

Protecting Public Access to the Courts: Chancery Rule 5.1

The Delaware Court of Chancery is adopting Rule 5.1 to update its handling of confidential filings. The Court developed Rule 5.1 after extensive internal discussion and with valuable assistance from the Court of Chancery Rules Committee, a group of highly experienced lawyers who litigate frequently in the Court. Rule 5.1 is intended to make clear that only limited types of information qualify for confidential treatment in submissions to the Court. Rule 5.1 also addresses a number of issues not covered by the old rule, including (1) procedures for filing a complaint confidentially, conditioned on a public version being filed within three days, (2) automatic loss of confidential treatment if a public version is not timely filed, and (3) a simplified procedure for challenging confidentiality designations.

I. Background

The Delaware courts have long attempted to balance the public's right of access to information about judicial proceedings with the legitimate needs of the litigating parties to have certain information treated confidentially. Like federal and state courts in every jurisdiction, the Delaware Court of Chancery historically allowed parties to apply for a judicial order authorizing confidential documents to be filed "under seal," meaning the documents could not be viewed by the public.

Beginning in the 1980s, confidentiality orders became routine in takeover cases, largely because of the highly sensitive and market-moving nature of much of the information at issue. As the practice of entering confidentiality orders expanded to other major corporate disputes, the members of the Court became concerned that too much information was being placed under seal, including information that was not confidential at all. This led the Court in 1990 to adopt Rule

5(g) (the “Old Rule”), which formalized for the first time the practice of filing under seal and required parties to file redacted copies of letters and briefs within three days.

As litigation practices evolved, various issues developed with Rule 5(g). These issues, which became more serious over time, included (1) the absence of a clear definition as to what qualified as “good cause” for confidential treatment, (2) a routine litigation practice of designating too much material as “confidential,” (3) problems with parties not timely filing public versions of letters and briefs, (4) a lack of clarity as to how to handle documents other than letters and briefs, (5) the absence of a procedure for filing complaints under seal, and (6) the need for a straightforward mechanism for the public or press to challenge a filing’s confidential status. Nevertheless, the Court did not amend Rule 5(g), largely because the Rule worked well in most cases, Chancery practitioners developed detailed confidentiality stipulations to address many issues that they regularly faced, and the Court worked to remedy in a case-specific manner any legitimate public access concerns raised about abuses of the Rule.

In recent years, however, it became apparent that the Court needed to take a hard look at whether Rule 5(g) was serving its important purpose optimally and remained in the best interests of the public. Issues raised by the press, the public, and litigants included:

(1) Increasingly frequent assertions of confidentiality for information that did not fall within any recognized exception to the public’s right of access and was not truly sensitive or confidential in nature;

(2) Reliance on broad and often boilerplate confidentiality clauses in commercial contracts and agreements to justify filing under seal, irrespective of the nature of the suit;

(3) A resulting large increase in applications to file garden-variety complaints under seal, which resulted in the public knowing for the first three days only that a suit had been filed involving certain parties, but nothing substantive about the case;

(4) Frequent failures to file redacted versions in timely fashion, combined with a lack of procedures in the Register in Chancery for unsealing the original versions automatically, leading to complaints from the public and press that the duty to file a redacted version was honored only when someone complained;

(5) Public versions that redacted far too much information and left the public with an improperly narrow view into the case;

(6) Some parties' use of the Rule to pressure their opponents by not allowing public access to information or by wasting their adversaries' time in expedited litigation on discussions about overbroad confidentiality designations.

Enough instances of concern emerged that the Court believed it necessary to evaluate Rule 5(g) and make revisions to account for new developments and long experience.

Thus, in 2011, the Court of Chancery initiated a full review of Rule 5(g) with particular emphasis on establishing procedures to address the growing practice of filing complaints under seal and creating a simplified mechanism for the public and press to challenge confidential treatment. With assistance of the Rules Committee, the Court drafted Rule 5.1.

II. An Overview of Rule 5.1

The overarching purpose of Rule 5.1 is to protect the public's right of access to information about judicial proceedings. Although litigating parties have a legitimate need to

keep some material confidential, Rule 5.1 makes clear that most information *presented to the Court* should be available to the public. Rule 5.1 recognizes that parties in litigation exchange enormous amounts of information during discovery that is never presented to the Court. It does not alter the current practice of allowing parties to enter into confidentiality stipulations to govern discovery, nor is it likely to affect the parties' general practice of over-designating material as confidential during discovery. Where Rule 5.1 draws the line is when information designated by the parties as confidential is filed with the Court. At that point, the public's right of access comes into play.

To protect the public's right of access, Rule 5.1 reduces the categories of information that are entitled to protection once material is filed with the Court and requires that any information designated "Confidential" meet the tests traditionally recognized by courts as sufficient to justify limiting the public's right of access. Rule 5.1 clarifies the procedures a party must follow when filing a document confidentially and makes clear that if a public version is not timely filed, the confidential document automatically loses its confidential status. Rule 5.1 establishes for the first time procedures for filing a complaint confidentially, a practice previously governed by custom rather than formal rules. Rule 5.1 also establishes a simple procedure for challenging confidential treatment.

A. *Definition of "Good Cause"*

Confidential treatment always has required a showing of "good cause." Rule 5.1 defines "good cause" to exist "only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause." Rule 5.1 provides the following examples of confidential information: "trade secrets; sensitive proprietary information; sensitive financial, business, or personnel information; sensitive

personal information such as medical records; and personally identifying information such as social security numbers, financial account numbers, and the names of minor children.” This is a narrower interpretation than litigants often took under the Old Rule. Rule 5.1 specifies that if a designation is challenged, the party seeking confidential treatment has the burden of showing that “good cause” exists.

B. *Procedure for Filing Confidential Documents*

Rule 5.1 eliminates the concept filing of “under seal” and replaces it with the terms “Confidential Filing” and “Confidential Treatment.” As under the Old Rule, a party may not make a Confidential Filing without a prior Court order. Unlike the Old Rule, which requires public versions only for letters and briefs filed “under seal,” Rule 5.1 requires that unless exempted by Rule, a public version must be filed for every Confidential Filing. The most notable exceptions are for documentary exhibits or deposition transcripts.

Under the Old Rule, a party that files a sealed document with the Court has three days to file a public version. Parties often fail to meet this deadline, and in more than a few cases no redacted version is ever filed. Under Rule 5.1, not later than 3:00 p.m. on the next business day after a Confidential Filing, the filing party must give notice of a Confidential Filing to all other parties who have asserted that certain information in the filing is confidential. The notice must include a proposed public version of the filing. The party asserting confidentiality then has until 3:00 p.m. on the fifth day¹ after the Confidential Filing to tell the filing party what additional information should be redacted from the public version. At the end of the five day period, the filing party must file a public version that redacts only the information designated by the filing

¹ Rule 5.1 contains a provision expressly excepting all of the time periods in Rule 5.1 from the additional time for responses provided for in Rule 6(e) if a pleading is served by mail or electronic service.

party or another party. If no public version is filed within five days, the Register in Chancery automatically makes the original document available for public inspection. Rule 5.1 thus gives parties a somewhat longer period in which to prepare a redacted version, counterbalanced by a strict requirement that a redacted version must be prepared and automatic loss of confidential status if the requirement is not met.

C. *Procedures for Filing Complaints Confidentially*

Rule 5.1 discards the existing ad hoc practice for complaints under seal in favor of a more simple process. A plaintiff may file the complaint and any supporting documents as a Confidential Filing with Lexis/Nexis, provided that she also file a letter addressed to the Register in Chancery certifying compliance with the Rule 5.1. To ensure that the public is made aware of the nature of the dispute promptly, Rule 5.1 requires that the cover sheet required by Rule 3(a)(2) be filed publicly, and that the cover sheet summarize the claims asserted in the complaint.

On the same day a plaintiff files a complaint confidentially, she must use her best efforts to give actual notice to each person who could have a legitimate interest in designating information in the complaint as confidential. The notice must contain plaintiff's proposed public version of the complaint, and inform the recipient that the plaintiff's proposed version of the complaint will be filed publicly if by 3:00 p.m. on the third day after the complaint is filed no one designates any additional information as confidential. The three-day time period is shorter than the five-day time period for other filings because of the heightened importance of public access to the initial filing in a case and the public's right to know the essence of what the case involves.

D. Challenges to a Confidential Filing

If anyone, including the public or press, wishes to challenge the Confidential Treatment of a Confidential Filing, or the redactions in a public version, Rule 5.1 contemplates that the challenger need only file a notice with the Register in Chancery. The notice need not articulate any basis for the challenge.

Once a challenge notice is filed, the party or parties seeking to maintain continued Confidential Treatment must establish that good cause exists. If the notice challenges a document for which no public version was filed, such as a documentary exhibit or deposition transcript, a public version of the document must be filed within ten days. The period is longer than the standard five days because documentary exhibits and deposition transcripts are often voluminous and detailed, requiring greater time to review and redact. If the notice challenges a document for which a public version exists, then any party seeking continued Confidential Treatment must file a motion to maintain Confidential Treatment within five days. If no motion is filed, then the Register in Chancery makes the original document available to the public. If a motion is filed, the person challenging continued Confidential Treatment has five days to file an opposition. If an opposition is not filed, the challenge is deemed withdrawn. After the opposition is filed, the Court determines whether continued Confidential Treatment is warranted or whether additional proceedings are necessary.

E. Time Limits on Confidentiality

The Old Rule provides that all documents are released from confidential treatment thirty days after final judgment is entered without appeal, but confidential treatment can be extended for good cause shown. The Old Rule also provides that all confidential treatment expires three

years after final disposition of an action, but confidential treatment may be extended for good cause. In practice, parties often requested and were granted extensions.

Rule 5.1 discards the two-tiered approach by causing all orders providing for Confidential Treatment to expire three years after the final disposition of the action and establishes procedures for seeking continued Confidential Treatment that are far more exacting than the Old Rule. Under Rule 5.1, the Register in Chancery must give at least ninety days prior notice of the expiration date. In a departure from previous practice, a party seeking continued Confidential Treatment may not simply file a short and conclusory motion. Instead, the party must file, within thirty days of receiving the Register's notice, a motion, supporting brief and affidavits in support of the motion, and identify on a document by document basis the reason for continued confidential treatment.

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