a document or documents under seal in the Southern District is to obtain such a protective order or letter. Once granted, the copy of the order or letter must be presented when filing the document with the clerk of the court.

The only exceptions to this requirement are if the entire action has been placed under seal or if a judge has signed an order in which the entire action is placed in a sealing envelope and submitted directly to the sealed records clerk.<sup>13</sup>

Documents submitted to the Southern District pursuant to an application for filing under seal must be provided to the court in an envelope that is unique to the Southern District. The front of the sealing envelope must show: whether the documents are submitted by the plaintiff or defendant, counsel's name, firm name, address, phone number, case caption, case number, date of protective order, and the name of the judge who signed the order. Additionally, in the lower left-hand corner the movant must specifically list the contents of the sealing envelope. All documents subject to the request to be sealed must be placed in the envelope, but the envelope itself should not be sealed until the contents are reviewed and verified by the clerk's office.<sup>14</sup>

The Southern District, like most courts, requires that all documents filed contain original signatures.<sup>15</sup> Further, the court requires that all envelopes containing documents to be filed under seal must be submitted in person; documents to be filed under seal may not be submitted by mail or any other form of service.<sup>16</sup> For cases filed electronically, all documents and exhibits that a litigant seeks to file under seal must be personally submitted on a CD Rom in PDF format.<sup>17</sup>

**Eastern District of New York.** In 2004, the U.S. District Court for the Eastern District of New York established through an administrative order a uniform procedure for the filing of documents under seal.<sup>18</sup> The order requires that a movant submit a form that is unique to the Eastern

District.<sup>19</sup> The form must include the case caption, docket number, assigned judge, and date of the order authorizing filing under seal. If there is no pre-existing order, the form must include the statute, regulation or other legal basis that authorizes filing under seal.<sup>20</sup>

The Eastern District's administrative order specifically preserves the right to bring a formal motion on an ex parte basis for leave to file a particular document under seal before the assigned judge.<sup>21</sup> If a litigant seeks to initiate such an ex parte proceeding, the procedure for such an action remains substantially similar to the procedure in the Southern District.

The brief is written and the exhibits accompanying it have been assembled with care. Then the phone rings and the client advises that Exhibit #12 contains sensitive information that it does not want to be made public as a result of the filing.

### The Potential Pitfalls

Potential procedural pitfalls await the unwary practitioner. Regardless of the court, the following should universally be practiced:

- Always submit the original order to show cause to the appropriate clerk's office, which will reject copies.

- Know the individual practices of the justice or judge before whom the action has been commenced. Some justices and judges have established specific rules regarding requests to file documents under seal. These individual practices should be followed to the extent they are provided.

- Remember protective orders between the parties. Even if the client does not request the filing of documents under seal, protective orders or stipulations made between the parties to a litigation may necessitate the filing of documents under seal in connection with a motion or other submission to the court.

- Always inform the appropriate clerk's office that you are submitting papers to be filed under seal. Clerks in both the federal and state courts of New York handle countless requests during any given day. Unless the clerks are informed that documents should be filed under seal pursuant to a court order, the normal processing procedures will be applied, which may result in the public disclosure of the information.

### Conclusion

The procedural steps required to file a document or an entire court record under seal are complex. While the substance of such a request is essential to its success, the procedural requirements are of equal, if not greater, import. A firm grasp of them will best protect a client's commercially sensitive information from public disclosure and best serve a client's interests in New York commercial litigation.

1. See, e.g., "Filing Commercial Documents Under Seal," George Bundy Smith and Thomas J. Hall, Aug. 20, 2009 NYLJ, 3 (col.1).

2. N.Y. COMP. CODES R. & REGS. tit. 22, §216.1(a). For a discussion of the substantive standard, see Smith and Hall, supra note 1.

3. See N.Y. COMP. CODES R. & REGS. tit. 22, §202.6(a).

4. N.Y. C.P.L.R. 2217(b).

5. See "Sealing Documents in Business Litigation: A Comparison of Various Rules and Methods Applied in Federal, New York State and Delaware Courts," Commercial Division Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, available at <http://www.nysba.org/AM/Template.cfm?Section=Committees2&Template=/CM/ContentDisplay.cfm&ContentID=35622>.

6. In New York state court, it is extremely rare for the court to agree to seal an entire file. Thus, the party seeking the order should be prepared to be extremely specific about which document or documents should be sealed and why.

7. If a TRO is sought in addition to an order to show cause for the filing of documents under seal, Rule 20 of the Commercial Division's rules contemplate an appearance by the applicant and requires that the applicant notify the opposing party that an application will be made, permitting the opposing party to appear and contest it. See Commercial Division Rule 20, N.Y. COMP. CODES R. & REGS. tit. 22, §202.70.

8. See New York State Supreme Court, New York Court, The County Clerk's Office—Litigation—Related Functions, available at [http://www.nycourts.gov/supctmanh/litigation\\_functions.htm](http://www.nycourts.gov/supctmanh/litigation_functions.htm).

9. Id.

10. Id.

11. Fed. R. Civ. P. 26(c). As previously discussed, while this article does not address the substantive considerations of "good cause," practitioners should be aware of the potentially differing interpretations of this standard by the federal courts and the New York state courts. See Smith and Hall, supra note 1.

12. See U.S. District Court, Southern District of New York, Sealed Records Filing Instructions, available at [http://www.nysd.uscourts.gov/cases\\_records.php?records=sealed\\_records](http://www.nysd.uscourts.gov/cases_records.php?records=sealed_records).

13. Id.

14. As a practice point, when submitting documents to the clerk's office in a sealing envelope, you should also bring a copy of the completed envelope to the clerk's office to have stamped received by the clerk, as a record of the filing.

15. See Sealed Records Filing Instructions, supra note 12.

16. Id.

17. Id.

18. See U.S. District Court, Eastern District of New York, Administrative Order 2004-05, available at <http://www.nyed.uscourts.gov/pub/docs/adminorders/adminorder04-05.pdf>.

19. Copies of this form are available at [http://www.nyed.uscourts.gov/General\\_Information/Court\\_Forms/SealingCoverSheet-January172007.doc](http://www.nyed.uscourts.gov/General_Information/Court_Forms/SealingCoverSheet-January172007.doc).

20. Id. at ¶1.

21. Id. at ¶3.

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