PRACTICAL ASPECTS OF PRIVACY AND CONFIDENTIALITY IN LITIGATION

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This manuscript provides a general overview on certain issues related to the disclosure of confidential information during litigation:

- First, when producing documents, what restrictions do two prominent privacy protection statutes — HIPAA and the Gramm Leach Bliley Act — impose on civil litigants?
- Second, when can a party obtain a protective order that precludes one of its adversary's own attorneys from accessing documents designated by the producing party as confidential?
- Third, when can a party file a document under seal in the federal courts and in North Carolina state courts?
- Finally, what information, if any, must be redacted from documents filed in North Carolina's federal and state courts?

I. THE APPLICATION OF HIPAA AND THE GRAMM LEACH BLILEY ACT TO CIVIL DISCOVERY

A number of federal statutes regulate the disclosure of private or confidential information. This section looks into how two of the more well-known privacy-related acts — the Health Insurance Portability and Accountability Act ("HIPAA") and the Gramm Leach Bliley Act ("GLBA") — apply to civil litigation.

A. HIPAA

1. Overview

HIPAA restricts health care entities from disclosure of "individually identifiable health information." The definition of "individually identifiable health information" includes information:

- that relates to the individual's past, present or future physical or mental health or condition;
- that relates to the provision of health care to the individual,

- that relates to the past, present, or future payment for the provision of health care to the individual;

- and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual. (Individually identifiable health information includes many common identifiers such as name, address, birth date, or Social Security Number.)

HIPAA preempts state law that is contrary to HIPAA, unless a contrary state law is "more stringent" than HIPAA's own requirements. Id. § 160.203; see also Townsend v. Shook, No. 5:06cv70 (W.D.N.C. May 31, 2007).

2. HIPAA and civil discovery

As a general matter, HIPAA was not intended to allow litigants to circumvent their obligation in civil discovery to disclose relevant, discoverable information. E.g., Garnish v. M/V EYAK, LLC, No. 1:07-cv-08, 2008 WL 2278238, at *4 (D. Alaska May 29, 2008). Rather, HIPAA's regulations expressly discuss when HIPAA-protected information may be disclosed during litigation.

First, a health care provider may disclose records protected by HIPAA if the subject of those records authorizes their release. See 45 C.F.R. § 164.502(a)(1)(iv) (2008). The requirements for a valid authorization are found in section 164.508 of chapter 45.

Second, even if a release has not been executed, a health care provider may still disclose protected medical information under HIPAA if required to do so by a court order. See id. § 164.512(e)(1)(I); see also Metzger v. Am. Fidelity Assurance Co., No. CIV-05-1387-M, 2007 WL 3274921, at *1 (W.D. Okla. Oct. 23, 2007) (explaining that "it is a routine matter in litigation for courts to require production, where necessary, of records that reflect medical treatment, sometimes with the identities of the actors redacted"); Barnes v. Glennon, No. 9:05-CV-0153, 2006 WL 2811821, at *5 n.6 (N.D.N.Y. Sep. 28, 2006) (patient's consent not needed to make disclosure required by court order).

Finally, if provided with the proper assurance, a health care provider may disclose protected medical information in response to a discovery request. The assurance, which must be provided by the party seeking the information, needs to show "that reasonable efforts have been made by such party to secure a qualified protective order." Id. § 164.512(e)(ii)(b). An assurance is satisfactory under HIPAA if (1) the parties seeking the request for information have agreed to a qualified protective order and have submitted it to the court, or (2) if the party seeking the information has requested a qualified protective order from the court. Id. § 164.512(e)(iv)(A), (B).

The terms of a HIPAA-qualified protective order are discussed below.

3. A HIPAA-qualified protective order

A qualified protective order under HIPAA must satisfy two aims:

- First, the order must prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

- Second, the order must require the return or destruction of the protected material at the litigation's conclusion.

Id. § 164.512(e)(v).

A HIPAA-qualified protective order not only allows a party to disclose protected medical information in response to discovery requests, but also allows a party to disclose the records during an ex parte interview. See, e.g., Santaniello ex rel. Quadrini v. Sweet, No. 3:04CV806, 2007 WL 214605, at *3 (D. Conn. Jan. 25, 2007); Bayne v. Provost, 359 F. Supp. 2d 234, 242-43 (N.D.N.Y. 2005).

4. HIPAA violations

There is no private cause of action under HIPAA. E.g., Iannucci v. Mission Hosp., No. 1:08CV471, 2008 WL 5220641, at *3 (W.D.N.C. Dec. 11, 2008). The North Carolina Court of Appeals, however, has adopted HIPAA as the standard of care medical practitioners must meet in preventing unauthorized disclosure of patient treatment information. See Acosta v. Faber, 180 N.C. App. 562, 638 S.E.2d 246 (2006).

B. GLBA

1. Overview

The GLBA is a privacy protection statute that affects the ability of financial institutions to disclose its customers' financial information. The act was enacted with the view that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a) (2008).

The GLBA's purposes are threefold:

- To insure the security and confidentiality of consumer records and information;

- To protect against any anticipated threats or hazards to the security or integrity of such records; and

- To protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer.

See 15 U.S.C. § 6801(b) (2008).

To achieve these goals, a financial institution — before it releases any customer's nonpublic personal information to a non-affiliated third party — must give its customers (1) notice of the disclosure and (2) an opportunity to opt out of the disclosure. Id. § 6802.

2. Application to civil discovery

The GLBA's notice and opt-out provisions would provide a significant hurdle to responding to civil discovery requests or to a subpoena. Accordingly, some financial institutions have argued that the GLBA wholly precludes them from producing their customers' nonpublic private information.

Courts addressing this argument have turned to an exception to the GLBA found in section 6802(e) of the Act. Under that section, a financial institution may disclose information otherwise subject to the GLBA's requirements:

> [t]o comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

Id. § 6802(e)(8) (2008).

The leading case addressing this question is Marks v. Global Mortgage Group Inc., 218 F.R.D. 492, 495-97 (S.D.W.V. 2003). In Marks, the magistrate judge concluded that the exception in section 6802(e) applied to responses to civil discovery requests on account of the phrase "[t]o comply with Federal, State, or local laws, rules, and other applicable legal requirements." Id. at 495.

The district court judge, however, disagreed. He interpreted the first portion of section 6802(e) — the portion on which the magistrate judge relied — not to apply to civil discovery, but instead to mean that financial institutions can avoid compliance with "the numerous federal and state statutes, rules, and legal requirements that regulate the financial industry." Id. at 496.

Nonetheless, the district court adopted the magistrate judge's conclusion, but did so by relying on the last portion in section 6802(e) — "to respond to judicial process or

government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." In particular, the district court judge seized on the term "judicial process," which he reasoned includes civil discovery requests. To reach this conclusion, when the GLBA itself does not define "judicial process," the Marks court referred to a single piece of the GLBA's legislative history. Legislative history attendant to the House Bill discussed a judicial process exception without reference to an exception for "government regulatory authorities." Id. (citing H.R. 74, 106th Cong. 93, 108-09, 124 (1999))

In the court's view, the term "judicial process" was separate and distinct from the phrase "government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." Id. Thus, the third portion of section 6802 contains not one, but two different exceptions: one exception for responses to "judicial process," and a second exception for responses to government regulatory authorities. Id.

With little legislative history as support, the Marks court then turned to the more general principle that "the mere fact that a statute generally prohibits the disclosure of certain information does not give parties to a civil dispute the right to circumvent the discovery process." Id. Here, the court relied on two cases from the District of Columbia Court of Appeals in which that court held that silence as to discovery in non-disclosure statute does not mean that information protected by the statute could not be disclosed during discovery. Id. at 496-97. As the D.C. Court of Appeals explained, "in the absence of a specific prohibition against disclosure in judicial proceedings, . . . clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice." Freeman v. Seligson, 405 F.2d 1326, 1348-49 (D.C. Cir. 1968).

State and federal courts considering this issue have parroted the Marks opinion. See, e.g., Barkley v. Olympia Mortgage Co., No. 04-CV-475, 2007 WL 656250, at *19-20 (E.D.N.Y. Feb. 27, 2007); Ex parte Nat'l W. Life Ins. Co., 899 So. 2d 218, 226 (Ala. 2004). No federal appellate court, however, has addressed the question.

Although the GLBA does not excuse the disclosure of protected information during discovery, a financial institution can comply with the spirit of the GLBA by entering into a confidentiality order that limits the disclosure during litigation of its customers' nonpublic personal information. See., e.g., The KnifeSource, LLC v. Wachovia Bank, N.A., No. 6:07-677-HMH, 2007 WL 2326892, at *1 (D.S.C. Aug. 10, 2007).

II. OBTAINING A PROTECTIVE ORDER THAT PRECLUDES AN ADVERSARY'S ATTORNEY FROM ACCESSING CONFIDENTIAL INFORMATION

In a case between business competitors, one party might worry that any confidential documents disclosed to the opposing party's in-house counsel might create a competitive disadvantage for the disclosing party. The theory is that the in-house counsel is so involved in the competitor's business planning that he will not, as a practical matter, be able to segregate out the confidential information he learns during the litigation when he is involved in his company's competitive business decisions. See, e.g., Vishay Dale Elecs., Inc. v. Cyntec Co., No. 8:07CV191, 2008 WL 4372765, at *2 (D. Neb. Sep. 22, 2008). To prevent the chance for such inadvertent disclosure, the disclosing party might move the court for a protective order that limits the disclosure of confidential information to the opposing party's in-house counsel.

A. "Competitive Decisionmaking"

The courts that have issued protective orders that bar in-house counsel from viewing an adversary's confidential documents have done so when the in-house counsel engages in a company's "competitive decisionmaking." See, e.g., id. at *4. In the seminal case in this area, U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), the Court of Appeals for the Federal Circuit defined "competitive decisionmaking" to be "shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." Id. at 1468 n.3.

To determine whether an in-house counsel engages in competitive decisionmaking, a "comprehensive inquiry" is needed into the in-house counsel's actual role in his company's affairs. See AutoTech Tech. Ltd. P'ship v. Automationdirect.com, Inc., 237 F.R.D. 405, 407 (N.D. Ill. 2006). It is not enough that an in-house attorney has regular contact with corporate officials. Rather, the in-house attorney must truly advise and participate in the company's competitive decisionmaking. Matsushita Elec. Indus. Co. v. United States, 929 F.2d 1577, 1580 (Fed. Cir. 1991).

B. Specific applications

As these standards suggest, the decisions in this area of the law are fact-specific:

- One area in which parties have succeeded in moving for protective orders to prevent in-house counsel from viewing documents is the patent arena. Those courts have explained that advice related to patent prosecution and advice on the scope of patent claims constitute competitive decisionmaking. See Andrx Pharms, LLC v. GlaxoSmithKline, PLC, 236 F.R.D. 583, 586 (S.D. Fla. 2006). As one court explained, patent attorneys exposed to the confidential information of their client's customers would face a "sisyphean task" if forced to "constantly challenge the origin of every idea, every spark of genius" in future patent prosecutions. See Commissariat A L'Energie Atomique

v. Dell Computer Corp., No. Civ.A. 03-484-KAJ, 2004 WL 1196965, at *3 (D. Del. May 25, 2004)

- An attorney's participation in patent prosecution, however, does not automatically disqualify him from viewing confidential documents. See, e.g., MedImmune, Inc. v. Centocor, Inc., 271 F. Supp. 2d 762, 774 (D. Md. 2003) (denying restriction to patent counsel's access to confidential information because no evidence proffered that attorney participated in product design, pricing, or marketing).

- In Autotech Technologies, the court issued a protective order to prevent an in-house counsel, who was also the company's chief executive officer, from viewing confidential documents. See 237 F.R.D. at 409-413. The court found that the attorney was "the person most actively involved in the decisions relating to the design, development, manufacturing, and marketing of the products that were the subject of the litigation." Id. at 409.

- In Glaxo Inc. v. Genpharm Pharms., Inc., 796 F. Supp. 872 (E.D.N.C. 1992), the court refused to prevent an in-house counsel from accessing the opposing party's confidential documents when the attorney attested that, for over twenty-eight years, he had not advised his company about competitive decisions such as pricing, scientific research, sales, or marketing. Id. at 874.

- In Volvo Penta of the Americas, Inc. v. Brunswick Corp., 187 F.R.D. 240 (E.D. Va. 1999), a party's counsel was permitted access to confidential documents on account of both a lack of evidence that she played a role in her client's competitive decisionmaking and the assistance that she could provide to her client given the fast pace of litigation in that case.

- In Carpenter Tech. Corp. v. Armco, Inc., 132 F.R.D. 24, 28 (E.D. Pa. 1990), the court explained that the advice of in-house counsel with specialized industry knowledge could be essential to proper handling of litigation, and therefore cut against any restriction on in-house counsel reviewing confidential information.

III. FILING CONFIDENTIAL DOCUMENTS UNDER SEAL

It is standard practice for parties to agree to a protective order that restricts the persons who can view documents designated by the producing party as confidential. The protective order ensures that competitively sensitive documents are not revealed during the discovery process.

Although a protective order may serve the parties well during discovery, a separate inquiry arises when one of the parties desires to file a motion that discloses information or documents designated as confidential. The fact that a party designated a document as "confidential" — even if that designation was made pursuant to a court-approved protective order — does not mean that the document qualifies to be filed under seal. Rather, as explained below, the court must perform an independent analysis for each document that is proposed to be filed under seal.

A. Right to access public documents

The filing of documents under seal requires judicial scrutiny owing to two separate rights of the public to view court documents. One right is derived from the common law. The second right is embedded in the First Amendment of the United States Constitution.

First, the common law presumes a right to inspect and copy all judicial records and documents. The common law right of access rests on the notion that the professional and public monitoring of judges is an essential feature of democratic control. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006); accord Landmark Commc'ns., Inc. v. Virginia , 435 U.S. 829, 839 (1978) (operations of the courts are matters of utmost public concern). This notion is undermined when a document is permitted to be filed under seal because the raw material underlying formal judicial action is shielded from public view. See City of Hartford v. Chase, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring).[1]

Second, the right to access public documents under the First Amendment extends only to particular judicial records and documents. Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180-81 (4th Cir. 1988). These documents include documents filed in connection with a motion for summary judgment, see Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988), and documents filed in connection with plea hearings and sentencing hearings in a criminal case. See In re Washington Post, 807 F.2d 383, 390 (4th Cir. 1986).

[1] In his concurrence in the City of Hartford opinion, Judge Pratt provided another, more practical reason why the filing of documents under seal should rarely be allowed: The special resources needed to execute a filing under seal, and to ensure that the document remains under seal (such as the creation of a special file, locked vault space, and special handling requirements) inflict a substantial burden on the judicial system. Id.

Importantly, the common law right to access and the First Amendment right to access are subject to different presumptions:

- The common law presumption may only be overcome if competing interests heavily outweigh the interest in access. Stone, 855 F.2d at 180; accord Rushford, 846 F.2d at 253. Applying this test in Stone, the Fourth Circuit instructed that the public's right of access to judicial records and documents may be abrogated only in "unusual circumstances." 855 F.2d at 182.

- By contrast, where the First Amendment guarantees access, it may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest. Id. at 180; accord Rushford, 846 F.2d at 253. This standard is "more rigorous" than the standard that applies to the common law right to public access. Id. at 253.

Thus, when a party desires to move to seal a document, the party might wish to consider whether one or both of these rights to access would apply to a request to unseal the document.

B. Fourth Circuit Standards for Filing Under Seal

Because of the common law and First Amendment rights to access of public documents, the Fourth Circuit has crafted a specific protocol to which a district court must adhere when a party moves to file a document under seal:

- First, the district court must give the public (a) notice of a request to seal and (b) a reasonable opportunity to challenge the request. The court can accomplish these aims by docketing the motion to seal "reasonably in advance of their disposition."

- Second, the district court must consider less drastic alternatives to sealing.

- Third, if it grants the request to seal, the district court must provide reasons, supported by specific findings, for rejecting the alternatives.

In re Knight Publishing Co., 743 F.2d 231, 235 (4th Cir. 1984).

The Fourth Circuit has consistently required its district courts to abide by the Knight standards. Consider the following illustrations:

- In Stone, 855 F.2d at 178, the parties moved jointly to seal the record. Id. at 180. The district court granted the motion in a one-sentence order and left only the complaint, amended complaint, and answers unsealed. Id. The district court did not hold a hearing on the motion, and it did not give reasons for granting the motion. Id. On appeal, the Fourth Circuit

chastised the district court for failing "utterly to meet the requirements of Knight." Id. at 181. Accordingly, the Stone court reversed the sealing order, which had been challenged by the Baltimore Sun, and remanded for reconsideration. Id. at 182.

- In Rushford, 846 F.2d at 249, the district court analyzed whether three documents covered under a protective order remained subject to the order once they were filed with a summary judgment motion. Id. at 252. The Fourth Circuit held that once documents are made part of a dispositive motion, such as a summary judgment motion, they "lose their status of being 'raw fruits of discovery'" and become public records. Id. (quoting In re Agent Orange Prod. Liab. Litig., 98 F.R.D. 539, 544-45 (E.D.N.Y. 1983)). Because the district court did not consider any of the Knight factors at the time that the movant filed the confidential documents with its summary judgment motion, the Fourth Circuit remanded the case to the district court to apply those factors.

- In Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000), the district court sealed a confidential settlement agreement, but a newspaper reporter nonetheless obtained access to the agreement. After the district court held the newspaper in contempt, the Fourth Circuit concluded that the sealing order that served as the basis of the contempt motion did not comply with Knight. The Fourth Circuit noted that the district court failed to follow Knight even though the newspaper had already demonstrated interest in the case. Id. at 302-03.

Published opinions from district courts within the Fourth Circuit also show the importance of parties adhering to Knight. See, e.g., Collins v. Chem. Coatings, Inc., No. 5:07cv116, 2008 WL 5105277, at *1-2 (W.D.N.C. Dec. 1, 2008) (applying Knight standards to request to file under seal exhibits with confidential personal information); Hall v. United Air Lines, 296 F. Supp. 2d 652, 679-80 (E.D.N.C. 2003) (unsealing thousands of pages of documents because of lack of compliance with Knight).

The Knight standards are important to keep in mind not only when moving to seal a document, but also when moving for the entry of a protective order in a Fourth Circuit district court. As Knight and its progeny make clear, the fact that one party designated a document to be confidential, or even "attorneys' eyes only," does not abrogate the district court's duty to perform the analysis outlined in Knight. In the Eastern District of North Carolina, the following language has been deemed acceptable under Knight:

> The party submitting particular documents under seal shall accompany that submission with a motion to seal and a supporting memorandum of law in which the movant specifies the interests which would be served by restricting public access to those documents. The court will grant the motion only after providing adequate notice to the public

> and opportunity for interested parties to object, after carefully weighing the interests advanced by the movant and those interests favoring public access to judicial documents and records, and upon finding that the interests advanced by the movant override any common law or constitutional right of public access which may attach to the document(s). Documents submitted under seal in accordance with this paragraph shall remain under seal pending the court's ruling. If a party desiring that the information be maintained under seal does not timely file a motion to seal, then the materials will be deemed unsealed, without need for order of the Court.

See Arysta Lifescience N. Am. Corp. v. The Hide Group, No. 5:07-CV-144-BO(3) (Docket No. 16.)

C. Rules for Filing under Seal in North Carolina's Federal Courts

Each federal district court in North Carolina has specific procedures for filing documents under seal, and the same is true for the United States Court of Appeals for the Fourth Circuit:

1. Eastern District of North Carolina

Local Rule 79.2 governs sealed documents. Under that rule, absent statutory authority, no cases or documents may be sealed without a court order.

When a party files a motion to seal, the proposed sealed material shall be temporarily sealed, pending a ruling on the motion. If the motion is allowed, the sealed material is filed on the same day as the order allowing the motion. On the other hand, if the motion is denied, the movant has two options: (1) retrieving the material, or (2) having the material filed on the day that the motion is denied.

When the case is completed, including all appeals, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Within ten days after the court send notice to all counsel by mail, and within thirty days after final disposition, the court may order documents be unsealed, and they will be available for public inspection.

Finally, section (e) of this rule specifies the exact method by which documents to be filed under seal shall be delivered to the clerk's office. They must be enclosed in a red envelope, marked with the case caption, case number, and a descriptive title of the document, and prominently display a specific message about being filed under seal.

2. Middle District of North Carolina

The Middle District's rules concerning under-seal filing are found both in the court's local rules and its electronic case filing manual.

The relevant local rule is 79.4, which governs the custody and disposition of sealed documents. Under the rule, any sealed document in the clerk's office more than thirty days after the time for appeal has expired, or after an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk. Certain documents — complaints, answers, motions, responses, and replies — are forwarded to the General Services Administration for permanent storage regardless of whether they were filed under seal. According to Rule 79.4, the confidentiality of sealed document cannot be assured after the file is transferred to GSA.

Section G(6) of the Middle District's electronic case filing manual provides the mechanics of filing under seal. If a document is subject to an existing sealing order or sealing statute, then it must be filed electronically under seal. A motion to seal is filed using the proper docketing event on the ECF system. The document for which sealing is sought, plus a proposed order, must be submitted to the appropriate judge's e-mail box. When a party files a document electronically under seal under this rule, counsel is required to serve the sealed document in a conventional manner, such as U.S. mail.

3. Western District of North Carolina

Under Local Civil Rule 6.1, no materials may be filed under seal except by court order, pursuant to a statute, or in accordance with a protective order. When a party files a motion to seal, the party must state why sealing is necessary and why there are no alternatives to filing under seal. This requirement follows Knight. Rule 6.1 also contains a specific time period for public notice. After a party moves to file under seal, other parties, interveners, and non-parties may file objections and brief in opposition or support of the motion within fourteen days, the regular period for responding to a motion under Local Civil Rule 7.1.

At the final disposition of a case, any case file or documents under seal that have not previously been unsealed by the Court shall be unsealed, unless otherwise ordered by the Court.

4. Fourth Circuit Court of Appeals

The Fourth Circuit's rules for filing under seal are found in Local Rule 25(c). Among other provisions, Rule 25(c) requires counsel to file a certificate of confidentiality when a party seeks to file documents that are held under seal by another court or agency. The certificate must (1) identify the sealed material, (2) list the dates of the orders sealing the material, (3) specify the terms of the protective order governing the information, and (4) identify the appellate document that contains the sealed information.

Local Rule 25(c)(2) makes clear that, in the first instance, the lower court or agency should receive any motions to seal. There are, however, three limited circumstances in which a motion to file under seal may be made to the Fourth Circuit:

- A change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue below;

- The need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or

- Additional material filed for the first time on appeal warrants sealing.

Any motion to seal made to the Fourth Circuit must comply with Knight's mandates. The movant must state the reasons why sealing is necessary, and explain why a less drastic alternative to sealing will not afford adequate protection.

Subsection (3) then provides the mechanics for filing, including the method for filing, how to mark the sealed material, and the number of copies filed and served.

D. Sealing of judicial documents under North Carolina law

Separate from any federal rights, the public has the right to inspect court records in criminal and civil proceedings in North Carolina under section 7A-109(a) of the General Statutes.

Notwithstanding this statutory right, however, the North Carolina Supreme Court has held that "a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public." In re Will of Hester, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987). The court's authority to shield portions of its proceedings "is a necessary power rightfully pertaining to the judiciary as a separate branch of the government." Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999).

In Virmani, the Supreme Court instructed that the judiciary's "necessary and inherent power" to shield public records should "only" be exercised when:

> Its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.

Id., 515 S.E.2d at 685.

The Supreme Court then addressed the public's right under the North Carolina Constitution to access civil proceedings, concluding that the state Constitution guarantees a "qualified" constitutional right on the part of the public to attend civil proceedings.

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open." N.C. Const. art. I, sec.18. According to the Virmani court, this constitutional right to access is "not absolute" and "is subject to the reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes." Virmani, 350 N.C. at 476, 515 S.E.2d at 476. The right may be limited "when there is a compelling countervailing public interest and closure of the court proceedings of sealing of document is required to protect such countervailing public interest." Id., 515 S.E.2d at 476.

Like the Fourth Circuit, the North Carolina Supreme Court requires that a trial court, when evaluating whether or not to seal a document, must consider alternatives to sealing. Id., 515 S.E.2d at 476. Also like the Fourth Circuit, if the trial court elects to seal documents, the trial court must make findings of fact which are specific enough to allow for meaningful appellate review. Id., 515 S.E.2d at 476-77.

An application of the principles stated in Virmani is found in the recent case of Thomas Cook Printing Co. v. Subtle Impressions, Inc., No. 05 CVS 11566, 2008 WL 4695734, at * 3-4 (N.C. Sup. Ct. Oct. 24, 2008). In Thomas Cook Printing, the North Carolina Business Court permitted a class action settlement agreement concerning alleged violations of the Federal Telephone Consumer Protection Act to be filed under seal. In concluding that sealing the settlement agreement would be consistent with the interests of justice, the court listed three specific reasons: (1) the parties could have settled confidentially and filed a voluntary dismissal without filing the settlement agreement; (2) the settlement amount was "relatively insubstantial"; and (3) the subject matter did "not implicate substantial public policy concerns." Id. at *4. On the last point, the court noted that "neither the media nor the public [] voiced interest" in the plaintiff's allegations.

E. Relevant Provisions from the North Carolina Business Court Rules

The North Carolina Business Court Rules do not contain a specific provision that concerns filing documents under seal. Two Business Court Rules, however, do address the exchange and filing of confidential information.

First, Rule 10.1 allows a party to move for an order prohibiting the electronic filing in a case of specifically identified information. The motion must be supported by the following grounds:

- The information must be subject to a proprietary right or a right of confidentiality, and

- Electronic filing is likely to result in a substantial prejudice to those rights.

See BCR 10.1. Notably, Rule 10.1 contains a time restriction. To obtain an order under Rule 10.1, a party must file its motion "not less than three business days before the information to which the motion pertains is due to be filed with the Court." Id.

Second, Rule 17.1(a) — which addresses the topic to be discussed on a Case Management Meeting — requires the parties to confer about whether any security measures should be adopted to protect information that is produced in electronic format or that will be converted into electronic format and stored on counsel's computer systems. See BCR 17.1(a). The parties' discussion "should encompass whether and under what circumstances clients will be afforded access to the information produced by another party and what security measures should be used for such access." Id. Thus, the question of disclosure of confidential documents to an adversary's in-house counsel (discussed above) should be discussed at the outset of a case in the Business Court.

IV. REDACTING PERSONAL DATA IDENTIFIERS WHEN FILING DOCUMENTS

The Federal Rules of Civil Procedure, as well as the local rules of each of North Carolina's federal courts, have rules that bear on the filing of documents that contain personal data identifiers.

A. Federal Rule of Civil Procedure 5.2

Federal Rule 5.2(a) requires that the following information be redacted from any filing with the court:

- An individual's social-security number. The filing may include only the last four digits of the social-security number.
- An individual's taxpayer-identification number. The filing may include only the last four digits of the taxpayer-identification number.
- Birth date. The filing may include only the year of the individual's birth.
- The name of a minor. The filing may include only the minor's initials.
- A financial-account number. The filing may include only the last four digits of the financial-account number.

Subsection (b) contains limited exceptions to the redaction rule. Among the exceptions is a financial-account number that identifies property allegedly subject to forfeiture in a forfeiture proceeding.

Rule 5.2 also has provisions that relate to under-seal filings and protective orders. A court may order that a party, in lieu of Rule 5.2's required redactions, make a filing under seal. In addition, a party on its own may file an unredacted copy under seal of a redacted filing that the party made under Rule 5.2(a). A court may also issue a protective order that requires redaction of additional information or that limits or prohibits a nonparty's remote electronic access to a document filed with the court.

Subsection (h) addresses the waiver of Rule 5.2(a)'s protections. A person waives those protections as to their own information by filing it without redaction and not under seal.

The protections of Rule 5.2 extends to filings in the federal court of appeals under Rule 25(a)(5) of the Federal Rules of Appellate Procedure.

B. Local Federal Court Rules

The Eastern, Middle, and Western Districts have substantially similar privacy sections in their electronic case filing manuals. These sections mirror Rule 5.2, with the following additions:

- In all three courts, if a home address must be included, only the city and state may be listed. (This applies only to criminal cases in the Eastern District.)

- The Western District's electronic filing also calls for the filing, under seal, of a reference list that contains the complete personal data identifiers that were redacted in the filed document. The reference list is retained by the court, but it is not available for public access.

C. North Carolina Public Records Act

Under section 132.10(d) of the North Carolina General Statutes, "No person preparing or filing a document to be recorded or filed in the official records of the register of deeds, the Department of the Secretary of State, or of the courts may include any person's social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in that document, unless otherwise expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted."

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