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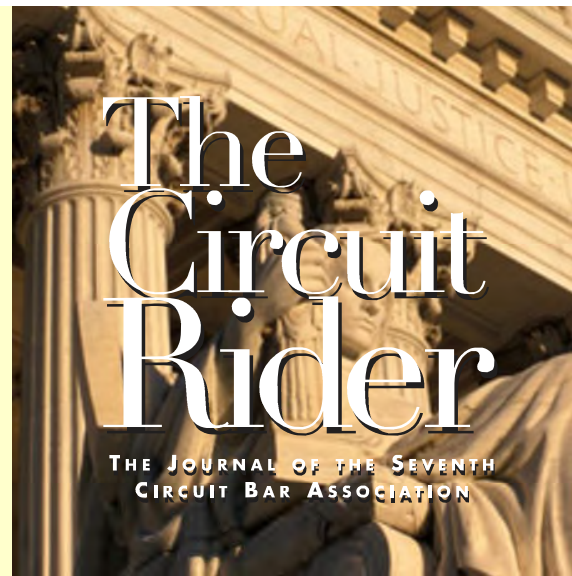
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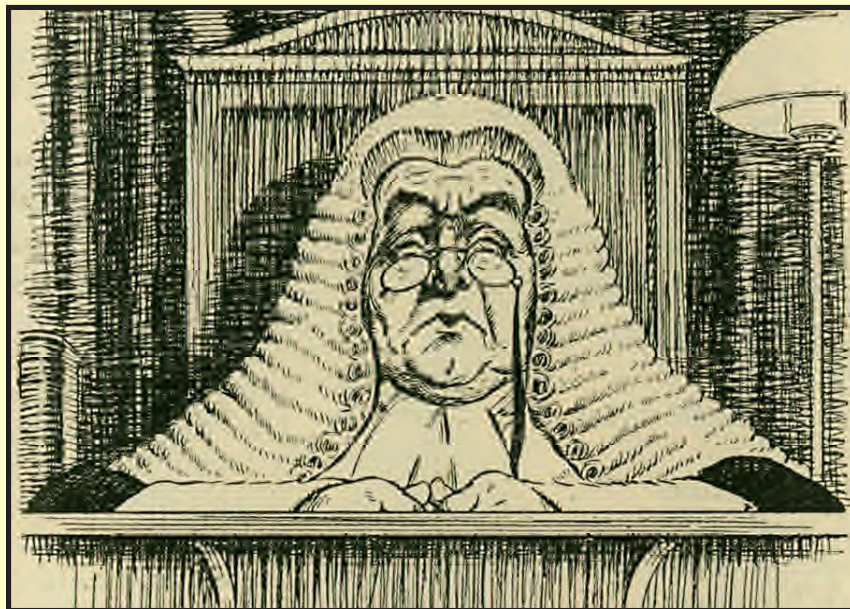
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Sealing Portions *of the* Appellate Record:

A GUIDE FOR SEVENTH CIRCUIT PRACTITIONERS

*By Alexandra L. Newman**

As a matter of tradition and constitutional law, judicial proceedings and documents are presumptively open to public viewing.¹ The right of public access to judicial proceedings originated in the context of criminal proceedings, but over time federal courts expanded the right to the context of civil proceedings because, as the Seventh Circuit has explained, “the contribution of publicity is just as important there,” especially because “mistakes in civil proceedings may be more likely to inflict costs upon third parties.”² This expansion of the right of public access to judicial proceedings has occurred because, courts have reasoned, public scrutiny over the court system serves to promote community respect for the rule of law, provide a check on the activities of judges and litigants, and foster more accurate fact finding.³ In the specific context of federal appeals, the Seventh Circuit has advised that “[i]nformation transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case’s outcome.”⁴

In light of this presumption of publicity, the Seventh Circuit has a history of forbidding sealed records, opinions, briefs, and arguments, “even if the litigants strongly prefer secrecy.”⁵ To the extent that parties previously agreed during the discovery phase to keep documents secret, the court has concluded that such agreements “are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in this court.”⁶

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To enforce the presumption of public access to the appellate record, Seventh Circuit Operating Procedure 10 requires a party to file a motion to seal documents contained in the appellate record if the party wants a document that was sealed by the district court to remain under seal in the court of appeals:

7th Circuit Operating Procedure 10: Sealing Portions of the Record

(a) *Requirement of Judicial Approval.* Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. §3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed.

(b) *Delay in Disclosure.* Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure.⁷

Because the presumption under Operating Procedure 10 is that documents will not be sealed, a motion to seal must demonstrate sufficient cause to keep documents under seal. A generic motion will not suffice. A motion to seal must be specific and must “analyze in detail, document by document, the propriety of secrecy providing reasons and legal citations.”⁸ The Seventh Circuit has recently advised that it “does not look favorably on indiscriminate, reflexive motions to seal the appellate record, but narrow, specific requests will be granted when based on articulated, reasonable concerns for confidentiality.”⁹ Yet parties must act promptly. Unless a party moves to seal within the 14-day time limit, the court will place into the publicly available appellate record all items previously sealed in the district court.¹⁰

The Seventh Circuit has identified *Baxter International, Inc. v. Abbott Laboratories* and *Union Oil Co. of California v. Leavell* as the seminal cases setting forth the criteria that parties must

follow when moving to seal documents in the appellate record.¹¹ The *Baxter International* and *Union Oil* requirements for motions to seal are not new, but the court has repeatedly noted — sometimes disparagingly — that even experienced counsel frequently fail to meet these requirements in their motions to seal.¹² Therefore, practitioners before the Seventh Circuit should be alert to the following principles when drafting motions to seal documents in the appellate record:

Excluding Documents from the Appellate Record

In light of the Seventh Circuit’s rigorous requirement that “counsel analyze in detail, document by document, the propriety of secrecy” for documents sought to be sealed in the appellate record, counsel, before drafting a motion to seal, should first determine whether any documents may be excluded from the appellate record in the first instance. The court has instructed that “it is often better to exclude the documents from the appellate record than to analyze at length the reasons why they should or should not be sealed.”¹³ Furthermore, the court has emphasized, returning documents to the district court “is appropriate when they are not among ‘the materials that formed the basis of the parties’ dispute and the district court’s resolution.’”¹⁴

In asking for a document to be returned to the district court, counsel should explain to the court of appeals how the document “contribute[s] little to the resolution of the case” and why the document “could be returned to the district court without loss to the appellate process.”¹⁵ A careful preliminary review of which documents actually constitute the basis of the parties’ dispute and the grounds for the district court’s resolution will undoubtedly save counsel time in preparing the motion to seal and enable the court of appeals to rule more efficiently on the motion.

Records Required to be Sealed by Statute or Rule of Procedure

As Operating Procedure 10 acknowledges, a statute or rule of procedure may require some portions of the appellate record to be sealed.¹⁶ For example, under 18 U.S.C. § 3509(d), the name of a minor victim of a sexual assault must be filed under seal. Similarly, certain “matter[s] occurring before the grand jury” must be sealed pursuant to Federal Rule of Criminal Procedure 6(e)(2), and under Seventh Circuit Rule 26.1(b) a litigant using a

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pseudonym must disclose his or her true name in the disclosure statement but may do so under seal. Counsel should specify the statute or rule of procedure under which the motion to seal is made.

It is noteworthy that not all federal statutes that concern data privacy contain explicit provisions requiring that records be sealed in judicial proceedings. For example, the “Standards for Privacy of Individually Identifiable Health Information” under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) does not provide for the filing of medical records under seal in court.¹⁷ The HIPAA privacy regulations instead require that health care providers and organizations, as well as their business associates, develop and follow procedures that ensure the confidentiality and security of protected health information when it is transferred, received, handled, or shared, but the regulations do not govern the transmission of medical records in judicial proceedings.¹⁸ Additionally, the Right to Financial Privacy Act of 1978 does not provide in general for the sealing of financial records in judicial proceedings; instead, the statute allows financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a federal grand jury to be disclosed for some purposes as authorized by Federal Rule of Criminal Procedure 6(e).¹⁹ Despite the lack of expansive or explicit sealing requirements under these statutes, prudent counsel should exercise care before allowing covered information to be unsealed; for example, counsel should consider requesting to exclude sensitive medical or financial records from the record, as described above, where the district court’s ruling did not necessarily rely on them.

Documents Containing Trade Secrets

The Seventh Circuit has recognized that trade secrets are a category of information that may be sealed in the appellate record.²⁰ Significantly, the court has observed that a trade secret “is one of the most elusive and difficult concepts in the law to define,” and

in many cases the existence of a trade secret will require an “ad hoc evaluation of all the surrounding circumstances.”²¹

In preparing a motion to seal, counsel should evaluate applicable trade secret doctrines to determine whether there is a colorable argument that a document sought to be sealed in the appellate record contains trade secrets. For example, under the Uniform Trade Secrets Act (which has been adopted in all states except New York, North Carolina, and Massachusetts), a “trade secret” is defined as “information, including a formula, pattern, compilation, program, information, including a formula, pattern, compilation, program, device, method, technique, or process, that (i) derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through appropriate means by other persons who might obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”²²

Additionally, courts frequently refer to common law factors (which are compiled in § 757 of the Restatement (First) of Torts) in determining whether information is a trade secret, including: (1) the extent to which the information is known outside of the party’s business; (2) the extent to which the information is known by employees and others involved in the party’s business; (3) the extent of measures taken by the party to guard the secrecy of the information; (4) the value of the information to the party’s business and to its competitors; (5) the amount of time, effort, and money expended by the party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²³ Counsel should evaluate these or other appropriate factors when moving to seal documents in the appellate record on the ground that they contain trade secrets; failure to do so can subject the motion to denial.²⁴

In one recent case, *KM Enterprises, Inc. v. Global Traffic Technologies, Inc.*, the Seventh Circuit granted a motion to seal a document in an antitrust action on the basis of trade secrets where the appellee-movant asked that the document be sealed or returned to the district court to protect sensitive, confidential pricing and customer information.²⁵

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The appellee described the document sought to be sealed as an affidavit with attachments containing “nonpublic, confidential data regarding [the appellee’s] *de minimis* sales into the district from 2008 through 2011[.]”²⁶ Specifically, the appellee explained that the purportedly confidential document “included transaction- level data that identifies the names of the individual customers, the products purchased, and the prices invoiced.”²⁷ The appellee urged that this information should be kept under seal in the appellate record, citing case law in support of the proposition that sensitive pricing information constitutes a trade secret.²⁸ The appellant, on the other hand, vigorously opposed the sealing of this document, arguing that the appellee’s proposed sealing did not survive a *Baxter International* analysis and urging that the document sought to be sealed was “fundamental to the outcome of the issue on appeal” and did not contain price information constituting a trade secret.²⁹ Ultimately, the Seventh Circuit concluded — without extensive analysis — that the appellee’s motion to seal was “narrow, specific, and justified,” and therefore granted the motion in full.³⁰



Documents Containing Privileged Information

The Seventh Circuit has not yet had an occasion to address a motion to seal based on privilege grounds in a written opinion, but the court has advised, in the abstract, that documents containing information that is covered by a recognized privilege are entitled to be kept secret on appeal.³¹ Specifically, the court has noted that a motion to seal might be founded on the attorney-client privilege.³² (Documents arguably protected by the attorney-client privilege may enter the district court record in the first instance, for example, through presentation to the district judge during *in camera* review.) Depending on the circumstances, the court of appeals might grant a motion to seal on the basis of other

privileges that are recognized under federal common law, such as the spousal communications privilege,³³ the priest-penitent privilege,³⁴ and the psychotherapist-patient privilege.³⁵ (In diversity actions in which state law supplies the rule of decision, privileges will be determined in accordance with state law,³⁶ and therefore the court may recognize additional privileges such as the physician-patient privilege,³⁷ the accountant-client privilege,³⁸ or other miscellaneous privileges.³⁹) Notably, the Seventh Circuit, like the Supreme Court, is reluctant to create new privileges,⁴⁰ so counsel should not expect the court to expand the categories of privileged documents that may be sealed in the appellate record.

Confidential Information

The fact that parties may consider confidential certain information contained in the appellate record documents will not necessarily justify the sealing of those documents under Operating Procedure 10.⁴¹ As the Seventh Circuit has remarked, “many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.”⁴² The court has admonished that “[p]eople who want secrecy should opt for arbitration,”⁴³ and therefore the court’s standard for

keeping confidential information under seal in the appellate record is very high.

The Seventh Circuit will consider sealing a document containing purportedly confidential information only if the party can show that the document contains, if not a trade secret, “something comparable whose economic value depends on its secrecy.”⁴⁴ To meet this exacting standard, a party cannot merely assert that a document contains confidential information; instead, the party must justify the conclusion that information should not be publicly disclosed.⁴⁵

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For example, instead of baldly asserting that confidentiality of a document would promote a party's business interest, the party must explain, at minimum, how disclosure of the document would harm the party's competitive position; whether this sort of harm constitutes a legal justification for secrecy in litigation; why the information contained in the document is sufficient to justify its sealing; and why the document should be sealed despite the district court's reliance on the document in a written opinion.⁴⁶ The Seventh Circuit expects a detailed and specific analysis of these issues before it will grant a motion to seal a document that a party contends contains confidential information.

For example, in *Baxter International* the Seventh Circuit denied a motion to seal documents containing an allegedly confidential licensing agreement between two parties where the parties did not justify that confidentiality would promote their business interests — the parties said only that the licensing agreement “is, by its terms, confidential,” and concluded without analysis that the terms of the agreement, if made public, could harm their competitive position.⁴⁷ Similarly, in *Milam v. Dominick's Finer Foods, Inc.* — concerning an appeal from the denial of a motion for relief from judgment on the basis of excusable neglect under Federal Rule of Civil Procedure 60(b)(1) — the court denied a motion to seal an affidavit that the moving party maintained “would potentially cause embarrassment and affect [counsel's] personal and professional reputation by disclosing personal matters”; the court reasoned that “[i]f the nature of the neglect reflects poorly on counsel, that supports disclosure rather than confidentiality: a lawyer's clients (current and future) are entitled to know what sort of error or other shortcoming led a district court to enter judgment against people he represents.”⁴⁸ In light of the court's demanding standard for sealing documents on the basis of confidentiality, as illustrated in these cases, counsel should prepare a thorough analysis of the confidential documents grounded in facts, not mere conclusions.



Other Categories of Information

In addition to the above-listed categories, the Seventh Circuit has advised that it will grant motions to seal documents containing some other categories of information, including documents containing the identities of undercover agents and documents containing information that, if disclosed, would lead to retaliation against an informant.⁴⁹ Notably, the court will not necessarily grant a motion to seal documents containing information about national security.⁵⁰ Indeed, the court has asserted that it “can imagine, though only barely, a sealed opinion and order in cases involving issues of national security,”⁵¹ and it has repeatedly pointed out that briefs and judicial opinions in the *Pentagon Papers* case and the hydrogen bomb plans case were not kept entirely under seal.⁵² The court's conclusion that opinions in these “grave matters”⁵³ belong in the public domain is consistent with the court's strong adherence to the policy that judicial proceedings and documents are presumptively public.

Briefs, Oral Arguments, and Judicial Opinions Will Not Likely be Sealed

Counsel should proceed with caution before asking the Seventh Circuit to seal briefs or judicial opinions or to conduct oral arguments in secrecy. The court deems such requests to be “extraordinary” and generally denies them.⁵⁴ As a policy matter, the court has advised that judicial opinions will not be sealed in the appellate record because they “are not the litigants' property. They belong to the public, which underwrites the judicial system that produces them.”⁵⁵ “Not only the judgment (which is in the open record) but also the district court's explanation for its judgment should be placed in public view.”⁵⁶ Moreover, the court has instructed, “the judicial proceedings held, and evidence taken, on the way to a final decision also are presumptively in the public domain.”⁵⁷ Consequently, in order to uphold the policy goal of a public judicial system, the court has concluded that “both judicial opinions and litigants' briefs must be in the public record, if necessary in parallel versions — one full version containing

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all details, and another redacted version with confidential information omitted.”⁵⁸ The court will reject any party’s attempt, however, to “hold the entire appellate proceedings off the public record”⁵⁹ or to keep “not only the details but also the *existence* of [a] case from public view”⁶⁰ by filing judicial opinions, orders, and judgments under seal.

Similarly, the court strongly disfavors motions to hold oral arguments in secrecy. For example, in *Central National Bank of Mattoon*, a lawyer moved at oral argument to close the argument and expel a newspaper reporter who the lawyer had noticed upon entering the courtroom.⁶¹ The court denied the motion and later explained in its opinion that a motion to conduct oral argument in secrecy is “extraordinary” relief that a party must request in advance of argument, “not only to give the other party fair warning and the bench an opportunity for due deliberation but also to give the press — which may be the only adversary of the request for secrecy — a chance to be heard.”⁶² When requesting that oral argument be held in secrecy, a party must make a strong showing that the party’s interest in secrecy outbalances the interest of the public or the press (as the self-appointed representative of the public) in access to judicial proceedings.⁶³ The court advised that this standard is not met by a party’s mere showing that public knowledge of the litigation could impair the party’s standing with customers; indeed, the court explained, a “bank’s interest in keeping the bad news about its management secret is meager in relation to the claims of a free press for access to governmental proceedings.”⁶⁴ The public’s interest in access to judicial proceedings is of paramount significance and generally trumps any party’s private business interests.

Conclusion

Sealing practices vary across the different federal courts of appeals. Some circuits appear to take an approach similar to the Seventh Circuit’s presumption against sealing.⁶⁵ But most circuits explicitly or implicitly provide for the opposite rule, so that documents that were sealed in the district court are automatically sealed in the appellate court record.⁶⁶ Which practice is better is a matter of debate.⁶⁷ The Seventh Circuit, however, is committed to its demanding approach in upholding the policy of presumptively public judicial proceedings and documents. Counsel practicing

before the Seventh Circuit therefore should keep in mind the principles outlined above in order to efficiently and properly respond when sealed documents are transmitted from the district court as part of the appellate record.

Notes:

- ¹ *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and *Nixon Comm’ns*, 435 U.S. 589 (1978)); but see *Bonds v. Utreras*, 585 F.3d 1061, 1073–76 (7th Cir. 2009) (presumption of public access does not apply to unfiled discovery materials).
- ² *Grove Fresh Distribs.*, 24 F.3d at 897 (citing *Smith v. U.S. Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992)); see generally Daniel Lombard, Note, *Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents*, 55 DEPAUL L. REV. 1067, 1077–96 (2006) (examining the use of Supreme Court precedent by lower courts in expanding the right of access to documents filed in civil cases).
- ³ *Grove Fresh Distribs.*, 24 F.3d at 897 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).
- ⁴ *United States v. Foster*, 564 F.3d 852, 853 (2009) (Easterbrook, C.J., in chambers) (citing *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002)).
- ⁵ *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (record documents); see also, e.g., *Milan v. Dominick’s Finer Foods, Inc.*, 567 F.3d 830 (7th Cir. 2009) (Easterbrook, C.J., in chambers) (record document); *Foster*, 564 F.3d at 854 (record documents); *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348–49 (7th Cir. 2006) (district court opinion); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (settlement agreement); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000) (record, briefs, argument, appellate court opinion); *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999) (appendix); *Pepsico, Inc. v. Redmond*, 46 F.3d 29 (7th Cir. 1995) (Easterbrook, J., in chambers) (district court opinion); *Lopacich v. Falk (In re Krynicki)*, 983 F.2d 74 (7th Cir. 1992) (Easterbrook, J., in chambers) (briefs); *Central Nat’l Bank of Mattoon v. U.S. Dep’t of Treasury*, 912 F.2d 897, 900–01 (7th Cir. 1990) (argument).
- ⁶ *Foster*, 564 F.3d at 853 (citing *Baxter Int’l*, 297 F.3d at 545).
- ⁷ U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT OPERATING PROCEDURES 8 (Sept. 26, 2000), available at <http://www.ca7.uscourts.gov/ops00.pdf>.
- ⁸ *Baxter Int’l*, 297 F.3d at 545–48; see *Foster*, 564 F.3d at 854–55; see generally PRACTITIONERS’ HANDBOOK FOR APPEALS TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT OPERATING PROCEDURES 98 (2012 ed.), available at <http://www.ca7.uscourts.gov/rules/handbook.pdf>.
- ⁹ *KM Enters., Inc. v. Global Trade Techs., Inc.*, 725 F.3d 718, 734 (7th Cir. 2013) (citing *Baxter Int’l*, 297 F.3d at 546–47).
- ¹⁰ *Bowers v. Fédération Internationale de l’Automobile*, 489 F.3d 316, 323 n.3 (7th Cir. 2007); cf. *Thanongsing v. Bd. of Educ.*, 462 F.3d 762 (7th Cir. 2006) (considering a document that was sealed in the district court—which the parties did not produce in the appellate record or move to keep sealed—where the parties stipulated as to the document’s contents).
- ¹¹ PRACTITIONERS’ HANDBOOK, *supra* note 8, at 98 (citing *Baxter Int’l*, 297 F.3d at 545–46); see *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (citing *Baxter Int’l*, 297 F.3d at 544, and *Union Oil*, 220 F.3d at 562).



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¹²*In re Specht*, 622 F.3d at 701 (“Because the motions to seal do not contend that the standards of *Baxter* and *Union Oil* have been satisfied, they are denied.”); *Foster*, 564 F.3d at 854 (describing a motion to seal documents filed by the U.S. Attorneys’ Office as “egregiously deficient” where it made no “serious attempt to apply the criteria of *Baxter International*,” failed to cite to that decision or any other, and failed to cite to any statute, rule, or privilege; “To call the performance of the United States Attorney’s Office in this case a disappointment would be a gross understatement.”); *Baxter Int’l*, 297 F.3d at 546 (noting the frequency with which litigants move to seal appellate records and “litigants’ frequent inattention to the legal standards for closure of records”).

¹³*Foster*, 564 F.3d at 854.

¹⁴*KM Enters.*, 725 F.3d at 734 (citing *Baxter Int’l*, 297 F.3d at 547).

¹⁵*Baxter Int’l*, 297 F.3d at 548; see also *KM Enters.*, Appellee’s Mot. to Seal 7 (Feb. 2, 2013), ECF No. 37 (moving to return documents to the district court); *KM Enters.*, 725 F.3d at 734 (granting motion to return documents to the district court).

¹⁶*Baxter Int’l*, 297 F.3d at 546.

¹⁷Pub. L. 104–191, 110 Stat. 1936.

¹⁸Similarly, the following privacy-related statutes do not explicitly provide for the sealing of records in judicial proceedings: Freedom of Information Act, 5 U.S.C. § 552; Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*; Privacy Act of 1974, 5 U.S.C. § 552a; Family Education Rights and Privacy Act, 20 U.S.C. § 1232g; Privacy Protection Act of 1980, 42 U.S.C. § 2000aa; Cable Communications Policy Act of 1984, 47 U.S.C. § 551; Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*; Video Privacy Protection Act of 1988, 18 U.S.C. § 2710; Driver’s Privacy Protection Act of 1994, 18 U.S.C. § 2721; Communications Assistance for Law Enforcement Act of 1994, 47 U.S.C. § 1001 *et seq.*; Taxpayer Browsing Protection Act of 1997, Pub. L. 105–35; Children’s Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 *et seq.*; Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; Wireless Communication and Public Safety Act, Pub. L. 106–81; E-Government Act, 44 U.S.C. § 101; Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108–159; and Do-Not-Call Implementation Act of 2003, 15 U.S.C. § 6101 *et seq.*

¹⁹12 U.S.C. § 3420.

²⁰*Baxter Int’l*, 297 F.3d at 546.

²¹*Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 724 (7th Cir. 2003).

²²UNI . TRADE SECRETS ACT § 1.4 (amended 1985); see also 765 ILCS 1065/2(d) (defining trade secrets under Illinois law); WIS. STAT. § 134.90(1)(c) (defining trade secrets under Wisconsin law); IND. CODE § 24–2–3–2 (defining trade secrets under Indiana law).

²³*Learning Curve Toys*, 342 F.3d at 722 (citations omitted) (applying Illinois law).

²⁴*In re Specht*, 622 F.3d at 701 (noting that the parties did not contend that the terms of their indemnity agreement were trade secrets and denying the motions to seal).

²⁵725 F.3d at 734.

²⁶*KM Enters.*, Appellee’s Mot. to Seal 2 (Feb. 2, 2013), ECF 37.

²⁷*Id.*

²⁸*Id.* at 5–6 (citing *Baxter Int’l*, 297 F.3d at 546–48; *Bal Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1346 (7th Cir. 1986); and *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 709 n.3 (7th Cir. 2010)).

²⁹*KM Enters.*, Appellant’s Mot. in Opp’n 4 (Feb. 7, 2013), ECF 40.

³⁰*KM Enters.*, 725 F.3d at 734.

³¹*Baxter Int’l*, 297 F.3d at 546.

³²*Id.*

³³*E.g., Trammel v. United States*, 445 U.S. 40, 45 n.5 (1980) (recognizing “independent rule protecting confidential marital communications” which was “not at issue” in this case involving only testimonial privilege).

³⁴*E.g., Totten v. United States*, 92 U.S. 105, 107 (1875) (recognizing that public policy forbids maintaining suit that would “inevitably lead to the disclosure of matters which the law itself regards as confidential,” which means that suits cannot go forward that require “disclosure of the confidences of the confessional”).

³⁵*E.g., Jaffe v. Redmond*, 518 U.S. 1, 15 (1996) (noting that the attorney-client privilege, the spousal communications privilege, and the psychotherapist-patient privilege are recognized under federal common law); see ED. R. EVID. 501, Notes of Comm. on the Judiciary, House Rpt. No. 93–650 (listing “required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer” as among Congress’s proposed “non-constitutional privileges which the federal courts must recognize”).

³⁶ED. R. EVID. 501 (“[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”); see *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 693 (7th Cir. 2005) (“Only in diversity litigation do state evidentiary privileges apply directly.”).

³⁷The Seventh Circuit has declined to recognize physician-patient or hospital-patient privilege under the power of federal courts to define new privileges. See *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007); *Northwestern Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995).

³⁸The Supreme Court has explained that no confidential accountant-client privilege exists under federal law. *E.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984); *Couch v. United States*, 409 U.S. 322, 335 (1973); accord *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (“There is no accountant-client privilege.”).

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³⁹ See generally Craig L. Unrath, ILL. INST. OR CONTINUING LEGAL, EDUC., *Privileges* (2009), available at <http://www.iicle.com/links/civiltrial09-ch7-unrath.pdf> (discussing recognized privilege doctrines under federal and state law).

⁴⁰ *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009) (holding that subpoenaed arbitration documents were subject to disclosure pursuant to arbitration agreement, declining to create an “arbitration privilege,” and noting that the Supreme Court similarly declined to create an “academic privileges privilege” (citation omitted)).

⁴¹ *Baxter Int'l*, 297 F.3d at 547; *Union Oil*, 220 F.3d at 567–68.

⁴² *Baxter Int'l*, 297 F.3d at 547; see *Union Oil*, 220 F.3d at 567.

⁴³ *Union Oil*, 220 F.3d at 568; see *Baxter Int'l*, 297 F.3d at 547 (“Trade secret law does not exhaust legitimate interests in confidentiality, and businesses that fear harm from disclosure required by the rules for the conduct of litigation often agree to arbitrate.” (internal citation omitted)).

⁴⁴ *Baxter Int'l*, 297 F.3d at 547.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 567 F.3d at 831; see also *Foster*; 564 F.3d at 854–55 (discussing *Milam*).

⁴⁹ *Foster*, 564 F.3d at 854; *Hicklin Eng'g*, 439 F.3d at 348 (collecting cases).

⁵⁰ *Union Oil*, 220 F.3d at 567 (“Even disputes about claims of national security are litigated in the open.”).

⁵¹ *Pepsico*, 46 F.3d at 30.

⁵² *Id.* at 30 (citing *United States v. Progressive, Inc.* 467 F. Supp. 990, *reh'g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (hydrogen bomb case)); *Union Oil*, 220 F.3d at 567 (citing *Progressive* as well as *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon papers case), and *In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (a national security case with public briefs and opinions, although parts of one opinion were redacted to protect confidences)).

⁵³ *Pepsico*, 46 F.3d at 30.

⁵⁴ *Central Nat'l Bank of Mattoon*, 912 F.2d at 900; *Pepsico*, 46 F.3d at 30.

⁵⁵ *Pepsico*, 46 F.3d at 31 (citations omitted).

⁵⁶ *Id.* at 30.

⁵⁷ *Id.* (citations omitted).

⁵⁸ *Hicklin Eng'g*, 439 F.3d at 348. As discussed below, the court will also generally deny requests to seal judicial opinions that concern disputes about claims of national security. See *Pepsico*, 46 F.3d at 30; *Union Oil*, 220 F.3d at 567.

⁵⁹ *Pepsico*, 46 F.3d at 30.

⁶⁰ *Union Oil*, 220 F.3d at 567.

⁶¹ 912 F.2d at 900.

⁶² *Id.* (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) and *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (concurring opinion)).

⁶³ *Id.*

⁶⁴ *Id.* On the other hand, the court noted that, in the specific context of banking litigation, the court would consider a motion for secret oral argument if made by the Comptroller of the Currency (which regulates national banks) or the Federal Deposit Insurance Corporation (which insures deposits in national banks) instead of the bank itself because “[t]he history of bank ‘runs’ could be thought to argue for controlling public access to information about disciplinary proceedings against banks.” *Id.* at 900–01.

⁶⁵ See 3d Cir. R. 106.0; 8th Cir. R. 25A(g); 11th Cir. R. 25-5.

⁶⁶ See 1st Cir. R. 11.0; 1st Cir. R. 30.0; 1st Cir. Op. R. 7; 2d Cir. R. 25(a)(1)(E); 4th Cir. R. 25(c); 6th Cir. R. 11(c); 6th Cir. R. 25(h); 9th Cir. R. 27-13; 10th Cir. R. 11.3(D); D.C. Cir. R. 47.1.

⁶⁷ *E.g.*, *Lombard*, *supra* note 2, at 1099–1100.