Sealing Court Records and Proceedings: A Pocket Guide

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Table of Contents

Introduction

Essential to the rule of law is the public performance of the judicial function. The public resolution of court cases and controversies affords accountability, fosters public confidence, and provides notice of the legal consequences of behaviors and choices.

On occasion, however, there are good reasons for courts to keep parts of some proceedings confidential. Courts will keep confidential classified information, ongoing investigations, trade secrets, and the identities of minors, for example.

The public in general and news media in particular have a qualified right of access to court proceedings and records. This right is rooted in the common law.[1] The First Amendment also confers on the public a qualified right of access. In 1980, the Supreme Court held that the First Amendment right of access to court proceedings includes the public's right to attend criminal trials.[2] The Court suggested that a similar right extends to civil trials, but they were not at issue in the case.[3] Some courts of appeals have held that the public's First Amendment right of access to court proceedings includes both criminal and civil cases.[4]

The process used by courts to keep some of their proceedings and records confidential is generally referred to as seal-

1. Nixon v. Warner Communications, Inc., 435 U.S. 589, 596–97 (1978).

2. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion, quotation marks omitted).

3. *Id.* at n.17.

4. *E.g.*, Lugosch v. Pyramid Co., 435 F.3d 110, 121 (2d Cir. 2006) Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

ing.[5] If a proceeding is sealed, often referred to as closed, it is not open to the public. Usually that means that any transcript made of the proceeding will be regarded as a sealed record. Clerks of court traditionally protected sealed filings and records by storing them separately from the public case file in a secure room or vault. As court records have become more electronic in form, electronic methods of security have been developed.

The Public Right of Access

The common law and the Constitution afford the public a qualified right of access to judicial records and proceedings. The Constitution affords a criminal defendant both a right to public proceedings and limited protection from public proceedings.

The Common Law and the First Amendment

If the public has a First Amendment right of access to a court proceeding or record, then sealing the proceeding or record to preserve confidentiality must be narrowly tailored to a compelling confidentiality interest.[6] Some courts have said that the

5. This pocket guide discusses the sealing of court proceedings and records. It does not discuss the related issue of protective orders, which are orders that courts issue requiring parties to keep their own records confidential.

6. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982); Washington Post v. Robinson, 935 F.2d 282, 288, 292 (D.C. Cir. 1991); *Lugosch*, 435 F.3d at 124; United States v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985); Virginia Dep't of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); United States v. Edwards, 823 F.2d 111, 115 (5th Cir. 1987); Grove Fresh Distribs, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *In re* Search Warrant, 855 F.2d 569, 575 (8th Cir. 1988); Times Mirror Co. v. United States, 873 F.2d 1210, 1211 n.1 (9th Cir.

First Amendment right of access requires a higher showing of the need for confidentiality than the common-law right of access.[7] The common-law right of access requires a balancing of the need for confidentiality against the public's strong right of access to court proceedings and records.[8] Some courts have said that even under the common law, sealing requires narrow tailoring[9] or a compelling showing.[10]

Courts have articulated a two-prong test to determine whether a public right of access is rooted in the First Amendment.[11] The *history,* or *experience,* prong is an analysis of whether the proceeding has historically been open. The *logic,* or *function,* prong is an analysis of whether the right of access fosters good operation of the courts and the government. Some

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1989); United States v. McVeigh, 119 F.3d 806, 814 (10th Cir. 1997); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001).

7. *Lugosch*, 435 F.3d at 124; *In re* Cendant Corp., 260 F.3d 183, 198 n.13 (3d Cir. 2001); *In re* Baltimore Sun Co., 886 F.2d 60, 64 (4th Cir. 1989); Valley Broadcasting Co. v. U.S. Dist. Court, 798 F.2d 1289, 1293 (9th Cir. 1986).

8. *In re* National Broadcasting Co., 653 F.2d 609, 612–13 (D.C. Cir. 1981); Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994); SEC v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102–03 (9th Cir. 1999).

9. Media General Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005).

10. *In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002); Pintos v. Pacific Creditors Assoc., 565 F.3d 1106, 1115 (9th Cir. 2009).

11. *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1331–32 (D.C. Cir. 1985); *Lugosch*, 435 F.3d at 120; United States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994); *In re Baltimore Sun Co.,* 886 F.2d at 64; United States v. Corbitt, 879 F.2d 224, 237 (7th Cir. 1989); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940 (9th Cir. 1998).

courts of appeals have determined that the constitutional right of access requires *both* a historical and a logical foundation.[12]

In practical terms, it may be of little consequence whether a right of access is rooted in the First Amendment or "only" in the common law. It may be a rare situation in which the need for confidentiality is strong enough to outweigh the common-law right of access, but the need for confidentiality is not compelling enough to overcome the First Amendment right of access and the court has determined that the First Amendment does not apply to the proceeding or record. On the other hand, some courts of appeals have said that appellate review of sealing decisions under the First Amendment is more searching than appellate review of sealing decisions under the common law.[13]

The Sixth Amendment

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial, by an *impartial* jury . . . ."[14]

Courts have recognized limited exceptions to the defendant's right to a completely public trial. For example, it can be permissible to close the courtroom to the public while taking testimony from a witness whose safety would be endangered if the testimony were public.[15] Courts sometimes permit light

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12. *In re Reporters Committee*, 773 F.2d at 1332; *Phoenix Newspapers, Inc.*, 156 F.3d at 946.

13. *In re Providence Journal Co.,* 293 F.3d at 10; United States v. Smith, 123 F.3d 140, 146 (3d Cir. 1997); EEOC v. Westinghouse Elec. Corp., 917 F.2d 124, 127 (4th Cir. 1990).

14. Emphasis added.

15. Brown v. Kuhlmann, 142 F.3d 529, 531, 533, 537–38, 544 (2d Cir. 1998) (noting that the transcript, in which the witness, an undercover police officer, was identified only by his badge number, was neither sealed nor

disguise or visual screening of the witness instead of full closure of the courtroom.[16]

Although the Sixth Amendment guarantees a public trial, it also guarantees a fair trial.[17] Sometimes the right to a fair trial is served by withholding from the public, from which the jury will be drawn, preliminary information about the case.[18] One court of appeals approved a district court's delaying until the end of the trial the public release of evidentiary sidebar conferences, noting that one juror had already been excused because he had seen inadmissible evidence in the press.[19]

Specific Record and Proceeding Issues

Some sealing issues have arisen frequently enough for case law about them to be developed. Some types of information are understood to be properly protected by sealing, such as national security secrets. Some proceedings are understood to be properly held in secret, such as grand jury proceedings. The identities of some parties, such as juveniles, are properly protected by sealing or redaction. The following are summaries of the case law pertaining to several such issues.

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redacted, and the witness's testimony occupied less than six pages of the transcript, which was over 900 pages long).

16. Robert Timothy Reagan, National Security Case Studies: Special Case-Management Challenges 34, 49, 86, 115–16, 126–28, 161, 170–71 (Federal Judicial Center 2010) (describing procedures used to protect witnesses in national security cases).

17. *E.g.*, United States v. Raffoul, 826 F.2d 218, 223 (3d Cir. 1987); Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

18. *In re* Globe Newspaper Co., 729 F.2d 47, 49, 55 (1st Cir. 1984); United States v. Cojab, 996 F.2d 1404, 1404–05, 1408 (2d Cir. 1993); *In re* Charlotte Observer, 882 F.2d 850, 853 (4th Cir. 1989); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431 (5th Cir. 1981).

19. Sacramento Bee v. U.S. Dist. Court, 656 F.2d 477, 479–80, 482–83 (9th Cir. 1981).

National Security

On rare occasions, adjudication of a case requires presenting to the court classified information, which is information an intelligence agency has determined could result in damage to national security if it were disclosed to the wrong person.[20] The Executive Branch decides access and storage limits for classified information.[21] The public is given access to cases involving classified information by redacting the classified information from the public record.[22]

Grand Jury Proceedings

Grand jury proceedings are held in secret.[23] Sometimes, however, justice may require the availability of portions of grand jury records for other proceedings.[24] In addition, one court of appeals found a qualified right of "access to ministerial records in the files of the district court having jurisdiction of the grand jury."[25]

Judicial proceedings ancillary to grand jury proceedings often arise. For example, a witness may move to quash a grand jury subpoena, or the government may initiate contempt pro-

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20. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers 1–2 (Federal Judicial Center 2007) [hereinafter Keeping Government Secrets]; *see also* Reagan, *supra* note 16 (providing case examples of how courts have protected national security).

21. *See* Reagan, Keeping Government Secrets, *supra* note 20, at 3, 19.

22. *E.g.*, United States v. Ressam, 221 F. Supp. 2d 1252 (W.D. Wash. 2002).

23. Fed. R. Crim. P. 6; *see* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

24. *Douglas Oil Co.*, 441 U.S. at 219–20.

25. *In re* Special Grand Jury, 674 F.2d 778, 781 (9th Cir. 1982).

ceedings against an uncooperative witness. Such judicial proceedings are often conducted under seal,[26] but it has been held that there should be a public record of such proceedings and that only parts of the record should be sealed as necessary to protect grand jury secrecy.[27]

Juveniles

Courts must protect the identities of juvenile defendants in criminal cases, unless they are tried as adults.[28] Some courts seal the entire case,[29] but protection of the juvenile's identity can also be accomplished by using initials for the juvenile's name and sealing or redacting filings as necessary.[30]

The identities of minors who are parties in civil cases can also be protected by using their initials and sealing documents that must include their complete names.

False Claims Act

The False Claims Act permits persons to file qui tam actions on behalf of the government against entities that the filers claim have defrauded the government.[31] Such an action is filed initially under seal, without notice to the defendant, to give the government time to investigate the complaint and decide

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26. Tim Reagan & George Cort, Sealed Cases in Federal Courts 14 (Federal Judicial Center 2009).

27. *In re* Motions of Dow Jones & Co., 142 F.3d 496, 500, 504 (D.C. Cir. 1998).

28. 18 U.S.C. §§ 5038(a), (e).

29. Reagan & Cort, *supra* note 26, at 18; C.D. Cal. Civ. R. 79-5.4; D. Idaho Civ. R. 5.5(c); C.D. Ill. Crim. R. 49.4(B)(3); D. Me. Crim. R. 157.6(a)(3).

30. Reagan & Cort, *supra* note 26, at 18.

31. 31 U.S.C. § 3730(b).

whether or not to take the lead in the action.[32] The statute provides for a 60-day seal, but the government frequently requests long extensions of time to decide whether or not to intervene.[33]

After the government decides whether or not to intervene, the complaint is unsealed and served on the defendant. Sometimes courts grant the government's request to keep sealed court filings pertaining to the government's investigation, such as materials supporting motions for extensions of time.

If the government decides not to intervene, the qui tam filer, known as the relator, may determine that the action is unlikely to lead to a monetary recovery and may decide to dismiss the action voluntarily, or the parties may settle the case. Sometimes a party will ask the court to keep the whole action permanently sealed. Courts typically deny this request.[34] Closed False Claims Act cases ordinarily should not be sealed.

Criminal Justice Act

When a court appoints and supervises counsel for an indigent criminal defendant, the court is not exercising the judicial function at the core of the common-law and constitutional rights of public access.[35] The Criminal Justice Act, however, affords the

32. *Id.* § 3730(b)(2).

33. Reagan & Cort, *supra* note 26, at 5–7.

34. *E.g.*, United States ex rel. Herrera v. Bon Secours Cottage Health Servs., 665 F. Supp. 2d 782, 785 (E.D. Mich. 2008) ("there is nothing in the FCA suggesting that the initial seal was imposed to protect the identity of the relator or that qui tam complaints in which the Government decides not to intervene should be permanently sealed"); United States ex rel. Permison v. Superlative Techs., Inc., 492 F. Supp. 2d 561, 564 (E.D. Va. 2007) ("the presumption in favor of public access to court filings is especially strong where, as here, the filings involve matters of particular concern to the public, such as allegations of fraud against the government").

35. *E.g.*, *In re* Boston Herald, Inc., 321 F.3d 174, 191 (1st Cir. 2003) ("neither the First Amendment nor the common law provides a right of ac-

public a qualified right of access to information about funds spent pursuant to the Act.[36]

Court approval of defense expenses in appointed-counsel cases, especially expenses for services other than counsel, is usually an ex parte process so that the confidentiality of the defendant's litigation strategy is protected.[37] However, the Antiterrorism and Effective Death Penalty Act of 1996 requires, in capital cases, a "proper showing" of a need for confidentiality to conduct ex parte proceedings concerning the approval of expenses for investigators, experts, and other service providers.[38]

Public disclosure of appointed-counsel expenses is often delayed until after judicial proceedings pertaining to the case are completed.[39]

Personal Identifiers

In light of court files' now being available for inspection on the Internet, federal rules of practice and procedure provide that certain identifiers be redacted in court filings: minors should be represented by their initials; Social Security, taxpayer-

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cess to financial documents submitted with an initial application to demonstrate a defendant's eligibility for CJA assistance"); United States v. Gonzales, 150 F.3d 1246, 1250, 1255 (10th Cir. 1998) ("the court essentially acts in an administrative, not a judicial, capacity when approving voucher requests and related motions for trial assistance"); *but see* United States v. Suarez, 880 F.2d 626, 631 (2d Cir. 1989) (holding that news media had a First Amendment right of access to payment documentation once payment had been approved).

36. 18 U.S.C. § 3006A(d)(4), (e)(4).

37. *Id.* § 3006A(e)(1); 7A Guide to Judiciary Policy §§ 310.30, 640.20.

38. 18 U.S.C. § 3599(f), formerly 21 U.S.C. § 848(q); *see* Pub. L. No. 109-177 § 222(a), 120 Stat. 231 (recodifying); Pub. L. No. 104-132 § 108, 110 Stat. 1226 (enacting provision).

39. 7A Guide to Judiciary Policy § 510.40.

identification, and financial-account numbers should be represented by the last four digits only; and only years should be given in birth dates.[40] The Federal Rules of Criminal Procedure extend this protection to a home address, which should be represented by the city and state only.[41] The rules provide for optional filing of more complete unredacted information under seal, in the form of either unredacted versions of the redacted filings or separate reference lists.[42]

Search Warrants

Law enforcement entities typically obtain search warrants from magistrate judges in ex parte proceedings that often are sealed to protect the confidentiality of ongoing investigations. This is a temporary justification for sealing, although for some information in supporting affidavits permanent redaction from the public record may be justified.

Some courts have held that the public has a qualified right of access to judicial records of search warrants and their supporting documentation, once temporary reasons for keeping them sealed have expired.[43]

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40. Fed. R. Bankr. P. 9037(a); Fed. R. Civ. P. 5.2(a); Fed. R. Crim. P. 49.1(a); *see also* Fed. R. App. P. 25(a)(5) (incorporating by reference the other rules of procedure on this matter).

41. Fed. R. Crim. P. 49.1(a).

42. Fed. R. Bankr. P. 9037(e)–(f); Fed. R. Civ. P. 5.2(f)–(g); Fed. R. Crim. P. 49.1(f)–(g).

43. *In re* Newsday, Inc., 895 F.2d 74, 79 (2d Cir. 1990*); In re Search Warrant,* 855 F.2d 569, 573, 575 (8th Cir. 1988); United States v. Peterson, 627 F. Supp. 2d 1359 (M.D. Ga. 2008); *In re* New York Times, 585 F. Supp. 2d 83 (D.D.C. 2008); *In re* Search of 8420 Ocean Gateway, Easton, Md., 353 F. Supp. 2d 577 (D. Md.).

Some local rules provide that search warrant files are public records unless otherwise ordered.[44] Other local rules provide for keeping search warrant files under seal.[45]

Discovery

Information exchanged by the parties during discovery is not subject to a First Amendment or common-law public right of access.[46] If the fruits of discovery are filed in conjunction with a dispositive motion, a qualified right of access attaches.[47] If

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44. D. Conn. Crim. R. 57(b)7(d); E.D. Mo. R. 13.05(B)(2); N.D. Okla. Crim. R. 4.1.A; W.D. Okla. Crim. R. 4.1; D.S.D. Crim. R. 41.1.D; W.D. Va. Loc. R. 9(h)(1).

45. N.D. & S.D. Iowa Crim. R. 41.d; D. Me. Loc. Crim. R. 157.6(a)(1); D. Neb. Crim. R. 41.1; D. Wyo. Crim. R. 6.2(b).

46. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial"); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1118–20 (3d Cir. 1986) (the standard for issuing a discovery protective order is good cause; First Amendment concerns are not a factor); *In re* Gannett News Serv., Inc., 772 F.2d 113, 116 (5th Cir. 1985) ("The results of pretrial discovery may be restricted from the public."); Bond v. Utreras, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public."); Pintos v. Pacific Creditors Assoc., 565 F.3d 1106, 1115 (9th Cir. 2009) ("[discovery] documents are not part of the judicial record"); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.").

47. Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988) ("if the case had gone to trial and the documents were thereby submitted to the court as evidence, such documents would have been revealed to the public and not protected"); Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir.

they are attached to a filing in conjunction with a discovery motion, however, the public right of access is substantially diminished.[48]

Pleas

Courts have found a qualified right of access to plea agreements[49] and plea hearings.[50]

2002) ("[*D*]*ispositive* documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it?"); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1136–39 (9th Cir. 2003); Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) ("Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access."); Vulcan Materials Co. v. Atofina Chems. Inc., 355 F. Supp. 2d 1214, 1217 (D. Kan. 2005).

48. Anderson v. Cryovac, Inc., 805 F.2d 1, 11–13 (1st Cir. 1986); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 165 (3d Cir. 1993) ("we hold there is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents"); Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002); *see* D. Alaska Civ. R. 5.4(a)(4); W.D. Wash. Civ. R. 5(g)(2).

49. Washington Post v. Robinson, 935 F.2d 282, 292 (D.C. Cir. 1991) (vacating orders sealing the plea agreement of a criminal defendant cooperating in the prosecution of Mayor Barry for cocaine possession) ("Under the first amendment, plea agreements are presumptively open to the public and the press."); United States v. Haller, 837 F.2d 84, 85–89 (2d Cir. 1988) (holding that it was improper to seal the whole plea agreement but proper to redact one paragraph specifying the defendant's obligation to testify before a grand jury); *In re* Copley Press, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008) (finding a First Amendment right of access to a cooperation addendum to a plea agreement).

50. *In re* Washington Post Co., 807 F.2d 383, 389–90 (4th Cir. 1986); *but see* United States v. El-Sayegh, 131 F.3d 158, 159, 162 (D.C. Cir. 1997) (holding that the right of access does not attach until the plea agreement is

It is common for courts to temporarily seal records of criminal defendants' cooperation in order to protect the confidentiality of ongoing investigations, and to either temporarily or permanently seal records of cooperation to protect the safety of the cooperating defendants and the defendants' families.[51]

Some courts have local rules that call for the filing under seal of a plea supplement in all cases in which there is a plea agreement. If the defendant is a cooperator, then the document contains details of cooperation; if the defendant is not a cooperator, then the document is empty and there is no public clue concerning the defendant's cooperation.[52] The rules for one district specify that the sealing of the supplement is temporary, unless the court orders otherwise.[53]

Voir Dire

The Supreme Court has determined that the public has a qualified First Amendment right to attend jury voir dire in criminal trials.[54] Balancing the public's right of access to jury selection against legitimate privacy interests of prospective jurors presents the court with the sometimes challenging obligation to keep confidential only what needs to be kept confidential.

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filed as such; the public did not have a right of access to an agreement filed with a motion to seal it but withdrawn before the court ruled on the sealing motion).

51. Reagan & Cort, *supra* note 26, at 19.

52. D. Alaska Crim. R. 11.2(e), 32.1(e); D. Me. Crim. R. 111(b), 157.6(a)(10); N.D. & S.D. Miss. Crim. R. 49.1(B)(2); D.P.R. R. 111(b); D.S.D. Crim. R. 11.1.A.

53. D. Me. Crim. R. 111(c).

54. Presley v. Georgia, 558 U.S. ___, ___ (2010) (p. 4 of slip op.) (concluding that a state court's exclusion of the defendant's uncle from voir dire was error); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984).

> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record.
>
> By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.[55]

Trial Evidence

Courts have determined that a qualified right of public access attaches to evidence admitted at trial.[56] In high-profile cases,

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55. *Press-Enterprise Co.*, 464 U.S. at 511–12.

56. Poliquin v. Garden Way, Inc., 989 F.2d 527, 532–34 (1st Cir. 1993); *In re* NBC, 635 F.2d 945, 952 (2d Cir. 1980); United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981); United States v. Guzzino, 766 F.2d 302, 303–04 (7th Cir. 1985); United States v. Massino, 356 F. Supp. 2d 227 (E.D.N.Y. 2005); United States v. Sampson, 297 F. Supp. 2d 342 (D. Mass. 2003); *but see In re* Providence Journal Co., 293 F.3d 1, 17 (1st Cir. 2002) (the news media did not have a right of access to original tapes, portions of which were played at trial); Littlejohn v. BIC Corp., 851 F.2d 673, 682–83 (3d Cir. 1988) (a newspaper did not have a right to copy trial exhibits that it

courts work with the parties to make copies of exhibits that are entered into evidence available to news media, to the extent practical, and courts often post these exhibits on their websites.

Some courts have held that it is proper to deny news media the right to copy and broadcast audiovisual evidence so that the court can protect the fairness of a possible retrial[57] or another defendant's subsequent trial.[58] A district court held that audiovisual recordings played at a motion hearing in a criminal case should not be released for broadcast until after the trial, but transcripts of the evidence were released publicly in advance of trial.[59]

Sentencing

Courts have found qualified rights of access to sentencing.[60] In one illustrative case, a district judge concluded that a psychiatric evaluation of the defendant submitted as part of the sentencing process should be publicly filed with limited redactions to protect the privacy of information on the defendant's personal history that was not germane to sentencing.[61]

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did not request to copy until after they had been returned to the parties); United States v. McDougal, 103 F.3d 651, 657 (8th Cir. 1996) (denying a right of access to an electronic copy of a videotape deposition entered into evidence).

57. United States v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986).

58. Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 425–26, 429, 431 (5th Cir. 1981); United States v. Edwards, 672 F.2d 1289, 1296 (7th Cir. 1982).

59. *In re* NBC Universal, Inc., 426 F. Supp. 2d 49 (N.D.N.Y. 2006).

60. *In re* Washington Post Co., 807 F.2d 383, 389–90 (4th Cir. 1986); CBS, Inc. v. U.S. Dist. Court, 765 F.2d 823, 824–26 (9th Cir. 1985).

61. United States v. Sattar, 471 F. Supp. 2d 380, 387–90 (S.D.N.Y. 2006).

Presentence reports, however, are not considered judicial records to which the public has a right of access.[62]

Settlement Agreements

Parties may wish to settle their cases according to confidential terms, and often there is no need to file settlement agreements.[63] Often, however, the agreement requires court approval or the parties wish to retain the court's jurisdiction over enforcement. In those situations, the agreement may be filed, and then a qualified right of public access attaches.[64] As one court observed, "The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."[65]

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62. *In re* Siler, 571 F.3d 604, 610 (6th Cir. 2009) (presentence reports are not court documents: they are documents prepared by and maintained by the U.S. Probation Office, and they are released to courts for the limited purpose of sentencing); United States v. Corbitt, 879 F.2d 224, 239 (7th Cir. 1989) ("Only where a compelling, particularized need for disclosure is shown should the district court disclose [a presentence] report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need."); United States v. McKnight, 771 F.2d 388, 391 (8th Cir. 1985) ("Generally, pre-sentence reports are considered as confidential reports to the court and are not considered public records, except to the extent that they or portions of them are placed on the court record or authorized for disclosure to serve the interests of justice.").

63. *See generally* Robert Timothy Reagan, Sealed Settlement Agreements in Federal District Court (Federal Judicial Center 2004).

64. Bank of Am. v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343–45 (3d Cir. 1986); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993).

65. Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002).

General Considerations

In the end, whether a judicial record should be sealed depends on the judgment and discretion of the presiding judge. Appellate review of sealing decisions is by interlocutory appeal in some circuits and by mandamus in others. Local rules concerning sealing often were crafted to help clerks clean out their vaults; for paper records, storage of sealed files was often a substantial burden.

Discretion

The court has discretion to weigh the need for secrecy against the public's right of access.[66] Court records should be sealed to keep confidential only what must be kept secret, temporarily or permanently as the situation requires. Sealing of judicial records is not considered appropriate if it is done merely to protect parties from embarrassment.[67] Public versions of court documents are sometimes redacted, however, to protect the privacy interests of persons who are not parties, such as clients, employees, or witnesses.

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66. *In re* Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) ("Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court."); Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("The trial court enjoys considerable leeway in making decisions of this sort."); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

67. *Siedle,* 147 F.3d at 10; Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

Appeals

Some courts of appeals have determined that they have jurisdiction to hear interlocutory appeals of trial court decisions to seal, to not seal, or to unseal judicial records.[68] Other courts of appeals review district court sealing orders by mandamus.[69]

Appellate review is for abuse of discretion, but some courts of appeals have determined that review must be more searching than ordinary abuse-of-discretion review.[70] Some courts have determined that appellate review of the constitutional right of access is more searching than appellate review of the common-law right of access.[71]

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68. United States v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987); *In re* Tribune Co., 784 F.2d 1518, 1521 (11th Cir. 1986).

69. *McVeigh,* 119 F.3d at 810 (noting that the Courts of Appeals for the First, Fourth, Eighth, and Ninth Circuits review district court sealing orders by mandamus and that the Courts of Appeals for the Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits review district court sealing orders by appeal).

70. *In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002).

71. *Id.* ("constitutional access claims engender de novo review"); United States .v Smith, 123 F.3d 140, 146 (3d Cir. 1997) ("[W]hen we deal with a First Amendment right of access claim, our scope of review of factual findings is substantially broader than that for abuse of discretion. With respect to the newspapers' common law right of access to judicial proceedings and papers, we review the district court's order for abuse of discretion.") (citations and quotation marks omitted); EEOC v. Westinghouse Elec. Corp., 917 F.2d 124, 127 (4th Cir. 1990) ("Under the common law the trial court's denial of access to documents is reviewed for abuse of discretion, but under the First Amendment, such denial is reviewed de novo and must be necessitated by a compelling government interest that is narrowly tailored to serve that interest.").

Storage

Some local rules provide presumptive time limits for sealing records, and these rules were motivated in substantial part by storage considerations. When case files were in paper form, before the advent of electronic filing, clerks of court kept sealed records in their vaults.[72] When it was time to send case files to National Archives records centers, the clerks usually kept the sealed records, because the records centers were ill-equipped to keep records sealed.[73]

Many courts enacted local rules specifying a time limit after which sealed documents would be unsealed, returned, or destroyed. It is important to observe that the return or destruction of sealed documents makes them even less available to the public than they were when they were sealed but in the court's care. Some local rules, therefore, provide for unsealing documents after the expiration of a time limit, unless the court orders otherwise, and do not list return or destruction as options.

Procedural Checklist

Courts generally require the following when a record is sealed or a proceeding is closed:

1. Absent authorization by statute or rule, permission to seal must be given by a judicial officer.

Clerks' offices should not agree to seal a record unless directed to by a statute, rule, or court order.[74] Also, sealing requires more than an agreement among the parties.[75]

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72. *See, e.g.*, *In re* Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994).

73. *See, e.g.*, *In re* Estate of Martin Luther King, Jr. v. CBS, Inc., 184 F. Supp. 2d 1353, 1356–61 (N.D. Ga. 2002).

74. *See, e.g.*, United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (reviewing sealed reports by a special master, the court observed, "While

2. Motions to seal should be publicly docketed.

Public notice of motions to seal gives the public, the news media, and interested parties an opportunity to be heard on the matter.[76]

3. Members of the news media and the public must be afforded an opportunity to be heard on motions to seal.

Courts routinely permit non-parties to intervene for the purposes of challenging motions to seal.[77]

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we think that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so."); Media Gen. Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005) ("The decision to seal documents must be made after independent review by a judicial officer, and supported by findings and conclusions specific enough for appellate review.") (quotation marks omitted).

75. R&G Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 584 F.3d 1, 12 (1st Cir. 2009) ("Sealing orders are not like party favors, available upon request or as a mere accommodation."); *see* N.D. & S.D. Miss. Civ. R. 79(d).

76. *See* Washington Post v. Robinson, 935 F.2d 282, 289 (D.C. Cir. 1991); *In re* Herald Co., 734 F.2d 93, 102 (2d Cir. 1984); United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982); *In re* Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475 (6th Cir. 1983).

77. *Washington Post*, 935 F.2d at 289, 292; *In re* Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); United States v. Aref, 533 F.3d 72, 81 (2d Cir. 2008); United States v. Raffoul, 826 F.2d 218, 221–22 (3d Cir. 1987); *In re* Knight Publ'g Co., 743 F.2d 231, 234 (4th Cir. 1984); Ford v. City of Huntsville, 242 F.3d 235, 241 (5th Cir. 2001); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475–76 (6th Cir. 1983); *In re* Associated Press, 162 F.3d 503, 507 (7th Cir. 1998); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 949 (9th Cir. 1998); *In re* Tribune Co., 784 F.2d 1518, 1521 (11th Cir. 1986).

4. There should be a public record of permissions to seal.

There should be a public record of what is sealed and why, consistent with the reason for sealing.[78]

5. Sealing should be no more extensive than necessary.

Although it is often easier to seal more than is necessary, courts should be careful to seal only the portions of the record that require sealing.[79] An entire case file should not be sealed to protect the secrecy of some documents. An entire filing should not be sealed to protect the secrecy of an exhibit. When possible, redacted versions of sealed documents should be filed

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78. *Washington Post*, 935 F.2d at 289; United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) ("the fact that a sealing order [has] been entered must be docketed"); *In re Associated Press,* 162 F.3d at 510 ("Sealing of the entire explanation would indeed be an extraordinary step for a district court to take, given the heavy burden it would place on the Press . . . ."); *In re* Search Warrant, 855 F.2d 569, 575 (8th Cir. 1988) ("The fact that a closure or sealing order has been entered must itself be noted on the court's docket, absent extraordinary circumstances."); *cf. In re* Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986) ("if the court concludes that a denial of public access is warranted, the court may file its statement of the reasons for its decision under seal"); *In re* Copley Press, Inc., 518 F.3d 1022, 1028 (9th Cir. 2008) (the public does not have a First Amendment right to documents explaining why something should be sealed if those documents contain secrets that the sealing is designed to protect).

79. SEC v. TheStreet.com, 273 F.3d 222, 231 (2d Cir. 2001); United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982); Media Gen. Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005); United States v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983); Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869, 872 (7th Cir. 1997); United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir. 1982); Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 667 (D. Kan. 2008); United States v. Polsen, 568 F. Supp. 2d 885, 928 (S.D. Ohio 2008); *see* D. Alaska Civ. R. 5.4(a)(3); N.D. Cal. Civ. R. 79-5(a); N.D. Cal. Crim. R. 55-1; E.D. Mich. Civ. R. 5.3(c)(2); N.D. & S.D. Miss. Civ. R. 79(b); W.D. Wash. Civ. R. 5(g)(3).

publicly. Courts should be skeptical of arguments that following proper procedures is too burdensome.[80]

6. The record of what is sealed and why should be complete for appellate review.

The record of the case should include specific reasons for sealing and specific reasons for not employing more limited forms of secrecy, such as redacting a document instead of sealing the whole document.[81] If part of the record of what is sealed and why must itself be sealed to protect necessary secrecy, it should still be included in the case record for possible appellate review.

7. Records should be unsealed when the need for sealing expires.

Records are often sealed for a temporary purpose, and courts should follow procedures that ensure records become unsealed when they can be.[82]

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80. *See* Banks v. Office of the Senate Sergeant-at-Arms, 233 F.R.D. 1, 10–11 (D.D.C. 2005).

81. EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1410 (D.C. Cir. 1996); *In re* Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); *In re Herald Co.*, 734 F.2d at 100; *In re* Knight Publ'g Co., 743 F.2d 231, 234–35 (4th Cir. 1984); *In re Washington Post Co.,* 807 F.2d at 391; *In re Associated Press,* 162 F.3d at 510, 513 ("district courts should articulate on the record the reason for any order that inhibits the flow of information between the courts and the public."); *In re Search Warrant,* 855 F.2d at 574.

82. *See* United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994) ("Under the First Amendment, once an overriding interest initially necessitating closure has passed, the restrictions must be lifted."); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 948 (9th Cir. 1998) ("consistent with history, case law requires release of transcripts when the competing interests precipitating hearing closure are no longer viable"); United States v. Valenti, 987 F.2d 708, 714 (11th Cir. 1993).

The Federal Judicial Center

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