

By Paul G. Lannon, Jr.

Keeping Secrets Secret: How to Preserve Confidential Information in State Court



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Imagine their surprise when two battling litigants agree that a document should remain private and file a joint motion to impound it, only to have the court deny their motion and publish the document. Wouldn't happen, you say? Yet, this occurred in a recent case involving radio talk show personality Howie Carr, *see Carr v. Entercom Boston, LLC*, No. 07-2935-BLS, 22 Mass. Law Rptr. No. 27, 628 (Mass. Super. Aug. 13, 2007), and it was not an isolated event. There is a growing trend in state courts to scrutinize efforts by parties to shield court records from public view. As a result, litigants find it more difficult than ever to keep their secrets secret.

Why is this happening? Massachusetts courts have developed an increasingly "rigorous presumption of openness." *See Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608 (2000). As Justice Holmes explained, "It is desirable that the [judicial proceedings] should take place under the public eye ... because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). Accordingly, "impoundment is always the exception to the rule," and "public access to judicial records" is now "strictly construed in favor of the general principal of publicity." *The Republican Co. v. Appeals Court*, 442 Mass. 218, 222-223 (2004).

That's all well and good, but how can lawyers protect legitimate privacy rights? With respect to documents filed in state court, the Uniform Rules on Impoundment Procedure (URIP), adopted as Trial Court Rule VIII, set forth the proper procedure. "Impoundment" means keeping court records "separate and unavailable for public inspection" (URIP 1). A person requesting impoundment must file both a written motion and a supporting affidavit (URIP 2). The motion and the affidavit must identify with "particularity" the material at issue, the grounds for impoundment, and how long the impoundment should last (URIP 2).

Motions for impoundment may be filed at any time, even before service of the original complaint (URIP 4). Indeed, if a submission arguably contains a party's confidential information, that party is well advised to seek an impoundment order prior to or at least simultaneously with the filing of the submission. Impoundment may be sought *ex parte* but only for ten days and only upon a showing that "immediate and irreparable injury may result" (URIP 3).

Agreement by the parties is not enough, as recently emphasized in the January 2, 2008 Formal Guidance of the Business Litigation Session. Only courts may order impoundment and only upon written findings "after hearing, for good cause shown" (URIP 7 and 8). Parties should focus their efforts on this good cause showing. The courts

“shall consider all relevant factors,” including the nature of the parties and their dispute, the type of information, privacy interests, and community interest. *Id.* Third parties may be heard in the court’s discretion. *Id.*

Absent statutory protection, persons seeking to impound need to establish that their privacy interests outweigh the public’s right to know. For example, courts have impounded records identifying child abuse victims but have refused to impound documents identifying their alleged abusers, information which they found to be of “immense public concern and of enormous community interest.” See *Globe Newspaper Co., Inc. v. Clerk of Suffolk County*, *Super. Ct.*, 14 Mass. Law Rptr. 315 (Mass. Super. 2002); *Globe Newspaper Co., Inc. v. Clerk of Middlesex County*, *Super. Ct.*, 14 Mass. Law Rptr. 412 (Mass. Super. 2002). Similarly, a court refused to impound a confidential settlement agreement where the public had a strong interest in the potentially defective products at issue. See *Gleba v. Daimler Chrysler Corp.*, 13 Mass. Law Rptr. 576 (Mass. Super. 2001).

Business information is more likely to be impounded the closer it comes to a trade secret. See Mass. R. Civ. P. 26(c) (7). Accordingly, parties seeking impoundment should detail their efforts to develop the information and keep it confidential, and explain how the information would lose its value or aid competitors if disclosed.

To avoid public disclosure of confidential information during the impoundment hearing, move to close the courtroom. URIP 7. Engage a court reporter to record the closed hearing and keep the recording confidential. Alternatively, petition the court to review the confidential information *in camera*. See *The Republican Co.*, 442 Mass. at 226.

Obtaining an impoundment order is only half the battle: the other half is monitoring compliance. Impounded materials should be filed in separate sealed envelopes labeled with the case name, number and terms of impoundment. The impoundment terms should also be noted on the docket. URIP 9. Because impoundment orders impose a “serious burden” on the clerk’s office, see *Carr*, 22 Mass. Law Rptr. at 629, it is good practice to inspect the case file to ensure that all impounded materials are segregated, marked and unavailable for public inspection.

Orders approving or refusing impoundment may be appealed to a single justice of the Appeals Court, but the URIP contain no provision for further appellate review. URIP 12. Consequently, aggrieved parties may either petition the single justice to report the case to the full bench of the Appeals Court, or petition a single justice of the Supreme Judicial Court under G.L. c. 211, § 3. See *Sharpe*, 432 Mass. at 601-602. The review standard is only abuse of discretion or error of law. *Id.* at 601-603. Don’t let confidential information leak out during the appeal. Move to maintain impoundment during the appeal, and check with the appellate clerk’s office to ensure that impounded materials transferred from the trial court remain sealed.

To preserve a client’s confidential information in court, lawyers need to plan ahead. Even before commencing litigation, the risks of disclosure should be assessed, confidentiality agreements and impoundment orders obtained in advance, and contingency plans for further judicial relief mapped out. Mastering the Uniform Rules of Impoundment Procedure is a good start. ■

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