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The Supreme Law of the Land: Recent E-Filing Drama Implicates the First Amendment in Civil Litigation

As the various circuits in Illinois struggle with the last steps toward mandatory e-filing, the particular problems faced by Cook County with respect to immediate availability of filed complaints provide a reminder for practitioners of the public's right to access court filings. In *Dragged Into the Future: Modernizing the Legal Profession through E-Filing, IDC Quarterly*, Vol. 26, No. 2, Donald Patrick Eckler and Matt Reddy, we addressed the potential pitfalls with e-filing and cases that placed the onus on lawyers to ensure that documents were filed timely and in conformity with court rules. Those prescriptions remain, but recent developments in federal litigation implicate the First Amendment to the U.S. Constitution by underscoring the tension between confidentiality and public access, raising issues of practice well beyond e-filing.

Recent Orders on E-Filing

As the deadline of January 1, 2018 for circuit courts to institute mandatory e-filing approached and then passed, several Clerks of the Circuit Court filed a flurry of petitions seeking extensions of time to comply with the order. Extensions on discrete issues were granted to McHenry County, Madison County, DuPage County, and DeKalb County. Most importantly, Cook and Winnebago Counties were granted until June 30, 2018 and July 1, 2018, respectively, to implement mandatory e-filing.

Of notable importance though is the Supreme Court's denial of Cook County's request for an extension of time to comply with the requirements of the order of Judge Kennelly of the United States District Court for the Northern District of Illinois to provide immediate and contemporaneous access of newly filed cases to the media. In orders entered January 8, 2018 and February 13, 2018, Judge Kennelly, ruling on a motion for preliminary injunction held that the Clerk of the Circuit Court of Cook County (Clerk) could not withhold e-filed complaints until administrative processing was complete and required the Clerk to provide timely, contemporaneous access to complaints upon filing. *Courthouse News Serv. v. Brown*, No. 17 C 7933, 2018 WL 318485 (N.D. Ill. Jan. 8, 2018); *Courthouse News Serv. v. Brown*, No. 17 C 7933, 2018 WL 835220 (N.D. Ill. Feb. 13, 2018).

The Courthouse News Case

Courthouse News Service (CNS) provides information on civil litigation in 2500 state and federal courts across the nation. CNS filed suit against the Clerk because in 2015, after years of providing hard copies of electronically-filed complaints, the Clerk only provided access after the electronically-filed complaints had been accepted and were able to be viewed on terminals in the Clerk's office or in the courthouse press room. *Courthouse News Serv.*, 2018 WL 318485,

at *1. As a result of this change, the press could not see newly filed electronic complaints until at least the next business day. *Id*. CNS sought to remedy this situation by providing alternatives to the Clerk, but the Clerk declined to modify the policy. *Id*. at *2. Following that, CNS filed suit seeking injunctive and declaratory relief against the Clerk and moved for a preliminary injunction. *Id*.

In granting a mandatory injunction, an order many courts are reluctant to issue, the court held that the law is clear that under the First Amendment "[t]he public's right to access to court proceedings and documents is well-established." *Id*. at *3 (citing *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). As the Court of Appeals for the Seventh Circuit Court explained, "public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) provide foster more accurate fact finding." *Courthouse News Serv*., 2018 WL 318485, at *3. The Seventh Circuit found that "immediate and contemporaneous" access is required to comply with the First Amendment and Judge Kennelly held that any delay in access to a complaint violated the law. *Id*. at *6.

The court ordered the Clerk to implement a system that would provide access to newly filed civil complaints contemporaneously with their receipt by the Clerk's office. *Id*. at *7. In an order entered February 13, 2018, Judge Kennelly denied stay of the preliminary injunction pending appeal to the Seventh Circuit. *Courthouse News Serv.*, 2018 WL 835220, at *3.

What Does This Have to Do with Civil Practice for Defense Practitioners?

In a word: everything. Parties often come to the circuit court with disputes that have aspects that they would prefer to keep secret. Putting aside cases that involve sexual abuse raising separate concerns than those addressed here, this issue most often arises in the civil defense context in litigation related to product liability, intellectual property, and trade secrets. The leading case in Illinois on the right of public access to court files is *A.P. v. M.E.E.*, 354 Ill. App. 3d 989 (1st Dist. 2004), which involved the Chicago Tribune's request for access to a court file involving "issues of whether certain minor and unborn children of the Pritzker family should be joined to a private confidential settlement agreement already negotiated and signed by adult family members." *A.P*., 354 Ill. App. 3d at 990. In *A.P.*, the trial court sealed the complaints in the case and entered into a protective order that maintained the entire court file under seal. *Id*. The Tribune intervened in the case in order to gain access to the sealed court file. *Id*.

Reversing the trial court's decision, the court noted that in the United States court files in civil cases are open to the public by "force of tradition." *Id*. at 993. Illinois courts have recognized the right of public access to court files under both Illinois law and the First Amendment. *Id*. at 994. The right to access is not absolute as the court has "supervisory power over its own records and files, and access may be denied where court files might become a vehicle for improper purposes." *Id*. (citing *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231 (2000)). "The right of access, however, may not be evaded by the wholesale sealing of court files; the court must be sensitive to the rights of the public in determining whether any particular document or class of documents is appropriately under seal." *Id*. (citing *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)). With respect to pleadings in particular, the court held that those are not protected like information in pre-trial discovery and pleadings together with motions and other papers "assume the presumption of public access." *Id*. at 997.

In view of this qualification, the *A.P.* court set forth principles for determining how and whether certain documents should be placed under seal. *Id*. at 995-1003. The trial judge, as the primary representative of the public interest, should

not rubber stamp a stipulation to seal a record. *Id*. at 995 (citing *First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)). The court suggests that the request to seal the records should be accompanied by an affidavit as to the reasons that the documents be placed under seal. *Id*. at 995-996. The *A.P.* court criticized the trial court for not considering redacting portions of the documents, including issues related to financing and identity of minors affected by the litigation. *Id*. at 996.

The court held that the closure order should "articulate the privacy interest involved and be accompanied by the reasons 'specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Id*. (quoting *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). As it related to the settlement agreement reached between the parties, the *A.P.* court found that such agreements have not historically been available for public access in a court proceeding. *Id*. at 1001. Finally, the court placed the burden on the parties to show that particular documents should not be unsealed and ordered the trial court on remand to review each document sought to be kept under seal to determine if it was appropriate. *Id*. at 1002-1003.

How Should Civil Litigants Proceed?

Applying the principles from *Courthouse News* and *A.P.*, counsel should also be mindful that public access to any filed document is the default. In most courts in Illinois, discovery responses are not filed with the court, so a protective order for such documents will suffice to protect sensitive documents disclosed in discovery. That protective order, however, cannot under the *A.P.* decision, preemptively require that any sensitive document be filed under seal. The burden is on the parties to demonstrate, document by document, that certain information should be withheld from the public. The appropriate language for the protective order would require that the party who seeks to file information marked confidential request and obtain leave of court before filing the allegedly confidential document under seal.

The party demanding confidentiality, which is likely not to be the party that wants to file the document, will likely need to provide an affidavit to demonstrate that the document or information is properly sealed. While it is unlikely that the Chicago Tribune will intervene in a typical products liability case to obtain documents that are under sealed by the court, most trial courts are aware of the requirements of Illinois law and the First Amendment, and the chances of obtaining the requested privacy are increased by attention to these details to comply with the well-settled law.

Conclusion

There is a constitutional dimension to even the most mundane procedure of filing a document with a court clerk—and to changes in how that is done through the implementation of mandatory e-filing. While most lawyers do not practice what any of them would call "constitutional law," the supreme law of the land informs and affects nearly everything a lawyer does in one way or another. Keeping in mind the protections and requirements of the Constitution are often critical to providing effective service to clients.

About the Author

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage

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