Filing confidential documents under seal in the appellate courts

Mar 28, 2011

Categories:

Publications

Indiana Administrative Rule 9 governs public access to records and has significant implications for our appellate practice. Administrative Rule 9(G)(4) and several of the Appellate Rules expressly address how to handle records on appeal that have been excluded from public access. When appealing a case involving confidential documents/documents filed under seal at the trial level, attorneys should be aware of these obligations under the Indiana Appellate Rules, and well as possible additional obligations to their clients arising from these Rules.

I. Obligations under the Appellate Rules.

For the most part, the default under the Appellate Rules regarding confidential filings is to maintain the status quo. If documents were filed on green paper at the trial court, they should likewise be filed on green paper at the appellate court, unless the appellate court orders otherwise. (See the next section for an important additional requirement.)

When documents have been excluded from public access by virtue of a court order, appellate counsel must provide notice of such exclusion on the Appellant's Case Summary, and must attach all trial court orders concerning each exclusion. (*See* Appellate Rule 15(C), (D); Administrative Rule 9(G)(4)(c)(i).) Failure to follow this procedure can result in the information being released by the clerk and appellate counsel being subjected to sanctions. (Administrative Rule 9(G)(4)(c)(iv).)

In addition, certain categories of documents must be protected from public access under Administrative Rule 9(G). This list includes (1) information that is excluded from public access under federal law; (2) information that is excluded from public access under Indiana statute or court rules; (3) information excluded from public access by a specific court order; (4) complete Social Security Numbers of living persons; (5) certain information that would personally identify witnesses or victims in criminal or civil protection order proceedings or the addresses of court staff; (6)

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

certain financial account information; (7) criminal or juvenile expungement orders; (8) certain personal and deliberative material of judges, court staff, and jurors; and (9) certain enumerated administrative records. (See Rule 9(G) for non-exhaustive lists.)

If any of the documents listed under Administrative Rule 9(G) are included in the record but not filed on green paper below, appellate counsel has a duty to correct this omission on appeal, subject to the requirements identified in the next section. See Southern v. State, 878 N.E.2d 315 (Ind.Ct.App. 2007); Lemond v. State, 878 N.E.2d 384 (Ind.Ct.App. 2007).

Failure to do so can result in the document that should have been confidential suddenly being made publically available, which can expose the attorney to liability and possible disciplinary action. See J.S. v. State, 928 N.E.2d 576 (Ind. 2010)

II. The effect of Administrative Rule 9(G)(1.2) on appellate filings.

Administrative Rule 9(G)(1.2) provides, "During court proceedings that are open to the public, when information in case records that is excluded from public access pursuant to this rule is admitted into evidence, the information shall remain excluded from public access only if a party or a person affected by the release of the information, prior to or contemporaneously with its introduction into evidence, affirmatively requests that the information remain excluded from public access."

If trial counsel properly made the Rule 9(G)(1.2) request below, Administrative Rule 9(G)(4) does not require a separate request when including the evidence in appellate filings.

But, should appellate counsel become aware that trial counsel did not make the 9(G)(1.2) request below, counsel should make this affirmative request on appeal prior to or contemporaneous with the filing of this evidence on green paper at the appellate level. As noted above, failure to do so can expose the attorney to liability and possible disciplinary action.

III. Mechanics of filing confidential documents with the appellate court.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Appellate Rule 9(J) directs appellate counsel to file confidential documents in accordance with Trial Rule 5(G) and Administrative Rule 9(G)(4). This means documents excluded from public access must be tendered on light green paper (or be tendered with a light green coversheet attached to the document marked "Not for Public Access" or "Confidential"). (*See* Trial Rule 5(G).) Additionally, the parties must not disclose any matter excluded from public access. (Administrative Rule 9(G)(4)(a)(ii).)

Because the public has access to Appendices and Briefs filed on appeal, appellate counsel must file two separate versions: a public access version *without* the confidential records and a separate version *with* the confidential records. Although most often this applies only to the Appendix, if appellate counsel discloses any of the confidential information contained in the Appendix in the appellate Briefs, two separate Briefs must be filed as well.

The public access version is tendered on white paper, with the confidential pages omitted and a page noting this omission inserted in their place. The separately-bound confidential version is filed on green paper, and consists only of those confidential documents removed from the public access version. The confidential document pages should be numbered as if they were part of the public access version.

As noted in the previous section, when filing confidential evidence on appeal, counsel should consider whether a Administrative Rule 9(G)(1.2) request must be made at the appellate level.

Finally, if oral argument is set, Appellate Rule 53(H) requires "the parties and their counsel shall conduct oral argument in a manner reasonably calculated to provide anonymity and privacy in accordance with the requirements of Administrative Rule 9(G)(4)." Administrative Rule 9(G)(4) in turn provides "the parties and counsel, at any oral argument … shall not disclose any matter excluded from public access."

In light of these requirements, appellate counsel should employ the use of initials, pseudonyms, and other means when arguing a case involving confidential documents. If there is absolutely no way that counsel can meaningfully conduct oral argument without disclosing

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

matter excluded from public access, counsel should contact the appellate court prior to oral argument to seek guidance as to how to proceed.

IV. Possible additional obligations to your client.

If a document does not fall within the categories identified by Administrative Rule 9(G) as requiring the document to be excluded from public access, then Administrative Rule 9(H) provides the exclusive means by which a party may file documents under seal. (*See* Administrative Rule 9(H); Travelers Cas. and Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 114 (Ind. 2008).)

This Rule provides that a request to prohibit public access to information in a court record must be verified, must be in writing, must meet at least one of four factors identified in the Rule, notice of the request must be provided to all parties and other persons as the court may direct. Id. If the trial court does not initially deny the request, it must, after posting advance public notice, conduct a public hearing. Id. In order to prohibit public access to records, the trial court must find "by clear and convincing evidence" that at least one of the conditions listed have been satisfied and it must state in writing the reasons for granting the request. Id. A Trial Rule 26 protective order does *not*, in and of itself, meet the requirements of Administrative Rule 9(H). *See* Travelers Cas. and Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 114 (Ind. 2008).)

Likewise, as discussed above, an affirmative request is required under Administrative Rule 9(G)(1.2) in order to keep any document introduced at a hearing from public access.

As explained above, appellate counsel's responsibility under the Appellate Rules is to maintain status quo and to continue to file documents on green paper if those documents were filed on green paper below. If the appellate court has reason to believe that documents were improperly filed under seal below, it regularly issues orders to appellate counsel to show cause as to why the documents should not be unsealed and if counsel cannot show that Rule 9(H) and Rule 9(G)(1.2) were followed, the documents will no longer be treated as confidential. (Administrative Rule 9(G)(4)(c)(ii).)

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Moreover, even if no order to show cause is ever issued, the appellate court can still sua sponte unseal the records if its independent review reveals a failure to follow the requirements of Administrative Rule 9(H). See Allianz Ins. Co. v. Guidant Corp., 884 N.E.2d 405 (Ind.Ct.App. 2008); Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008).

Thus, if appellate counsel is concerned that the requirements of Administrative Rule 9(G)(1.2) or 9(H) were not followed below, counsel may need to inform your client of the potential for the documents to be unsealed on appeal. If your client is concerned about these documents being unsealed, you may need to consider either seeking a remand to allow the trial court to hold that hearing and properly protect these documents pursuant to 9(H) or 9(G)(1.2) or requesting that the appellate court hold a hearing in compliance with Administrative Rule (9)(H) to allow the documents to be treated as confidential.

For more information, please contact Julia Blackwell Gelinas or any other attorney in Frost Brown Todd's Appellate group.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons