

YOUR EYES ONLY: FILING UNDER SEAL

California Rule of Court 2.551

Procedures for filing records under seal

Presented by

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Rule 3-100: Confidential Information of a Client

- “A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.”
 - The only exception is that a member “may, but is not required to” reveal info “that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”
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Rule 1.6 – Confidential Information of a Client

“A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.”

(b) allows it when the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, only after trying to keep the client from doing so and telling the client that disclosure will occur.

And the lawyer’s disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

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Rule 1.6 – Confidential Information of a Client

Comment 1:

“To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” A lawyer’s duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship.

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Rule 1.6 – Confidential Information of a Client

Comment 2:

The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].)

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But we need that information ...

Our clients will know what happened.

- Relationships with other parties/witnesses/CWs/etc.
 - The incident in question
 - The investigation
 - The arrest
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Usual Use of Such Information

Pitchess

Need to establish a “plausible factual scenario of officer misconduct” which requires presenting “one that might or could have occurred.”

Warrick v. Superior Court (2005) 35 Cal.4th 1011, 1025-1026.

Can make an offer of proof at an *in camera* hearing or file an affidavit under seal to support the assertion.

Alford v. The Superior Court of San Diego County (2003) 29 Cal.4th 1033

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Usual Use of Such Information

Discovery from Third Parties

The trial court may order an *in camera* review of the records produced under the subpoena duces tecum (Pen. Code, § 1326, subd. (c)) and may conduct some or all of the hearing concerning the defendant's entitlement to those records *ex parte* in order to safeguard privileged information or attorney work product.

People v. Superior Court (Humberto S.), *supra*, 43 Cal.4th at pp. 749-750.

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“On information and belief ...”

This is just a way to get around the need to disclose confidential information.

But you can actually state what happened and how you know without disclosing how you got it (even indirectly) to the other side if you file under seal.

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Other Circumstances

Many instances when you want opposing counsel and the court to have the answer but shouldn't put it in the public record:

- Medical records
 - Mental health diversion treatment plans
 - Individualized diversion updates
 - Mitigating facts about sensitive matters
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File It Under Seal!

You **MUST** have an order from the court to file anything under seal.

This can be confusing to file, but it is not a complicated procedure.

TIP: Take a copy of Rule 2.551!

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Motion or Application to Seal Record

- Request that the record be filed under seal
 - Accompanied by a memorandum of points and authorities
 - Include a declaration containing facts sufficient to justify the sealing.
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How To Establish Grounds

A defendant who seeks to use *in camera* procedures should first give a proper and timely notice of the privilege claim. (*City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1131.)

The court is not bound by a “naked claim of confidentiality” but should instead make orders in light of all the facts and circumstances. (*Id.* at 1130.)

To preserve a claim of confidentiality at the time of the motion, declarations and other supporting evidence may be submitted to the trial court for an *in camera* examination so that the court may decide if the claim of confidentiality is justified. (*Id.*)

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Grounds for Sealing

- California Business and Professions Code section 6068 mandates that attorneys must “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code § 6068(e)(1).)
- The work product doctrine is applicable to civil litigation, but “it’s role in assuring the proper functioning of the criminal justice system is even more vital.” (*People v. Collie* (1981) 30 Cal.3d 43, 59, citing *United States v. Nobles* (1975) 422 U.S. 225, 238.)
- Redactions from declarations in support of various motions have been deemed appropriate for not only attorney-client privileged information, but also information containing the accused’s trial strategy and other attorney work product. (See *Garcia v. Superior Court* (2004) 120 Cal.App.4th 1252, 1265-1266.)

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Be Fair

- It is recognized by the Courts that because sealings limit the ability of opposing counsel to challenge the requests, that there are often deficiencies in the presentation of reasonably adequate factual and legal contentions from diverse perspectives.

People v. Ayala (2000) 24 Cal.4th 243, 262

- So be fair while protecting your client, work-product, and strategy
Only redact what needs to be redacted, provide those records that you can, and limit what you work to seal.
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Motion or Application to Seal Record

- Declaration of counsel may or may not have redacted portions.
 - If you have a redacted declaration, ensure that the court gets a copy of the redacted and unredacted documents.
 - The records to be sealed are submitted separately.
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Redacted vs. Unredacted

- Redacted copies must state, “Public – Redacts materials from conditionally sealed record” on the cover.
 - Unredacted copies must stated, “May Not Be Examined Without Court Order – Contains material from conditionally sealed record.”
-

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DON'T DISCLOSE INFORMATION TO BE SEALED!

- A record filed publicly in the court must not disclose material contained in the record this is sealed, conditionally under seal, or subject to a pending motion or an application to seal.

- 2.551(c)

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Service

DOCUMENT	SOMETIMES	ALWAYS	Notes
Motion/Application to Seal		Court Opposing Counsel	
Unredacted Records	Opposing counsel – if they have access to the records already OR if you want	Court	Lodged rather than Filed
Redacted Records		Court Opposing Counsel	Attached as an exhibit to the Motion/Application or filed separately
[Proposed] Order and Label for granting		Court Opposing Counsel	

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OF NOTE!

- Who opposing counsel is may differ
See Pitchess Motions - party of interest is the custodian of records, not the prosecutor.
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Lodging of Record Pending Determination of Motion or Application

- If there is good cause to not lodge it or if it's already been lodged under 3(A)(i)* then doesn't have to be lodged.
 - Otherwise, ALL records requesting to be sealed must be lodged.
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* Rule 2.551(b)(3)(A)(i)

- If the records are produced in discovery but are subject to confidentiality agreement or protective order, they can be lodged subject to the confidentiality agreement or protective order.
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Lodging of Record Pending Determination of Motion or Application

- If filed in paper form, put it into an envelope or other appropriate container, seal it, and then lodge it with the court.
 - If filed in paper form, the envelope or container must be labeled “CONDITIONALLY UNDER SEAL.”
-

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Cover Sheet - “CONDITIONALLY UNDER SEAL.”

- Cover sheet must contain all the information required on a caption page under rule 2.111
 - States the enclosed record is subject to a motion or an application to file the record under seal.
 - Example present in materials
-

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UNCOMMON AND CONFUSING

- On receipt of the record lodged, the clerk must endorse the affixed cover sheet with the date of the receipt and must retain but not record unless the court orders it filed.
 - TAKE A COPY OF RULE 2.551 WITH YOU
Clerks regularly do not know this procedure and will occasionally refuse to file them if you don't have the rule with you to show them what has to happen.
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Outcome

- It can be granted, denied, or split
 - I have been directed to amend the documents to limit present redactions for further review, had some granted and some denied, etc.
 - Granted – requires the use of an order and specific behavior by the clerk.
 - Denied - Lodged record must be returned unless the moving party requests otherwise.
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GRANTED – Envelope Changes

- Envelope or container must be labeled with a label that states, “SEALED BY ORDER OF THE COURT ON DATE”
This replaces the “CONDITIONALLY UNDER SEAL”
 - The cover sheet of the envelope must be replaced with a file-endorsed copy of the court’s order.
Make sure to provide one.
-

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Denied - Return

- Unless the moving party specifically requests a modification within 10 days* of the order denying the motion or application to seal the clerk **MUST** do two things:
 1. Return the lodged record to the moving party if it is in paper form
 2. Permanently delete the lodged record if it is in electronic form.
- * The Court may provide a different period of time.
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IT CANNOT BE REVEALED

- The rules require that the lodged records be returned *unless requested by the moving party*.
 - I always include this explicitly in my moving papers because I have had judges threaten to release the lodged records to opposing counsel upon denial.
 - THEY CANNOT DO THIS – be ready to defend this
-

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Denied - Modification

- Within 10 days of the order denying the motion or application to seal, or whatever period ordered by the court, the moving party may notify the court that the lodged record is to be filed unsealed.
 - Upon receipt of the notification the clerk must unseal and file the record.
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Not Common But Useful

- This is not a commonly used tool, but it should be used more.
 - I file all of my Mental Health Diversion status updates and treatment plans under seal and have been thanked by prosecutors and the Court for doing so.
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California Rules of Court

(Revised January 1, 2021)

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Rule 2.551. Procedures for filing records under seal

(a) Court approval required

A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.

(Subd (a) amended effective January 1, 2007.)

(b) Motion or application to seal a record

(1) *Motion or application required*

A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.

(2) *Service of motion or application*

A copy of the motion or application must be served on all parties that have appeared in the case. Unless the court orders otherwise, any party that already has access to the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version. Other parties must be served with only the public redacted version. If a party's attorney but not the party has access to the record, only the party's attorney may be served with the complete, unredacted version.

(3) *Procedure for party not intending to file motion or application*

(A) A party that files or intends to file with the court, for the purposes of adjudication or to use at trial, records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must:

- (i) Lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in (d);
- (ii) File copies of the documents in (i) that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order; and
- (iii) Give written notice to the party that produced the records that the records and the other documents lodged under (i) will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule.

(B) If the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly transfer all the documents in (A)(i) from the envelope, container, or secure electronic file to the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court.

(4) *Lodging of record pending determination of motion or application*

The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it or the record has previously been lodged under (3)(A)(i). Pending the determination of the motion or application, the lodged record will be conditionally under seal.

(5) *Redacted and unredacted versions*

If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete, unredacted version conditionally under seal. The cover of the redacted version must identify it as "Public-Redacts materials from conditionally sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order-Contains material from conditionally sealed record."

(6) *Return of lodged record*

If the court denies the motion or application to seal, the moving party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the moving party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the moving party if it is in paper form or (2) permanently delete the lodged record if it is in electronic form.

(Subd (b) amended effective January 1, 2017; previously amended effective January 1, 2004, January 1, 2007, and January 1, 2016.)

(c) References to nonpublic material in public records

A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal.

(Subd (c) amended effective January 1, 2004.)

(d) Procedure for lodging of records

- (1) A record that may be filed under seal must be transmitted to the court in a secure manner that preserves the confidentiality of the records to be lodged. If the record is transmitted in paper form, it must be put in an envelope or other appropriate container, sealed in the envelope or container, and lodged with the court.
- (2) The materials to be lodged under seal must be clearly identified as "CONDITIONALLY UNDER SEAL." If the materials are transmitted in paper form, the envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL."
- (3) The party submitting the lodged record must affix to the electronic transmission, the envelope, or the container a cover sheet that:
 - (A) Contains all the information required on a caption page under rule 2.111; and
 - (B) States that the enclosed record is subject to a motion or an application to file the record under seal.
- (4) On receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed.

(Subd (d) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

(e) Order

- (1) If the court grants an order sealing a record and if the sealed record is in paper format, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of

the court's order. If the sealed record is in electronic form, the clerk must file the court's order, maintain the record ordered sealed in a secure manner, and clearly identify the record as sealed by court order on a specified date.

- (2) The order must state whether-in addition to the sealed records-the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.
- (3) The order must state whether any person other than the court is authorized to inspect the sealed record.
- (4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Subd (e) amended effective January 1, 2017; previously amended effective January 1, 2004, January 1, 2007, and January 1, 2016.)

(f) Custody of sealed records

Sealed records must be securely filed and kept separate from the public file in the case. If the sealed records are in electronic form, appropriate access controls must be established to ensure that only authorized persons may access the sealed records.

(Subd (f) amended effective January 1, 2017; previously amended effective January 1, 2004.)

(g) Custody of voluminous records

If the records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency instead of the clerk to maintain custody of the original records in a secure fashion. If the records are requested by a reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under these rules.

(h) Motion, application, or petition to unseal records

- (1) A sealed record must not be unsealed except on order of the court.
- (2) A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of any motion, application, or petition to unseal must be filed and served on all parties in the case. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with (c).
- (3) If the court proposes to order a record unsealed on its own motion, the court must give notice to the parties stating the reason for unsealing the record. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is provided and any other party may file a response within 5 days after the filing of an opposition.
- (4) In determining whether to unseal a record, the court must consider the matters addressed in rule 2.550(c)-(e).
- (5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope, container, or secure electronic file, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(Subd (h) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

Rule 2.551 amended effective January 1, 2017; adopted as rule 243.2 effective January 1, 2001; previously amended and renumbered as rule 2.551 effective January 1, 2007; previously amended effective January 1, 2004, and January 1, 2016.

1 Attorney Name (SBN:)
Office
2 Office Address OR
Mailing Address
3 Phone #
Fax #
4 E-mail address
5 Attorney for Defendant

6
7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF _____

10
11 THE PEOPLE of the
State of California,
12 Plaintiff,
13 vs.
14 DEFENDANT,
15 Accused.

CASE NO.
NOTICE OF FILING
CONDITIONALLY UNDER SEAL
[Cal. Rule of Court 2.551(d)(3)]
TITLE OF WHAT YOU ARE
SEALING
DATE:
TIME:
DEPT.:
JUDGE:

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17
18 **To the Honorable Judge of the Above-Entitled Court and to the
District Attorney of _____ County:**

19 DEFENDANT Name of Defendant hereby submits the enclosed
20 TITLE OF WHAT YOU ARE SEALING conditionally under seal
21 pursuant to *California Rule of Court 2.551.*

22 **CONDITIONALLY UNDER SEAL**
23 **The enclosed records are subject to a motion or an application to
file the record under seal.**