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Subject: FW: Administrative Rule 9 Update - Effective January 1, 2020
Date: Friday, November 22, 2019 10:54:35 AM
Attachments: [Access2CourtRecordsIndyBar.pdf](#)

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DeAnna,

Hope things are going well. The email below and attachment have info from a recent presentation on changes to Administrative Rule 9 and specifically handling documents excluded from public access. This is probably on your radar already, but just in case, I wanted to get it to you for consideration in the procedural rules change. I did not attend the presentation, but from a quick review, it looks like Administrative Rule 9 is being converted into an entirely new set of court rules on public access.

All the best,
Jeff

Jeffery A. Earl

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From: Wakefield, Melissa <mwakefield@boselaw.com>
Sent: Friday, November 22, 2019 10:44 AM
To: *All BME <AllBME@boselaw.com>
Subject: Administrative Rule 9 Update - Effective January 1, 2020

Yesterday the Indianapolis Bar Association held the Annual Litigation Section Judicial Roundtable and Reception discussing upcoming changes to Administrative Rule 9. As of January 1, Administrative Rule 9 will be removed from the Administrative Rules and be Indiana Rules on Access to Court Records. With that change are other changes. I have not yet had a chance to read the Indiana Rules on Access to Court Records, but from the presentation yesterday, here are some of the highlights:

- The Office of Court Services will create and maintain a list with the court records, case records, and other documents excluded from public access. I
- Failure to comply with the Rules may subject attorneys or parties to sanctions. As I recall, sanctions were a possibility under the current rules but now Judges are “authorized and expected” to enforce.

- If you are redacting information required to be redacted and it is not necessary for the disposition of the case, you can simply redact that information. You will no longer be required to file the Administrative Rule 9 Notice of Exclusion. Redacting information necessary for the disposition of a case still requires public and not for public versions and the Notice of Exclusion.
- Under the current rules there are a potential of three (3) different forms that might be required regarding the notice of exclusion of confidential information. Under the new Rules, there will be only one form and a sample of that form is provided at the end of the Rules.
- Significant changes regarding medical records. Effective with the new rule, all medical records will be excluded from public access
- Mental Health Records – most mental health records will be excluded from public access. Those records for treatment purposes will be excluded. Those records related to competency or insanity defenses will not be excluded from public access.
- Drug or Substance Abuse Records. Records related to substance abuse treatment will be excluded. Legal monitoring test records will not be excluded. For example, if a person is on probation and the probation officer orders a drug test for monitoring purposes, that would not be excluded.
- For purposes of evidence presented during court proceedings, use green paper for those items that should be excluded from public access. Before starting any questioning/discussion regarding confidential information, advise the judge so appropriate steps can be made and the court reporter knows to put that portion of the transcript in a separate volume. It is possible that if you fail to do this and it would be necessary to fix transcripts at a later time, you could be responsible for additional costs incurred in making such corrections. It is a good idea to discuss potential procedures for confidential testimony/materials at the pre-trial or in advance of a hearing, if possible.
- Modifications have been made regarding dates of birth being excluded from public records. This includes criminal, juvenile and civil protection order proceedings. Instead of just victims of sex crimes (under the current rules) dates of birth for witnesses or victims are to be excluded from public access effective January 1, 2020. You will still need public and not for public versions of documents with that information. It was also suggested that full dates of birth for minors in domestic relations cases should not be included in public access documents. It was suggested to either reference a minor's age or month and year of birth rather than a complete date of birth.
- There are significant changes to the improper exclusion of information. The only information provided at the presentation dealt with waiving exclusion of confidential information. Currently, waiving exclusion only requires failure to comply with the rules on exclusion. Effective January 1, the exclusion must be (1) in writing; or (2) verbally in a hearing.
- It was suggested that we re-read Trial Rule 86(L)(3) and (4).
- We were also told that attorneys or parties who fail to exclude confidential information may have liability in the event the information would be used. Basically, as I understood this, should you fail to exclude social security numbers, account numbers, etc. and someone's identity was stolen as a result,

the attorney or party who failed to exclude could be liable for damages to the party whose information was not properly excluded.

Once I have an opportunity to read the final version of the Rules I may have more clarity on some of the changes.

The presentation materials are attached.

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The New:
Rules on Access to Court Records

Formerly: Administrative Rule 9

Presented by:
 Judge Marianne Vorhees,
 Delaware Circuit Court No. 1
 Judge Paul Felix,
 Hamilton Circuit Court
 Judge Heather Welch,
 Marion Superior Court

 *November 21, 2019*

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Part I

**Introduction to the new
Rules on Access to Court
Records**

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Administrative Rule 9(A), (B), (C), (D), (G), and (J)

Are now removed from the
Administrative Rules and are
now :

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Indiana Rules on Access to Court Records

The **Rules on Access to Court Records** include ten rules:

- Rule 1: formerly AR 9(A)--"Scope and Purposes"
- Rule 2: formerly AR 9(B)--"Who Has Access"
- Rule 3: formerly AR 9(C)--"Definitions"
- Rule 4: formerly AR 9(D)--"General Access Rule"

These four rules have no substantive changes from the former Administrative Rules they replaced.

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The new Rules, continued:

- Rule 10: NEW: The Office of Court Services will create and maintain a list with the Court Records, Case Records, and Other Documents Excluded From Public Access.
- Rule 11: NEW: the failure to comply with these Rules may subject counsel and/or a party to sanctions. **Judicial Officers are "authorized and expected" to enforce this Rule.**
- Rule 12: Formerly AR 9(J)—"Immunity"—No substantive change.

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Former AR 9(G) is broken down into five separate rules:

- Rule 5: Records and Information Excluded from Public Access.
- Rule 6: Formerly Rule 9(G)(4): no substantive changes.
- Rule 7: Formerly Rule 9(G)(5)(a)(i): in the courtroom; exhibits; transcripts.
- Rule 8: Formerly Rule 9(G)(6): Consent, Failure to Exclude, Improper Exclusion.
- Rule 9: Formerly Rule 9(G)(7): Obtaining Access to Court Records Excluded From Public Access.

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Don't Confuse the Rule With *The Access to Public Records Act*

Indiana Code Section 5-14-3-5.5 ("APRA"): this section provides for public records to be "sealed."

Records are not "sealed" under the Access to Court Records Rules. They are "excluded from public access."

But: if a record is sealed under the APRA, it is excluded from public access per Rule 5(A)(2) and/or 5(B)(4).

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Part II:

Breaking the Rule Down into Categories

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Access to Court Records Rule 5: What is Excluded From Public Access?

The Commentary to Rule 1 continues the presumption of “open access to public records.”



The Rule weighs this presumption against “the public safety and privacy reasons” for restricting access to certain records.

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Categories for Rule 5 Exclusion:

Category #1: the entire case is confidential –no action necessary

Category #2: Temporary Exclusion from Public Access



Category #3: Rule 5 Exclusions from Public Access

Category #4: Indiana Statutory Exclusions from Public Access

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Part III:

Category #1: The Entire Case is Excluded From Public Access

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Category #1: "Automatic" Exclusion

- Rule 5(A)(1) says there are Cases where all Court Records are declared confidential by statute or court rule.
- The entire case on Odyssey is "locked."
- Odyssey says you should "lock" all the documents within the "locked" case.
- Paper filers: still use **green paper**.



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Category #1, continued:

All Juvenile Paternity Cases *prior to* 7/1/14
(Rule 5(A)(6))



Adoptions
CHINS
Juvenile Terminations
Juvenile Delinquency



Mental Health (MH) Cases
(Rule 5(A)(4))

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Category #1, continued:

Miscellaneous Criminal (MC) Cases:

Entire cases that exclusively pertain to investigative requests and process unrelated to a pending criminal proceeding, such as search warrants, subpoenas, and other investigative requests.

Rule 5(A)(5)

Important:
This provision applies to **pre-charge** requests.



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Part IV:

Temporary Exclusions from Public Access

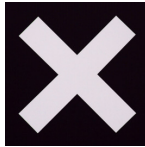
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Category #2:

Temporary Exclusions under Rule 5(E)

- Rule 5(E), Subparts 1 and 2, includes the current provisions but places them in this section to clarify their status as "excluded from public access" is temporary.
- Subpart 1 allows the State to open a new criminal case along with a request for an arrest warrant and request the court to exclude the entire case from public access until the warrant is served.
The judge will have to issue an order with specific findings. Once the defendant is arrested, the order expires.



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Temporary Exclusions, continued:

- Under Subpart 1, the case would be opened, "locked," then "unlocked" once the defendant is arrested on the warrant.




- Subpart 2 allows probation or community corrections officers to "lock" requests for warrants in a similar manner.
- Those requests would be filed pursuant to the Rule 5(B) procedure set out above.

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Part V:

**Excluded from Public Access
by Rule 5**


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Category #3:
Rule 5 Exclusions from Public Access

- Rule 5, in Subparts (B), (C), and (E) includes several changes:



- The method to exclude the document or information from public access is stated in the Rule itself, not in a separate section.
- **There is only one Form to use: the “ACR Form”** found at the end of the Rule! (The former rule included three different forms.)
- Subsection (E) clarifies the current rule to emphasize the exclusion is only *temporary*.


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**Rule 5 Exclusions,
continued:**

Rule 5(B)(6):
Case Records created or maintained by an agency or program
for **pretrial release and supervision** and
problem-solving court supervision;

Rule 5(B)(7):
Records pertaining to permissible *ex parte* proceedings
or requests for *in camera* review,
and ordered confidential by the trial judge; and

Rule 5(B)(7):
Post-charging investigatory requests for process.
(All these are in the current rule.)

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Rule 5 Exclusions: Medical Records

- **Rule 5(B)(8) is NEW and addresses medical records!**
- The Rule excludes from public access *all* medical records, unless the person consents to having the records accessible to the public. This includes records related to a Trial Rule 35 examination (Plaintiff's exam done by a Defendant-selected doctor).
- This could include Physician Reports in Guardianship cases.



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Rule 5 Exclusions: Mental Health Records

- **Rule 5(B)(9) is NEW and addresses mental health records!**
- Mental health records compiled for treatment purposes are excluded from public access in their entirety.
- Reports for competency to stand trial, or for the insanity defense, are not for treatment purposes and therefore remain accessible to the public.



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Rule 5 Exclusions: Drug or Substance Abuse Records

- **Rule 5(B)(10) is NEW and addresses drug and substance abuse records!**
- Records related to substance abuse treatment are excluded from public access in their entirety, *including a probationer's drug test results, when performed at the direction of a substance abuse treatment provider.*
- The drug test results related to a problem-solving court participant and a court alcohol and drug program client are also excluded from public access.
- Drug test results done as part of probation or community corrections supervision are *not* excluded from public access.

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Rule 5(B) continued: How to Exclude the Document

- These documents will be excluded *in their entirety*.
- The document is filed and "locked" (if e-filing).
- If it is an exhibit, it will be on **green paper**.
- You will use the ACR Form to state the Rule subsection under which it is excluded from public access.
- The ACR Form is not "locked." It tells the public what document is being excluded.
- This is existing practice.



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Rule 5(C) Exclusions, continued:

- **Rule 5(C)(1) has important, new changes!!!**
- **Complete SSNs, Account #s, and PINs are still excluded from public access.**



- **CHANGE:** If the Court does not need the Account Number or Social Security Number in order to rule, the party simply redacts the Number **without the ACR Form** and files the redacted document.

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Rule 5(C)(1), continued:

- If a Social Security Number or Account Number is necessary for the court to issue an order (e.g., Income Withholding Order, Garnishment Order, QDRO), **current practice continues**. The filer will submit a Public Access Version with the confidential information redacted, and a Non-Public Access Version containing the confidential information, along with the ACR Form.
- Also: put a heading on the confidential version:
"EXCLUDED FROM PUBLIC ACCESS PER ACCESS TO COURT RECORDS RULE 5"



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Rule 5(C) exclusions, continued:

- Rule 5(C)(2) also contains **NEW** provisions expanding protection for children. The former rule protected “*child sex crime victims.*”
- The new Rule excludes from public access **the identity of all child witnesses in cases involving sex offenses.**
- The Rule gives the judge flexibility to refer to child victims and witnesses by initials or by numbers (e.g., where initials would still lead to identifying the child).
- No notice of exclusion from public access is required (i.e., no ACR Form needs to be filed).

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Rule 5(C) Exclusions, continued:

- **Rule 5(C)(3) slightly modifies current practice.**
- **It adds “dates of birth” of witnesses or victims to the information excluded from court access.**
- The case categories are simplified to: **criminal, juvenile, or civil protection order proceedings.**
- Current procedure continues: the party must file a non-public access version (“locked”) and a redacted version.
- The ACR Form is also required.



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Rule 5(D) Exclusions: Court Administrative Records

- This Rule collects miscellaneous provisions from the current rule and places them in one category:
- Attorney residences provided to the Clerk of the Supreme Court;
- Residence addresses for judges, clerks, court employees, and clerk employees;
- Personal notes, organizers, emails;
- Deliberative matter created by judges, jurors, court staff, and judicial agencies.



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Part IV:

Excluded from Public Access by Court Rule or Indiana Statute

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Category #4: Exclusions by Indiana Statute or Court Rule

- Rule 5 excludes from public access all case records declared confidential by Indiana statute or court rule.
- These documents are basically handled the same way as in the current rule.
- Remember, OCS will prepare a list of the items included in this category, but the list isn't going to be all-inclusive. You still need to check on your own.



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Category #4: Excluded per Indiana Code or Court Rule

- Due to time restraints, we won't be able to go through each exclusion in detail, but here are the most commonly seen:
- I.C. 31-17-2-20: custody evaluations, expert witness reports, GAL/CASA Reports regarding children in custody and parenting time issues;
- I.C. 34-26-5-7: Petitioner's address in a Protective Order case;
- I.C. 35-38-1-13: Presentence Investigations;



- Evidence Rule 412(c)(2): certain motions filed in sex-offense cases.

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Part VII:

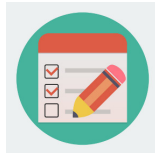
How to Exclude Information Not Otherwise Protected

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Rule 6: Former Rule AR 9(G)(4)

- Rule 6 incorporates the former AR 9(G)(4) without significant change.
- The only way to exclude information from public access that otherwise is not protected in the above categories is to follow the four-part process! This includes:
 - (1) Verified Written Request
 - (2) Notice and Right to Respond
 - (3) Public Hearing With Advance Notice
 - (4) Written Order With Specific Findings



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Caution: Parties Cannot Agree to Exclude Information Otherwise Accessible to the Public Without Using Rule 6!

- Sometimes litigants *want* to exclude information from public access, but they have no basis to do so.
- Example: salary or compensation terms; covenant not to compete details; settlement agreements; business or marketing strategies.
- Failure to comply with Rule 6 could result in disastrous consequences for the client and the attorney!



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Part VIII:

Rule 9, TR 26 Protective Orders, and Trade Secrets

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Another Caution: Rule 9

Rule 9 preserves the current AR 9(G)(7).

- **A court can decide (Rule 9(A)):**
- It should not have excluded a Record from Public Access;
- The Exclusion was improper or no longer appropriate;
- Disclosure is appropriate "to further the establishment of precedent" or to develop the law.
- **Any person can file a written request for access to a Court Record pursuant to Rule 9(B).**
- The moral is: if it is "life and death" matter, don't rely on Rule 6 to protect you.

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Caution: Trial Rule 26(B) Protective Orders

- **A Trial Rule 26(B) Protective Order** does not provide exclusion from public access, only protection from disclosure by the parties, lawyers, and witnesses during the discovery process.
- **To protect information, the parties must use Rule 6 or the Indiana Access to Public Records Act!**
- If the parties have used Rule 6 to protect information and later need to submit the information to the court, they may file a motion, designation of evidence, etc., with a redacted version open to the public and the full version "locked" with the ACR Form.



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Caution: Trade Secrets

- Trade Secrets have no automatic exclusion under the Rule.
- The Court must hold a hearing under Indiana Code 5-14-3-4(a)(4) and first find the information is a trade secret before the information is excluded from public access.



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Practice Point!

- If the judge doesn't need the confidential information in order to rule, don't give it to the judge!
- For example, in a divorce case, meet before the hearing and designate the bank accounts and credit cards by name or other designation ("FMB Visa", "Joint Checking Account", "Nancy's Saving's Account").
- Stipulate to values if possible so bank statements and other personal financial statements don't have to be in the record.
- Prepare a summary from the tax returns so the returns themselves don't have to go into evidence (with the many opportunities to miss someone's SSN).

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Part IX:

How Does the Rule Work in the
Courtroom?
Transcripts?

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Rule 7: Exhibits in the Courtroom

- **Rule 7 collects the current provisions related to exhibits and testimony excluded from public access.**
- **Exhibits:**
- If an exhibit excluded from public access is tendered or admitted into evidence for a hearing, trial, or *in camera* review, the party must provide the basis for exclusion on the ACR Form submitted with the exhibit.
- The better practice would be to place the excluded exhibit on green paper so there is no confusion.

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Rule 7: Testimony in the Courtroom

- **Every word spoken in court may be transcribed!** Attorneys should discuss confidentiality concerns among themselves and with the judge before presenting evidence.
- **In a case completely excluded from public access (“Category #1”), the entire transcript is excluded from public access and no further work is necessary.**
- **In a case type not excluded from public access,** the party should give the Court Reporter notice that the matters about to be discussed are excluded from public access. The Court Reporter should make a note to the typist that the testimony following is excluded from public access.

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Rule 7: Juror Information

- **Rule 7 also gives the judge the ability to exclude from public access any *in camera* discussions pursuant to Jury Rule 10.**
- If a juror has personal information to provide on an *in camera* basis, i.e., outside the presence of the other jurors and any observers, the judge can exclude this dialogue from public access.
- So if a juror has an embarrassing or otherwise very personal issue to tell the parties, she can do so without worrying about the information becoming public.



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Rule 7: Transcripts

- **Transcripts typed for appeal purposes:** the Court Reporter will place any testimony or exhibits excluded from public access in a separate volume.
- **Parties can ask the Court Reporter to “fix” issues pursuant to Appellate Rules 28(F)(3) or (4) if information is in a transcript which should have been excluded from public access.**
- **Rule 7 requires the Court Reporter to comply with Appellate Rules 28(F) and 29(D) when preparing the transcript for appeal** (the former “AR 9(G)” Rules).
- **Private Transcripts:** private transcripts not filed with the trial court or appellate court do not have to follow these rules (unless later filed, of course).

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Rule 7, a final thought:

- **The Appellate Rules do not address who must pay the Court Reporter for the additional work if he/she must correct and refile a transcript due to non-compliance with Rule 7 (formerly AR 9(G)).**
- **Judges’ Opinions?**
- **Just another reason to do your “homework” up front and make sure the Record is clear!**



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Part X: Rule 8

Waiver,
Improper Exclusion,
Failure to Exclude

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**Rule 8:
Consent, Failure to Exclude,
Improper Exclusion**

- Rule 8(A) is a *significant* change in practice.
- The current Rule AR 9(G) allows filers to waive the right to exclude otherwise confidential information simply by failing to comply.

Rule 8(A) now states:

A person may consent to make otherwise confidential records accessible to the public.

The consent must be in writing if it is a document filed with the court.

The consent must be verbal if presented during a hearing.

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**Rule 8(A):
Consent**

- The Commentary suggests language showing consent to release as required in Rule 8(A) similar to this:

I consent to the [name of information], which is otherwise confidential, being part of the Public Record in this case.



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**Rule 8(B):
Failure to Exclude**

- Rule 8(B) is the current AR 9(G)(b)(i) and (ii).
- If someone files confidential information by mistake, the right to confidentiality is not forfeited.
- Immediately upon learning a record was not excluded, the party can refile in compliance with the Rule.
- But if the public accesses the information before the party can remedy the situation, it is too late.



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Rule 8(C): Improper Exclusion from Public Access

- **Rule 8(C) is the current AR 9(G)(6)(c).**
- If a court determines Court Records are excluded from public access without first satisfying the Rule, the court *shall* make the records available for public access *seventy-two hours* after notice to the parties and any person affected by the release.
- The party can immediately take steps to maintain confidentiality.
- **Court practice?** The court can “lock” the documents pending compliance with this rule.



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Rule 8(C), continued:

- **The party's options:**
- **Use the Rule 6 procedure (formerly AR 9(G)(4)); or**
- **Resubmit the Court Record in compliance with Rule 5.**
- If the court decides the Record is not entitled to exclusion from public access, the party originally filing it must resubmit the Court Record as a Public Access Document.



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Rule 8(C) and TR 86(L): Caution

- **If you are e-filing, you *must* make yourself familiar with TR 86.**
- **TR 86(L)(3) and (4) are critical if you file a non-conforming document (including a document not complying with Rule 5):**

If a document does not comply with Rule 5, the clerk must accept it and direct it to the intended court.

The court *shall*:

- (a) Strike the non-conforming document; or
- (b) Allow the party 72 hours to cure the defect.

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Trial Rule 86 caution, continued:

- **TR 86(L)(4) also states if a party submits a cured document within the 72 hours, excluding days the court is closed, the document is timely filed.**
- **Don't take a chance!** Courts are discouraged from "striking" documents but it can happen, and you may have lost a statute of limitations or summary judgment cut-off date.



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Final Thoughts on E-Filing

- Don't use green paper when e-filing.
- Put "Confidential and Excluded From Public Access" on the top of e-filed documents in case they are printed off or, for returns of subpoenas, for example, the Clerk knows to "lock" them.
- Print documents excluded from public access on green paper just to be sure they aren't disclosed improperly.
- If someone is a paper filer, he or she must use green paper when filing a document excluded from public access.

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