

*In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566

Not surprisingly, heated litigation over the sealing of financial records in divorce cases seems to belong to the “rich and famous.” Ron Burkle was the standard-bearer. Now, Henry Nicholas, of Broadcom infamy, joins the club. Usually pitted against the armada of sealing crusaders is a representative of the media, the Los Angeles Times in the *Nicholas* case. *Burkle and Nicholas*, and *NBC Subsidiary (NBC-TV), Inc. v. Superior Court* (1999) 20 Cal.App.4th 1178 and *Estate of Hearst* (1977) 67 Cal. App.3d 777 before them, demonstrate that sealing attempts fail before the overriding and primary policy of open civil proceedings. As *Nicholas* once again makes clear, “Open court records safeguard against unbridled judicial power, thereby fostering community respect for the rule of law.”

In the *Nicholas* case, the Orange County Superior Court first assigned the case to Judge Nancy Pollard who entered the first sealing order, then to Judge Salvador Sarmiento (second, third, fourth and fifth sealing orders). The fifth sealing order appointed a special master to determine which court records, previously filed records and future filings should be sealed or redacted. The parties then stipulated to have the case referred to a retired judge, Judge Thomas Murphy. That reference was approved by the court, and the Supervising Judge then re-assigned the case to Judge Richard Waltz to determine all issues pertaining to the family court’s files. Judge Waltz, after ordering the special master to prepare a privilege log regarding all pleadings and documents filed under seal and all redacted pleadings and documents, issued a sixth and seventh sealing order. The seventh sealing order unsealed the two particularized and detailed sets of documents. Guess what? We’re now in the Court of Appeal.

Our friend Mr. Nicholas wanted to keep intact the fifth sealing order which sealed everything, and to overturn the seventh sealing order, which unsealed a great deal. He contended that since the fifth sealing order had not been appealed, it became final and no subsequent judge had jurisdiction to alter or modify it. Nice try, but no thanks, said the Court of Appeal. “We reject Nicholas’s efforts to treat sealing orders as if they were sealed caskets rather than presumptively open court records, ‘stamp[ing] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.’” Wow! The court denied the attack on the unsealing order on First Amendment Constitutional principles, California Supreme Court holdings [*NBC Subsidiary*] and judicial rules concerning the sealing and unsealing of records [Rules 2.550 and 2.551 of the California Rules of Court].

As non-receptive as the courts may be toward sealing motions, creative counsel still have room for client protection. California Rules of Court, rules 2.550 and 2.551, allow some trial court discretion; for example, if the court finds an “overriding interest” that overcomes the right of public access to the records and the proposed sealing is narrowly tailored. Rule 2.550 (d)(1)(4). What are some legitimate sealing concerns for counsel to consider? Documents containing sensitive information regarding minor children. Private medical information or

confidential financial information regarding third parties. It is blanket sealing orders that are likely to fail. The cases are instructive and the rules are specific. But proper protective orders are still available if pursued with reason and good cause.

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