**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**MARSHALL, TEXARKANA AND TYLER DIVISIONS**

**REGARDING CASES ASSIGNED TO**
**U. S. DISTRICT JUDGE RODNEY GILSTRAP AND**
**U. S. DISTRICT JUDGE ROBERT W. SCHROEDER III**

# STANDING ORDER REGARDING PROTECTION OF PROPRIETARY AND/OR CONFIDENTIAL INFORMATION TO BE PRESENTED TO THE COURT DURING MOTION AND TRIAL PRACTICE[1]

WHEREAS, consistency and uniformity in both the form and substance of the methods and procedures used by counsel to protect confidential and/or proprietary information presented during motion or trial practice is a meritorious goal and further;

WHEREAS, reasonable planning and steps by counsel to efficiently marshal such evidence in advance of the time for presentation will minimize the disruptions otherwise present in such protective measures during motion or trial practice is an additional meritorious goal and

WHEREAS, such conduct, and these orders for the implementation of the same, fall squarely within the Court's inherent power to manage its docket and oversee the fair presentation of evidence at all stages of the litigation process;

NOW, THEREFORE, IT IS ORDERED THAT :

1. Requests to seal or otherwise protect certain information of a confidential and/or proprietary nature from public disclosure during a hearing or trial should be made before the public disclosure of the information.

2. Any such request must demonstrate: a) that the information sought to be protected is of such a sensitive nature that its disclosure creates a risk of harm that outweighs the strong presumption in favor of public access to judicial proceedings; and b) that the parties have met and conferred in good faith concerning the manner in which the sensitive information will be presented at the hearing or at trial, with the goal of minimizing the need to seal the record and the courtroom.

3. Except for requests to redact information referenced in Fed. R. Civ. P. 5.2(a), requests to seal or protect information after its public disclosure at a hearing or trial must, in

addition to the preceding requirements, show good cause why the motion was not made in advance of the disclosure.

4. The terms of this Standing Order shall immediately apply to and supplement all active civil cases currently pending before the undersigned or that may otherwise be assigned to the undersigned hereafter.

SIGNED AND EFFECTIVE THIS 1st DAY OF JUNE, 2016.

**U. S. DISTRICT JUDGE RODNEY GILSTRAP**

**U. S. DISTRICT JUDGE ROBERT W. SCHROEDER III**

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[1] **Commentary**

*Background*

Since their adoption in 1937, the Federal Rules of Civil Procedure have required that at trial, the testimony of witnesses must be taken in open court. *See* Fed. R. Civ. P. 43. Courts have similarly recognized that "there is a strong presumption in favor of a common law right of public access to court proceedings." *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (citing *Nixon v, Warner Communications, Inc.*, 435 U.S. 589, 597–99 (1978)); *see also United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) (there is a "strong presumption that all trial proceedings should be subject to scrutiny by the public."). The U.S. Supreme Court has emphasized the societal importance of open trials, writing that they "assure the public that procedural rights are respected, and that justice is afforded equally" and cautioning that closed trials "breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980).

In order to overcome the strong presumption of access, courts have held that a party seeking to seal judicial records must provide "sufficiently compelling reasons that override the public policies favoring disclosure. . . . That is, the party must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process. *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (applying 9th Cir. law). When ruling on a motion to seal court records, the Federal Circuit has held that a court must "conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret." *Id.* Similarly, the Fifth Circuit has made clear that a district court's discretion to seal the record of judicial proceedings is to be exercised sparingly. *Federal Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)

*Sealing of Courtrooms / Redaction of Trial Transcripts*

As a result of privacy concerns due to the public availability of court documents online, Fed. R. Civ. P. 5.2 was adopted in 2007 in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. The rule provided that four "personal identifiers" (parts of social security numbers, years of birth, initials of a minor and certain digits of bank accounts) be redacted from public filings. In response, the Eastern District of Texas adopted Local Rule CV-5.2 which set forth a procedure for redaction of personal identifiers from court transcripts through a process which took place after the hearing or trial. The rule was limited to personal identifiers, but stated that parties could also request the redaction of additional information by motion. This "additional information" most often takes the form of confidential technical or financial information in complex civil cases. The rule did not set forth requirements for the timing for such additional motions, or establish standards for such redactions, or for the corresponding requests to seal the courtroom when information that would be the subject of such requests is used.

Since the adoption of CV-5.2, parties have pursued different approaches to protecting confidential information at hearings or trials. The parties to the case or an interested third party may request that the courtroom be sealed during the presentation of such testimony. Or they may seek alternative trial presentation procedures to protect the confidentiality of the information without requiring sealing, i.e. requiring witnesses not to read the information aloud, or place it on the courtroom display screens, or redacting names or financial numbers from the portions displayed at trial while leaving them in unredacted form in the admitted exhibits.

In addition, parties have requested either at the time or - assuming that the same timing as requests under CV-5.2 would apply - several days or weeks after the hearing or trial - that the relevant portions of the trial transcript be "sealed." The term "sealing" is actually a misnomer, since what is actually done is redaction of the publicly available version of the transcript, with the original "locked" version of the transcript still available to the district and appellate courts. The practice of processing substantial requests for redactions after a hearing or trial imposes on court staff significant burdens, and in many cases the requested redactions are of information which may have been publicly disclosed without any request for special treatment during trial, or which could have been protected at trial without sealing by an alternative method of presentation.

*This Order*

This standing order is based upon and codifies the existing case law which balances the interests of parties seeking to protect confidential information against the strong presumption in favor of a common law right of public access to court proceedings noted above. It does so by providing guidance as to when such requests should be made, and what standards apply to such requests.

*When Should the Request Be Made?*

The above standing order makes clear that requests to seal or otherwise protect information from public disclosure during a hearing or trial should be made before the public disclosure of the information. This avoids the current problem of parties mistakenly assuming that redaction and sealing requests can be made after the fact, as is the case for requests to redact information referenced in Fed. R. Civ. P. 5.2(a), and gives parties the maximum opportunity to work out sealing and redaction issues by agreement.

Requests to seal or protect information after its public disclosure at a hearing or trial are not prohibited, but must, in addition to the normal requirements, show good cause why the motion was not made in advance of the disclosure. Failing a clear showing of good cause such requests should be denied.

*What Are the Standards for Sealing/Redaction?*

The standards for sealing and redaction are well-established, as noted above, and the above standing order makes no substantive change to them, but instead simply brings them to the parties' attention by requiring that any such request must demonstrate:

a) that the information sought to be protected is of such a sensitive nature that its disclosure creates a risk of harm that outweighs the strong presumption in favor of public access to judicial proceedings; and
b) that the parties have met and conferred in advance and in good faith concerning the manner in which the sensitive information will be presented at the hearing or at trial, with the goal of minimizing the need to seal the record and the courtroom.

The latter requirement gives the parties and the Court the ability to utilize alternative methods of presentation to avoid unnecessary sealing of the courtroom, and redactions to the transcript, as well as opportunities to minimize the inherent courtroom disruptions that the sealing process includes.