

NOTICE TO THE BAR

APPELLATE DIVISION REMINDER TO COUNSEL REGARDING SUBMISSION OF CONFIDENTIAL DOCUMENTS AND OTHER ISSUES CONCERNING CONFIDENTIALITY

The Appellate Division is reminding attorneys about the submission and treatment of confidential material in Appellate Division matters. The Judiciary is committed to transparency and this notice emphasizes that although certain statutes, rules, and case law may classify some material as confidential and excluded from public access, material that is not specifically protected is not considered confidential and is not excluded from public access, unless otherwise directed by the court.

1. Confidential Personal Identifiers. Rule 1:38-7 defines personal confidential identifiers as a Social Security number, driver's license number, vehicle plate number, insurance policy number, active financial account number, or active credit card number, or information pertaining to an individual's military status. These confidential personal identifiers shall not be included in any document or pleading submitted to the Appellate Division unless otherwise required by statute, rule, administrative directive, or court order. However, an active financial account may be identified by its last four digits when that account is the subject of the litigation and cannot be identified by other means. Rule 1:38-7(b). Please ensure that your submissions redact confidential personal identifiers. It is the filing party's obligation to redact, and the court shall not order the clerk to assume this task. Rule 1:38-7(g)(3). Please note that both the Appellate Division Civil and Criminal Case Information Statements (Rules Appendices VII and VIII) require the filing party to execute a certification that all confidential personal identifiers have been removed and will continue to be removed in future filings.

2. Case Information Statement. Attorneys are reminded that all Appellate Division opinions, both published and unpublished, will be posted on the internet. Both the Appellate Division Civil and Criminal Case Information Statements (Rules Appendices VII and VIII) contain a statement advising that "Whether or not an opinion is approved for publication in the official court report books, the Judiciary posts all Appellate Division opinions on the Internet." Please discuss this with your clients before filing a notice of appeal and consider present and future implications of an opinion naming your client being posted on the internet. See, e.g., RPC 2.1.

Once the appeal is posted on the internet, it is beyond the ability of the Appellate Division to remove it.

3. Submission of Confidential Documents. Rule 2:6-1(a)(3) describes the mechanism to submit documents that are excluded from public access in otherwise unsealed cases. An attorney must submit the documents electronically in a separate exhibit marked as sealed. This document shall be filed by selecting “confidential appendix” under the exhibit document category. The format of the confidential appendix must conform with the requirements of Rule 2:6-1. Documents that are subject to a protective order pursuant to Rule 3:13-3 or Rule 4:10-3, or juvenile records sealed pursuant to N.J.S.A. 2A:4A-62, shall be submitted to the court in paper in three separate envelopes clearly marked for the confidential use of the court. See Notice to the Bar, Electronic Filing in the Appellate Division ("eDATA") (January 21, 2015).

When uploading documents into the eCourts Appellate system, attorneys shall not select the confidential option unless there is authority pursuant to statute, rule, or case law to do so.

4. Motions to Seal the Record. Records deemed confidential by statute, rule or case law will continue to be treated as confidential in the Appellate Division. Trial court orders that designate other material and proceedings as confidential do not bind the Appellate Division. Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 382 (1995). If a party wants to continue as sealed in the Appellate Division material that was sealed below, a motion for that relief should be made in the Appellate Division within 30 days of the filing of the notice of appeal. Please be reminded that this motion must be supported by a brief that explains the facts and circumstances giving rise to the appeal and why the requested relief (sealing) should be granted, including the legal basis for doing so. A certification will not suffice. Rule 2:8-1. It is important to consider that the court's obligation is to "examine each document individually and make factual findings with regard to why the interest in public access is outweighed by the interest in nondisclosure." Keddie v. Rutgers, 148 N.J. 36, 54 (1997)." Greebel v. Lensak, 467 N.J. Super. 251, 260 (App. Div. 2021). Motions to seal the record require the applicant to demonstrate by a preponderance of the evidence that good cause exists. Good cause exists when disclosure will likely cause a clearly defined and serious injury to any person or entity and the person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open to public inspection pursuant to Rule 1:38. Rule 1:38-11.

5. Oral Argument. Oral argument is a proceeding that shall be conducted in open court. Rule 1:2-1. Counsel in certain proceedings, e.g., appeals in termination of parental rights matters, must exercise proper judgment to avoid using names and other personal identifiers during argument. Counsel should expect the details of the case to be discussed in open court.

6. Opinions. All Appellate Division opinions, whether published or unpublished, are posted on the internet. An Appellate Division opinion may quote or reference court records that are otherwise excluded from public access. Rule 1:38-1A.

Carmen Messano
Presiding Judge for Administration
Appellate Division

Dated: September 1, 2021