

# Double Exposure: Keeping Your Confidential Information Out of the Public Eye in the Wake of *Apple v. Samsung*

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The issues that a court must address in determining whether to seal the record in a patent case present an interesting counterpoint to most other aspects of high-stakes litigation, in which one typically finds adversaries fighting for every advantage until a resolution is obtained by judicial means or settlement: Both sides may agree on the desired resolution, but the story—and the outcome—does not end there.

In *Apple v. Samsung*,<sup>1</sup> Apple sued Samsung under several utility and design patents in connection with Samsung's sales of its Galaxy phones and tablets in the United States. The case highlights the pitfalls, some unavoidable, in attempting to preserve the secrecy of competitively valuable information when litigating a technology case. Both Apple and Samsung agreed that exhibits containing various categories of financial and technical information that were filed under seal should have remained sealed, but the district court disagreed.<sup>2</sup> The outcome: a large volume of information produced by both parties was ordered open to public inspection. While the court's rulings are currently on appeal,<sup>3</sup> this is the poster child for the bell that cannot be unrung. This article explores this important aspect of the case, the standards that the court applied in arriving at its rulings, and the lessons that may be drawn from this example and applied in practice.

## **Apple v. Samsung: The Parties' Requests to Seal the Record**

The *Apple v. Samsung* trial involved claims for infringement of Apple's design patents and user-interface software patents for the iPad, infringement of the trade dress of the iPad, and dilution of the trade dress of both the iPad and iPhone.<sup>4</sup> A jury eventually awarded Apple more than \$1 billion in damages.<sup>5</sup> During the journey that led to this conclusion, the parties filed well over 100 motions to file under seal. The documents filed under seal were related to, among other things, motions for summary judgment, *Daubert* motions, claim construction statements, and motions in limine.<sup>6</sup> Apple and Samsung filed these sealing motions to protect what they contended were trade secrets, financial information, product launch strategies, marketing strategies, litigation strategies, and other commercial information. Operating under an agreed-upon protective order, both Apple and Samsung took the position that their respective information should be sealed and did not oppose the sealing of the other's information.<sup>7</sup> Nonetheless, applying Ninth Circuit law, Judge Koh ordered many of the exhibits unsealed when she determined which trial exhibits and information filed with evidentiary or summary judgment motions would remain sealed.<sup>8</sup>

## **The Ninth Circuit Standard for Sealing Judicial Records**

The Ninth Circuit recognizes a "general right to inspect and copy public records and documents, including judicial records and documents," as set forth by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*<sup>9</sup> While this right is not absolute, a party seeking the sealing of judicial records must articulate justifications for sealing that outweigh the public policies favoring disclosure, and motions for sealing must be narrowly tailored.<sup>10</sup>

The Ninth Circuit has instructed that "[w]hen ruling on a motion to seal court records, the district court must balance the competing interests of the public and the party seeking to seal judicial records."<sup>11</sup> Some documents are not subject to public access at all, such as grand jury transcripts and preindictment warrant materials, because these documents have "traditionally been kept secret."<sup>12</sup> With respect to documents that do not fall within this category, a presumption in favor of access applies as the starting point for the analysis.<sup>13</sup> Courts in the Ninth Circuit apply one of two standards in determining whether to seal documents filed in a case.<sup>14</sup> The determination as to which standard is applicable depends on whether the documents are to be used in connection with a trial or dispositive motion, or some other procedure.<sup>15</sup>

The particular standard to be applied derives from the strength of the public's interest in access to the documents. The Ninth Circuit reasons that the public's interest in understanding the bases and outcomes of nondispositive motions is relatively low; therefore, a party seeking to seal a document attached to a nondispositive motion need only demonstrate "good cause."<sup>16</sup> The standard for determining good cause for sealing records is that generally applicable under Federal Rule of Civil Procedure 26(c):<sup>17</sup> the party seeking protection must show that specific prejudice or harm will result if no protection is granted.<sup>18</sup> If particularized harm is found, then a court balances the harm against the public interest to decide whether protection is necessary for information such as "trade secrets or other confidential research, development, or commercial information."<sup>19</sup> Once the presumption of public access has been rebutted with a showing of good cause, the burden shifts to the party seeking disclosure to present a compelling reason why the information at issue should be released under the common law right of access.<sup>20</sup>

The standard for sealing records filed in connection with dispositive motions or for use at trial is substantially more stringent than that for records filed with nondispositive motions.<sup>21</sup> The rationale for the stricter standard is that

a trial or summary judgment motion—which resolves a dispute on the merits—is “at the heart of the interest in ensuring the ‘public’s understanding of the judicial process and of significant public events.’”<sup>22</sup> Documents filed in connection with motions collateral to dispositive motions or trial (such as motions in limine) may also be considered dispositive and subject to the higher threshold for record sealing.<sup>23</sup>

To seal a judicial record filed in connection with trial or a dispositive motion, a party must demonstrate with specific facts that compelling reasons support the preservation of secrecy.<sup>24</sup> Conclusory statements concerning hypothetical harm that may result from public disclosure of such documents fail to carry this burden.<sup>25</sup>

This does not mean that sensitive financial and technical documents cannot be protected, even at trial or on summary judgment. For example, the courts will typically find that a compelling reason for sealing a document exists when “court files might have become a vehicle for improper purposes,” such as to release a competitor’s trade secrets.<sup>26</sup> Trade secrets for this purpose are defined in the Ninth Circuit as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>27</sup> They include source code,<sup>28</sup> pricing terms, royalty rates, and minimum payment terms of licensing agreements.<sup>29</sup> The use of records to gratify private spite, promote public scandal, or circulate libelous statements may also constitute compelling reasons to seal the record.<sup>30</sup>

However, the potential for embarrassment, incrimination, or exposure to litigation of a party through the public disclosure of information is not, without more, sufficient for court protection.<sup>31</sup> Neither is a third party’s reliance on a stipulated protective order in producing documents.<sup>32</sup>

Courts in the Ninth Circuit tend to disfavor sealing broad categories of documents, especially where specific details regarding the need for such protection are absent.<sup>33</sup> Courts are more willing to seal information that has been narrowly tailored to key documents, and even more willing to seal the most highly competitive parts of key documents, when a party has demonstrated a genuine need and provided a detailed explanation of that need.<sup>34</sup> Specific facts supporting the harm that may result should be laid out for the court in a request to seal the documents.<sup>35</sup>

### **The District Court’s Application of Ninth Circuit Law in *Apple v. Samsung***

The district court denied Apple’s and Samsung’s requests to seal trial exhibits containing financial information including profit margins, profits on specific products, sales figures, revenue, costs, and tax accounting procedures.<sup>36</sup> Judge Koh was not persuaded that Apple’s interest in sealing these financial documents—that the information could be used by competitors to price products lower than a profitable level for Apple, and suppliers could use profit and costs to leverage higher prices—outweighed the public’s interest in accessing the information, especially where the financial information was “essential to each party’s damages calculations,” the data was critical to the public’s understanding of the multi-billion dollar jury award,

which had potential for “wide ranging ripple effects,” and there had been extraordinary public interest in the case.<sup>37</sup>

The district court also refused to seal trial exhibits containing Apple’s internal market research reports on its consumers’ usage habits, buying preferences, and demographics because it was not convinced that Samsung could not replicate the analysis and because consumer preferences are commonplace.<sup>38</sup> The determining factors were that (1) Apple could not show harm was likely to result from the release of the marketing research; and (2) the information played an important role in Apple’s claim for damages, making the information important to the public.<sup>39</sup> The court applied the same rationale used in ruling on Apple’s motions in ruling on Samsung’s and third parties’ motions to seal and came to the same conclusions for the same categories of documents.<sup>40</sup>

However, the court did not remove protection for all of the parties’ information. Documents containing source code,<sup>41</sup> financial terms for current and past license agreements,<sup>42</sup> information on past production and supply capacity,<sup>43</sup> and analysis and strategy for future corporate plans and revenue projections remained sealed.<sup>44</sup> The court explained that source code and financial aspects of licensing agreements plainly fall within the definition of trade secrets.<sup>45</sup> The court found that compelling reasons for sealing documents containing production and supply capacity information existed because the potential of harm from disclosure was high given that competitors could alter their business and pricing models based on the information to gain an unfair competitive advantage and that suppliers could predict when need was greatest and capitalize on the information by increasing prices during these periods.<sup>46</sup> Further, production and supply capacity was only a limit on potential damages in the case, but was not a “driver of the damage claims,” and thereby the public interest in the information was less than if the information was directly relevant to the damage claims.<sup>47</sup> The court appeared to view future plans and projections as causing significant competitive harm, while having little value to the public given that the focus of the litigation was on past and current conduct.<sup>48</sup>

### **The Appeal**

Both Apple and Samsung appealed portions of the district court’s order denying their motions to seal.<sup>49</sup> The focus of both appeals is on financial data attached to pretrial motions. The Federal Circuit stayed the order until the appeal is resolved,<sup>50</sup> and thus the materials at issue remain sealed.

Appeals in patent cases are heard by the Federal Circuit, not by the various regional courts of appeals.<sup>51</sup> The Federal Circuit applies regional circuit law to issues that are not unique to patent law.<sup>52</sup> Thus, the definition of a trade secret is governed by regional circuit law.<sup>53</sup> The Federal Circuit has not, however, addressed the issue of whether regional circuit law applies in

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reviewing a district court's order regarding sealing the record.

It would seem that regional circuit law should apply in determining whether records remain sealed.<sup>54</sup> The use of confidential technical and financial information is not unique to patent cases. Additionally, the Federal Circuit has applied regional circuit law to issues similar to those issues involved in record sealing. For example, regional circuit law has been applied in resolving privilege and confidentiality issues, in compelling discovery, in quashing subpoenas, and regarding evidentiary rulings.<sup>55</sup>

If, however, the Federal Circuit were to conclude that a patent-specific standard were appropriate, the court's prior rulings suggest that it might apply a standard not materially different from that applicable in the Ninth Circuit. In *In re Violation of Rule 28(d)*, the Federal Circuit addressed the issue of whether the defendants' counsel had violated Federal Circuit Rule of Practice 28—which specifies the procedure for filing briefs containing material subject to a protective order—by marking nearly the entirety of its appellant's brief confidential.<sup>56</sup> In building up to its holding, the court discussed the standards applicable in various regional circuits for limiting disclosure of case-related information to the public, and noted that a higher burden is imposed on the proponent of sealing for information introduced at trial; for such information, a “compelling showing” is required to justify limiting disclosure.<sup>57</sup> The court also noted that many circuits deny protection for information designated as confidential under a protective order agreed to by the parties where good cause for protection has not been shown.<sup>58</sup>

The Federal Circuit then went on to sanction counsel for designating legal argument as confidential where the argument did not disclose “facts or figures of genuine competitive or commercial significance,” noting that an “improper casual approach to confidentiality markings . . . ignores the requirements of public access, deprives the public of necessary information, and hampers [the] court's consideration and opinion writing.”<sup>59</sup> While the Federal Circuit did not squarely address the standard that it would impose for sealing records were it to determine that such a uniform standard was required, the analysis that it employed in arriving at its conclusion concerning whether to impose sanctions appears to have been consistent with that applied by the Ninth Circuit to the question of whether to seal court records.

### Practical Lessons

So, what is the takeaway? First, make certain that you understand the standard that applies based on the procedural context in which the materials are being used—i.e., nondispositive motions or procedures (including discovery motions) on the one hand, or dispositive motions or trial on the other—as the Ninth Circuit and most other circuit courts apply different standards depending on the context.<sup>60</sup> Second, once you know which standard is applicable, make certain that you meet it. The standards for record sealing, even the “compelling reason” standard applicable to materials used at trial or on summary judgment, provide a fairly broad scope of discretion to the particular judge reviewing the request.

So, the good news: If you can present a strong case of real harm or hardship resulting from disclosure, your odds

of obtaining an order sealing materials that you use in connection with trial or dispositive motions are good. However, in the absence of such a showing, materials used in court are at risk of public disclosure, regardless of whether your adversary acquiesces in your request to seal those materials.<sup>61</sup> In other words, use facts and evidence to support your position that protection is necessary; assumptions, generalizations, and agreements of counsel likely will not carry the day.<sup>62</sup> Finally, note that your odds of success will be enhanced if you narrowly tailor the information that is claimed as confidential. Redact protectable information from documents instead of attempting to exclude documents or categories of documents in their entirety, whenever possible.<sup>63</sup> ■

### Endnotes

1. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK (N.D. Cal. 2012).
2. Order Granting in Part and Denying in Part Motions to Seal, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. Aug. 9, 2012), ECF No. 1649.
3. See generally *Apple, Inc. v. Samsung Elecs. Co.*, Nos. 12-1600, 12-1606 (Fed. Cir. 2012).
4. See Amended Complaint for Federal False Designation of Origin and Unfair Competition, Federal Trademark Infringement, Federal Trade Dress Dilution, State Unfair Business Practices, Common Law Trademark Infringement, Unjust Enrichment, and Patent Infringement, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. June 16, 2011), ECF No. 75; Apple's Trial Brief, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. July 25, 2012), ECF No. 1323.
5. Amended Jury Verdict, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. Aug. 24, 2012), ECF No. 1931; Clerk's Judgment, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. Aug. 24, 2012), ECF No. 1933.
6. See generally *Apple Inc. v. Samsung Electronics Co. Ltd. et al.*, JUSTIA, <http://dockets.justia.com/docket/california/candce/5:2011cv01846/239768/> (last visited Feb. 16, 2013).
7. See Agreed Upon Protective Order Regarding Disclosure and Use of Discovery Materials at 27, *Apple v. Samsung*, No. 11-CV-01846-LHK (N.D. Cal. Jan. 30, 2012), ECF No. 687.
8. Order Granting in Part and Denying in Part Motions to Seal, *supra* note 2.
9. 435 U.S. 589, 597 and n.7 (1978).
10. See *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006).
11. *In re Midland Nat'l Life Ins. Co. Annuity Sales Practice Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012) (citing *Kamakana*, 447 F.3d at 1179).
12. *Kamakana*, 447 F.3d at 1178, 1184–85 (holding that “traditionally been kept secret” is a term of art that refers to a class of documents that have “neither a history of access nor an important public need justifying access”).
13. *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).
14. *Id.*; *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010).
15. *Pintos*, 605 F.3d at 678; *Kamakana*, 447 F.3d at 1179; *Foltz*, 331 F.3d at 1135.
16. *Pintos*, 605 F.3d at 678; *Kamakana*, 447 F.3d at 1180; *Foltz*,

331 F.3d at 1135, 1138 (reasoning that discovery material filed under seal should have met the good cause standard under Federal Rule of Civil Procedure 26(c) and thus applying a presumption of access would undermine a district court's power to fashion effective protective orders). The good cause standard also applies to information disclosed in discovery that is not made part of the court record. *Pintos*, 605 F.3d at 678.

17. *Kamakana*, 447 F.3d at 1180.

18. Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002).

19. *Id.*

20. *Id.* at 1213; *In re* Midland Nat'l Life Ins. Co. Annuity Sales Practice Litig., 686 F.3d 1115, 1119 (9th Cir. 2012).

21. *Kamakana*, 447 F.3d at 1179.

22. *Id.* (quoting Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nev., 798 F.2d 1289, 1294 (9th Cir. 1986)).

23. *Midland Nat'l Life Ins.*, 686 F.3d at 1119–20 (holding that *Daubert* motion was filed in connection with pending summary judgment and therefore applying the compelling reasons standard); *In re* LDK Solar Sec. Litig., No. C07-05182 WHA, 2010 WL 724809 (N.D. Cal. Mar. 1, 2010) (holding motions in limine were part of the trial and not entitled to rebuttal of the presumption of access); Order Granting in Part and Denying in Part Motions to Seal, *supra* note 2, at 12 (applying compelling reasons standard to documents attached to *Daubert* motions and motions in limine because the admissibility of evidence was a closely contested issue in the case).

24. *Kamakana*, 447 F.3d at 1179.

25. *Id.* at 1182 (holding that “the City’s declarations, which largely make conclusory statements about the content of the documents—that they are confidential and that, in general, their production would, amongst other things, hinder [the Criminal Intelligence Unit’s] future operations with other agencies, endanger informants’ lives, and cast [Honolulu Police Department] officers in a false light”—do not meet the compelling reasons standard).

26. *Id.* (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)).

27. *In re* Elec. Arts, Inc., 298 F. App’x 568, 569–70 (9th Cir. 2008) (nonprecedential) (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939)) (applying the Restatement’s definition of trade secret in the record-sealing context); *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (adopting the Restatement’s definition of trade secret).

28. *Agency Solutions.com, LLC v. TriZetto Grp., Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011).

29. *Elec. Arts*, 298 F. App’x at 569.

30. *Kamakana*, 447 F.3d at 1178.

31. *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003).

32. *Kamakana*, 447 F.3d at 1183.

33. *Id.* at 1182–84 (finding that the request for a limited number of specific redactions has “the virtue of being limited and clear,” but “[s]imply mentioning a general category of privilege, without elaboration or any specific linkage with the documents, does not satisfy the burden”).

34. *See id.* at 1184.

35. *See id.* at 1182–84.

36. Order Granting in Part and Denying in Part Motions to Seal, *supra* note 2, at 5–6, 16–17.

37. *Id.* at 6.

38. *Id.* at 9.

39. *Id.*

40. *Id.* at 16–29.

41. *Id.* at 8, 17, 27–28.

42. *Id.* at 10, 18, 21. *But see id.* at 19 (holding information related to proposed royalty rate will not be sealed).

43. *Id.* at 4, 18.

44. *Id.* at 7–8, 18.

45. *Id.* at 8, 10–11, 21 (citing *In re* Elec. Arts, Inc., 298 F. App’x 568, 569 (9th Cir. 2008)).

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 7–8, 18.

49. Corrected Brief for Plaintiff-Appellant Apple Inc., *Apple, Inc. v. Samsung Elecs. Co.*, Nos. 12-1600, 12-1606 (Fed. Cir. Sept. 14, 2012), ECF No. 29; Corrected Brief for Defendants-Cross-Appellants Samsung Electronics Co., *Apple v. Samsung*, Nos. 12-1600, 12-1606 (Fed. Cir. Oct. 2, 2012), ECF No. 46; Reply Brief for Plaintiff-Appellant Apple Inc., *Apple v. Samsung*, Nos. 12-1600, 12-1606 (Fed. Cir. Nov. 16, 2012), ECF No. 59.

50. Order, *Apple v. Samsung*, Nos. 12-1600, 12-1606 (Fed. Cir. Sept. 18, 2012), ECF No. 39-1.

51. 28 U.S.C. § 1295(a)(1); *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1346 (Fed. Cir. 1999).

52. *See, e.g., LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 66 (Fed. Cir. 2012).

53. *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987).

54. *See infra* note 55 and accompanying text. *But see In re* Deutsche Bank Trust Co. Ams., 605 F.3d 1373, 1377–78 (Fed. Cir. 2010) (concluding that the determination of whether a protective order should include a patent prosecution bar is a matter governed by Federal Circuit law); *In re* Violation of Rule 28(d), 635 F.3d 1352, 1357–58 (Fed. Cir. 2011) (without addressing choice of law and without deciding whether good cause existed, citing cases from multiple circuits in an appeal from a New Jersey district court in describing “good cause” for sealing documents under Federal Rule of Civil Procedure 26(c)(1)); Brief for the Reporters Committee for Freedom of the Press, et al. as Amici Curiae in Support of Affirmance at 6–8, *Apple v. Samsung*, Nos. 12-1600, 12-1606 (Fed. Cir. Oct. 15, 2012), ECF No. 51.

55. *See In re* Google Inc., 462 F. App’x 975, 977 (Fed. Cir. 2012) (looking to the regional circuit court’s decisions in reviewing a district court’s refusal to protect communications under the attorney-client privilege); *In re* Advanced Micro Devices, Inc., 230 F. App’x 971, 972–73 (Fed. Cir. 2007) (applying Ninth Circuit law to the decision of whether to grant a motion for protective order); *Atmel Corp. v. Silicon Storage Tech., Inc.*, 76 F. App’x 298, 312 (Fed. Cir. 2003) (applying the law of the regional circuit for review of evidentiary rulings of the district court); *Dorf & Stanton Commc’ns, Inc. v. Molson Breweries*, 100 F.3d 919, 922 (Fed. Cir. 1996) (considering regional circuit law for the proper standard of review of an order compelling discovery); *Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1209 (Fed. Cir. 1987) (applying regional circuit law to review an order quashing a subpoena).

56. 635 F.3d at 1354–55.

57. *Id.* at 1358 (citing *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993)).

58. *Id.* (citing *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994)).

59. *Id.* at 1360.

60. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119, 121 (2d Cir. 2006); *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003); *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545–46 (7th Cir. 2002); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311–12 (11th Cir. 2001); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001); *Poliquin*, 989 F.2d at 533; *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (holding that First Amendment analysis applies only to certain documents).

61. *See, e.g.*, *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1183 (9th Cir. 2006); *Lugosch*, 435 F.3d at 125–26; *Baxter Int’l*, 297 F.3d at 545–46; *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *Jepson, Inc.*, 30 F.3d at 858; *see also In re Violation of Rule 28(d)*, 635 F.3d at 1358.

62. *See In re Violation of Rule 28(d)*, 635 F.3d at 1360; *Kamakana*, 447 F.3d at 1182–84; *Lugosch*, 435 F.3d at 120; *Foltz*, 331 F.3d at 1135; *Cendant Corp.*, 260 F.3d at 194.

63. *See In re Violation of Rule 28(d)*, 635 F.3d at 1360; *Kamakana*, 447 F.3d at 1182–84; *Lugosch*, 435 F.3d at 113.