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A Five-Step Inquiry for Filing Confidential Information in a Civil Case

Does your lawsuit involve potentially confidential information? For example, will the parties be producing business valuations, medical records, or employee background checks? What about the terms of a decedent's trust, or the assets of an estate? As a preliminary matter, the parties might decide to enter into a confidentiality agreement governing the use of discovery and protections against its misuse. That is entirely different from agreeing not to file documents containing confidential information in court records. Redacting information from the public view or sealing documents involves a much higher degree of scrutiny, and it is not up to the parties alone. Below is a five-step inquiry for filing confidential information in a civil case:

1. Is Your Document in the "Top 10"? There are 10 automatic exemptions from public disclosure. Rule 2.420 of the Florida Rules of Judicial Administration begins in subsection (a) by stating the general rule that the public shall have access to all judicial branch records, except as set forth below. Subsection (b) provides a number of definitions, and then subsection (c) itemizes 10 categories of confidential and exempt records. Generally speaking, these 10 categories are: (1) judge's notes; (2) court administrative memos; (3) complaints against judges; (4) judge evaluations; (5) unpaid court volunteer applications; (6) arrest warrants; (7) all records made confidential under the Florida and United States Constitutions and Florida and federal law; (8) all records deemed confidential by court rules or the Florida Statutes or case law; (9) any court record determined to be confidential if required to prevent harm, avoid injustice, or protect trade secrets; and (10) information about judges mentioned in an advisory opinion of a judicial ethics committee. Many of these categories are highly specific and probably seldom seen, but the much broader and potentially ambiguous subsections are (c)(7), (c)(8), and (c)(9).

2. What Information Is Protected by State and Federal Law Under Subsections (c)(7) and (c)(8)? The information protected by state and federal law under subsections (c)(7) and (c)(8) is set out in subsection (d)(1)(B), which contains 22 categories of records: (1) dependency, guardian ad litem and child neglect; (2) adoption; (3) social security number, bank account number, credit card number; (4) HIV tests; (5) sexually transmitted disease records; (6) birth records and parts of

death records; (7) abortions; (8) Baker Act; (9) substance abuse; (10) criminal defendant incompetency; (11) estate inventories and accountings; (12) domestic violence; (13) child abuse victims; (14) gestational surrogacy records; (15) guardianship and orders appointing court monitors; (16) grand jury; (17) family services for kids; (18) juvenile delinquency; (19) tuberculosis; (20) presentence investigation reports; (21) forensic behavioral health; and (22) defendants in drug court programs. If you have any of these, you need to file a subsection (d)(2) Notice of Confidential Information Within Court Filing indicating whether the entire document is confidential or identifying the precise location of confidential information, and using the form supplied in the Appendix to Rule 2.420. The clerk will review your notice, locate the corresponding information, and redact it from public and online access. If the clerk cannot find that the information in your notice falls among the list of 22 items, he or she will contact you within 5 days, and then keep it confidential for another 10 days pursuant to subsection (d)(2)(B), in which case you can file what is known as a (d)(3) Motion, described in more detail in the sections below, to have the judge decide. Pursuant to subsection (d)(4), you also need to provide a specific notice to any affected non-parties, and any interested person can file a (d)(2) notice if the filer of the document with confidential information neglected to do so.

3. When Is Confidentiality Appropriate to Prevent Harm or Avoid Injustice under Subsection (c)(9)? This rule includes any court record determined to be confidential in case decision or court rule on the grounds that confidentiality is required to: (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; (ii) protect trade secrets; (iii) protect a compelling government interest; (iv) obtain evidence to determine legal issues in a case; (v) avoid substantial injury to innocent third parties; (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; or (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law. However, if it is not a trade secrets case and you are looking to prevent harm or avoid injustice, first review the applicable case law. Some of the relevant cases include: *Barron v. Fla. Freedom Newspapers, Inc.*,

531 So.2d 113, 119 (Fla. 1988) (holding medical records are not confidential if made an integral part of the proceedings); *Carnegie v. Tedder*, 698 So.2d 1310, 1312 (Fla. 2d DCA 1997) (holding that damaging allegations in counterclaim are inherent to civil proceedings and not confidential); *Rocket Grp., LLC v. Jatib*, 114 So.3d 398, 400-01 (Fla. 4th DCA 2013) (quashing trial court order compelling production of corporate financial information which parties agreed was confidential); *Carter v. Conde Nast Publ'ns*, 983 So.2d 23, 25 (Fla. 5th DCA 2008) (holding parties' agreement to file documents under seal without a hearing was improper); *Post-Newsweek Stations, Fla. Inc. v. Doe*, 612 So.2d 549, 553 (Fla. 1992) (refusing to withhold names on a prostitute's client list); *Sentinel Commc'ns Co. v. Watson*, 615 So.2d 768, 773 (Fla. 5th DCA 1993) (holding juror interviews that went beyond verdict and deliberations were not confidential); *Sentinel Commc'ns Co. v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), *rev. denied*, 503 So.2d 328 (Fla. 1987) (express finding of injury to an innocent third party where a minor child was adversely affected by the litigation and continued publicity would likely be highly detrimental to the child); and *Times Publ'g Co. v. Bollea*, 2016 WL 9083356, at *1 (Fla. 2d DCA 2016) (unpublished) (refusing to seal famous wrestler Hulk Hogan's court file).

To proceed under subsection (c), you must file a subsection (d)(3) Motion to Determine Confidentiality of Court Records (a "(d)(3) Motion"), which also requires a specific notice to be sent to any affected non-parties under subsection (d)(4). If you claim one of these (c)(9) categories, your (d)(3) Motion must specify that the "degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary" to protect the interests set forth above, and that there are "no less restrictive measures available" to protect those interests.

4. If the Case Law Supports It, How Do You File a (d)(3) Motion? The specific requirements of a (d)(3) Motion are listed in subsection (e): you must identify the particular court records or

the portion thereof specifically without revealing the confidential information, specify the bases for determining that the court records are confidential without revealing the confidential information, and set forth the specific legal authority and any applicable legal standards. Any written motion must include a signed certification that it is made in good faith and is supported by a sound factual and legal basis. The clerk must treat it as confidential until the court rules. A response may be filed within 10 days of service, and pursuant to subsection (e)(2), the court must hold a hearing within 30 days if the (d)(3) Motion is opposed. Even if the (d)(3) Motion is unopposed, the court in its discretion may hold a hearing because, again, the parties cannot simply agree among themselves to withhold court records from public view. The hearing must be an open proceeding, but any person may request that the court conduct all or part *in camera* to protect the interests at issue. Any person can request an expedited ruling, and the movant must hire a court reporter or rely on a court's recording device. The court may require prior public notice of the hearing on the (d)(3) Motion and must issue its ruling on it within 30 days of the hearing. In any event, the court may not determine that the number associated with a case or docket is confidential.

5. What Happens If the Court Grants Your (d)(3) Motion?

Assuming your (d)(3) Motion is successful, the resulting order must follow subsection (e)(3). It must state with as much specificity as possible without revealing the confidential information:

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the type of case in which the order is being entered; the particular grounds for determining that the information is confidential; whether any party's name is determined to be confidential and, if so, the particular pseudonym or other term to be substituted for the party's name; whether the progress docket or similar records generated to document activity in the case are confidential; the particular information that is determined to be confidential; and identification of persons who are permitted to view the confidential information. The court must also specifically find that (1) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests; and (2) no less restrictive measures are available to protect those interests. The clerk then has to publish the information pursuant to subsection (e)(4), such that the order must be posted on the website and in a prominent place in the courthouse within 10 days, and the order must remain in both locations for no less than 30 days. There are a number of provisions in subsection (e)(5) for vacating such an order. It is important to note that sanctions can be imposed pursuant to Rule 2.420(i) against a party or attorney who files either a (d)(2) Notice or a (d)(3) Motion in bad faith or without a sound legal or factual basis. Finally, in addition to Rule 2.420, which is outlined above, Rule 2.425 contains rules regarding minimizing the filing of sensitive information and how to truncate certain names and numbers.

David P. Hathaway, Esq., is the chair of Dean Mead's Litigation Department in Orlando. In addition, he leads the Trust and Estate Litigation Practice Group. He represents corporations and business people to resolve difficult disputes in both state and federal courts. Mr. Hathaway also represents trustees, personal representatives, and family members regarding wills, trusts and estates. He counsels clients in intellectual property matters. He has been a member of the OCBA since 2002. He may be reached at dhathaway@deanmead.com.