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Dissemination of Privileged Confidential Information**

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Sealed Documents to Prevent “Perfectly Legitimate” Review and Dissemination of Privileged or Confidential Information

By Bridget Hoy & Dana Malkus

A recent federal district court case serves as a reminder that when filing documents through an electronic filing system, the information contained in the documents is immediately available to anyone “through perfectly legitimate means: by reading a public filing.” The January 6, 2009 opinion in *E-Smart Technologies, Inc., et al. v. Wayne Drizin, et al.*, 2009 U.S. Dist. LEXIS 272 (N.D. Ca. Jan. 6, 2009), demonstrates that when caution is not taken at the onset to seal documents that contain privileged or confidential information, there might be little recourse for immediate distribution of information that one might later determine should have been kept private.

In *E-Smart*, two biometric identification system companies brought suit against certain individuals and related companies responsible for the development and manufacturing of technology related to the plaintiffs’ biometric identification system. Putting aside the vast web of procedural and substantive issues not relevant for our purposes, the relevant facts of the case are as follows: At the start of the case, the plaintiffs were represented by Maranda Fritz, and the defendants were represented by Patricia Douglass. During the course of the litigation, Donald Putterman was substituted as

counsel for the plaintiffs. Further, one of the defendants filed a separate, but related, suit against the plaintiffs in the U.S. District Court for the Southern District of California. After Mr. Putterman was substituted as counsel in the Northern District case, Ms. Fritz sought to withdraw from the Southern District case. In connection with her withdrawal, and in response to certain allegations made by Mr. Putterman directed toward her, Ms. Fritz filed a declaration explaining her actions.

On the same day that Ms. Fritz filed the declaration, Ms. Douglass used the court’s electronic filing system to download and forward copies of the declaration to the Enforcement Division of the SEC and to another attorney who served as private counsel to multiple board members of one of the plaintiffs. Very soon thereafter, the Southern District case was dismissed for lack of subject matter jurisdiction. In conjunction with the dismissal and in response to a request from Mr. Putterman, the Southern District found that the declaration contained confidential attorney-client communications and ordered that the declaration be sealed in order to prevent harm or prejudice from the disclosure of the communications.

When Ms. Douglass subsequently sought to withdraw from the Northern District case, Mr. Putterman did not object to the motion, but requested that

the court “retain jurisdiction” over Ms. Douglass because he believed that she had acted unethically in downloading and distributing the declaration. Mr. Putterman argued that Ms. Douglass should have known that the declaration contained privileged attorney-client information and that she had a duty to refrain from reading or distributing the public filing. In denying Mr. Putterman’s request, the Northern District emphasized that Ms. Douglass had obtained the declaration “through perfectly legitimate means: by reading a public filing” and that Ms. Fritz had “knowingly placed the material in a publicly available location.” The court concluded that Ms. Douglass had not engaged in any misconduct by downloading and distributing the privileged declaration.

E-Smart serves as an important reminder to lawyers practicing in courts that utilize e-filing systems. It also highlights the need to carefully review documents and consider their confidential nature prior to filing them. Failing to take these important steps could leave privileged or confidential documents vulnerable to nearly instantaneous public viewing and dissemination. The resulting harm may occur long before any corrective action can be taken.

Both the Eastern District of Missouri and the Southern District of Illinois permit electronic filing of

sealed documents. The Administrative Procedures for the CM/ECF system used in the Eastern District of Missouri instruct that the filer should make two separate entries in the CM/ECF system. First, the filer should make an entry with a motion requesting leave to file the sealed document. Second, the filer should make an entry with all of the documents to be sealed. If a protective order granting leave to file documents under seal has already been entered in the case, it is, of course, not necessary to first file a motion for leave to file the sealed document. The document will be provisionally sealed pending a ruling on the motion for leave to file the sealed document. If the motion for leave is granted, the document will remain sealed. Alternatively, if the motion for leave is denied, the judge may instruct the Clerk's Office to remove the sealed access level, and the document will be publicly available. Upon filing the sealed document, a Notice of Electronic Filing goes to the attorneys of record, but the document itself is not accessible from the Notice of Electronic Filing. Therefore, because service will not occur via the CM/ECF system, the filer of the sealed document should remember to serve opposing counsel

by other means. Information on filing documents under seal in the Eastern District of Missouri is available at http://www.moed.uscourts.gov/cmecf/cmecf_adminprocedures.pdf.

The CM/ECF system in the Southern District of Illinois also allows for the electronic filing of sealed documents by all attorneys of record for the particular case. However, access to view a sealed document is set by the court. To file a document under seal, the filer should attach the PDF document to the selected event, and the system will automatically seal the document. Thereafter, the document can be viewed only by users who have been granted access by the court to view the sealed document. A Notice of Electronic Filing will be generated and transmitted for each event related to the sealed motion, including the original filing and responses and replies related to the original filing. Information on filing documents under seal in the Southern District of Illinois can be found at http://www.ilsd.uscourts.gov/cm_ecf.html.

Originally published in St. Louis Lawyer, a publication of the Bar Association of Metropolitan St. Louis.



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**This paper was originally published in the
St. Louis Lawyer (March2009)**