The History Of Sealing

Author:
Robert M. Sanger

August, 2008

CRIMINAL JUSTICE

By Robert Sanger

Robert Sanger writes this regular column for the Santa Barbara Lawyer entitled **Criminal Justice**. Mr. Sanger has been a criminal defense lawyer here in Santa Barbara for over 34 years. He is a Certified Criminal Law Specialist, a member of the Board of Governors of California Attorneys for Criminal Justice, a Director of Death Penalty Focus and a member of the Sentencing Committee of the ABA. He has published numerous articles in the Federal Lawyer, the ABA Journal, CACJ Forum and published a law review article on California's death penalty laws in the Santa Clara Law Review in 2003. He is a partner at Sanger & Swysen which limits its practice to litigation, emphasizing criminal defense.

INTRODUCTION

Lawyers and sometimes judges struggle with whether or not and to what extent they can seek to seal a record or documents related to a particular case. There are specific statutory provisions sealing certain matters but others are subject to general rules. The general rules originated in case law but are now found in the Rules of Court. We have had occasion to deal with these issues in some "high profile" maters

and have even obtained a published decision on one aspect of the rules. As a practical matter, it may be helpful to go over those rules and the procedures which apply in criminal cases to both the prosecution and the defense.

THE HISTORY OF SEALING

Certain kinds of records and proceedings have traditionally been the subject of confidentiality. For instance, juvenile records are confidential and can actually be permanently sealed under appropriate circumstances.[1] There are very specific procedures to unseal juvenile records or to release them subject to protective orders.[2] In adult criminal cases there are also some specific sealing provisions. For instance, grand jury transcripts are sealed until the unsealing of the indictment and for 10 days thereafter.[3] Search warrant affidavits are sealed until at least 10 days after service.[4]

However, there are a vast number of circumstances in which counsel want to have the court seal records but for which there is not a particular sealing statute. In criminal cases, the argument on the part of the government is often that an alleged victim will be harmed or that some law enforcement investigation will be compromised. On the part of defense, the argument is often that the defendant will not have due process or a fair trial if there is pretrial publicity. Sometimes the parties agree but, whether they do or not, the court must make specific findings in order to seal records not subject to a specific statute.

This is because there is another party to the contest over sealing – the public. The public, often represented by the press, has a right to access to the courts and, in particular, to observe criminal trials and review criminal case records. This public right is related to the Constitutional right of a defendant to a public trial under the Sixth Amendment.[5] Defendants have an interest in forcing the government to try them in public or not at all. And, people not defendants want to be assured that they or their families will not be whisked away in the middle of the night without a public trial. In addition, the press asserts its claims to inform the public under the First Amendment.

The culmination of the press' effort to litigate access to court records in this state came in the California Supreme Court case of *NBC Subsidiary (KNBC-TV) Inc. v. Superior Court*.[6] That case held that there is a presumption of openness. Records cannot be sealed by the court, whether at the request of the prosecution or defense, except under very stringent circumstances. In essence, the Court has to balance the interest advanced by the party (or the court itself) which seeks to seal the records against the right to public access of court records and files. The presumption of openness requires that, if there is to be sealing at all, it must be kept to a minimum.

In light of *NBC Subsidiariry*, the California Judicial Council codified five requirements which must be met before records can be sealed. Rule 243.1(d) was added to the California Rules of Court and later renumbered as Rule 2.550(d). It presently provides that the Court has the authority to order a record be filed under seal if the Court expressly finds that:

1. There exists an overriding interest that overcomes the right of public access to the record;

2. The overriding interest supports sealing the record;

3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

4. The proposed sealing is narrowly tailored; and

5. No less restrictive means exist to achieve the overriding interest.

The court must make these express findings on the record.

PROCEDURE FOR SEALING

In order to seal a record, counsel should submit a straightforward application articulating the precise grounds for sealing under Rule 2.550(d). The defense generally places the defendant's right to due process and a fair trial in the balance

under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, and 15 of the California Constitution. The right to a fair trial in a criminal case has long been held to take precedence over complete access of the press and entertainment media to all aspects of the proceedings.[7]

The application to seal should include a declaration demonstrating specific facts which demonstrate that the due process and fair trial rights will be prejudiced and, as a result, that prejudice overrides the public's right to know. This declaration, itself, may have to be sealed since, to be specific, counsel will need to disclose enough of the information in the proposed sealed document that it would, in itself, prejudice the due process and fair trial rights of the accused.

Sometimes the prosecution will want to move to seal. Under *People v. Hobbs*,[8] the prosecution can seek to seal a portion (and sometimes all) of an affidavit for a search warrant. The grounds are generally that the identity of a confidential informant may be disclosed and that the confidential informant will be compromised or in danger. We have also seen the prosecution join in motions to seal records where early disclosure of material might affect the integrity of the process. For instance, booking photographs have been sealed pending line up identification procedures.

Whatever the basis for the request, Rule 2.550(d) requires that the sealing be narrowly tailored. This often means that an entire document cannot be sealed but that, instead, the court will be required to order the document redacted. Therefore, it is good practice to submit to the court with the original application a proposed redacted document which excludes only the material that gives rise to the overriding prejudice.

Finally, the parties cannot simply stipulate to sealing without a showing and findings by the court. The parties, even if in agreement, have to establish the specific grounds under Rule 2.550(d) and have to show that they have tailored the order accordingly. The court should make those findings on the record.

WHO CARES?

Many readers who have been practicing law for a while will recall days when fairly undisciplined motions were made and the courts sealed documents on an equitable basis of some sort. Those days are over. Even recently, we have encountered judges making quick – although probably correct – sealing orders without making the findings required by Rule 2.550(d). The issue then is who will object or seek to unseal records that were not properly sealed? In other words, who cares?

The answer is, generally, the press. Increasingly, the press or the infotainment media will employ counsel to fight the sealing of records or to unseal them once they were sealed. In each "case of the century" *de jour*, one can expect the media to be represented in court and to vigorously fight any sealing orders. If I could be permitted a first person story:

In the Michael Jackson criminal case, the lawyer for the media was actually given a seat in the courtroom inside the bar. And when he was not there, he was making seemingly endless motions to unseal records and taking writs to the Court of Appeal and even to the Supreme Court. While co-counsel and I were in court cross-examining and calling witnesses, my colleague, Steve Dunkle, was in the office drafting oppositions and respondents briefs. We actually obtained two favorable appellate decisions, including one in which the interest in the right to a fair trial was held to override the right to access of the grand jury transcripts prior to trial under the facts of the case.[9] Judge Melville handled the matter masterfully and set up a court web page to provide access to the media. He would seal only if he could make the specific findings under the Rules of Court.

Jackson was, of course, a case that drew international press attention. But media access among more mundane cases is increasingly becoming an issue. There are just more people associated with media and infotainment. There is just more space to be filled on television. Criminal defense lawyers increasingly have cases where there is a request to do gavel to gavel coverage or where there are media personnel doing national reporting on matters that in days gone by would not have gotten coverage out of the county.

CONCLUSION

As practitioners, either as prosecutors or defense lawyers, if we want to seal records, we need to employ the particular procedures on California Rule of Court 2.550(d). We want to have the court make the appropriate specific findings and seal just the part of the document necessary to meet the overriding interest.

.

---

[1]See Welfare and Institutions Code Section 781.

[2]Welfare and Institutions Code Sections 827 *et seq*.

[3]Penal Code Section 938.1.

[4]Penal Code Section 1534.

[5]The Supreme Court has held that the Sixth Amendment's public trial requirement is for the benefit of defendants, not the public. (*Walker v. Georgia* (1984) 467 U.S. 39Walker v. Georgia (1984) 467 U.S. 39.

[6](1999) 20 Cal.4th 1178.

[7] See, e.g., *Sheppard v. Maxwell* (1966) 384 U.S.333 [86 S.Ct. 1507, 16 L.Ed.2d 600]; Sheppard v. Maxwell (1966) 384 U.S.333 [86 S.Ct. 1507, 16 L.Ed.2d 600]; Gannett Co. v. DePasqual (1979) 443 U.S. 386 [99 S.Ct. 2898, 61 L.Ed.2d 608]; and *Press Enterprise Co. v. Superior Court* (1986) 478 U.S.1 [106 S.Ct. 2735, 92 L.Ed.2d 1].) Press Enterprise Co. v. Superior Court (1986) 478 U.S.1 [106 S.Ct. 2735, 92 L.Ed.2d 1].

[8]7 Cal.4th 948 (1994).

[9]People v. Jackson (2005)128 Cal.App.4th 1009.