July 2, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed Amendment to FRCP 5 (Filings Under Seal)

The American Association for Justice (AAJ) and Public Justice submit this joint letter to urge the Advisory Committee on Civil Rules (Advisory Committee) to move forward with an amendment to Rule 5, Filings Under Seal. AAJ is a voluntary bar association whose members represent victims injured and killed by defective products, negligent and reckless conduct, and other corporate wrongdoing. Public Justice is a non-profit legal advocacy organization that fights to preserve access to justice for victims of corporate and governmental misconduct and has long conducted a special project devoted to ensuring public access to court records and proceedings.

AAJ and Public Justice support an amended rule clarifying that the standard for sealing documents is more rigorous than the standard for blanket protective orders. Sealing is routinely requested in civil cases where there is no justification other than to keep important information relating to health and safety or governmental misconduct from the press and public. These motions are granted all too often. An amended rule would help protect the well-established presumption that court records are public.

I. Protective Orders Lead to Pervasive, Unnecessary Sealing

In many jurisdictions across the country, courts have standing blanket protective orders. Plaintiffs frequently feel compelled to stipulate to them to keep discovery moving, and because they think judges will *not* be inclined to enter protective orders that contain provisions deviating from past standing orders. In some jurisdictions, protective orders are so broad that they apply to all discovery. They may even prohibit litigants from sharing information with regulators throughout the duration of the litigation even when serious health and safety issues are discovered.[1]

Blanket protective orders also frequently permit automatic sealing of information marked as "confidential." But a protective order granted under a good-cause standard should not automatically

[1] *See, e.g.*, Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public, in Hidden Injustice*, REUTERS (Jan. 16, 2020), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

protect information from disclosure once it is filed because the standard for sealing documents is different and often significantly more stringent. Yet parties routinely file motions seeking to seal documents solely on the ground that information is marked "confidential" subject to a protective order. These motions to seal are often granted as a matter of course.[2] While a court could reject a sealing request because it is overbroad, many courts will not take the time to thoroughly evaluate whether information warrants sealing unless a party specifically requests it do so.[3]

And why isn't the plaintiff side objecting? In most instances, the plaintiff lawyer does not want the material sealed, but the lawyer's duty is to zealously represent the client, not to protect the public's access to information. Unfortunately, the two interests are sometimes in conflict. It is almost always more expeditious and financially feasible for the plaintiff to agree to sealing.[4] Civil litigation is time-consuming, and most plaintiffs with life-altering, catastrophic injuries or employment discrimination and other loss of livelihood cannot afford to wait any longer to receive legal relief, such as a settlement that could help pay or provide access to medical care, accessibility services and accommodations, and other needed support to rebuild their lives.

II. Data Confirms that Confidentiality Orders Are Prevalent and Can Cause Significant Harm

The problem of overbroad protective orders and the secrecy they foster is well-documented. In 2019, Reuters released the results of an investigation into the prevalence of protective orders in "Dangerous Secrets: Confronting Confidentiality in the Courts," as part of Reuters' Investigates' "Hidden Injustice" series.[5] Reuters manually reviewed docket entries for 115 of the largest product MDLs going back 15 years to determine the judges' reasoning for sealing. Were parties seeking these orders to protect company trade secrets or individuals' private information, such as social security numbers and personal medical records? Or, were they seeking to shield health and safety information from the public?[6] The investigation found that at least 48% of the 115 MDLs reviewed contained sealed public health and safety evidence. Reuters also checked the court dockets to see if the judge offered any

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[2] Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1260 (2020) (noting that under blanket protective orders, "[a]ccess to the materials designated as confidential is then frequently limited to the court, parties, attorneys, and witnesses").

[3] Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211 (2021), https://scholarship.law.missouri.edu/mlr/vol86/iss1/6.

[4] Reuters' findings confirm what plaintiff lawyers know. The reason plaintiff lawyers go along with entrenched court secrecy, "is their duty to their clients, as spelled out in state bar association rules." Jaimi Dowell & Benjamin Lesser, *These Lawyers Battle Corporate America—And Keep Its Secrets*, *in Hidden Injustice*, REUTERS (Nov. 7, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lawyers/ ("Many plaintiffs have suffered catastrophic injuries and other hardships and literally can't afford to wait for disputes over what can and can't be made public as bills mount.").

[5] *See* Dan Levine, A *Full Accounting: How Transparency in the Courthouse Can Help the Country Heal, in* POUND CIVIL JUST. INST., DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS, https://ncji.org/wp-content/uploads/2020/12/Pound-Report-2020_web.pdf. See all NCJI reports at *Judges Forum Reports*, NCJI, https://ncji.org/content/what-we-do/judges-forum/reports/ (last visited June 4, 2025).

[6] The cases reviewed included nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers: drugs, cars, medical devices, and other products. Levine, *supra*, at 66; *see also Hidden Injustice*, *supra* note 4.

justification for the secrecy, finding that in 85% of the cases with sealed health and safety materials, judges offered no reasoning in the court record.[7]

A group of legal scholars recently analyzed the full Reuters data set, which included over 2.2 million federal cases filed between 2005 and 2012. [8] The results provided an empirical answer to a basic question: How prevalent is the use of protective orders? Researchers found that there are an average of 9,000 stipulated protective order cases in federal civil courts per year, a number that has consistently trended upward. The study also confirmed what the Reuters investigation suggested—and anecdotal evidence supports—that many judges are not fulfilling their obligation to ensure transparency by conducting thorough good cause analyses before entering protective orders.[9] The results can be devastating. A primary example is opioids litigation, where pervasive secrecy resulted in hundreds, if not thousands, of deaths that could have been prevented if salient filings had *not* been sealed in 2001.[10] There are many other case law examples of preventable harms caused by unjustified sealings, including cars,[11] toys, household products, and prescription drugs, as well as horrific examples involving child

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[7] Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimi Dowell, *How Judges Added to the Grim Toll of Opioids*, *in Hidden Injustice: A Reuters Investigation*, REUTERS (June 25, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/.

[8] Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke L.J 1 (2024) p. 156-7. The Reuters data set has also been used by Professor Dustin Denham at Texas Tech University School of Law, who documented the use of sealing orders in the Jeffrey Epstein matter. The District Court entered a sealing order that allowed the parties to decide what to seal resulting in prospective sealing requests. *See* Benham, *supra* note *3* at 225 discussing *Brown v. Maxwell*, 929 F.3d 41, 46–51 (2d Cir. 2019) (reversing district court's refusal to unseal materials where original order delegated sealing decisions to parties without further court involvement).

[9] Relatedly, and positively, that study also found that 54% of all stipulated protective order merits-based denials were traceable to the fact that the orders contained provisions that required the court to automatically seal court filings. This finding highlights that the inclusion of automatic sealing provisions is not uncommon. It also shows the importance of a judge's role in protecting the public right of access.

[10] In West Virginia's 2004 lawsuit against Purdue, Judge Booker Stephens, now retired, wrote, "Plaintiff's evidence shows Purdue could have tested the safety and efficacy of OxyContin at eight hours, and could have amended their label, but did not." Harriet Ryan, Lisa Girion, & Scott Glover, *"You Want a Description of Hell?" Oxycontin's 12-Hour Problem*, L.A. TIMES, May 5, 2016, https://www.latimes.com/projects/oxycontin-part1/. On the eve of trial, Purdue agreed to settle the case by paying the state $10 million for programs to discourage drug abuse. All the evidence under seal would remain confidential. *Id.* A week later, Judge Stephens sealed a November 5, 2004, ruling that there was enough evidence against Purdue to warrant a trial.

[11] The classic car example is the Ford/Firestone defective tires which created a dangerous rollover risk. Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 But Not Reported,* N.Y. TIMES, June 24, 2001, http://query.nytimes.com/gst/fullpage.html?res=9A03E2D61230F937A15755C0A9679C8B63. In another well-documented example, GM knew of its ignition switch defective in which over 100 people died, yet did not recall the vehicles or notify regulators. It was only after a lawyer representing the parents of a deceased 29-year-old crash victim violated a protective order and notified regulators that the public was made aware of the problem, and the vehicles were recalled. *See, e.g.*, Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

sexual abuse.[12]

III. A Rule Amendment Is Necessary to Protect the Public's Right of Access

While there is a consensus that the standard required for sealing is higher than the good cause standard required for a protective order, document sealing pursuant to a blanket protective order should not be the default. An amended rule that acknowledges the existence of different legal standards, such as draft Rule 5(d)(5), would remind both litigants and the court to consider whether sealing is justified, and consistent with the common law and First Amendment rights of public access to court filings. AAJ and Public Justice do not believe that a lengthy rule is necessary to garner the attention of courts and parties. A rule that provides a prompt to consider which materials require sealing would significantly promote public access to information.

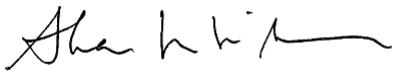
As the Fifth Circuit recently noted, "[e]ntrenched litigation practices harden over time, including overbroad sealing practices that shield judicial records from public view for unconvincing (or unarticulated) reasons. Such stipulated sealings are not uncommon. But they are often unjustified." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 421 (5th Cir. 2021). A rule amendment would help curb the "steady flow of unjustified low-profile sealings" which result in "a gradual, sub silentio erosion of public access to the judiciary, erosion that occurs with such drop-by-drop gentleness as to be imperceptible." *Id.* The need for a rule change is pressing, and the time to change it is now.

Conclusion

Our organizations encourage the Advisory Committee to move forward with a proposed amendment on filings under seal. If we can be of further assistance or provide additional information about how sealing conceals access to important information from the public, please contact Sue Steinman, AAJ's Senior Director of Policy and Senior Counsel (susan.steinman@justice.org), or Jackie Aranda Osorno, Public Justice's Richard Zitrin Anti-Court Secrecy Senior Attorney (JAOsorno@publicjustice.net).

Respectfully Submitted,

Lori Andrus
President
American Association for Justice



Sharon McGowan
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[12] Animated by the Boston Globe's "Spotlight" series, news organizations brought legal challenges to uncover sealed records of past lawsuits involving sexual abuse and allegations of sexual abuse by Catholic priests. Michael Rezendez, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html.