Sealing Judicial Records in Trade Secret Litigation

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It is not uncommon for parties in trade secret and non-compete litigation to ask the court for permission to file documents under seal. In a recent post, this blog discussed one court's reaction, which was based primarily upon the public's interest in having access to judicial records. The court's reaction was not surprising given that courts historically have recognized that the public has a "general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communs., Inc., 435 U.S. 589, 597 & n.7 (1978).

While courts will make exceptions to keep trade secrets private, a "strong presumption in favor of access" is the starting point. A party seeking to seal a judicial record bears the burden of overcoming this strong presumption by showing 'compelling reasons' to deviate. To meet this standard, a party must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure. In turn, courts are then charged with conscientiously balancing the competing interests of the public and the party who seeks to keep certain judicial records secret. After considering these interests, if the court decides to seal 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. 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.

Trade secret litigants need to keep in mind that an order sealing the record will require a heightened showing, and they should not assume that such orders will be granted freely. Before asking a court to seal the record, parties should demonstrate to the court that they have considered other alternatives, such as redacting sensitive information.

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