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Ohio Justices' Take On Sealing Records Has Biz Attys On Alert

By **Eric Heisig**

Law360 (October 21, 2022, 4:04 PM EDT) -- The Ohio Supreme Court has sent a stern warning that judges and parties must justify sealing court records that would otherwise be public or be prepared to unshield them, in a decision that involved a politician's divorce papers but could also impact business litigators seeking to shield confidential information.

The move that rankled the high court came from a trial judge in Ashland County, who offered no reasoning when he sealed records containing financial details and other personal information for former state treasurer and three-time Republican U.S. Senate candidate Josh Mandel and his then-wife Ilana.

The former couple cited as reasoning Mandel's past as "a former state treasurer of Ohio and member of the Ohio House of Representatives" and Ilana's coming from "a very public family in the state" involved in "national financial and civic communities."

Lawyers and professors who watch the court said even if the decision may not make it harder to get records sealed, it puts the legal community on notice to justify such a request.

"Both judges and lawyers in those cases will have to work a bit harder," said Cleveland-Marshall College of Law Professor Doron M. Kalir, a former Skadden Arps Slate Meagher & Flom LLP lawyer. He added that attorneys would be well-advised to ask judges to detail their reasoning so a decision has a better chance of surviving an appeal.

Common Pleas Judge Ronald P. Forsthoefel granted the splitting couple's sealing motion without a hearing, writing it was "well-taken" but did not further explain his take. Asked by the Cincinnati Enquirer to weigh in, the high court's Oct. 11 decision held that a judge cannot seal a record without detailing clear and convincing evidence, even if both sides agree to it.

The justices noted that the judge went as far as sealing the case designation sheet — which includes basic information like the parties' names, the case number and the type of complaint — as "perhaps the most glaring example" of the lack of evidence he cited.

"Judge Forsthoefel … says that he performed the analysis prescribed by the Rules of Superintendence," the opinion said, referring to a section of the state's requirements that, with few exceptions, court records are publicly accessible. "But this argument does not square with his order, which fails to cite, let alone discuss, the Rules of Superintendence. In any event, Judge Forsthoefel's affidavit is beside the point. This court is reviewing the correctness of Judge Forsthoefel's order, not his after-the-fact descriptions of that order."

It is not uncommon for judges to issue one- or two-sentence rulings that do not fully explain their legal reasoning in all sorts of cases, especially with requests to seal documents where both sides agree. Lawyers can also sometimes take note and follow suit, according to David M. Krueger, a partner at Benesch Friedlander Coplan & Aronoff.

"Parties can be a little lax if there isn't any controversy," Krueger said.

That does not mean the job will be harder, though. At least in terms of business litigation, "proprietary business information" is one of the factors the Rules of Superintendence list as a

possible reason for sealing a court record.

"In my line of work, I think most litigators exercise a good-faith evaluation of whether something's confidential," Krueger said. "I think a lot of attorneys do dot their I's and cross their T's when they need to justify."

"This decision is more for the practitioners who might not take that extra step," he added.

Justice Sharon L. Kennedy concurred with the decision but argued the court does not have the authority to issue rules about whether court records are public. That power, instead, comes from the state public records law, passed by the Legislature, wrote Justice Kennedy, who is currently in a race with fellow Justice Jennifer Brunner to replace the retiring chief justice.

However, she also noted the Enquirer was following the justices' precedent when it sought the records under the Rules of Superintendence. Justice R. Patrick DeWine, also running for re-election, joined in the concurrence.

But despite some intricacies of what is required to seal and unseal a record, the message the justices sent was simple one: explain yourselves. There must be clear and convincing evidence pled and shown for such a ruling, according to the opinion.

It's not the first time this year the justices have made clear their requirements to seal a case, observed Scott A. Kane, managing partner of Squire Patton Boggs LLP's Cincinnati office. Another was in State ex rel. Cincinnati Enquirer v. Shanahan, in which a judge sealed a police officer's affidavit, citing the potential for harm against the officer.

In that case, the court also overturned the judge's sealing order, citing the lack of clear and convincing evidence that the sealing was necessary to protect the officer's safety, privacy rights or public safety.

"Between the two decisions, the theme of them is that it's a high bar to seal records, and you have to make some specific showings supported by an evidentiary record," Kane said.

Kalir said he thought the opinion "first and foremost was a warning call for the judges in Ohio to do their work."

He added that "the rule is very clear that if and when a judge wants to overcome the presumption of a hearing and restrict public access, they have to do a lot of yeoman's work."

--Editing by Philip Shea and Alyssa Miller.

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