WINTHROP & WEINSTINE

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Tricia Pepin, Chief Deputy Clerk
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SENT VIA EMAIL

Dear Ms. Pepin and Local Rules Committee:

I am writing in regards to the District's proposed amendments to Local Rule 5.6. Prior to entering private practice, I encountered sealing issues as a law clerk in the District (both prior to and after the implementation of Local Rule 5.6). And since joining private practice, I have worked extensively on a specific matter before the Court involving hundreds of sealed filings and multiple motions under Local Rule 5.6. Viewing the proposed amendments with this experience in mind, I write to offer what I hope will be helpful feedback and well-rounded insight.

First, I believe the proposed amendment allowing litigants to file sealed documents as attachments, rather than separate docket entries, is a very worthwhile change. In cases involving several to hundreds of sealed filings, the many separate "sealed exhibit" entries make the Court's online docket difficult to read and navigate. Filing sealed documents as separate attachments to, for example, a declaration will improve the organization and usability of the docket. It may also improve public access to temporarily-sealed filings which are subsequently unsealed because such documents will be easier to locate due to how they are cited in briefs and appear on the docket. In addition, the current separate-entry requirement has, in many cases, imposed undue administrative burdens on law firm support staff, who sometimes must spend several hours filing, downloading, and organizing separate entries. The attachment filing process is much less burdensome on both the frontend and backend. However, I understand that the option to file attachments under seal is not yet enabled on the District's ECF system. Assuming the feature can be enabled, this option is likely to be a positive change for the Court, members of the bar, support staff, and the public.

Second, I believe the changes to Local Rule 5.6(d)(2)(A) and new draft Joint Motion for Continued Sealing should not be implemented in their current form, as the requirement to precisely identify information which should be sealed and unsealed within a document will only impose additional burdens on litigants, while likely providing the Court with limited additional benefit in evaluating continued sealing. Based on the public notice, I understand the change to be directed at documents that only *partially* contain confidential information. In my experience, however, all documents contain both information that should and need not be sealed. A medical record, for example, may contain highly-confidential personal information, but yet also contain mundane notes. If the change is meant to apply to *all* sealed documents, I do not believe it would be practical to require parties to jointly and precisely identify what information should be sealed and unsealed and where the parties disagree. Identifying such information may not be difficult for short documents, such

as brief emails. However, large documents spanning tens to hundreds of pages would turn the joint motion into an inordinately time-consuming and expensive process. For example, an economic expert's report may span of over 200 pages, reference both party and nonparty information, and include detailed and specific confidential information and analyses in several charts, tables, and exhibits. In my experience, such reports often contain different types of confidential information on almost every page to varying degrees. Under the proposed rule and comments, parties would be required to provide an extensive, page-by-page listing of the precise sealable data within.

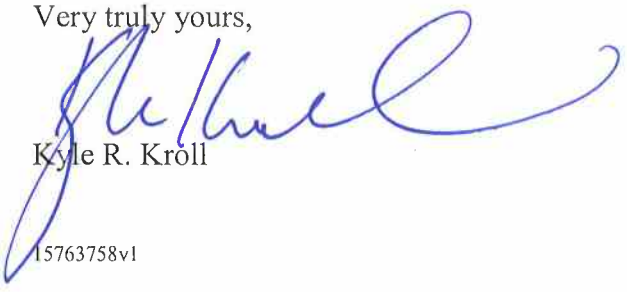
Precisely identifying sealable information would not only undermine the purpose for filing the document under seal in the first place (i.e., to keep the information confidential), but also would be extremely burdensome and likely lead to disagreements between parties and nonparties. On its face, it also seems unnecessary for parties to identify both information which should be sealed, as well as information which should be unsealed (presumably, information which is not identified as what should be sealed). In addition, if parties must precisely identify sealable and non-sealable information, then the Advisory Committee Notes' provision to file proposed redactions under seal in connection with the joint motion would appear to—when read in conjunction with the entire rule—*require* proposed redactions of the precisely-identified information. After such identification, there would be no basis to claim that "redaction is impracticable," for example. LR 5.6(d)(1)(A)(ii). Moreover, the rule's "precise" identification requirement will likely cause the joint motions to lengthen considerably, particularly if the sealed documents contain many pages. In sum, the precise identification requirement will require numerous hours of work (resulting in great expense to parties) and increase the number of sealed filings in the form of proposed redacted versions—especially if the parties disagree about what should be redacted and file competing proposed redactions. In my view, if a change is desired, it would be better to require parties in the "reasons" column to state which *types* of sealable information (e.g., margins, trade secret source code, social security numbers, etc.) are within the document and on what representative—but not all—pages. This level of specificity is not too taxing and would likely adequately assist the Court in identifying and evaluating whether a document should remain sealed.

Lastly, I would like to provide overarching feedback on Local Rule 5.6. There is a general opinion among members of the bar that the Court is imposing additional sealing procedures and requirements in an effort to deter sealed filings by making the process more burdensome. I am not suggesting this is the case, but it is a widespread belief among the many members I have spoken to about Local Rule 5.6. In my private practice experience, post-filing burdens are not a material factor in the decision to file documents under seal because the filing party often has no choice but to file under seal. Consider a plaintiff who desires to file a well-supported motion based primarily on the defendant and nonparties' documents. Consider also that parties and nonparties often over-designate documents—hopefully, for good faith reasons—as "confidential" or "attorneys' eyes only" in document production, pursuant to usually-broad protective orders. In preparing for filing, the plaintiff does not have the option—for fear of disclosing information in violation of the protective order or other law—to file many of its supporting documents under seal if such documents have been designated by other parties. True, the plaintiff may seek a change in designation under many protective orders' terms. But whether something is "confidential" under a protective order is, as this Court's sealing decisions have uniformly stated, not determinative of

whether something should be sealed. The former standard is lower, but the plaintiff and its counsel cannot take the risk of assuming that documents designated confidential will be unsealed due to that difference. There is a disconnect between protective orders' broad terms and the sealing rules' stricter standards, forcing careful attorneys to file designated documents under seal and forego a de-designation process, despite those attorneys' belief that perhaps some documents should not have been designated at all or, even if designated, are not subject to sealing. Unfortunately, requiring interparty collaboration before filing would impose an almost impossible burden and unfair strategic disadvantage on moving parties because drafting often is not completed far advance, there are usually last-minute changes to briefs, there is a desire not to reveal one's theories and themes, and often there are nonparties who are unresponsive to confidentiality inquiries. Thus, it appears to me that unless Local Rule 5.6 specifically states what types of information are sealable, or unless protective orders specifically identify what can be designated confidential and overlap with sealing standards, sealed filings will continue at the same pace or increase without regard to Local Rule 5.6's burdens and procedural requirements. This will only further inhibit public access to filed documents. And as stated above, I believe the proposed new additional requirement to precisely identify sealable information will impose even greater burdens on litigants, with at best minor proportional benefits to the Court in making sealing decisions—and such benefits may be offset by the additional paper presented to the Court.

Thank you for the opportunity to be a part of the amendment process. Please do not hesitate to contact me with any questions or comments.

Very truly yours,



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