

Restricting Access to and Redacting Bankruptcy Records

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It is a basic principle that the public should have access to judicial documents. In other words, there is a “strong presumption in favor of [public] access to information filed with a court.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir.2003). The presumption of public access is based on the need for courts to have a measure of accountability and for the public to have confidence in the administration of justice. *See Valley Broad. Co. v. U.S. Dist. Court—D. Nev.*, 798 F.2d 1289, 1294 (9th Cir.1986). Nonetheless, courts will deny access to judicial documents in limited circumstances—generally, where open inspection may be used as a vehicle for improper purposes.¹ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).

Sealing Court Records Under Local Bankruptcy Rule 9018-1

The Bankruptcy Court for the Western District of Washington has a local rule that sets forth the procedure for sealing and redacting court records. *See* Local Bankruptcy Rule 9018-1.

Motions to File Under Seal - Overview

- Follow Local Bankruptcy Rule (LBR) 9013-1 for motions.
- In certain cases, it may be appropriate for the motion to be filed *ex parte* per LBR 9013-1(g), however, the court has discretion to set the matter for hearing.

¹ See analysis on page 5 for the standard for overcoming the presumption of public access.

Electronic Filing Process. If electronically filing a document under seal, make sure the motion to file under seal includes a specific statement of the applicable legal standards and basis, with evidentiary support in the form of declarations where necessary. A proposed order shall be uploaded through ECF.²

- **Use of Designated ECF Event.** The designated ECF event for the motion to file under seal will permit documents to be filed under seal without prior court approval, pending the court's ruling on the motion to seal. The document(s) sought to be sealed shall be electronically docketed separately from but simultaneously with the motion to file under seal. If sensitive material is in the motion itself, file it under seal using a designated ECF event.
- **Sensitive Material in Motion to Seal.** If the motion to seal, the opposition, reply, or declarations in support must be filed under seal, the filing party must still prepare and file a motion to file the pleading under seal then file the motion, opposition, reply, or declaration as a sealed document using a designated ECF event.
 - *Submissions on Paper.* Parties who are not ECF participants may submit a motion to file under seal and the documents sought to be filed under seal on paper, in accordance with Local Bankruptcy Rule 5005-2.

Sealing an Exhibit within a Public Document. If the document to be filed under seal is an exhibit to another document, an otherwise blank page should be inserted into the openly filed document reading "Exhibit __: FILED UNDER SEAL".

² See Local Bankruptcy Rule 9018-1 (b)(2)(A) for conventions on delivering a document sought to be sealed.

Denial of Motion to File Under Seal. If a motion to file under seal is denied, the document filed under seal will remain under seal and shall not be considered by the court for any purpose. If the filer subsequently wishes to have the document considered by the court, the document must be re-filed using a nonrestricted ECF docket event.

Access to Sealed Documents. Except as provided under 11 U.S.C. §§107(c)(2) and (3) or otherwise ordered by the court, only the filer has access to the sealed document on the public docket. Any other party seeking disclosure of the sealed document must file and serve a motion pursuant to LBR 9013-1 with notice to the party that requested the document be sealed.

Service. A publicly viewable Notice of Electronic Filing (NEF) will be generated when a motion to file under seal and related sealed document are placed on the docket. The motion will be viewable electronically through the Notice; however, the sealed document will not be viewable. Service of the motion to seal and the sealed document, where appropriate, must be made in accordance with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and these Local Bankruptcy Rules and be accompanied by a certificate of service.

Documents Remain Under Seal. When the court grants a motion to seal a particular document, that document will remain under seal until further order of the Court.

Redacting Documents According to Local Bankruptcy Rule 9018-1

Due to the presumption of public access, alternatives to filing a document under seal should be considered, including considering whether the document could be filed in a redacted version to address secrecy, privacy or confidentiality concerns while still providing the relevant information.³

³ See Fed. R. Bankr. P. 9037.

Procedure to Remove Protected Private Information from Documents Previously Filed.

Federal Rule of Bankruptcy Procedure 9037(a) limits the private information that may be disclosed in an electronic filing or non-electronic paper filing and requires the redaction of certain information by the filing party. If a document is filed that discloses protected private information, a party seeking to protect the private information on the publicly accessed electronic docket may file a motion (*See* LBR 9013-1) seeking to have the document redacted.

- Upon receipt of a motion to redact a previously filed document, the clerk shall temporarily block public access to the document at issue pending the court's determination of the motion.
- If the motion is granted, then within seven days of the entry of the order granting the motion, the party who filed the original unredacted document will be responsible for filing a redacted version of the document.
 - *Tip: The order will likely be Submitted But Not Entered by the reviewing judge if it does not contain this language.*
- When the redacted document is filed, the clerk will permanently block public access to the original unredacted version.

Overcoming the Presumption of Public Access

A party seeking to seal a judicial record bears the burden of rebutting this strong presumption by meeting a “compelling reasons” standard. *Foltz*, 331 F.3d at 1135. That is, the party must articulate compelling reasons supported by specific factual findings that outweigh the general presumption in favor of public access. *Id.* In turn, the court must carefully balance the competing interests of the public and the party who seeks to keep certain judicial records private. *Id.* After considering these interests, if the court seals certain judicial records, it must “base its

decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.” *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995) (citing *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1295 (9th Cir.1986)).

In general, “compelling reasons” sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. *Nixon*, 435 U.S. at 598, 98 S.Ct. 1306. The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will *not*, without more, compel the court to seal its records. *Foltz*, 331 F.3d at 1136.

The Bankruptcy Code, cited as 11 U.S.C § 107(b), has carved out the *limited circumstances* where bankruptcy courts must deny access to judicial documents and where they have discretion. *In re Roman Catholic Archbishop of Portland*, 661 F.3d 417, 429-30 (9th Cir. 2011). The code provides:

(b) On request of a party in interest, the bankruptcy court *shall*, and on the bankruptcy court’s motion, the bankruptcy court *may*—

- (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information;⁴ or
- (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.⁵

⁴ 11. U.S.C § 107(b)(1).

⁵ 11. U.S.C § 107(b)(2).

Section 107(c) protects “means of identification” from being publicly disclosed.⁶ Means of identification include “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual.”⁷

⁶ 11. U.S.C § 107(c)(1)(A).

⁷ 18 U.S.C. § 1028(d)(7).