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The Sedona Conference

Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal

A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1)

December 2021
Public Comment Version
Submit comments by February 5, 2022, to
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PUBLIC COMMENT VERSION

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Preface

Welcome to the December 2021 Public Comment Version of The Sedona Conference *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal ("Commentary")*, a project of The Sedona Conference Working Group 1 on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The intent of this *Commentary* is to minimize the burden on litigants and courts created by the lack of uniformity in United States district court procedures for sealing confidential documents and electronically stored information (ESI). The *Commentary* offers a Proposed Model Rule designed both to bring uniformity to the process of filing under seal and to create a fair and efficient method to deal with the sealing and redacting of ESI, so that the parties can focus on the litigation while conserving the resources of the court. The Proposed Model Rule does not provide any guidelines or guidance for what ESI is properly sealed or redacted; it only provides a procedure for doing so.

The *Commentary* was a topic of dialogue at the Working Group 1 2020 Annual Meeting and 2021 Midyear Meeting and was published for member comment earlier this year. This public comment version reflects the valuable input provided by Working Group members.

On behalf of The Sedona Conference, I thank drafting team leaders Bethany Caracuzzo, Tony Petruzzi, and Jodi Munn Schebel for their leadership and commitment to the project. I also recognize and thank drafting team members Zachary Caplan, Karen Mitchell, Maria Salacuse, and Jeff Schaefer for their dedication and contributions, and Steering Committee liaisons Ross Gotler, Heather Kolasinsky, Timothy Opsitnick, the Hon. Andrew Peck, and Martin Tully for their guidance and input. I also wish to recognize the Hon. Maria Audero, the Hon. Cathy Bissoon, and the Hon. Timothy Driscoll for their contributions as Judicial Advisors.

Please note that this version of the *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal* is open for public comment through February 5, 2022, and suggestions for improvement are very welcome. After the deadline for public comment has passed, the drafting team will review the public comments and determine what edits are appropriate for the final version. Please submit comments by email to comments@sedonaconference.org.

In addition, we encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent remedies and damages; patent litigation best practices; trade secrets; data security and privacy liability; and other "tipping point" issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
December 2021

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I. INTRODUCTION

As any practitioner in federal court knows, there is a lack of uniformity as to the process for sealing confidential documents and electronically stored information (ESI). Federal Rule of Civil Procedure 5.2 provides concrete and repeatable rules for sealing personal information, including social security, tax-ID and financial account numbers, as well as birth dates and the names of minors, but guidance from the rules as to sealing stops there. If a party wants to use a produced confidential document in support of a motion for summary disposition, for example, the process it must follow is almost entirely governed by local rules. And those rules are so varied that not only do they differ from district to district,[1] but also differ between districts within the same state.[2]

Frequently, those rules place the burden to seal a document on the party that did not designate the document as containing confidential information, and in many cases disagrees with that designation. Under traditional sealing rules, the filing party must move to seal confidential documents appended to or referenced in a motion. However, if the filing party did not produce the confidential documents, the filing party has no knowledge as to the reason(s) why any individual confidential document was designated as such by the producing party. Thus, not only does the filing party lack foundation upon which to base a motion to seal, it may not even agree that the confidential documents deserve to be sealed. This results in an impracticable situation in which, by application of local sealing rules, the filing party must file a motion to seal documents that it may actually oppose. As a result, the filed motion to seal is oftentimes perfunctory and lacking in meaningful content. So that the court can properly weigh whether the confidential documents meet the requirements to be sealed,[3] this *Commentary* posits that it should be the designating party's burden to file a declaration in support of sealing, because the designating party is uniquely situated and appropriately motivated to describe the nature and basis of each confidential document. Only upon such proper foundation can the court determine whether the documents or information at issue should be sealed from public view.

To rectify this problem, this *Commentary* proposes the use of a Notice of Proposed Sealed Record, which is filed with the underlying motion, pleading, or response, and identifies the

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1 For example, in the Northern District of New York, all documents sought to be sealed must be sent to the court for in camera review in .pdf format through an email to the assigned judge, and served on all counsel. See N.D.N.Y. L.R. 83.13(6). However, in the Central District of California, sealed documents must be filed electronically. See C.D. Cal. L.R. 79-5.

2 An order to seal in the Western District of Texas lasts unless otherwise directed by the Court. *See* W.D. Tex. L.R. 5.2(d). However, in the Northern District of Texas, an order to seal paper documents is deemed unsealed 60 days after final disposition of the case, unless a party seeking to maintain the order to seal files a motion for relief before expiration of the time period. *See* N.D. Tex. L.R. 79.4.

3 The substantive standard to be used by a court in considering whether a document should be sealed in whole or in part is an entirely different matter from the procedure addressed by the Proposed Model Rule and is not addressed by this *Commentary* or the Proposed Model Rule, which is procedural only. Applicable standards include the common law right of access, the right of access under the First Amendment, and Federal Rule of Civil Procedure 26(c)(1)(G), which permits a party to seek protection, on a showing of good cause, from "annoyance, embarrassment, oppression, or undue burden or expense" as to "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]" For ease of reference and to provide background on the applicable standard for sealing and the split among the federal circuits as to the proper standard to be applied, an Appendix Case Law Summary is attached to this *Commentary*.

confidential documents referenced in or appended to that motion, pleading, or response. The Notice, proposed in this *Commentary* to be a standardized and simple form for consistency and efficiency, then triggers the obligation of the designating party to file a properly supported motion to seal. This process change not only eases the burden on the filing party, but also places the burden to seal on the proper party—the party that produced the documents with a confidential designation. The Proposed Model Rule also addresses other inconsistencies and differences between the local sealing rules, including setting a uniform and reasonable time frame to file a motion to seal, proper notice to be provided to non-parties whose confidential documents are subject to a Notice of Proposed Sealed Record, and how sealed and redacted records are to be filed by the parties and disposed of by the court. The proposed Notice form also aids courts, litigators, non-parties, and the public by using a clear and consistent docketing entry signaling that a motion to seal has been filed.

These changes, like the others proposed in this *Commentary* and its Proposed Model Rule, are designed to not only bring uniformity to the process of filing documents and ESI under seal, but to be a fair and efficient method to deal with the sealing and redacting of ESI and documents so that the parties can focus on the litigation while conserving the resources of the court. To effect these goals, this *Commentary*: (1) recommends a consistent process for filing ESI and documents under seal, considering the attendant burdens for sealing on parties, non-parties, and the court; and (2) provides guidance and best practices to practitioners on ESI and document sealing, including the steps required to do so and potential pitfalls to avoid in the process.

In addition to this Introduction, this *Commentary* includes two other sections:

- Section II is the Proposed Model Rule, with Proposed Notice form;

- Section III is an annotated version of the Proposed Model Rule containing practice tips for complying with the Proposed Model Rule, discussion of the factors considered by the drafting team and inconsistencies presented by the multiple differing local federal rules, and a process flowchart illustrating the practical application of the Proposed Model Rule.

Finally, the Appendix includes a circuit-by-circuit case law summary analyzing federal law on the standards for sealing of ESI and documents, with attachments. Attachment A depicts, in a chart format, whether and how each federal circuit defines a "judicial record," and Attachment B identifies whether a public right of access exists for nondispositive motions in each federal circuit.

By providing a uniform process, including a single set of rules for sealing documents in civil litigation and a standardized form for providing notice of the filing of sealed documents, this Proposed Model Rule, if enacted, should ease the burden on litigants and the court alike, and lead to a more equitable process for all.

II. PROPOSED UNIFORM MODEL RULE FOR THE SEALING AND REDACTING OF INFORMATION FILED WITH A FEDERAL COURT WITH PROPOSED FORM OF NOTICE

Model Rule: Procedures for the Sealing and Redaction of Records in a Federal Civil Case

1.0 Definitions

As used in this Rule:

(A) **Conditionally Sealed Period.** The Conditionally Sealed Period is the time period during which a Record is temporarily sealed because it is identified in a Notice of Proposed Sealed Record, but has not yet been sealed pursuant to court order.

(B) **Confidential Information.** Confidential Information is information the Filing Party or Designating Party contends is confidential or proprietary in a Notice of Proposed Sealed Record or a motion to seal, including information that has been designated as confidential or proprietary under a protective order or nondisclosure agreement, or information otherwise entitled to protection from disclosure under statute, rule, order, or other legal authority.

(C) **Court Record.** The Court Record refers to the full collection of pleadings, motions, orders, and exhibits that make up a case file.

(D) **Designating Party.** The Designating Party is the person or entity that designated the Confidential Information at issue under this Rule. The Designating Party may be a non-party to the case and may also be the Filing Party for purposes of this Rule.

(E) **Filing Party.** The Filing Party is the party seeking to file Confidential Information.

(F) **Presumptively Protected Information.** A Record may contain Presumptively Protected Information if it includes any of the following:

(1) Personally Identifiable Information (PII) refers to information that can, either alone or when combined with other personal or identifying information, be used to distinguish or trace an individual's identity, such as social security number, or biometric records, or information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, or father's middle name;

(2) Information defined as Protected Individually Identifiable Health Information (PHI) by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and including information protected by comparable federal, state, or local laws, regulations, or rules governing healthcare information privacy;

(3) Information otherwise protected from disclosure by federal, state, or local laws, regulations, or rules governing data privacy;

(4) Information not otherwise covered by Federal Rule of Civil Procedure 5.2 ("Rule 5.2"), such as passport numbers, taxpayer ID numbers, military ID numbers, driver's license numbers; other national, state, or local government issued identification, license, or permit numbers; nonfinancial customer account numbers; internet or website user names, login IDs, or passwords; personal email addresses; personal telephone numbers; personal device internet protocol (IP) addresses; residence addresses; and personal geolocation data (except if such information must be publicly disclosed by rule or order, *e.g.*, residence address on initial pleading, docket form, summons, subpoena, or substantively in a given case).

(G) Proposed Sealed Record(s). A Proposed Sealed Record is a Record that is temporarily sealed or redacted during the Conditionally Sealed Period by virtue of its attachment to a Notice of Proposed Sealed Record or motion to seal.

(H) Record. Unless the context indicates otherwise, Record means all or a portion of any document, pleading, motion, paper, exhibit, transcript, image, electronic file, or other written, printed, or electronic matter filed or lodged with the court, by electronic means or otherwise.

(I) Redacted Record. A Redacted Record is a Record that, by court order, contains a specific subset of information that is not open to inspection by the public, but the Record itself is not entirely sealed.

(J) Sealed Record. A Sealed Record is a Record that by court order is not open to inspection by the public or is temporarily sealed pursuant to the Conditionally Sealed Period.

2.0 Sealing Presumptively Protected Information

(A) No prior Court approval required.

A Filing Party who seeks to file Presumptively Protected Information identified in Rule 5.2 shall follow its requirements. For all other Presumptively Protected Information as defined by Model Rule 1.0(F), the Filing Party may redact such information without prior court approval where the extent of the redaction(s) is no greater than required to protect the disclosure of such information. Where other content in a Record supports or requires filing under seal, the provisions of Model Rule 3.0 apply, notwithstanding any redactions made under this section.

(B) No requirement to redact received materials.

A Filing Party receiving unredacted Records from a Designating Party is not required by this section to apply redactions to the Designating Party's Records before filing. This provision does not supersede any court order (such as a protective order or ESI order), law, regulation, or rule that imposes an affirmative requirement on a receiving party to redact information prior to filing, including Rule 5.2.

(C) No requirement to defend Designating Party's redactions.

A Filing Party receiving redacted Records from a Designating Party is not required to defend the appropriateness of redactions made by a Designating Party under this section in order to file them in the form received, after providing the Notice set forth in Model Rule 3.0(C). This provision does not preclude a receiving party from objecting to or challenging redactions by a Designating Party.

(D) Redactions to be no more extensive than required.

Redactions to prevent unauthorized public disclosure of information described in Model Rule 1.0(F) should be no more extensive than required to maintain the confidentiality of the Presumptively Protected Information, and should not, where feasible, obscure the type of information being redacted, if the nature of the type of information is indicated on the original document; *for example*, "D.O.B. ____".

(E) Redactions to be textual where feasible.

To apprise viewers of the bases for redactions, where the technology used to redact provides for textual redactions (as opposed to blackbox or whitebox redaction), textual redactions that characterize the redactions should be used (e.g., "PHI/PII Redacted," or "Personal Protected Information Redacted").

3.0 All Other Sealing

(A) Court approval required.

A Record must not be filed under seal or redacted without a court order, except in connection with a Notice of Proposed Sealed Record, or if the Record contains Presumptively Protected Information governed by Model Rule 2.0. A Record filed under seal in connection with a Notice of Proposed Sealed Record will be temporarily sealed unless and until an order disposing the motion to seal is entered, *e.g.*, the "Conditionally Sealed Period." Thereafter, the Record remains sealed unless determined otherwise by an order of the court. See Model Rules 1.0(A), 3.0(F), and 4.0.

(B) CM/ECF filing requirement.

(1) Unless otherwise ordered by the court, any Record to be filed under seal, Notice of Proposed Sealed Record, or motion to seal must be filed electronically with restricted access using the court's Case Management/Electronic Case Filing (CM/ECF) System. Notwithstanding this requirement, a Filing Party who is not represented by an attorney (*i.e.*, is "pro se") must not file electronically unless the pro se is approved to become a CM/ECF user in that case pursuant to local rules or court order. If a pro se party is not an approved CM/ECF user, the pro se must file such documents

in paper form, and the Clerk of Court will perform the necessary filing steps in the CM/ECF system.

(2) Proposed Sealed Records are to be filed only with the underlying motion, pleading, or response, and each such Record shall be filed separately so that each document is assigned its own ECF docket number (*e.g.*, ECF No. 2, or ECF No. 2-2). The Proposed Sealed Record(s) must be filed as separate docket entries in both sealed and unsealed and redacted and unredacted forms. Any Filing Party must file a Notice of Proposed Sealed Record pursuant to Model Rule 3.0(C).

(3) **Nonpublic Filing of Proposed Sealed or Redacted Records.** An unsealed or unredacted copy of each Proposed Sealed or Redacted Record must be filed concurrently with the motion, pleading, or response to which the Proposed Sealed or Redacted Record(s) are referenced or attached, using CM/ECF restricted viewing. All Records filed under seal or in unredacted form must state "FILED CONDITIONALLY UNDER SEAL" at the top of the Record or in such a place so as not to obscure the content of the document.

(4) **Publicly Filed Versions of Proposed Sealed and Redacted Records.** Redacted Records must be filed in redacted form in the public record. A Record to be sealed in its entirety must be filed in the public record by a placeholder slip sheet stating "DOCUMENT FILED UNDER SEAL." Each Proposed Sealed Record that is an attachment to a filing must be numbered (*e.g.*, as "Sealed Exhibit Number ___" and "Redacted Exhibit Number ___").

(5) Filing a document under seal does not exempt the filer from the service requirements imposed by federal statutes, rules, or regulations or by a court's local rules. E-service on parties in sealed or unredacted forms will be accomplished through the CM/ECF system, where available. If CM/ECF service is unavailable for such Records, a Filing Party who is an approved CM/ECF user must accomplish service same day as otherwise required by the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Local Rules. Service on a pro se party or non-party who has not been previously approved to be a CM/ECF user in the case must be made in accordance with Federal Rule of Civil Procedure 5.

(6) The motion to seal and its supporting documents, identified below in Model Rule 3.0(D), must not be filed under seal or with redactions unless the motion cannot be drafted in a manner that protects the Confidential Information from disclosure.

(7) Any order disposing of a motion to seal should be publicly filed.

(C) Notice of Proposed Sealed Record.

(1) Filing of Notice of Proposed Sealed Record. If a Filing Party intends to file a motion, pleading, or response that references or appends Confidential Information, it must file a Notice of Proposed Sealed Record. A Filing Party must file a Notice of Proposed Sealed Record even if it is the Designating Party.

(2) Content of Notice of Proposed Sealed Record. The Notice of Proposed Sealed Record must identify each Proposed Sealed or Redacted Record or generally identify the Confidential Information that was redacted from each Proposed Sealed or Redacted Record, without disclosing Confidential Information, and identify the corresponding Designating Party. Each Proposed Sealed or Redacted Record shall be referred to the ECF docket number from the motion, pleading, or response to which the Proposed Sealed Records are referenced or attached.

(3) Notice Where Records Previously Sealed or Redacted by Court Order. If Records subject to the Notice of Proposed Sealed Record were previously sealed or redacted by court order in the same action, the Filing Party must file a Notice of Proposed Sealed Record in compliance with this section and identify the prior order by ECF docket number and date. A new motion to seal is not required if the court previously ordered the Record sealed or redacted.

(4) Timing of Notice of Proposed Sealed Record. A Notice of Proposed Sealed Record must be filed immediately after any motion, pleading, or response to which the Proposed Sealed or Redacted Records are referenced or attached (*e.g.*, a motion to compel, a motion for summary judgment, or a motion in limine).

(5) Notice to Non-Party Designating Parties. If Records subject to the Notice of Proposed Sealed Record were produced by a Designating Party that is a non-party to the litigation, the Filing Party filing the Notice of Proposed Sealed Record must provide notice of the filing to the non-party in accordance with Rule 3.0(B)(5).

(D) Motion to Seal.

(1) Motion to Seal. If a Designating Party whose Record(s) are the subject of a Notice of Proposed Sealed Record seeks to maintain such Records under Seal, the Designating Party must file a motion to seal. A Filing Party who is the Designating Party must file and serve the motion to seal in compliance with this Rule.

(2) Memorandum. The motion to seal must include a nonconfidential memorandum in support that complies with Model Rule 3.0(B)(6) describing:

(a) each Record(s) to be sealed or redacted; (b) the basis for the request; and (c) how each Record(s) to be sealed or redacted meets applicable standards for sealing.

(3) **Declaration in Support.** The motion to seal must include a nonconfidential declaration in support setting forth the legal basis for filing each Record under seal or in redacted form, and such Records should not be refiled, but should be identified by their ECF docket numbers from the motion, pleading, or response to which the Proposed Sealed Record(s) is referenced or attached (*e.g.*, ECF No. 2 or ECF No. 2-2).

(4) **Timing of Motion to Seal.** A Designating Party must file its motion to seal and supporting declaration within the time frame set for the filing of any responsive pleading to the motion that references or appends a Designating Party's Confidential Information, unless otherwise ordered by the court. If a responsive pleading is not permitted, the motion to seal and supporting declaration must be filed within seven (7) court days of service of the Notice of Proposed Sealed Record.

(5) **Failure to Timely Move to Seal.** If the Designating Party does not timely file its motion to seal in accordance with this Rule, the Designating Party waives its right to maintain that the Records contain Confidential Information.

(E) **Proposed Order.** A proposed order must be filed and served with the motion to seal.

(F) **Disposition of Proposed Sealed Records.**

(1) If the Designating Party fails to timely file a motion to seal after receiving Notice pursuant to Model Rule 3.0(C) above, the Filing Party must publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the expired motion to seal deadline.

(2) If the court grants the motion to seal, the Proposed Sealed Record will be deemed filed as of the date of the filing of the Notice of Proposed Sealed Record unless otherwise directed by the court.

(3) If the court denies the motion to seal, the Filing Party shall publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the order denying the motion to seal, or take other action as ordered by the court.

4.0 Disposition of Sealed and Redacted Records at the Conclusion of the Case.

Unless otherwise ordered by the Court, a Sealed or Redacted Record will remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served upon all parties in the case and

upon any Designating Party that is a non-party in accordance with the service requirements in this Rule.

FORM NOTICE OF PROPOSED SEALED RECORD

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF

_____ *
Plaintiff, *

v. **Case No.** _____
*

_____ *
Defendant.

NOTICE OF PROPOSED SEALED RECORD

The undersigned hereby provide Notice of a Proposed Sealed Record, setting forth below the ECF Number(s) of the document(s) to be sealed, the identity of the designating party or non-party, whether an objection to sealing is anticipated, and whether a prior sealing Order exists.

ECF No.	Designating Party	Objection Anticipated	Prior ECF No.	Prior Order Date
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		

If no prior Order exists, proposed reason for redacting or sealing:

I hereby certify that on this date I electronically filed this Notice and the documents identified above with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record, and that for any non-parties, I will serve copies of this Notice and the documents identified above in conformance with Fed. R. Civ. P. 5 and applicable Local Rules.

_____ _____

Date

Signature

Party Represented

Printed Name and Bar Number

Address

Email Address

Telephone Number

Fax Number

PRINT

III. ANNOTATED PROPOSED UNIFORM MODEL RULE FOR THE SEALING AND REDACTING OF INFORMATION FILED WITH A FEDERAL COURT

Model Rule: Procedures for the Sealing and Redaction of Records in a Federal Civil Case

1.0 Definitions

As used in this Rule:

(A) Conditionally Sealed Period. The Conditionally Sealed Period is the time period during which a Record is temporarily sealed because it is identified in a Notice of Proposed Sealed Record, but has not yet been sealed pursuant to court order.

(B) Confidential Information. Confidential Information is information the Filing Party or Designating Party contends is confidential or proprietary in a Notice of Proposed Sealed Record or a motion to seal, including information that has been designated as confidential or proprietary under a protective order or nondisclosure agreement, or information otherwise entitled to protection from disclosure under statute, rule, order, or other legal authority.

> ❖ ***COMMENT***
>
> Standing alone, the fact that a Record contains Confidential Information is not enough to justify sealing or redaction, nor is the existence of a Protective Order permitting "Confidential" or similar designations.[4] Records submitted under seal or in redacted form pursuant to this Model Rule cannot remain under seal without a court order determining such sealing or redacting is proper, except for Presumptively Protected Information (See definition at 1.0(F) and Model Rule 2.0) or as required by Federal Rules of Civil Procedure 5.2.[5]

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[4] The federal courts have long recognized different standards for maintaining the confidentiality of documents that are exchanged in discovery versus documents filed with the court. For example, the Third Circuit recently reiterated that once documents are filed with a court "there is a presumptive right of public access to pretrial motions of a non-discovery nature, whether preliminary or dispositive, and the material filed in connection therewith." *In re* Avandia Mktg. Sales Practices & Prod. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019); *see also*, *for example*, Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006). Parties and attorneys practicing in federal courts—particularly in courts in the Third Circuit—should be aware of these decisions encouraging increased judicial scrutiny of proposed under seal filings.

[5] The definition of Presumptively Protected Information under the Proposed Uniform Model Rule is broader than that covered in Federal Rule of Civil Procedure 5.2. Note, however, that some courts will not allow filing of redacted materials except to the extent permitted by the Federal Rules of Civil Procedure. *See, for example*, D.N.J. Electronic Case Filing Policies and Procedures (As Amended April 3, 2014), Section 10, https://www.njd.uscourts.gov/sites/njd/files/PoliciesandProcedures2014.pdf ("Unless otherwise provided by federal law, nothing may be filed under seal unless an existing order so provides or Local Civil Rule 5.3 is complied with.").

> The proposed Model Rule does not seek to set forth any guideline or guidance as to what information is properly sealed or redacted; it only provides a procedure for doing so.
>
> When this Model Rule refers to redacted documents, it means redactions for purpose of public filing, not redactions that already exist on the document as part of production (e.g., redactions for privilege).

(C) **Court Record.** The Court Record refers to the full collection of pleadings, motions, orders, and exhibits that make up a case file.

(D) **Designating Party.** The Designating Party is the person or entity that designated the Confidential Information at issue under this Rule. The Designating Party may be a non-party to the case and may also be the Filing Party for purposes of this Rule.

(E) **Filing Party.** The Filing Party is the party seeking to file Confidential Information.

(F) **Presumptively Protected Information.** A Record may contain Presumptively Protected Information if it includes any of the following:

(1) Personally Identifiable Information (PII) refers to information that can, either alone or when combined with other personal or identifying information, be used to distinguish or trace an individual's identity, such as social security number, or biometric records, or information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, or father's middle name;

(2) Information defined as Protected Individually Identifiable Health Information (PHI) by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and including information protected by comparable federal, state, or local laws, regulations, or rules governing healthcare information privacy;

(3) Information otherwise protected from disclosure by federal, state, or local laws, regulations, or rules governing data privacy;

(4) Information not otherwise covered by Federal Rule of Civil Procedure 5.2 ("Rule 5.2"), such as passport numbers, taxpayer ID numbers, military ID numbers, drivers' license numbers; other national, state, or local government issued identification, license, or permit numbers; nonfinancial customer account numbers; internet or website user names, login IDs, or passwords; personal email addresses; personal telephone numbers; personal device internet protocol (IP) addresses; residence addresses; and personal geolocation data (except if such information must be publicly disclosed by rule or order, *e.g.*, residence address on initial pleading, docket form, summons, subpoena, or substantively in a given case).

> ❖ ***COMMENT***
>
> This new definition and the provisions that follow in Section 2.0 for redaction of Presumptively Protected Information are intended to augment Federal Rule of Civil Procedure 5.2 and provide streamlined protection from disclosure for a broader group of materials than currently are set forth in Rule 5.2. The definition covers information that is defined elsewhere, such as PII and PHI.

(G) Proposed Sealed Record(s). A Proposed Sealed Record is a Record that is temporarily sealed or redacted during the Conditionally Sealed Period by virtue of its attachment to a Notice of Proposed Sealed Record or motion to seal.

(H) Record.[6] Unless the context indicates otherwise, Record means all or a portion of any document, pleading, motion, paper, exhibit, transcript, image, electronic file, or other written, printed, or electronic matter filed or lodged with the court, by electronic means or otherwise.

(I) Redacted Record. A Redacted Record is a Record that, by court order, contains a specific subset of information that is not open to inspection by the public, but the Record itself is not entirely sealed.

(J) Sealed Record. A Sealed Record is a Record that by court order is not open to inspection by the public or is temporarily sealed pursuant to the Conditionally Sealed Period.

2.0 Sealing Presumptively Protected Information

(A) No prior Court approval required.

A Filing Party who seeks to file Presumptively Protected Information identified in Rule 5.2 shall follow its requirements. For all other Presumptively Protected Information as defined by Model Rule 1.0(F), the Filing Party may redact such information without prior court approval where the extent of the redaction(s) is no greater than required to protect the disclosure of such information. Where other content in a Record supports or requires filing under seal, the provisions of Model Rule 3.0 apply, notwithstanding any redactions made under this section.

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[6] In considering the proper term for this document, this *Commentary* looked to the terms used by the varying circuits, which include "record," "judicial record," "document," "judicial document," "item," or "material." This document is to be distinguished from a document that becomes a part of the court file in a case (*see* 1.0(C)), but instead is meant to identify the document sought to be sealed or redacted pursuant to this Rule.

> ❖ ***COMMENT***
>
> The Model Rule proposes that a streamlined process of redaction is appropriate only to protect Presumptively Protected Information, and therefore does not require the procedure set forth in Model Rule 3.0 for filing Presumptively Protected Information under seal. Although the proposed Model Rule does not require prior court approval for the filing of Presumptively Protected Information, it does not preclude a party from challenging the filing or a non-party from intervening under Federal Rule of Civil Procedure 24(b) to challenge the sealing or redacting of any Record, including Presumptively Protected Information.

(B) No requirement to redact received materials.

A Filing Party receiving unredacted Records from a Designating Party is not required by this section to apply redactions to the Designating Party's Records before filing. This provision does not supersede any court order (such as a protective order or ESI order), law, regulation, or rule that imposes an affirmative requirement on a receiving party to redact information prior to filing, including Rule 5.2.

> ❖ ***COMMENT***
>
> Unless redaction is required by Federal Rule of Civil Procedure 5.2, the Model Rule does not obligate a Filing Party to redact Presumptively Protected Information when it has received documents or ESI in an unredacted form from the Designating Party. In that case, the party or entity producing materials that contain Presumptively Protected Information should bear the burden of protecting such information from disclosure. However, the Model Rule does not supersede any legal requirement that imposes a duty to protect any such information from disclosure.

(C) No requirement to defend Designating Party's redactions.

A Filing Party receiving redacted Records from a Designating Party is not required to defend the appropriateness of redactions made by a Designating Party under this section in order to file them in the form received, after providing the Notice set forth in Model Rule 3.0(C). This provision does not preclude a receiving party from objecting to or challenging redactions by a Designating Party.

> ❖ ***COMMENT***
>
> The Model Rule provides that a Filing Party need not defend a Designating Party's redactions of Presumptively Protected Information as a result of filing the redacted materials as received. Indeed, a Filing Party may object to or challenge those redactions. The justification for making the redactions remains the Designating Party's burden.

(D) Redactions to be no more extensive than required.

Redactions to prevent unauthorized public disclosure of information described in Model Rule 1.0(F) should be no more extensive than required to maintain the confidentiality of the Presumptively Protected Information, and should not, where feasible, obscure the type of information being redacted, if the nature of the type of information is indicated on the original document: *for example*, "D.O.B.___".

> ❖ ***COMMENT***
>
> Section 2.0(A) of the Model Rule requires that redactions of Presumptively Protected Information be "no greater than required to protect" disclosure. This provision states this obligation in a more specific manner to prevent the application of redactions in an overly broad manner that conceals not only the Presumptively Protected Information, but also conceals the type of information being redacted. This occurs, for example, when a redaction on a form conceals a Social Security Number, but also extends to conceal that what is being redacted *is* a Social Security Number, such as the header of the box containing the Social Security Number. Those applying redactions must be instructed not to conceal anything beyond the Presumptively Protected Information itself.

(E) Redactions to be textual where feasible.

To apprise viewers of the bases for redactions, where the technology used to redact provides for textual redactions (as opposed to blackbox or whitebox redaction), textual redactions that characterize the redactions should be used (e.g., "PHI/PII Redacted" or "Personal Protected Information Redacted").

> ❖ ***COMMENT***
>
> Many document review and software platforms that provide the ability to embed redactions on document images also have redaction format options that allow "text redactions" as well as traditional blackout or whiteout

redactions. The use of text redactions to provide a basis for and give context to redactions on the face of a document is preferred to blackout or whiteout redactions of Presumptively Protected Information. If technology does not permit, or if the filing party is pro se and does not have the capabilities to provide textual redactions, the party may use any reasonable method available to redact the Presumptively Protected Information.

3.0 All Other Sealing

(A) Court approval required.

A Record must not be filed under seal or redacted without a court order, except in connection with a Notice of Proposed Sealed Record, or if the Record contains Presumptively Protected Information governed by Model Rule 2.0. A Record filed under seal in connection with a Notice of Proposed Sealed Record will be temporarily sealed unless and until an order disposing the motion to seal is entered, *e.g.*, the "Conditionally Sealed Period." Thereafter, the Record remains sealed unless determined otherwise by an order of the court. See Model Rules 1.0(A), 3.0(F), and 4.0.

❖ ***COMMENT***

This Rule permits a Filing Party to file a Record under seal conditionally while a court ruling on the issue is pending. The Model Rule focuses on the procedure for filing under seal and not the substantive requirements for sealing Records. Nothing in the Rule shall be interpreted to restrict any rights to intervene under Federal Rule of Civil Procedure 24(a) or (b).

(B) CM/ECF filing requirement.

(1) Unless otherwise ordered by the court, any Record to be filed under seal, Notice of Proposed Sealed Record, or motion to seal must be filed electronically with restricted access using the court's CM/ECF System. Notwithstanding this requirement, a Filing Party who is not represented by an attorney (*i.e.*, is "pro se") must not file electronically unless the pro se is approved to become a CM/ECF user in that case pursuant to local rules or court order. If a pro se party is not an approved CM/ECF user, the pro se must file such documents in paper form, and the Clerk of Court will perform the necessary filing steps in the CM/ECF system.

(2) Proposed Sealed Records are to be filed only with the underlying motion, pleading, or response, and each such Record shall be filed separately so that each document is assigned its own ECF docket number (*e.g.*, ECF No. 2, or

ECF No. 2-2). The Proposed Sealed Record(s) must be filed as separate docket entries in both sealed and unsealed and redacted and unredacted forms. Any Filing Party must file a Notice of Proposed Sealed Record pursuant to Model Rule 3.0(C).

(3) Nonpublic Filing of Proposed Sealed or Redacted Records. An unsealed or unredacted copy of each Proposed Sealed or Redacted Record must be filed concurrently with the motion, pleading, or response to which the Proposed Sealed or Redacted Record(s) are referenced or attached, using CM/ECF restricted viewing. All Records filed under seal or in unredacted form must state "FILED CONDITIONALLY UNDER SEAL" at the top of the Record or in such a place so as not to obscure the content of the document.

(4) Publicly Filed Versions of Proposed Sealed and Redacted Records. Redacted Records must be filed in redacted form in the public record. A Record to be sealed in its entirety must be filed in the public record by a placeholder slip sheet stating "DOCUMENT FILED UNDER SEAL." Each Proposed Sealed Record that is an attachment to a filing must be numbered (*e.g.*, as "Sealed Exhibit Number ___" and "Redacted Exhibit Number ___").

❖ ***COMMENT***

These sections of the Model Rule discuss the process for filing Records under seal using the CM/ECF system. The Proposed Sealed and/or Redacted Records are filed ***just one time***, concurrently with the motion, pleading, or response to which the Proposed Sealed or Redacted Record are referenced. The Proposed Sealed or Redacted Record will be referenced by ECF docket number in both the Notice of Proposed Sealed Record and motion to seal, and is not to be attached to the Notice, the motion to seal, or any declaration filed in support. The purpose of this requirement is to prevent repetitious filings, reduce the burden on the courts, and lessen the likelihood of inconsistent sealed or redacted filings. See Model Rule 3.0(C) and (D) and discussion below. The Notice is to be filed after the underlying motion, pleading, or response, so that the Notice may referenced the Proposed Sealed or Redacted Records by docket number.

The Form Notice that this *Commentary* has devised and proposes be uniformly used for efficiency and consistency contains a dropdown feature to identify whether there are any known objections to the proposed Sealed Records. The functionality of this dropdown feature, unfortunately, is not available when the Form is incorporated within these materials. Available options include: Yes, No, and Unknown.

This *Commentary* understands that some district courts require that documents requested to be filed under seal or redacted be submitted in hard-copy ("paper") form.[7] This *Commentary* elects to require the use of ECF to adopt modern filing requirements and alleviate the burden on courts to manage paper files or external media containing such files. This *Commentary* also considered that requiring another submission in paper form adds an extra layer of complexity and security for the parties and the court, and therefore removed such a requirement from this Model Rule. This *Commentary* acknowledges a court may still want a paper copy of sealed or redacted Records in limited circumstances, or may need to require paper copies in the instance of filers who have not been approved as ECF users in the case, and so included 3.0(B)(4)(b) in the Model Rule.[8] As another example, recent CM/ECF data breach issues have caused jurisdictions around the country to issue specific guidance on filing highly sensitive documents in paper form or via other secure means.[9]

The Model Rule also requires the use of placeholder slip sheets in place of the sealed Record to make it easier to track the Record, and to consistently identify it by the same exhibit number from the time the Record is filed with the original motion, pleading, or response that cites to Sealed or Redacted Records, through the filing of the Notice of Proposed Sealed Record by the Filing Party (*see* 3.0(C)), and in the motion to seal and supporting declaration later filed by the Designating Party, which seeks to keep the information protected (*see* 3.0(D)). Placeholder slip sheets are commonly used by other courts.[10]

Grouping Sealed and Redacted Documents Together In One Docket Entry: Current CM/ECF filing capabilities require filers to group all redacted or sealed documents together in a single docket entry. This is because current CM/ECF capabilities do permit e-service of sealed documents (though all courts do not currently use

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7 *See*, *for example*, C.D. Cal. L.R. 79-5.2.1(b); *see also*, W.D.N.Y., L.R. 5.3; E.D. Pa. L.R. 5.1.2; W.D. Pa. CM/ECF Manual. Other courts permit a choice of either manual or ECF filing. *See*, *e.g.*, N.D. Cal. L.R. 79-5. While other courts require that such documents be filed only via ECF. *See* E.D. Tex. L.R. CV-5(a)(7)(D); N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13(6)); and D. Del. Electronic Case Filing CM/ECF User Manual XIV.C.

8 *See, for example*, N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13) (requiring a motion to seal to be via ECF, but also requiring that "copies of all documents sought to be sealed be provided to the Court, for its in camera consideration, as an attachment in .pdf form to an email to the judge").

9 *See Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records* (Jan. 6, 2021), U.S. COURTS, https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

10 *See* N.D.N.Y. L.R. 5.3 (former L.R. 83.13(6)).

this functionality), but only if the documents are grouped together in a single docket entry. For example, a filing of sealed documents or unredacted versions of documents would look like this:

1	COMPLAINT filed by Plaintiff Allison Apple (Smith, Joe) (Filed on 03/01/2021)(Entered: 03/01/2021)
2	NOTICE of MOTION to dismiss filed by XYC Corporation (Attachments: # 1 MEMORANDUM in Support, # 2 Proof of Service, # 3 Proposed Order) (Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
3	DECLARATION of Jessica Jones in support of 2 MOTION to dismiss filed by XYZ Corporation (Attachments: #1 Redacted Exhibit No. 1; # 2 Sealed Exhibit No. 2; # 3 Redacted Exhibit No. 3; # 4 Sealed Exhibit No. 4, # 5 Exhibit No. 5, # 6 Exhibit No. 6, # 7 Exhibit No. 7)(Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
4	PROPOSED SEALED DOCUMENTS for 3 Declaration of Jessica Jones filed by XYZ Corporation (Attachments: #1 Unredacted Version of Exhibit No. 1; # 2: Sealed Exhibit No. 2; # 3 Unredacted Version of Exhibit No. 3; # 4 Sealed Exhibit No. 4) (Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
5	NOTICE OF PROPOSED SEALED Records filed by XYZ Corporation (Jones, Jessica)(Filed on 04/30/2021) (Entered: 04/30/2021)

In the above example, party XYZ Corporation filed a motion to dismiss (ECF No. 2) and is filing exhibits in support. (ECF Nos. 3, 4). All the documents in ECF No. 3 are filed publicly. ECF Nos. 3-1 and 3-3 are redacted versions of Proposed Redacted Records. ECF Nos. 3-2 and 3-4 are the cover slip sheets for two documents filed under seal. ECF Nos. 3-5, 3-6, and 3-7 are exhibits not subject to any sealing or redacting requests and are simply filed in the public view.

All the documents filed in ECF No. 4 are filed under seal, away from public viewing until the motion to seal can be ruled upon. ECF Nos. 4-2 and 4-4 are unredacted versions of ECF 3-2 and 3-4. ECF Nos. 4-3 and 4-5 are unsealed versions of the entirely sealed ECF Nos. 3-3 and 3-5. The proper classification of these filings within a court's CM/ECF system will differ by local rules and ECF filing guidelines. A possible option would be to file these under the option "Exhibit."

By grouping these Proposed Sealed and Redacted Records together, filers can use the CM/ECF system to e-serve the unsealed and unredacted versions on relevant parties and registered ECF non-parties, rather than having to separately serve them via a different mechanism. This *Commentary* understands that while not all courts use this ECF functionality to permit e-service of unsealed and unredacted

versions of Proposed Sealed or Redacted Records, many districts do.[11] It is the hope that increased ECF functionality will, in the future, not require that all Proposed Sealed and Redacted Records be grouped together in one docket entry.

In the example above, ECF No. 5 is the Notice of Proposed Sealed Record, which is a form that is to be filed immediately after any motion, pleading, or response seeking to file sealed or redacted documents, which is discussed below. See Comment re. Model Rule 3.0(C), below, and Notice of Proposed Sealed Record form, above.

(5) Filing a document under seal does not exempt the filer from the service requirements imposed by federal statutes, rules, or regulations or by a court's local rules. E-service on parties in sealed or unredacted forms will be accomplished through the CM/ECF system, where available. If CM/ECF service is unavailable for such Records, a Filing Party who is an approved CM/ECF user must accomplish service same day as otherwise required by the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Local Rules. Service on a pro se party or non-party who has not been previously approved to be a CM/ECF user in the case must be made in accordance with Federal Rule of Civil Procedure 5.

❖ ***COMMENT***

This *Commentary* acknowledges that not all courts currently use the full functionality of the CM/ECF system. The CM/ECF system does have the functionality to permit parties to view Sealed and Redacted Records in their entirety, as well as to "serve" them via the CM/ECF notification system to registered users, while maintaining those Records as blocked from public view.[12]

(6) The motion to seal and its supporting documents, identified below in Model Rule 3.0(D), must not be filed under seal or with redactions unless the motion

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11 *See, for example*, District of Minnesota L.R. 5.6 and its Sealed Civil User's Manual.

12 *See, for example*, District of Minnesota, Sealed Civil User's Manual (Updated Sept. 28, 2021), https://www.mnd.uscourts.gov/sites/mnd/files/Sealed_Civil_Users_Manual.pdf, at p. 11, providing users with the ability to choose which parties can view unsealed and unredacted version of documents filed out of the public view; *see also* District of Rhode Island, Filing Instructions Civil Motion to Seal, https://www.rid.uscourts.gov/sites/rid/files/documents/cmecf/CivilMotiontoSealFilingInstructions.pdf (same); *see also Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records* (Jan. 6, 2021), U.S. COURTS, https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

cannot be drafted in a manner that protects the Confidential Information from disclosure.

(7) Any order disposing of a motion to seal should be publicly filed.

> ❖ ***COMMENT***
>
> See discussion on Model Rule 3.0(D), below. While this *Commentary* proposes that the Model Rule be uniformly applied, courts and judges may still have certain individual preferences, which practitioners should be familiar with, including checking standing orders, practical guides, scheduling orders, the judge's webpage, and ECF filing instructions.

(C) Notice of Proposed Sealed Record.

(1) Filing of Notice of Proposed Sealed Record. If a Filing Party intends to file a motion, pleading, or response that references or appends Confidential Information, it must file a Notice of Proposed Sealed Record. A Filing Party must file a Notice of Proposed Sealed Record even if it is the Designating Party.

> ❖ ***COMMENT***
>
> The Notice of Proposed Sealed Record is similar to the District of Maryland's process, requiring the filing of a Notice of Filing Exhibit or Attachment Under Seal.[13] The purpose of requiring that the Filing Party submit only a Notice of Proposed Sealed Record when filing documents either in redacted form or entirely under seal is to properly place the burden of supporting the sealing of all or part of a Record from the public file on the Designating Party, rather than on the Filing Party. This *Commentary* recognizes that often a party may need to submit documents to a court that another party (or non-party) has designated as Confidential. As a result, that party is required to move

[13] *See* District of Maryland, Sealed Civil Documents, https://www.mdd.uscourts.gov/content/sealed-civil-documents, https://www.mdd.uscourts.gov/sites/mdd/files/forms/NoticeofFilingofDocumentUnderSeal.pdf. The Northern District of California provides what it calls a "special" procedure for when one party wishes to e-file a document designated confidential by another party, but, in reality, that procedure simply requires that the Filing Party also include information in its declaration in support of the motion to seal identifying that party designated the information as Confidential. *See* Northern District of California, E-Filing Under Seal in Civil Cases, Special Note, https://www.cand.uscourts.gov/cases-e-filing/cm-ecf/e-filing-my-documents/e-filing-under-seal/. This *Commentary* believes this does not adequately place the burden on the Designating Party.

to seal the documents, despite not having itself designated the documents as Confidential.

This *Commentary* envisions the Notice itself to be succinct and pro forma and has drafted a fillable Form Notice to accompany the Proposed Model Rule for litigants to use. *See* Notice of Proposed Sealed Record form, above.

(2) **Content of Notice of Proposed Sealed Record.** The Notice of Proposed Sealed Record must identify each Proposed Sealed or Redacted Record or generally identify the Confidential Information that was redacted from each Proposed Sealed or Redacted Record, without disclosing Confidential Information, and identify the corresponding Designating Party. Each Proposed Sealed or Redacted Record shall be referred to the ECF docket number from the motion, pleading, or response to which the Proposed Sealed Records are referenced or attached.

❖ ***COMMENT***

The Notice of Proposed Sealed Record contains a section for the Filing Party to identify the reason for redacting or sealing identified records. The *Commentary* envisions that such reason simply may be that the Designating Party designated the records as confidential. Otherwise, if the Filing Party is the Designating Party, a more fulsome description for the proposed reason for sealing may be provided.

(3) **Notice Where Records Previously Sealed or Redacted by Court Order.** If Records subject to the Notice of Proposed Sealed Record were previously sealed or redacted by court order in the same action, the Filing Party must file a Notice of Proposed Sealed Record in compliance with this section and identify the prior order by ECF docket number and date. A new motion to seal is not required if the court previously ordered the Record sealed or redacted.

(4) **Timing of Notice of Proposed Sealed Record.** A Notice of Proposed Sealed Record must be filed immediately after any motion, pleading, or response to which the Proposed Sealed or Redacted Records are referenced or attached (*e.g.*, a motion to compel, a motion for summary judgment, or a motion in limine).

❖ ***COMMENT***

Under this section, a Filing Party would file the Notice of Proposed Sealed Record immediately after the pleading, motion, opposition, or response that includes redacted or fully sealed documents. See, for example, Eastern District of Texas Local Rule CV-5(a)(7)(C) and example in Section 3.0(B) above. This *Commentary* proposes that a form be used for greater efficiency and consistency. See Notice of Proposed Sealed Record form. Requiring that the Notice of Proposed Sealed Record be filed immediately after the underlying brief or pleading makes it easy to locate on the docket for both courts and practitioners and allows the Filing Party to identify the Sealed or Redacted Record by ECF number that has been generated. The Notice should be filed as a separate ECF docket entry.

Under many courts' current procedures, the same Sealed or Redacted Record may be filed multiple times in the same action. Model Rule 3.0(C)(3) obviates the need to repeatedly file a motion to seal every time the Sealed or Redacted Record is introduced if the court has already ruled on it being sealed or redacted. In such a circumstance, the Filing Party need only file the Notice of Proposed Sealed Record in compliance with the Model Rule and identify by ECF Docket number and date the prior court decision that orders the sealing or redaction of the Record. The Notice that this *Commentary* proposes allows the Filing Party to indicate whether it is aware of any objection to the filing of the document under seal. See Notice of Proposed Sealed Record form.

The documents proposed to be filed under seal, whether fully sealed or in partially redacted form, are <u>not</u> to be attached to the Notice of Proposed Sealed Record. Both redacted/sealed and unredacted/complete versions of the documents at issue will be filed only once, by the Filing Party with the underlying motion, pleading, or response to which they pertain, in compliance with Model Rule 3.0(B)(3).

Example 1: Filing Party A is filing a motion for summary judgment and seeks to file under seal, as Exhibits 1—6, documents that Filing Party A has previously deemed Confidential. Filing Party A would attach the Exhibits 1—6 in sealed and unsealed form ***only*** to its motion for summary judgment, grouping sealed and redacted documents in one docket entry, and the slip sheets for the sealed documents and redacted versions in the public view grouped in a separate docket entry. See example of and discussion re. Rule 3.0(B)

above. The public docket would contain slip sheet placeholders for each Sealed Record. Filing Party A would, immediately after filing its motion for summary judgment, file a Notice of Proposed Sealed Record. The Notice, which is proposed to be a fillable form, identifies Exhibits 1—6 as documents it is conditionally filing under seal by their ECF docket numbers, generally describing the documents in the Notice form: "ECF Nos. ___ are business records Filing Party A produced in this litigation and previously designated Confidential pursuant to the Stipulated Protective Order entered in this case, ECF No. ___".

Example 2: Filing Party B is filing an opposition to a motion for summary judgment and must file several of its exhibits, Exhibits 7—12, under seal because they were produced by another party who has designated the documents Confidential under the Confidentiality Order entered in the case. Filing Party B neither produced nor designated the records Confidential. Filing Party B would attach Exhibits 7—12, in both sealed and unsealed forms grouped together in compliance with Rule 3.0(B)(4) and current CM/ECF capabilities, ***only*** to its opposition, not to its Notice of Proposed Sealed Record. Filing Party B would, immediately after filing its opposition and exhibits in the docket, file a Notice of Proposed Sealed Record form, identifying Exhibits 7—12 as documents it is filing under seal by their ECF docket numbers, generally describing the documents: "ECF Nos. ___ are business records produced by Designating Party X in this litigation that Designating Party X has designated Confidential pursuant to the Stipulated Protective Order entered in this case, ECF No. __."

Example 3: Filing Party C is filing a motion in limine seeking to preclude another party's expert from testifying on certain matters contained within the expert's report. Small portions of the expert's report have been deemed Confidential, as they contain the Designating Party's financial information that it does not wish its competitors to see. While the expert's report is relevant to the motion in limine and therefore must be filed, the confidential financial information can be redacted out, leaving the rest of the report available to public viewing. Filing Party C would file the redacted expert report publicly and the unredacted complete version of the expert's report under seal, as a separate docket entry, ***only*** with its motion in limine, and not with its Notice of Sealed Record. Immediately after filing its motion in limine, Filing Party C would file a Notice of Sealed Records identifying the Confidential Information that Filing Party C redacted out of the Record by page and line number, for example: "Page 4, lines 10-20 are

redacted, as they contain financial information that Designating Party has designated as Confidential."

Example 4: Filing Party D is filing an opposition to a motion to exclude its expert. One of Filing Party D's exhibits is the expert's report, which contains redacted portions that were the subject of a prior motion to seal that was granted by the court earlier in the action. Filing Party D would file the redacted expert report publicly and the unredacted complete version under seal, as a separate docket entry, ***only*** with its opposition to the motion to exclude. Immediately after filing its opposition to the motion to exclude, Filing Party D would file Notice of Proposed Sealed Record identifying on the form the Confidential Information that Filing Party D redacted out by ECF Docket No. and page and line citation, and identify in the Notice the prior court order which approved the redaction of the expert report by date and ECF docket number. The Designating Party would not need to file another motion to seal the report, since the redactions were previously approved by the court.

See also exemplar ECF docket entries in section 3.0(B) above.

(5) Notice to Non-Party Designating Parties. If Records subject to the Notice of Proposed Sealed Record were produced by a Designating Party that is a non-party to the litigation, the Filing Party filing the Notice of Proposed Sealed Record must provide notice of the filing to the non-party in accordance with Rule 3.0(B)(5).

❖ ***COMMENT***

This section aims to ensure the filing party gives proper notice to any non-party Designating Parties that Confidential material is being submitted under seal and to give the non-party the opportunity to file a motion to seal and prevent the public dissemination of such Confidential information. Most of the time, this notice to non-parties may be accomplished via email to their counsel, but Rule 3.0(B)(5) also provides mechanisms for service on or by pro se filers or who may be a Designating Party.

(D) Motion to Seal.

(1) Motion to Seal. If a Designating Party whose Record(s) are the subject of a Notice of Proposed Sealed Record seeks to maintain such Records under Seal,

the Designating Party must file a motion to seal. A Filing Party who is the Designating Party must file and serve the motion to seal in compliance with this Rule.

(2) **Memorandum.** The motion to seal must include a nonconfidential memorandum in support that complies with Model Rule 3.0(B)(6) describing: (a) each Record(s) to be sealed or redacted; (b) the basis for the request; and (c) how each Record(s) to be sealed or redacted meets applicable standards for sealing.

(3) **Declaration in Support.** The motion to seal must include a nonconfidential declaration in support setting forth the legal basis for filing each Record under seal or in redacted form, and such Records should not be refiled, but should be identified by their ECF docket numbers from the motion, pleading, or response to which the Proposed Sealed Record(s) is referenced or attached (*e.g.*, ECF No. 2 or ECF No. 2-2).

❖ ***COMMENT***

This procedure places the burden of supporting a request to seal or redact information on the party who produced the document and who therefore has an interest in, and basis for, protecting it from public disclosure. This *Commentary* finds that most of the current sealing rules place the burden to defend redactions and Confidentiality designations on the party that seeks to file the documents under seal, without considering that the Filing Party may not be the Designating Party and may therefore have no interest in sealing the Records (or may be averse to their sealing). This *Commentary* anticipates that shifting the burden of sealing the documents to the Designating Party will reduce overdesignation of information and documents as Confidential.

This *Commentary* also finds it important to limit the number of submissions under seal to the court. After considering various local rules, this *Commentary* proposes that the motion to seal and supporting memorandum and declaration should, wherever possible, be filed in the public view and not under seal. This *Commentary* contends that Designating Parties can adequately describe the document and the nature of the Confidential Information contained in it without the need to provide Confidential Information in the motion to seal itself.[14] While some courts require that a declaration in support of a motion to

[14] *See, for example,* W.D. Tex. L.R. 5.2(b) (motions and pleadings under seal are "disfavored"), and (c) (while motions to seal are first filed under seal "the court expects parties to draft sealing motions to seal in a manner that does not disclose confidential information" because "the sealing motion may subsequently be unsealed by court order.").

seal also be sealed, this proposed Model Rule seeks to limit the number of documents that are sealed from public view and requires that the declaration not be sealed or redacted.

While the Model Rule does not have a meet-and-confer requirement, local rules, standing orders, and stipulated protective orders entered into between the parties may require parties to meet and confer before the filing of any motion, and conferring is always a best practice.[15] Even if the court handling a given case does not have such a requirement, it may help to include in the motion to seal whether the motion is unopposed/uncontested.

When designating documents and information as Confidential, all parties should avoid overdesignation, as moving to seal likely increases case costs over time.[16] This also applies to deposition and hearing transcripts as well as to motions and pleadings. Parties should review transcripts to designate only necessary portions of testimony as Confidential, if possible, rather than designating an entire transcript as Confidential. Parties also should do their best to frame motions, declarations, and pleadings to avoid the quotation or recitation of sealable or Confidential Information, which lessens the likelihood that the underlying motion must be sealed.

(4) **Timing of Motion to Seal.** A Designating Party must file its motion to seal and supporting declaration within the time frame set for the filing of any responsive pleading to the motion that references or appends a Designating Party's Confidential Information, unless otherwise ordered by the court. If a responsive pleading is not permitted, the motion to seal and supporting declaration must be filed within seven (7) court days of service of the Notice of Proposed Sealed Record.

(5) **Failure to Timely Move to Seal.** If the Designating Party does not timely file its motion to seal in accordance with this Rule, the Designating Party waives its right to maintain that the Records contain Confidential Information.

❖ ***COMMENT***

Recognizing that a Designating Party once in receipt of a Notice of Proposed Sealed Record must act quickly to defend its Confidential

[15] *See, for example*, D.N.J. L.R. 5.3(c)(2) ("Not later than 21 days after the first filing of sealed materials, the parties shall confer in an effort to narrow or eliminate the materials or information that may be the subject of a motion to seal.").

[16] *See, for example*, N.D. Cal. L.R. 79-5(b), requiring that all requests to seal "be narrowly tailored."

information and designations, this *Commentary* considered the number of days that the Designating Party should have to file a Motion to Seal, and considered including up to 14 days and as little as three days for such filing.[17] Ultimately, this *Commentary* opts to use the deadline of the response brief for the underlying filing as the target date, because such date is tied directly to the underlying filing and will ensure that sealing progresses promptly, avoids confusion and the possibility that a hearing on a motion to seal will be scheduled after the hearing on the underlying motion (if applicable), and avoids multiple deadlines related to the same motion (if applicable) for courts.

If the motion to seal is not timely filed by the Designating Party, the Filing Party must timely file the Confidential Information in unredacted or unsealed form pursuant to this Model Rule. See Model Rule 3.0(F)(1).

(E) Proposed Order. A proposed order must be filed and served with the motion to seal.

❖ ***COMMENT***

The Model Rule requires that a proposed order must be served with every motion to seal, as is currently required in most courts.[18] This *Commentary* has not proposed the substance or basis for the order, as district courts have widely differing standards on the substantive requirements that must be met for a court to justify removing a document, or a portion of a document, from public view.[19] See Appendix: Standards for Sealing Records.

In many instances, the number of documents to be sealed and redacted are numerous, and many cases involve multiple motions to seal. Parties should consider submitting a proposed order that, in addition to complying with local rules and standing orders, clearly sets forth what is sealed or redacted for future reference and citation.

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[17] *See, for example*, Northern District of California, E-Filing Under Seal in Civil Cases, Special Note, https://www.cand.uscourts.gov/cases-e-filing/cm-ecf/e-filing-my-documents/e-filing-under-seal/, which requires the designating party to submit a declaration "establishing that all of the designated material is sealable" within four days of the filing of the moving party's administrative motion to seal.

[18] *See* N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13(6)) (requiring proposed order).

[19] Having been tasked with proposing a purely procedural rule, this *Commentary* does not propose the substantive findings a court must make before permitting sealing or redacting a record from public view, if at all. *See, for example*, Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citation omitted) (setting forth substantive standard that must be met for documents to be filed under seal, on a document-by-document basis).

(F) Disposition of Proposed Sealed Records.

(1) If the Designating Party fails to timely file a motion to seal after receiving Notice pursuant to Model Rule 3.0(C) above, the Filing Party must publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the expired motion to seal deadline.

(2) If the court grants the motion to seal, the Proposed Sealed Record will be deemed filed as of the date of the filing of the Notice of Proposed Sealed Record unless otherwise directed by the court.

(3) If the court denies the motion to seal, the Filing Party shall publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the order denying the motion to seal, or take other action as ordered by the court.

> ❖ ***COMMENT***
>
> This provision derives from similar requirements employed by some federal courts.[20] Such courts require records to be resubmitted after a motion to seal is granted.[21] Further, this provision is intended to lessen the burden on the parties and the clerk as to the resubmission of records under seal pursuant to court order. If an order has been entered sealing Records, resubmission should not be required. But if the order modifies the portions of the records to be sealed, then the applicable order must specify resubmission as to affected records.[22]

4.0 Disposition of Sealed and Redacted Records at the Conclusion of the Case.

Unless otherwise ordered by the Court, a Sealed or Redacted Record will remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served on all parties in the case and upon any Designating Party that is a non-party in accordance with the service requirements in this Rule.

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20 *See* N.D. Tex. L.R. 79.3(b)(2) and E.D. Tex. L.R. 5(a)(7)(C).

21 *See*, *for example*, E.D.N.Y. "Steps for E-filing Sealed Documents – *Civil Case*", at ¶ 2.

22 *See also* W.D. Tex. L.R. CV-5.2(d).

❖ ***COMMENT***

Courts differ widely on the disposition of sealed records at the conclusion of a case. Many local rules are silent.[23] Some courts have rules that automatically unseal records after a certain time period.[24] It is always a best practice to check Local Rules.

While this *Commentary* understands that courts may have an interest in unsealing Records on their dockets, the alternatives explored were considered burdensome and could present several unique problems. For example, this *Commentary* considered options like the California Northern District rules, which require automatic unsealing of records after a certain time period unless a motion was filed to extend the sealing. However, since one of the goals of the proposed Model Rule is to lessen the burden on the courts and parties, the automatic unsealing of records was not included because it may not satisfy this goal. Such a rule might generate more court filings by parties seeking to keep records permanently under seal, and courts would have to track the established sealed period. Upon expiration of the sealed period, a court might need to manually unseal each individual document, because the electronic case filing system does not have an automated process to unseal documents. This proposed Rule also expressly acknowledges that a member of the public or non-party may move to unseal or unredact a document at any time.

This *Commentary* also considered applying a specified time period for sealing. A shorter time period (such as six months, one year, or two years) may lead to many motions, especially for larger litigation that can continue for several years. A longer time period for the automatic unsealing of records (such as 10 years) poses other problems and burdens. For example, after 10 years, a party that has a serious need to keep records sealed may not be able to locate and provide notice to all interested parties and non-parties. In either scenario, the court would also be burdened with tracking the expiration of the sealing order.

Other courts require a party to state the period of time the party seeks to have records maintained under seal.[25] This *Commentary* rejects the use of such process because it does not lessen the burden on courts to track such a deadline and take action to unseal records.

The Model Rule was designed to protect records that should remain sealed, while providing public access to records should there be an interest in the records. The proposed Model Rule protects the interests of all parties and non-parties while significantly lessening the burden on the courts.

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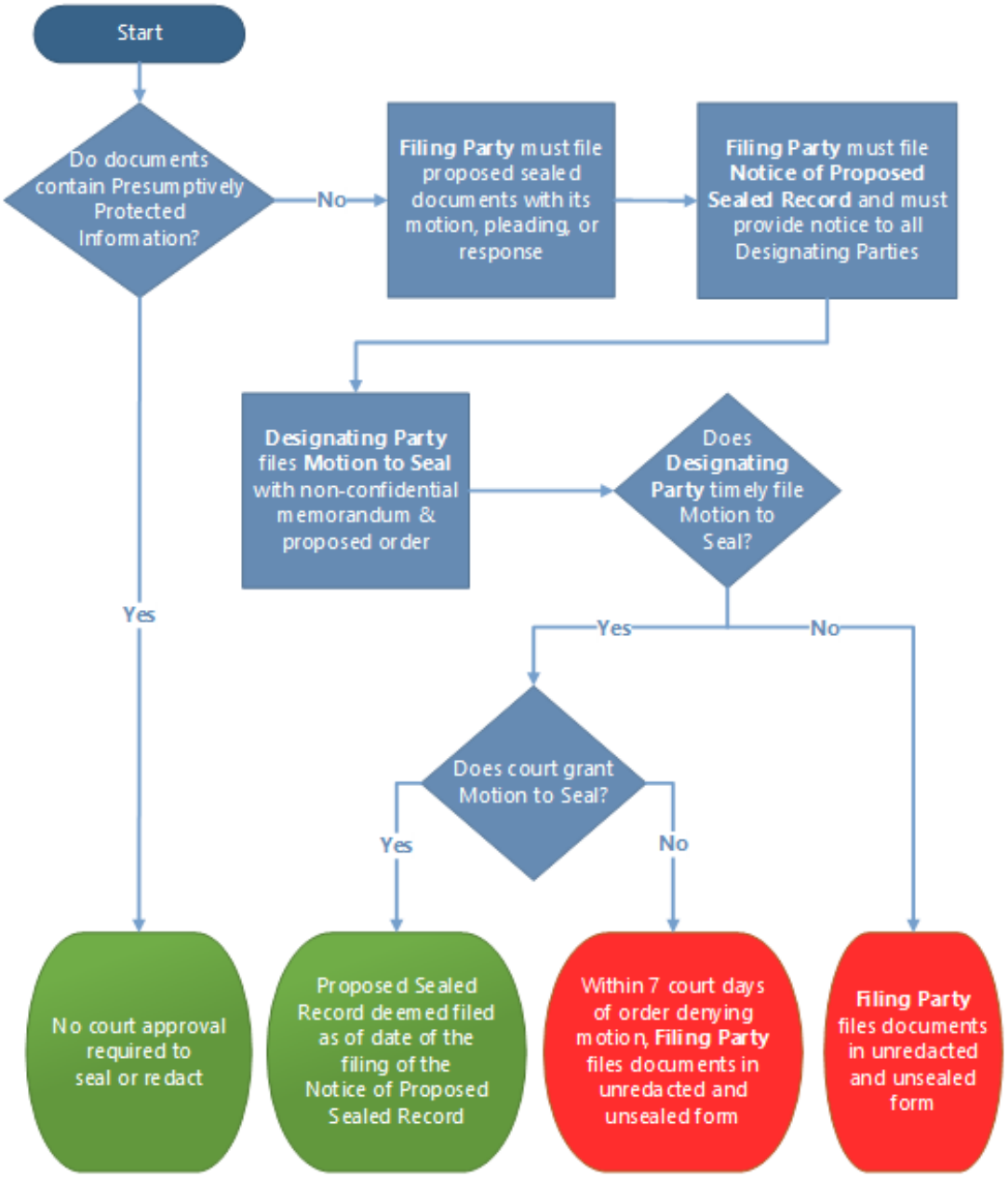
[23] The Model Rule in this section is similar to Local Rule 5.3 found in the Western District of New York; *see also* S.D. Miss. L.R. 79(f) and N.D. Miss. L.R. 79(f).



[24] For example, the Northern District of California automatically unseals records after 10 years unless ordered otherwise upon a showing of good cause. *See* N.D. Cal. L.R. 79-5(g).

[25] *See* E.D. La. L.R. 5.6(B)(4) and E.D. Va. L.R. 5(C)(4).

IV. APPENDIX: STANDARDS FOR SEALING IN FEDERAL COURTS

Presumptive Right of Access to Judicial Records

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[26] The right to access is based on the public's "desire to keep a watchful eye on the workings of public agencies."[27] This right derives from common law, the First Amendment, or both. Distinct from these rights is Rule 26(c) of the Federal Rules of Civil Procedure, which permits courts to protect documents and information exchanged during discovery. As detailed below, courts differ in their application of the common law and First Amendment and their definition of whether a particular document to be sealed is indeed a "judicial record." The procedures to be followed for sealing documents also differ.[28]

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[26] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

[27] *Id.*, 435 U.S. at 598. *See also In re* Providence Journal Co., 293 F.3d 1, 9 (1st Cir. 2002) (quotation omitted) ("Courts have long recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'"); United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1048 (2d Cir. 1995) (quotation omitted) ("The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice."); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988) ("As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud."); Columbus-Am. Discovery Grp. v. Atlantic Mut. Ins. Co., 203 F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case."); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) (citation omitted) ("Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."); Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) ("the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding."); IDT Corp. v. eBay, 709 F.3d 1220, 1222 (8th Cir. 2013) (citing *Nixon*, 435 U.S. at 597) ("This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and 'to keep a watchful eye on the workings of public agencies.'"); Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 38 (Oct. 3, 2016) (quoting *Amodeo II*, 71 F.3d at 1048) ("The presumption of access is 'based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.'"); United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985) ("The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes."); Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) (citation and internal citation omitted) ("the common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.").

[28] The drafters of this *Commentary* reviewed Appellate Rules, Local District Court Rules, and ECF rules and found little uniformity on procedures for sealing.

A. Common Law Right of Access

The common law public right of access, unlike a Rule 26(c)[29] inquiry by comparison, begins with a presumption in favor of public access.[30] The common law right of access "antedates the Constitution" and it attaches to both judicial proceedings and records, in both criminal and civil cases.[31] This common law right, however, is not absolute, but is left to the "sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[32] Because every court has inherent, supervisory power over its own records and files, even where a right of public access exists, a court may deny access where it determines that the court-filed documents may be used for improper purposes. Examples include the use of records "to gratify private spite or promote public scandal" or to circulate libelous statements or release trade secrets.[33]

B. First Amendment Right of Access

The Supreme Court has held that the First Amendment guarantees the public and the press the right of access to criminal trials.[34] Although the Supreme Court has not specifically extended the First Amendment right of public access to civil proceedings,[35] many courts have done so.[36] The constitutional right of access, however, has been found to have a more limited scope in civil context than it does in the criminal.[37] In limiting the public's access to civil trials where the First Amendment applies, there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.[38] A party seeking the removal of a document from the public eye bears the burden of establishing that there is good cause that

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29 Hereinafter, all references to "the Rule" or "Rules" shall refer to the Federal Rules of Civil Procedure unless expressly stated otherwise.

30 *In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., 924 F.3d 662, 670 (3d Cir. 2019).

31 *Id.*, at 672.

32 *Nixon*, 435 U.S. at 598–99.

33 *Id.*

34 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

35 *Id.* at n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

36 *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) ("A presumption of openness inheres in civil as well as criminal trials."). *See also* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984) (asserting that "the First Amendment does secure to the public and to the press a right of access to civil proceedings"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (holding that the "rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case"); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983) (" The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) ("we agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well.").

37 Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (citing Newman v. Graddick, 696 F.2d 796, 800–01 (11th Cir. 1983)).

38 *Publicker*, 733 F.2d at 1070 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179).

disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity.[39]

C. Federal Rule 26(c)

Federal Rule of Civil Procedure 26(c) permits a court upon a motion of a party to enter into a protective order to shield a party from "annoyance, embarrassment, undue oppression, or undue burden or expense."[40] Rule 26(c)'s procedures "replace[] the need to litigate the claim to protection document by document," and instead "postpones the necessary showing of 'good cause' required for entry of a protective order until the confidential designation is challenged."[41] The trial court has complete discretion over the entry of document protective orders. [42]

A protective order is "intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings." Rule 26(c) requires that "a party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection."[43] "Good cause" is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity.[44] The burden of justifying the confidentiality of each document sought to be covered by a protective order remains on the party seeking the order.[45] Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement, requiring courts to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential.[46]

While a protective order entered under Rule 26 generally governs the exchange of confidential information during discovery, it does not typically protect confidential information from ultimately being filed in the public record, as that is a determination for a court to make, often on a document-by-document basis.[47]

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39 *Publicker,* 733 F.2d at 1071*; see also In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019), quoting *Publicker*.

40 Fed. R. Civ. P. 26(c)(1).

41 *Chicago Tribune*, 263 F.3d at 1307–08 (citing *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987)).

42 Seattle Times v. Rhinehart, 467 U.S. 20, 36 (1984) (Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.").

43 Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994), quoting FED. R. CIV. P. 26(c).

44 *Publicker*, 733 F.2d at 1070.

45 Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied,* 484 U.S. 976 (1987).

46 *Chicago Tribune*, 263 F.3d at 1313 (citing Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985)).

47 *See* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other . . . Secrecy is fine at the discovery stage, before the material enters the judicial record . . . At the adjudication stage, however, very different considerations apply.").

D. Overview of Circuit Case Law

(i) First Circuit

In the First Circuit there are "two related but distinct presumptions of public access to judicial proceedings and records" under both the common law right and the First and Fourteenth Amendments.[48]

Under the common law analysis,[49] "judicial records" are those "materials on which a court relies in determining the litigants' substantive rights."[50] "[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies."[51] Such materials are distinguished from those that "relate[ ] merely to the judge's role in management of the trial."[52] Materials filed with the court relating only "'to the judge's role in management of the trial' and which 'play no role in the adjudication process'" are excluded from the common law presumption of access.[53] For example, the First Circuit classifies civil discovery motions and the materials filed with them as falling within this category, holding that the common law right to public access does not apply to such materials.[54] The First Circuit applies the Rule 26(c) "good cause" standard when deciding whether to protect such documents from disclosure.[55] "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."[56]

For documents that do play a role in the adjudication process and to which the presumption of access therefore applies, common law applies the "compelling need" standard: "only the most compelling reasons can justify non-disclosure of judicial records that come within the common-law right of access."[57]

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48 United States v. Kravetz, 706 F.3d 47, 52 (1st Cir. 2013).

49 "While the two rights of access [common law versus First Amendment] are not coterminous, courts have employed much the same type of screening in evaluating their applicability to particular norms." *In re* Providence Journal, 293 F.3d 1, 10 (1st Cir. 2002) (internal citation omitted).

50 *Id.* at 9–10, quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).

51 F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987).

52 *In re* Boston Herald, Inc., 321 F.3d 174, 189 (1st Cir. 2003) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408).

53 *Kravetz*, 706 F.3d at 54 (quoting *In re Boston Herald, Inc.*, 321 F.3d at 189; *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408).

54 *Kravetz,* 706 F.3d at 56 (citing *Anderson*, 805 F.2d at 11–13).

55 *Anderson*, 805 F.2d at 7.

56 *Id.* at 19.

57 *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (quoting *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983)); *see also, e.g.*, Panse v. Shah, 201 F. App'x. 3, 3 (1st Cir. 2006) ("Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings. It is justified only for compelling reasons and with careful balancing of competing interests.") (citations omitted).

The First Circuit considers the privacy rights of parties to be a compelling reason justifying the sealing of a document from the public eye.[58]

In determining if the First Amendment right of access applies, the First Circuit applies the Supreme Court's *Press-Enterprise II* "experience and logic" test, which asks (1) whether the document is one that has historically been accessible to the press and the public; and (2) whether public access plays a significant positive role in the functioning of the particular process the record concerns.[59] Upon undertaking this analysis, but before sealing a judicial document, the First Circuit mandates that the court issue "particularized findings"[60] and that where some portions of a document may be sealed, "redaction remains a viable tool for separating this information from that which is necessary to the public's appreciation of [the court's order]."[61]

(ii) Second Circuit

The Second Circuit recognizes both the common law right of access as well a qualified First Amendment right.[62] Like the First Circuit, not all court documents are considered "judicial documents," and "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access[]" under the common law.[63]

A "judicial document" or "judicial record" (a term used interchangeably) is a filed item that is "relevant to the performance of the judicial function and useful in the judicial process."[64] The presumption of the right of access is "at its zenith" where documents "directly affect an adjudication, or are used to determine litigants' substantive legal rights," and is at its weakest where a document is neither used by the court nor "presented to the court to invoke its powers or affect its decisions."[65] However, a document is "judicial" not only if the judge actually relied on it, but also if the "judge *should* have considered or relied upon [it] but did not."[66] Such documents "are just as deserving of disclosure as those that actually entered into the judge's decision."[67] Documents submitted to the court exist on a "continuum," spanning those that play a role in "determining

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58 *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411 ("[P]rivacy rights of participants and third parties are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records."); *Kravetz*, 706 F.3d at 63 (quoting *In re Boston Herald*, 321 F.3d at 190 (Medical information is, as intimated above, "universally presumed to be private, not public.")).

59 *Kravetz*, 706 F.3d at 53–54 (quoting Press-Enterprise Co. v. Superior Court of Calif. for Riverside Cty. (*Press-Enterprise II*), 478 U.S. 1, (1986)).

60 *Kravetz*, 706 F.3d at 61.

61 *Id.* at 63.

62 Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004).

63 United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995); U.S. CONST. amend. I; Trump v. Deutsche Bank AG, 940 F.3d 146 (2d Cir. 2019) (rejecting the Third Circuit's determination that any document physically on file with a court is a "judicial record" and aligning more with the First Circuit).

64 Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006).

65 Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142 (2d Cir. 2016).

66 *Id.* at 140, n.3, quoting *Lugosch*.

67 *Id.*

litigants' substantive rights," which are afforded "strong weight," to those that play only a "negligible role in performance of Article III duties . . . such as those passed between the parties in discovery," which lie "beyond the presumption's reach."[68]

The most common judicial records are those submitted in connection with a request for summary adjudication. "[D]ocuments submitted to a court for its consideration on a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches . . . ."[69] Documents submitted in support of a motion to dismiss likewise are subject to a presumption of access since they relate to a merits-based adjudication.[70] In contrast, there is no presumption of access to "documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery."[71]

Once the court determines that the document is in fact a judicial document and the strength of the presumption that attaches to that document, the "court must 'balance competing considerations against it,'" such as "'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'"[72] Motions to seal documents must be "carefully and skeptically review[ed] . . . to insure that there really is an extraordinary circumstance or compelling need" to seal the documents from public inspection.[73]

Under the First Amendment, the Second Circuit applies the Supreme Court's *Press-Enterprise II* "experience and logic" test.[74] Once the court finds that a qualified First Amendment right of access to certain judicial documents exists, documents may still be sealed, but only if "specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[75] As an example of the application of this test, the Second Circuit has held that attorney-client privilege can be a compelling reason to defeat the presumption of a right of access to judicial documents submitted in opposition to motions.[76] The Second Circuit urges district courts to expeditiously determine whether a document submitted to the court is a judicial document, to avoid impairing the First Amendment rights of a party or the public.[77]

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68 United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1049–50 (2d Cir. 1995).

69 Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019).

70 Shetty v. SG Blocks, Inc., No. 20-cv-00550-ARR-SMG, 2020 WL 3183779, at *10 (E.D.N.Y. June 15, 2020) (citing *Lugosch*, 435 F.3d at 121).

71 S.E.C. v. TheStreet.com, 273 F.3d 222, 232 (2d Cir. 2001); *see also Brown*, 929 F.3d at 50.

72 *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

73 Video Software Dealers Ass'n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994).

74 *Lugosch*, 435 F.3d at 120.

75 *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987).

76 *Lugosch*, 435 F.3d at 125.

77 *Id.* at 127. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). *Lugosch*, 435 F.3d at 127.

(iii) Third Circuit

The Third Circuit recognizes a common law and First Amendment right of access.[78] Under a common law inquiry, whether the right of access applies to a particular document or record "turns on whether that item is considered to be a 'judicial record.'"[79] A "judicial record" is a document that "has been filed with the court . . . or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings."[80] Once a document becomes a judicial record, a presumption of access attaches.[81]

The Third Circuit does not distinguish between material filed in connection with a motion for summary judgment and material filed for any other purpose.[82]

At common law, a party wishing to rebut the strong presumption of public access has the burden "to show that the interest in secrecy outweighs the presumption."[83] The movant must show "that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure."[84] The court in its determination must articulate compelling and countervailing interests to be protected, make specific findings on the record about the effects of disclosure, and provide an opportunity for third parties to be heard.[85] The court should conduct a "document-by-document review" of the contents of the materials sought to be sealed.[86] "[B]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient" to overcome the strong presumption of public access.[87]

While the Third Circuit has recognized that the right of public access enjoyed under the First Amendment as historically applied to criminal trials also applies to civil proceedings,[88] it also acknowledges that, still, "[t]he First Amendment right of access requires a much higher showing

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78 *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 669 (3d Cir. 2019).

79 *Id.*, 924 F.3d at 672 (quoting *In re* Cendant Corp., 260 F.3d. 183 at 192 (3d Cir. 2001).

80 *In re Avandia Mktg.*, 924 F.3d at 672. While filing clearly establishes a document as a judicial record in the Third Circuit, absent a filing a document may still be construed as a judicial record if a court interprets or enforces the terms of the document. *In re Cendant*, 260 F.3d at 192.

81 *See id.* at 192–93.

82 *In re Avandia*, 924 F.3d at 672–73; *see also* Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 164 (3d Cir. 1993) ("We see no reason to distinguish between material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction . . . .").

83 Bank of Am. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343 (3d Cir. 1986).

84 *In re Avandia*, 924 F.3d at 672 (quoting Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d. Cir. 1994)).

85 *In re Avandia*, 924 F.3d at 672–73 (citing *In re Cendant Corp.*, 260 F.3d at 194).

86 *In re Avandia*, 924 F.3d at 673.

87 *In re Cendant Corp.*, 260 F.3d at 194.

88 *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

than the common law right [of] access before a judicial proceeding can be sealed."[89] In this respect, the Third Circuit follows the "experience and logic" test, just as in the First and Second Circuits.[90]

(iv) Fourth Circuit

In the Fourth Circuit, the right of public access to judicial documents "derives from two independent sources: the First Amendment and the common law," and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed).[91] Because the common law and First Amendment invoke different standards for assessing the right of access, the district court must identify which is the source of the right of access before balancing the claimed interests.[92]

Under the common law test, when a party asks to seal judicial records, trial courts within the Fourth Circuit "must determine the source of the right of access with respect to each document," and then "weigh the competing interests at stake."[93] The court must also (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) "consider less drastic alternatives to sealing"; and (3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives.[94] Under the First Amendment test, like the First, Second, and Third Circuits discussed above, the Fourth Circuit similarly follows the "experience and logic" test.[95]

"Judicial records" in the Fourth Circuit are documents filed with the court that "play a role in the adjudicative process, or adjudicate substantive rights."[96] As examples, motions for summary judgment and the documents attached to those motions are judicial records, even if the attached documents were discovery documents previously covered by a protective order.

Unlike the other Circuits, the Fourth Circuit has not explicitly resolved whether discovery motions and materials attached to discovery motions are judicial records.[97] Some district courts, however, have predicted that the Fourth Circuit will find no public right of access to discovery motions and related exhibits, and that consequently, such documents may be sealed.[98]

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89 *In re Cendant Corp.*, 260 F.3d at 198 n.13.

90 *In re Avandia*, 924 F.3d at 673.

91 *In re* United States for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 290 (4th Cir. 2013).

92 Va. Dep't of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004); Co. Doe v. Pub. Citizen, 749 F.3d 246, 266 (4th Cir. 2014); Under Seal v. Under Seal, 230 F.3d 1354 (4th Cir. 2000) (remanding in part because district court failed to identify source of public's right of access).

93 *Va. State Police*, 386 F.3d at 576.

94 *Id.*; Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253–54 (4th Cir. 1988).

95 In re United States, 707 F.3d at 291.

96 *Id.* at 290 (citing *Rushford*, 846 F.2d at 252).

97 *In re United States*, 707 F.3d at 290.

98 *See, e.g.*, Kinetic Concepts, Inc. v. Convatec Inc., 1:08CV00918, 2010 WL 1418312, at *9 (M.D.N.C. Apr. 2, 2010) ("the Fourth Circuit has used language that suggests that no public right of access attaches [to discovery motions]").

(v) Fifth Circuit

The Fifth Circuit has held that along with the First Amendment right, there is a right of public access derived from common law that creates a presumption of access, but the right is also not absolute.[99] The decision is made on a case-by-case basis.[100] The decision is left to the sound discretion of the district courts as required by *Nixon*, and the Fifth Circuit consistently requires district courts to explain decisions to seal or unseal a document.[101]

While there is a common law presumption in favor of public access, the Fifth Circuit does not characterize the public access presumption as "strong" or to require a strong showing of proof.[102]

The Fifth Circuit has not generally defined the term "judicial record."[103]

More recently, however, the Eastern District of Texas, in determining whether to grant the parties' unopposed motions to seal documents filed in connection with discovery motions, articulated three categories of court materials: (1) materials that relate to dispositive issues in the case; (2) materials that relate to nondispositive issues in the case, and in particular, materials filed in connection with discovery disputes unrelated to the merits of the case; and (3) materials such as discovery that are exchanged between the parties and not made part of a court filing.[104] Under this framework, the court found that where materials relate to dispositive issues in a case, the party moving to seal the materials bears the burden to make a "compelling showing of particularized need to prevent disclosure."[105] On the other hand, the "good cause" standard of Rule 26(c) applies to materials that relate to nondispositive issues in the case, which includes materials filed in connection with discovery disputes unrelated to the merits of the case.[106] Finally, materials that are

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99 S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993); Belo Broad. Corp. v. Clark, 654 F.2d 423, 429 (5th Cir. 1981).

100 Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr., 913 F.3d 443, 450 (5th Cir. 2019) (citing United States v. Sealed Search Warrants, 868 F.3d 385, 390 (5th Cir. 2017)).

101 *Sealed Search Warrants*, 868 F.3d at 395; *e.g.*, *Van Waeyenberghe*, 990 F.2d at 849; United States v. Holy Land Found. for Relief and Dev., 624 F.3d 685, 690 (5th Cir. 2010).

102 *Vantage Health Plan*, 913 F.3d at 450; *see Belo*, 654 F.2d at 434 (holding that the presumption, "however gauged in favor of public access to judicial records" is only one of the interests to be weighed. This presumption applies so long as a document is a judicial record. *See Van Waeyenberghe,* 990 F.2d at 849.

103 *See* Bradley on behalf of AJW v. Ackal, 954 F.3d 225, 227 (5th Cir. 2020) (holding that sealed minutes are judicial records) (citing *In re United States*, 707 F.3d at 290 (stating that it is commonsensical that judicially authored or created documents are judicial records)); *Van Waeyenberghe*, 990 F.2d at 849 (holding that once a settlement agreement is filed in the district court, it becomes a judicial record).

104 Robroy Indus.-Tex., LLC v. Thomas & Betts Corp., No. 2:15-CV-512-WCB, 2016 WL 325174, at *2 (E.D. Tex. Jan. 27, 2016).

105 *Id.* (citing Ctr. for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092 (9th Cir. 2016)).

106 *Robroy* (citing Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164–65 (3d Cir. 1993); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).

exchanged between the parties but not filed with the court are not subject to the public interest in open judicial proceedings.[107]

The Eastern District of Texas applied this framework in *Script Security Solutions, LLC v. Amazon.com, Inc.*[108] In *Script Security Solutions*, the defendant moved to redact confidential information from a hearing transcript but failed to satisfy either the "compelling showing of particularized need" standard or the less-stringent "good cause" standard.[109] While the Eastern District of Texas cited *Center for Auto Safety v. Chrysler Group*[110] to support applying the "compelling reasons" standard to materials that relate to dispositive issues in the case, it did not specifically incorporate the Ninth Circuit's "tangentially related" language. *Center for Auto Safety* expressly rejected a mechanical application of the dispositive and nondispositive classifications as a way to decide which standard should apply to determine whether the documents should be sealed. However, it seems that the Eastern District of Texas still maintained the more rigid dispositive and nondispositive motion distinction, because the court in *Script Security Solutions* implied that it would incorporate the Ninth Circuit's less rigid distinctions when it said it would likely apply the "compelling reasons" test to the motion to redact portions of a hearing transcript.[111] This issue has not been fully addressed, however, as neither case has been heard by the Fifth Circuit, and thus this issue remains unsettled in the Fifth Circuit.[112]

(vi) Sixth Circuit

The Sixth Circuit recognizes that the long-established legal tradition under the common law of the presumptive right of the public to inspect and copy judicial documents and files goes back to the Nineteenth Century.[113] "Only the most compelling reasons can justify non-disclosure of judicial records."[114] The Sixth Circuit has also recognized that the right of public access enjoyed under the First Amendment applies to civil proceedings.[115]

Although the Sixth Circuit has not explicitly defined "judicial record," district courts within the Sixth Circuit have cited the Second Circuit's *Lugosch v. Pyramid Co. of Onondaga*[116] decision that a

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107 *Robroy* (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)).

108 No. 2:15-CV-1030-WCB, 2016 WL 7013938, at *2 (E.D. Tex. Dec. 1, 2016).

109 *Id.*

110 809 F.3d 1092, 1099 (9th Cir. 2016). See "Ninth Circuit," *infra*, for further discussion of *Center for Auto Safety*.

111 Script Security Solutions, 2016 WL 7013938, at *2.

112 *Id.*

113 *In re* Knoxville News-Sentinel Co, 723 F.2d 470, 474 (6th Cir. 1983) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) and collecting cases).

114 *In re Knoxville News*, 723 F.2d at 476.

115 Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177 (6th Cir. 1983) ("The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.").

116 435 F.3d 110, 119 (2d Cir. 2006).

judicial document is one that is "relevant to the performance of the judicial function and useful in the judicial process."[117]

Like other Circuits, the Sixth Circuit recognizes that the right to public access is "not absolute."[118] A party seeking to seal records must show that: (1) a compelling interest in sealing the records exists; (2) that the interest in sealing outweighs the public's interest in accessing the records; and (3) that the request is narrowly tailored.[119] "To do so, the party must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'"[120] The party seeking to seal the records bears a "heavy" burden; simply showing that public disclosure of the information would, for instance, harm a company's reputation is insufficient.[121] Instead, the moving party must show that it will suffer a "clearly defined and serious injury" if the judicial records are not sealed.[122]

When sealing court records, courts in the Sixth Circuit "must set forth specific findings and conclusions 'which justify nondisclosure to the public.'"[123] District courts must consider "each pleading [to be] filed under seal or with redactions and to make a specific determination as to the necessity of nondisclosure in each instance" and must "bear in mind that the party seeking to file under seal must provide a 'compelling reason' to do so and demonstrate that the seal is 'narrowly tailored to serve that reason.'"[124] If a district court "permits a pleading to be filed under seal or with redactions, it shall be incumbent upon the court to adequately explain '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.'"[125] Moreover, the compelling reasons for nondisclosure of judicial documents must be expressly stated on the record.[126] Moreover, a party to an action cannot waive the public's First Amendment right to access.[127]

(vii) Seventh Circuit

The Seventh Circuit recognizes both a common law and First Amendment right to inspect public records.[128]

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117 *See, e.g.*, Snook v. Valley OB-GYN Clinic, P.C., 14-CV-12302, 2014 WL 7369904, at *2 (E.D. Mich. Dec. 29, 2014); Thompson v. Deviney Constr. Co., 216-CV-03019-JPM-DKV, 2017 WL 10662030, at *2 (W.D. Tenn. Dec. 15, 2017).

118 *In re Knoxville News*, 723 F.2d at 474 (quoting *Nixon*, 435 U.S. at 598).

119 Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citation omitted).

120 *Id.* (citation omitted).

121 *Id.*; Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016).

122 *Id.* at 307.

123 Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co., 834 F.3d 589, 594 (6th Cir. 2016) (citation omitted).

124 *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939–40 (6th Cir. 2019) (quoting *Shane Grp.*, 825 F.3d at 305).

125 *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 940 (quoting *Shane Grp.*, 825 F.3d at 306).

126 *Rudd Equip.*, 834 F.3d at 595 (citing Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp., Inc., 565 F. App'x. 477, 490 (6th Cir. 2012)).

127 *Rudd Equip.*, 834 F.3d at 595.

128 Courthouse News Serv. v. Brown, 908 F.3d 1063, 1068–69 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 384 (2019).

"Judicial records" are "materials submitted to the court that 'affect the disposition' of the case and are not subject to a statute, rule, or privilege that justifies confidentiality."[129] This may include discovery material filed with the court that actually influences or underpins a judicial decision.[130] However, not every document filed with the court is part of the "judicial record."[131] Instead, the "judicial record" includes only materials that actually formed the basis of the parties' dispute and the district court's resolution.[132]

Courts weigh the First Amendment right of access, balancing the interests of the public against injury to the party seeking to seal judicial records, reconciling harm with newsworthiness.[133] The Seventh Circuit requires a showing of a "compelling interest in secrecy" to rebut the presumption of a right of access.[134] "The interest in secrecy is weighed against the competing interests case by case."[135] Additionally, a court may not solely rely on designations of confidentiality made by the parties.[136] Examples of a compelling interest in secrecy include trade secrets, the identity of informers, attorney-client privilege, state secrets, and the privacy of children.[137]

Even when a compelling interest in secrecy exists, courts must act with precision to seal as little information as necessary and are instructed to choose redactions rather than seal entire documents whenever possible.[138] However, the Seventh Circuit has contemplated that in cases involving "thousands of documents," there is no objection to a court crafting a broader order that seals information designated by the parties as highly sensitive if (1) the parties act in good faith in designating documents as confidential, and (2) any party or interested member of the public can challenge the order.[139]

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129 United States v. Curry, 641 F. App'x. 607, 609 (7th Cir. 2016) (unpublished), quoting City of Greenville v. Syngenta Crop Protection, LLC, 764 F.3d 695, 697 (7th Cir. 2014).

130 Baxter Int'l., Inc., v Abbott Labs., 297 F.3d 544, 545 (7th Cir. 2002).

131 Goesel v. Boley Inter. (H.K.) Ltd., 738 F.3d 831, 833 (7th Cir. 2013).

132 *Id.* (quoting *Baxter*, 297 F.3d at 548).

133 Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

134 Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002) (citing Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999); Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997); Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)).

135 *Jessup,* 277 F.3d 926 (citing Cent. Nat'l Bank v. U.S. Dep't of Treasury, 912 F.2d 897, 900 (7th Cir. 1990)). This showing must be articulated on the record. *In re* Associated Press, 162 F.3d 503, 510 (7th Cir. 1998) ("upon entering orders which inhibit the flow of information between the courts and the public, district courts should articulate on the record their reasons for doing so," quoting Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994)).

136 *See* Star Sci., Inc. v. Carter, 204 F.R.D 410, 416 (S.D. Ind. 2001); *see also Citizens First Nat'l Bank*, 178 F.3d at 945.

137 *Jessup*, 277 F.3d at 928; *see also* Mitze v. Saul, 968 F.3d 689, 692 (7th Cir. 2020).

138 *Mitze*, 968 F.3d at 692.

139 Citizens First Nat'l Bank, 178 F.3d at 946.

(viii) Eighth Circuit

The Eighth Circuit recognizes a common law right to access records but has "not decided whether there is a First Amendment right of public access to the court file in civil proceedings."[140] This common law right of access is not absolute; it "requires a weighing of competing interests."[141] A district court must balance "the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access against the salutary interests served by maintaining confidentiality of the information sought to be sealed."[142] The weight afforded to the presumption of access is determined by role of the material at issue.[143]

While the Eighth Circuit has not explicitly defined the term "judicial record," the District of Minnesota has concurred with the Fourth and D.C. Circuits that judicial records are "documents that are relevant to and integrally involved in the resolution of the merits of a case."[144] Applying the principles from *Littlejohn v. BIC Corp.*,[145] the court in *Wood v. Robert Bosch Tool Corp.*[146] held that exhibits identified in the defendant's post-trial motion to seal were not judicial records and were protected from public access. In addition, the Third Circuit does not appear to view nondispositive motions and exhibits to be included in the right of access.[147]

Unlike some circuits, the Eighth Circuit does not recognize a "strong presumption" of public access to judicial records.[148] Instead, the Eighth Circuit appears to defer to the judgment of the trial court.[149] Although the Eighth Circuit has not provided explicit guidance, district courts in the Circuit[150] have employed a six-factor test to determine whether a party has overcome the presumption in favor of publication: (1) the need to public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests

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140 IDT Corp. v. eBay, 709 F.3d 1220, 1224 (8th Cir. 2013).

141 Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

142 *IDT Corp.*, 709 F.3d at 1223.

143 *Id.*, at 1223–24.

144 Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc., 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019), quoting Krueger v. Ameriprise Fin., Inc., CV 11-2781 (SRN/JSM), 2014 WL 12597948, at *9 (D. Minn. Oct. 14, 2014), *aff'd*, 11-CV-02781 SRN/JSM, 2015 WL 224705 (D. Minn. Jan. 15, 2015).

145 851 F.2d 673 (3rd Cir. 1988).

146 No. 4:13CV01888 PLC, 2016 WL 7013034, at *7 (E.D. Mo. Nov. 30, 2016).

147 *See IDT Corp.*, 709 F.3d at 1223 (stating that "other than discovery motions and accompanying exhibits" the modern trend is to treat pleadings as presumptively public).

148 *In re* Bair Hugger Forced Air Warming Devices Prods. Liab. Litig., No. 15-MD-2666 (JNE/DTS), 2020 WL 4035548, at *1 (D. Minn. July 17, 2020) (quoting United States v. Webbe, 791 F.2d 103, 105 (8th Cir. 1986)).

149 Wood v. Robert Bosch Tool Corp., No. 4:13CV01888 PLC, 2016 WL 7013034, at *5 (E.D. Mo. Nov. 30, 2016) (quoting Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

150 For example, the District of Minnesota has found that the party seeking to have to information sealed must show that there is a "compelling reason" to overcome the public's right to access judicial records. Hudock v. LG Elecs. U.S.A., Inc., No. 0:16-CV-1220-JRT-KMM, 2020 WL 2848180, at *1 (D. Minn. June 2, 2020).

asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.[151] The presumption of access is high when the judicial record may be used by the public "to evaluate the reasonableness and fairness of the judicial proceedings."[152]

(ix) Ninth Circuit

In the Ninth Circuit, a strong presumption of access, based in both the common law and the First Amendment, attaches to court records.[153] The presumption of access to judicial proceedings "flows from an 'unbroken, uncontradicted history rooted in the common law that justice must satisfy the appearance of justice.'"[154]

A "judicial document" is any item filed with a court that is "relevant to the judicial function and useful in the judicial process."[155] In the Ninth Circuit, this has been interpreted to exclude documents filed in connection with discovery matters. Documents obtained in discovery are treated differently. Despite its "strong preference for public access," "the right to inspect and copy judicial records is not absolute," and the Ninth Circuit has "carved out an exception" for sealed materials attached to a discovery motion unrelated to the merits of a case.[156] Under this exception, a party need only to satisfy the less exacting "good cause" standard from Rule 26(c)(1) to seal such documents from public view.[157]

On the other hand, a party seeking to seal a judicial record bears the burden of overcoming the strong presumption of access by meeting the "compelling reasons" standard, a "stringent standard" that permits sealing only when a court finds a compelling reason and articulates the factual basis for the ruling, without relying on hypothesis or conjecture.[158] What constitutes a "compelling reason" is "best left to the sound discretion of the trial court."[159]

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[151] Bader Farms, Inc. v. Monsanto Co., No. 1:16-CV-00299-SNLJ, 2021 WL 289265, at *2 (E.D. Mo. Jan. 28, 2021); Nagel v. United Food & Comm. Workers Union, No. 18-CV-1053 (WMW/ECW), 2020 WL 6145111, at *2 (D. Minn. Oct. 20, 2020); *see also* Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc., 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019) (quoting Doe v. Exxon Mobile Corp., 570 F. Supp. 2d 49, 52 (D.D.C. 2008) and United States v. Hubbard, 650 F.2d 293, 318 (D.C. Cir. 1980)).

[152] *Sorin Grp.*, 2019 WL 2107282, at*4.

[153] Courthouse News Serv. v. Planet, 947 F.3d 581, 589 (9th Cir. 2020) ("We have long presumed a First Amendment 'right of access to court proceedings and documents'"); *see also* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1098, 1101 (9th Cir. 2016); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) ("Following the Supreme Court's lead, 'we start with a strong presumption of access to court records.'").

[154] *Courthouse News*, 947 F.3d at 589 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573–74 (1980)).

[155] *Courthouse News*, 947 F.3d at 592 (citing *Judicial Document*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[156] *Ctr. for Auto Safety*, 809 F.3d at 1096–97 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)).

[157] *Ctr. for Auto Safety,* 809 F.3d at 1097 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) and Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).

[158] *Ctr. for Auto Safety*, 809 F.3d at 1096–97 (quoting Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

[159] *Ctr. for Auto Safety*, 809, F.3d at 1097 (quoting *Nixon*, 435 U.S. at 599).

As an extension of these principles, when deciding what test to apply to a motion to *unseal* a particular court filing—the presumptive "compelling reasons" standard or the "good cause" exception—the Ninth Circuit has "sometimes deployed the terms 'dispositive' and 'non-dispositive,'" referring to the type of motion to which the documents are appended. However, in the wake of *Center for Auto Safety,* the Ninth Circuit expressly rejects a mechanical application of the dispositive and nondispositive classifications as a means of deciding which standard should apply to determine whether documents should be sealed. Rather, considerations of the public's right of access turns on "whether the [underlying] motion is more than tangentially related to the merits of a case."[160] This standard provides necessary flexibility, because some nondispositive motions, such as motions in limine, "are strongly correlative to the merits of a case," and thus warrant application of the higher standard to seal.[161] Such balancing also allows the court to recognize the "special role" that protective orders play. It does not make sense to render a district court's protective order useless simply because a party attached a sealed discovery document to a nondispositive motion.[162] In such circumstances, the "good cause" standard to seal applies.[163]

(x) Tenth Circuit

The Tenth Circuit recognizes a common law right of access to judicial records.[164] The Tenth Circuit, however, has repeatedly declined to address whether a First Amendment right of access exists for civil trials.[165]

Aligning with most circuits, the Tenth Circuit considers the interest of the public in judicial proceedings as "presumptively paramount."[166] To overcome this presumption, a party must establish that disclosure "will work a clearly defined and serious injury."[167] "'[T]he parties must articulate a real

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160 *Ctr. for Auto Safety*, 809 F.3d at 1099.

161 *Id.*

162 *Id.* at 1097–98.

163 *Id. Compare with* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135–36 (9th Cir. 2003), in which the Ninth Circuit applied the "compelling reasons" test as to whether documents attached to a motion for summary judgment should be sealed; *see also Kamakana*, 447 F.3d at 1178–80.

164 Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007).

165 Parson v. Farley, 352 F. Supp. 3d 1141, 1152, n. 5 (N.D. Okla. 2018), *aff'd*, No. 16-CV-423-JED-JFJ, 2018 WL 6333562 (N.D. Okla. Nov. 27, 2018); United States v. McVeigh, 119 F.3d 806, 814 (10th Cir. 1997); United States v. Roberts, 88 F.3d 872, 882–83 (10th Cir. 1996). *But see* Angilau v. United States, No. 2:16-00992-JED, 2017 WL 5905536, at *8 (D. Utah Nov. 29, 2016), *aff'd*, No. 216CV00992JEDPJC, 2018 WL 1271894 (D. Utah Mar. 9, 2018) (contested documents that have been submitted as supporting material in connection with motions for summary judgment are considered judicial documents under the common law and there is a qualified "First Amendment right of access to documents submitted to the court in connection with a summary judgment motion." *See also* Brigham Young Univ. v. Pfizer, Inc., 281 F.R.D. 507, 511 (D. Utah 2012) (quoting Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006).

166 Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 602 (1978)).

167 Harte v. Burns, No. 13-2586-JWL, 2020 WL 1888823, at *2 (D. Kan. Apr. 16, 2020); United States v. Walker, 761 F. App'x. 822, 834 (10th Cir. 2019); Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1135–36 (10th Cir. 2011).

and substantial interest that justifies depriving the public of access to the records that inform our decision-making process.'"[168]

In the Tenth Circuit, a qualified right of public access applies to judicial documents.[169] Although what constitutes a "judicial document" is not clearly defined, the Tenth Circuit has positively cited the Second Circuit's *Lugosch* decision, which found that merely filing a document with the court is insufficient; rather, "where documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches."[170] It has also cited favorably to the D.C. Circuit's *United States v. El-Sayegh* case[171] that "what makes a document a judicial record . . . is the role it plays in the adjudicatory process."[172] While pretrial documents and discovery materials that the parties intended to keep confidential may be sealed, agreement alone cannot support sealing.[173]

(xi) Eleventh Circuit

The Eleventh Circuit recognizes both a common law right and a limited First Amendment right of access to civil trial proceedings.[174]

Under common law, a trial court concealing the entire record of a case must show that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."[175] When concealing particular documents of a case, the court must balance the competing interests of the parties.[176] Public access to civil documents and proceedings receives less First Amendment protection, and "[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard."[177] Rather, in determining whether to unseal the discovery materials, the First Amendment right of access standard is "identical to the Rule 26 good cause standard."[178]

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168 Colony Ins. Co. v. Burke, 698 F.3d 1222, 1242 (10th Cir. 2012) (quoting Helm v. Kansas, 656 F.3d 1277, 1292 (10th Cir. 2011)).

169 *Angilau*, 2017 WL 5905536, at *7; *see also Colony Ins. Co.*, 698 F.3d at 1241 (quoting Soc'y of Prof'l Journalists v. Secretary of Labor, 616 F. Supp. 569, 576 (D. Utah 1985), *appeal dismissed*, 832 F.2d 1180 (10th Cir. 1987)).

170 *Colony Ins. Co.*, 698 F.3d at 1242 (quoting *Lugosch*, 435 F.3d at 121).

171 131 F.3d 158, 163 (D.C.Cir. 1997).

172 *See* United States v. Apperson, 642 F. App'x. 892, 899 n. 6 (10th Cir. 2016) (unpublished).

173 Grundberg v. Upjohn Co., 140 F.R.D. 459, 466 (D. Utah 1991); Sacchi v. IHC Health Servs., Inc., 918 F.3d 1155, 1160 (10th Cir. 2019).

174 Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001) (per curiam).

175 *Id.* at 1311 (quoting Wilson v. Am. Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985)).

176 *Chicago Tribune,* 263 F.3d at 1311.

177 *Id.* at 1310.

178 *Id.* (finding error in requiring a party to show a compelling interest to overcome the public's constitutional right of access).

In the Eleventh Circuit, "the mere filing of a document does not transform it into a judicial record."[179] Rather, judicial documents are those that are "integral to the 'judicial resolution of the merits' in any action taken by that court."[180] When a document is filed, the type of filing to which it is attached is a factor for the court to consider in deciding whether the document constitutes a judicial record.[181] For instance, documents filed in connection with discovery motions are not considered judicial documents and are not subject to the common law right of access.[182] However, discovery materials filed in connection with pretrial motions that require judicial resolution of the merits are subject to the common law right.[183] Any "motion that is 'presented to the court to invoke its powers or affect its decisions,' whether or not characterized as dispositive, is subject to the public right of access."[184]

(xii) D.C. Circuit

Relying on the Ninth Circuit's decision in *Foltz v. State Farm Mutual Auto Insurance Co.,*[185] the D.C. Circuit recognizes a common law right of access to judicial records.[186] Further, the First Amendment "guarantees the press and the public access to aspects of court proceedings, including documents, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct[.]'"[187] The D.C. Circuit applies the *Press-Enterprise II* test to determine if the sealed records have "historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct."[188] However, it is unclear whether the First Amendment right to access applies in civil cases.[189]

In the D.C. Circuit, "not all documents filed with courts are judicial records."[190] What makes a document a "judicial record" is "the role it plays in the adjudicatory process."[191] The reason for

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179 Comm'r., Alabama Dept. of Corrections v. Advance Local Media, LLC, 918 F.3d 1161, 1167 (11th Cir. 2019).

180 *Id.*; F.T.C. v. AbbVie Prod. LLC, 713 F.3d 54, 64 (11th Cir. 2013); *Chicago Tribune*, 263 F.3d at 1312.

181 *Advance Local Media*, 918 F.3d at 1166–68.

182 *Chicago Tribune*, 263 F.3d at 1313; *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987).

183 *Chicago Tribune*, 263 F.3d at 1312 (the court distinguishes between material filed with discovery motions and material filed in connection with more substantive procedures); Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to "material filed in connection with pretrial motions that require judicial resolution of the merits" but not documents "filed in connection with motions to compel discovery").

184 *Id.* at 1246 (citing United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1050 (2d Cir. 1995).

185 331 F.3d 1122 (9th Cir. 2003).

186 Apple Inc. v. Samsung Electronics Co., 727 F.3d 1214 (D.C. Cir. 2013).

187 S.E.C. v. Am. Int'l Grp., 712 F.3d 1, 5 (D.C. Cir. 2013).

188 Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (citing Press-Enterprise. Co. v. Superior Court of Calif. For Riverside Cty. (*Press-Enterprise II*), 478 U.S. 1, 8 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605–06 (1982); Oregonian Pub. Co. v. Dist. Court, 920 F.2d 1462, 1465 (9th Cir. 1990); United States v. Haller, 837 F.2d 84, 86 (2d Cir. 1988); *In re* Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986)).

189 *Am. Int'l Grp.*, 712 F.3d at 5.

190 *Id.* at 3.

191 *Id.*; United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997).

this rule is intuitive: "the concept of a judicial record assumes a judicial decision, and with no such decision, there is nothing judicial about the record."[192] The common law right of access does not apply to documents "whose contents were not specifically referred to or examined upon during the course of those proceedings and whose only relevance to the proceedings derived from the defendants' contention that many of them were not relevant to the proceedings . . . ."[193]

"A party seeking to seal judicial records can overcome the strong presumption of access by providing 'sufficiently compelling reasons' that override the public policies favoring disclosure."[194] Such compelling reasons must be "supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process."[195] This requires courts in the D.C. Circuit to "conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret."[196]

Under the common law analysis, courts in the D.C. Circuit consider six factors relating to the generalized interests for and against public disclosure, which "can be weighed without examining the contents of the documents at issue[]," but instead looks to the role the document plays in the litigation.[197] Those factors include: (1) the need for public access to the documents at issue; (2) previous public access to the documents; (3) the fact of an objection to public access and the identity of those objecting to public access; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice; and (6) the purposes for which the documents were introduced.[198] The proponent of a motion to seal must demonstrate that these six factors, in totality, overcome the "strong presumption in favor of public access to judicial proceedings," which is "the starting point in considering a motion to seal court records."[199]

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192 *Am. Int'l Grp.*, 712 F.3d at 3.

193 United States v. Hubbard, 650 F.2d 293, 316 (D.C. Cir. 1980).

194 Apple Inc. v. Samsung Electronics Co., 727 F.3d 1214, 1221 (D.C. Cir. 2013) (citing *In re* Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115, 1119 (9th Cir. 2012) (quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003)).

195 *Apple*, 727 F.3d at 1221 (citing Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (alterations and internal quotation marks omitted)).

196 *Kamakana*, 447 F.3d at 1179.

197 *Hubbard*, 650 F.2d at 317.

198 *Id.* at 317–22.

199 E.E.O.C. v. Nat'l Children's Ctr., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quoting Johnson v. Greater Se. Cty. Hosp. Corp., 951 F.2d 1268, 1277 (D.C.Cir. 1991)).

ATTACHMENT A: OVERVIEW OF JUDICIAL RECORD DEFINITION BY CIRCUIT

	Judicial Record Defined?
First Circuit	Yes. "[M]aterials on which a court relies in determining the litigants' substantive rights*" In re Providence Journal*, 293 F.3d 1, 9–10 (1st Cir. 2002), quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).
Second Circuit	Yes. Information that is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006).
Third Circuit	Yes. A document that "has been filed with the court . . . or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings." *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019).
Fourth Circuit	Yes. Documents filed with the court that "play a role in the adjudicative process, or adjudicate substantive rights.*" In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D),* 707 F.3d 283, 290 (4th Cir. 2013).
Fifth Circuit	Not specifically. *See Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 227 (5th Cir. 2020) (court has not generally defined "judicial record," but it is common sense that judicially authored or created documents are judicial records).
Sixth Circuit	Not specifically. However, district courts cite favorably to Second Circuit's *Lugosch* decision that a judicial document is one that is "relevant to the performance of the judicial function and useful to in the judicial process." *See, e.g., Snook v. Valley OB-GYN Clinic, P.C.*, 14-CV-12302, 2014 WL 7369904, at *2 (E.D. Mich. Dec. 29, 2014); *Thompson v. Deviney Constr. Co., Inc.*, 216CV03019JPMDKV, 2017 WL 10662030, at *2 (W.D. Tenn. Dec. 15, 2017).
Seventh Circuit	Yes. "[M]aterials submitted to the court that 'affect the disposition' of the case and are not subject to a statute, rule, or privilege that justifies confidentiality." *United States v. Curry*, 641 F. App'x. 607, 609 (7th Cir. 2016) (unpublished), quoting *City of Greenville v. Syngenta Crop Protection*, LLC, 764 F.3d 695, 697 (7th Cir. 2014).
Eighth Circuit	No. However, the District of Minnesota has concurred with the Fourth and D.C. Circuits that judicial records are "documents that are relevant to and integrally involved in the resolution of the merits of a case[.]" *Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc.*, 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019), quoting *Krueger v. Ameriprise Fin., Inc.,* CV 11-2781 (SRN/JSM), 2014 WL 12597948, at *9 (D. Minn. Oct. 14, 2014), aff'd, 11-CV-02781 SRN/JSM, 2015 WL 224705 (D. Minn. Jan. 15, 2015).

Ninth Circuit	Yes. Any item filed with a court that is "relevant to the judicial function and useful in the judicial process." *Courthouse News Service v. Planet,* 947 F.3d 581 (9th Cir. 2020).
Tenth Circuit	No. But the Tenth Circuit has cited favorably to the Second Circuit's *Lugosch* decision, which found that a judicial document must be "relevant to the performance of the judicial function and useful in the judicial process." *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012). It has also cited favorably to the D.C. Circuit's *El-Sayegh* case that "what makes a document a judicial record . . . is the role it plays in the adjudicatory process." *See United States v. Apperson*, 642 F. App'x. 892, 899 n. 6 (10th Cir. 2016) (unpublished).
Eleventh Circuit	Yes. Those that are "integral to the 'judicial resolution of the merits' in any action taken by that court." *Comm'r., Alabama Dept. of Corrections v. Adv. Loc. Media, LLC*, 918 F.3d 1161, 1167 (11th Cir. 2019) (citing *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013) (quoting *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).
D.C. Circuit	Yes. What makes a document a "judicial record" is the role it plays in the adjudicatory process. *United States v. El–Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). It must be specifically mentioned during the proceedings. *United States v. Hubbard*, 650 F.2d 293, 316 (D.C. Cir. 1980).

ATTACHMENT B: CIRCUIT ANALYSIS OF WHETHER PUBLIC RIGHT OF ACCESS EXISTS FOR NONDISPOSITIVE MOTIONS

	Nondispositive-related Motions and Exhibits Included in Right of Access?
First Circuit	No. *See United States v. Kravetz,* 706 F.3d 47, 54 (1st Cir. 2013) (no public right of access to discovery motions and related materials); *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 13 (1st Cir. 1986) (a request to compel or protect the disclosure of information in the discovery process is not a request for a disposition of substantive rights).
Second Circuit	Unlikely. *Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("The presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment.").
Third Circuit	Yes. *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019).
Fourth Circuit	Unclear. *In re Application for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013). But some district courts have predicted that the Fourth Circuit will find no public right of access to discovery motions and related exhibits, and that consequently, such documents may be sealed. *See, e.g.*, *Kinetic Concepts, Inc. v. Convatec Inc.,* 1:08tCV00918, 2010 WL 1418312, at *9 (M.D.N.C. Apr. 2, 2010) ("the Fourth Circuit has used language that suggests that no public right of access attaches [to discovery motions]").
Fifth Circuit	Unlikely. *Robroy Indus.-Tex., LLC v. Thomas & Betts Corp.*, No. 2:15-CV-512-WCB, 2016 WL 325174, at *2 (E.D. Tex. Jan. 27, 2016).
Sixth Circuit	Likely. A party seeking to seal records must advance arguments that allow the court to "set forth specific findings and conclusions 'which justify nondisclosure to the public.'" *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016).
Seventh Circuit	Depends. Public access depends on whether a document "influenc[ed] or underpin[ned] the judicial decision." *Baxter Int'l, Inc. v. Abbott Labs.,* 297 F.3d 544, 545 (7th Cir. 2002); *Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (declining to comment as a general matter whether there is a recognized right of public access to pretrial proceedings but finding presumption does apply to a motion to terminate).

Eighth Circuit	No. *IDT Corp. v. eBay,* 709 F.3d 1220, 1223 (8th Cir. 2013) (stating that "other than discovery motions and accompanying exhibits," the modern trend is to treat pleadings as presumptively public).
Ninth Circuit	Possibly. Will turn on whether the motion is "more than tangentially related to the merits of the case[.]" *Ctr. for Auto Safety v. Chrysler Grp., LLC,* 809 F.3d 1092, 1098, 1101 (9th Cir. 2016).
Tenth Circuit	Likely at common law. *Parson v. Farley*, 352 F. Supp. 3d 1141, 1153 (N.D. Okla. 2018), aff'd, 16-CV-423-JED-JFJ, 2018 WL 6333562 (N.D. Okla. Nov. 27, 2018) (finding Motion to Dismiss and exhibit as "judicial documents."). Unlikely under the First Amendment. A "'litigant has no First Amendment right of access to information made available only for purposes of trying his suit' and that 'pretrial depositions and interrogatories are not public components of a civil trial.'" *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 466 (D. Utah 1991) (quoting *Seattle Times v. Rhinehart*, 467 U.S. 20, 32–33 (1984)).
Eleventh Circuit	Depends. *Romero v. Drummond Co., Inc.,* 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to "material filed in connection with pretrial motions that require judicial resolution of the merits" but not documents "filed in connection with motions to compel discovery").
D.C. Circuit	No. S*.E.C. v. Am. Int'l Grp.*, 712 F.3d 1, 3–4 (D.C. Cir. 2013) (presumption applies only to record that "plays a role in the adjudicatory process," not to documents where the court "ma[kes] no decisions about them or that otherwise relie[s] on them").