

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.