

Recent Chancery Court Guidance on Rule 5.1

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Parties resisting a challenge to the confidential treatment of documents under Delaware Court of Chancery Rule 5.1(f) must offer individualized, contemporaneous good cause for such treatment to ensure that confidentiality designations are maintained throughout litigation. For older documents, that showing must overcome a presumption of "staleness" under Rule 5.1(f).

Rule 5.1 requires that information presented to the court be available to the public, absent a showing of good cause for information to remain confidential. Under Rule 5.1(b)(2), good cause will be found "only if the public interest in access to court proceedings is outweighed by the harm that public disclosure of sensitive, nonpublic information would cause." Since its enactment on Jan. 1, 2013, the Court of Chancery has issued few opinions interpreting the standards for designating and maintaining confidential treatment under the rule.

Recently, in *Reid v. Siniscalchi*, C.A. No. 2874-VCN (Del. Ch. Nov. 20, 2014), the Court of Chancery applied Rule 5.1 to adjudicate an objection to the continued designation of documents as confidential during the pendency of litigation, where such documents previously had been accorded confidential treatment by the court. In *Reid*, the plaintiff asserted various causes of action, including breach of contract and breach of fiduciary duty claims related to an alleged oral agreement between certain defendants and U.S. Russian Telecommunications LLC regarding a potential joint venture opportunity involving the manufacture and maintenance of Russian satellites. The defendants initially sought confidential treatment for filings and documents in 2009. At that time, the plaintiff argued that no confidentiality protection whatsoever was required in the litigation. On June 14, 2010, the court nevertheless entered a confidentiality order. Both parties subsequently designated documents as confidential.

In April, the plaintiff renewed his objection to confidential treatment, filing a notice pursuant to Rule 5.1(f). Rule 5.1(f) provides that "any person may challenge the confidential treatment of a confidential filing by filing a notice raising the challenge with the Register in Chancery." The plaintiff again argued that no documents in the action merited confidential treatment. In addition, drawing from Rule 5.1(g), the plaintiff argued that even if the documents at one point contained confidential information, the age of the documents alone obviated any good cause to keep those documents under seal.

The court agreed. Applying the Rule 5.1(b)(2) balancing test, the court acknowledged that the defendants offered "valid reasons why confidential treatment was warranted years ago," but, due to the passage of time, found the documents "presumably stale" and "the need for confidential treatment ... no longer apparent." The *Reid* decision is consistent with prior decisions applying Rule 5.1 to post-litigation challenges both to continued confidential treatment under Rule 5.1(g) and to redacted pleadings under Rule 5.1(f).

In *Horres v. Chick-fil-A*, C.A. No. 5530-VCL (Del. Ch. Mar. 27, 2013), Vice Chancellor J. Travis Laster granted a post-litigation challenge under Rule 5.1(g) to continued confidential treatment of documents filed in support of Chick-fil-A's opposition to a temporary restraining order sought by Joseph A. Horres Jr., operator of a Chick-fil-A franchise, against Chick-fil-A's termination of its franchise operating agreement with Horres. The contested documents included an affidavit and exhibits detailing the investigation of sexual harassment claims brought against Horres by Chick-fil-A employees. The case was dismissed in June 2010. Rule 5.1(g) presumptively limits post-disposition confidential treatment to three years, recognizing "that over time, information typically grows stale and its sensitivity fades."

In 2013, Chick-fil-A moved to maintain confidential treatment. Laster found that Chick-fil-A failed to show good cause to maintain confidential treatment (except as to sensitive information about the alleged victims) because the allegations raised against Chick-fil-A were merely embarrassing, not prejudicial, and because in the three years since the close of litigation, the public had gained an understanding of the case.

A few months later, in *Al-Jazeera America v. AT&T Services*, C.A. No. 8823-VCG (Del. Ch. Oct. 23, 2013), third-party news organizations initiated a Rule 5.1(f) challenge to the parties' redactions from the pleadings. To establish good cause for their redactions, the parties claimed that "collateral damage ... could result if the redacted information ... was made public," citing in particular economic disadvantage within their industry and a widespread industry practice of preserving the confidentiality of contract negotiations and terms.

Due to the high public interest and the identity of the parties in the dispute, Vice Chancellor Sam Glasscock III determined that, on balance, the parties' notably extensive redactions, which he characterized as "merely based on the potential economic or reputational impact that disclosure may have," did not outweigh the public's substantial interest in the litigation. Also worth reviewing is *Sequoia Presidential Yacht Group v. FE Partners*, C.A. No. 8270-VCG (Del. Ch. July 15, 2013).

The *Reid* decision, in revisiting and altering the court's treatment of prior-designated confidential documents during an active litigation, reinforces the court's strong commitment to public access and emphasizes that the court will carefully scrutinize claims of good cause. *Reid* is noteworthy in that the court applied the principles behind the presumptive time limit in Rule 5.1(g) to a challenge raised in ongoing litigation. Parties facing a challenge to the confidential treatment of documents during litigation, even if such documents were previously designated as confidential, must be prepared to offer precise and compelling arguments for continued confidential treatment, particularly where a significant period of time has passed since the initial confidential designation.

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