GUIDELINES FOR THE FILING OF CONFIDENTIAL INFORMATION IN CIVIL CASES

Parties to litigation occasionally have a need to file documents containing confidential information because that information is material to a pleading. Confidential information generally deserves protected status, but often exists alongside non-confidential information the public has a right to see. In the past, the sealed filing functionality of CM/ECF has been used to avoid the labor associated with redacting confidential information. Although counsel may designate a document as confidential in the context of discovery, pursuant to a confidentiality order, it does not follow that counsel may liberally seek to seal the entire document when filing, if only part of the document is confidential. The Court must carefully balance the presumptive public right of access against the confidentiality interest that is at stake in a particular case. Overuse of the "sealed" CM/ECF filing events is in direct conflict with the Court's obligation to maintain a public docket and to ensure that only confidential information is hidden from public view.

With this concern in mind, Local Rule 7A and the Form Confidentiality Order (Local Rules Appendix II) have been amended, effective January 1, 2013. Those amendments and these guidelines are meant to better ensure (1) that the procedure for docketing confidential information balances the private right to confidentiality with the public's right of access; (2) that the Court has an adequate record from which to assess the merits of requests to seal; and (3) that the process of making and determining such requests maintains a docket that is orderly and accessible to the public, the litigants, and the Court.

The first step in this process is for counsel to confer on the confidentiality issue prior to filing and to redact by agreement confidential information that is not material to the litigation. If counsel must file confidential information that is material to the litigation or if counsel cannot agree about the materiality of confidential information, then additional measures will be necessary. Typically, the confidential document can be cited in a pleading without incorporating the confidential information into the pleading. Sometimes, however, it is necessary to incorporate the contents of a confidential document into the pleading. Different approaches are called for if there is a need to seal portions of a pleading and not just portions of a supporting document.[1]

The following guidelines are offered to assist litigants with the process of preserving confidential information in the course of filing documents on the CM/ECF system. The first set of guidelines applies when there is no confidentiality order in place. The second set of guidelines applies when a confidentiality order is in place.

[1] In these Guidelines, the term "document" is a reference to supporting documents, or what the CM/ECF system calls "attachments." The term "pleading" is used to reference traditional pleadings (complaints and answers) and also motions, responses, replies, and statements of material fact. Be aware that in CM/ECF parlance a pleading might be referred to as a "Main Document," but herein the term document excludes pleadings.

WHEN THERE IS NO CONFIDENTIALITY ORDER IN PLACE	
If counsel are filing …	**Then counsel should ….**
Document(s)/Attachment(s) containing ***non-material*** personal data identifiers / similar information rendered confidential by statutory authority.	Redact the personal data identifiers and/or confidential information and file the document in its redacted form, *without* separately filing an unredacted version of the document. This document will be publicly available.
Document(s) /Attachment(s) containing ***material*** personal data identifiers / similar information rendered confidential by statutory authority.	Redact the personal data identifiers and/or confidential information and file the document(s) in redacted form as part of the initial filing which will be publicly available. Separately file an unredacted version of each redacted document so the Court has access to the material-but-confidential information. This should be done by choosing the "Unredacted Document" event on the CM/ECF system. The unredacted document will not be publicly available.
A non-confidential pleading that attaches one or more documents containing confidential information other than personal data identifiers / information rendered confidential by statutory authority (*i.e.*, the pleading, motion, or main filing event does not incorporate the confidential information; that information is found only in one or more attachments).	File the pleading, motion, or other event and attach to it all non-confidential attachments. In this initial filing, if counsel's motion to seal will not support sealing the entire confidential document, then attach a redacted version of the document. If counsel's motion to seal seeks to seal the entire document, then attach a separate placeholder attachment for the confidential document (a PDF document that reads, *e.g.*, "Confidential Exhibit G Customer List to be filed under seal"). After this initial filing event, file "Sealed Additional Attachments" and attach the confidential attachments in unredacted form. Finally, file a "Motion to Seal" *without* reattaching the proposed sealed documents. This motion "shall propose specific findings as to the need for sealing and the duration the document(s) should be sealed." It also "shall include a statement whether there is agreement of the parties to the sealing." D. Me. Loc. R. 7A(a). After the judge makes a ruling on the Motion to Seal, counsel must: (1) review the Order on the Motion to Seal; and (2) re-file ONLY those documents the judge orders be publicly available.

WHEN THERE IS A CONFIDENTIALITY ORDER IN PLACE	
If counsel are filing …	**Then counsel should ….**
Document(s) /Attachment(s) containing ***non-material*** personal data identifiers or similar information rendered confidential by statutory authority.	Redact the personal data identifiers and/or confidential information and file the document in its redacted form, *without* separately filing an unredacted version of the document. This document will be publicly available.
Document(s) /Attachment(s) containing ***material*** personal data identifiers or similar information rendered confidential by statutory authority.	Redact the personal data identifiers and/or confidential information and file the document(s) in redacted form as part of the initial filing. Counsel must also separately file an unredacted version of each redacted document so the Court has access to the material but confidential information. This should be done by choosing the "Unredacted Document" event on the CM/ECF system. The unredacted document will not be publicly available.
A non-confidential pleading/motion that attaches one or more documents that contain information protected under the confidentiality order, where counsel agree the information is ***non-material***.	Redact the document per agreement and file the document in its redacted form, *without* separately filing an unredacted version of the document and *without* filing a motion to seal. This document will be publicly available.

A pleading/motion that ***incorporates*** confidential information, usually by discussing the content of one or more confidential attachments/exhibits.	This is a special circumstance that requires counsel to file a Motion to Seal and to attach to that motion a **full and complete version** of the pleading and supporting exhibits, including both confidential and non-confidential attachments. The Motion to Seal must explain the need for sealing, the duration the document(s) should be sealed, and whether there is agreement. Counsel will separately file a redacted public version of the pleading and attach redacted versions of any confidential supporting documents and all of the non-confidential supporting documents. When describing redacted documents in a public filing, be sure to include "REDACTED" in the description. When making redactions, only redact the confidential information, not the entire document. After the judge makes a ruling on the Motion to Seal, counsel must: (1) review the Order on Motion to Seal and (2) re-file ONLY those documents the judge orders be publicly available using the "Additional Attachments" event in CM/ECF. If counsel has not been overzealous in redacting, the judge may be able to simply grant the motion without ordering any further public disclosure. **Full and complete version:** Counsel must file a full and complete version of the pleading and any and all attachments, including both non-confidential attachments and any confidential attachments they are requesting be filed under seal. These are all attached to the motion to seal. Because they are attachments to a motion to seal, none will be accessible to the public, but the Court will have access to a "full and complete version" of the pleading when it comes time to decide the issue presented. For example, counsel wishes to file a motion for summary judgment and statement of material facts under seal because they incorporate confidential information, along,with ten attachments, two of which are confidential and should also be filed under seal. Counsel selects "Motion to Seal" in CM/ECF and attaches to the motion to seal the motion for summary judgment, the statement of material facts, and all ten attachments, without redactions. Thereafter, counsel files his/her "Motion for Summary Judgment" and goes through the entire filing process again, but uploads redacted versions in place of the confidential pleadings and documents.

A non-confidential pleading/motion that attaches one or more documents that contain information protected under the confidentiality order, where counsel agree that the information is material to the case, or where they disagree and the *filing* party wants to maintain confidentiality.	File a Motion to Seal under Local Rule 7A, explaining the need for sealing, the duration the document(s) should be sealed, and whether the parties are in agreement. Attach to the Motion to Seal ONLY the document(s)/attachment(s) that contain information protected under the confidentiality order. Separately file your main pleading and attach to it all non-confidential supporting documents and redacted versions of all documents for which sealed status has been requested. When describing redacted documents in this public filing, be sure to include the word "REDACTED" in the description. When making redactions, only redact the confidential information, not the entire document. After the judge makes a ruling on the Motion to Seal, counsel must: (1) review the Order on Motion to Seal; and (2) re-file ONLY those documents the judge orders be publicly available using the "Additional Attachments" event in CM/ECF. If counsel has not been overzealous in redacting, the judge may be able to simply grant the motion to seal without ordering any further public disclosure.
A non-confidential pleading/motion that attaches one or more documents that contain information protected under the confidentiality order, where there is disagreement concerning confidentiality of one or more documents and the *non-filing* party wants confidentiality.	File the pleading/ motion and its attachments publicly, and file a placeholder attachment in place of the attachment in controversy, giving it an exhibit number and describing it, and indicating that it will be filed separately under seal by the opposing party. The party seeking to maintain confidentiality must then file a motion to seal within three business days, attaching unredacted versions of ONLY the document(s) in controversy. The motion to seal must explain the need for sealing and the duration the document(s) should be sealed. A best practice would be to attach a proposed redacted version of the document as well. If the party with the burden to file a motion to seal does not timely do so, the party who first raised the issue may file a motion as to the exhibit or the judge may sua sponte issue an order for action. After the judge makes a ruling on the Motion to Seal, counsel pursuing the motion to seal must (1) review the Order on Motion to Seal; and (2) re-file ONLY those documents the judge orders be publicly available using the "Additional Attachments" event in CM/ECF. If done correctly, the judge will need only direct the filing of the proposed redacted version.