



NEW YORK STATE  
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

MEMORANDUM

October 12, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Rule of the Commercial Division to Address the Sealing of Court Records

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The Administrative Board of the Courts is seeking public comment on a proposed new Rule 11-h of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 11-h) proffered by the Commercial Division Advisory Council, addressing the sealing of court records. The text of the proposed rule is as follows:

Rule 11-h. Sealing of court records.

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. Good cause may include the protection of proprietary or commercially sensitive information, including without limitation, (i) trade secrets, (ii) current or future business strategies, or (iii) other information that, if disclosed, is likely to cause economic injury or would otherwise be detrimental to the business of a party or third-party. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

As described by the Council in a memorandum supporting the proposal (Exh. A), the proposed rule – with the exception of its second sentence ("Good cause may include ...") – is identical to the more general sealing rule set forth in 22 NYCRR §216.1. The additional sentence is designed to clarify and highlight for courts and parties that the protection of

proprietary sensitive business information in commercial disputes is an appropriate goal of, and “good cause” for, sealing of selected documents or portions of documents filed in the course of litigation. According to the Council, the public disclosure of business data such as price information, historical company information, and confidential documents – often of marginal relevance to a case – has adversely and unnecessarily impacted New York’s attractiveness as a commercial litigation forum.

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Persons wishing to comment on the proposed rule should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 15, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

**EXHIBIT A**

## MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Mark C. Zauderer

SUBJECT: Sealing – A Proposal to Facilitate Sealing in Appropriate Cases in the Commercial Division

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### Background:

In New York, the practice of maintaining open court records has long been mandated by statute and case law. Underlying this policy are two concerns: providing a check on the work of government and the integrity and fairness of the judicial process; and providing the public with important information about the parties, products or events which are the subject of the dispute. However, courts and the legislature have long recognized exceptions to the “open file” policy, including in such matters as domestic relations proceedings, juvenile proceedings, adoption proceedings, and certain criminal proceedings. In addition, court rules recognize the propriety of “sealing” in Rule 216.1. While instructing courts to find “good cause” before entering a sealing order, the Rule nonetheless envisions circumstances under which papers filed in litigation will be sealed and not generally available to the public. As discussed below, the concerns that gave rise to the long-standing sealing rule -- the “burying” of information about harmful or defective consumer products -- has little or no applicability in most commercial cases.

Before one considers the legal backdrop, it is useful to recall how the procedural processes have operated in commercial cases, both in the New York State Courts and the U.S. District Court in the Southern District. As many litigators will recall, until relatively recently with the advent of electronic filing, the State Court, at least in New York County where much commercial litigation takes place, maintained a rudimentary system of docketing papers filed

with the Court, and the docket was often incomplete. When sealing was sought by Court order, the parties typically focused on whether an entire case file should be sealed, rather than a particular filing within the case.<sup>1</sup> This brought into focus an “all or nothing” issue for the Court. In contrast, the Federal Court in the Southern District had long been familiar with the concept of placing under seal particular filings. Whether or not the Federal Court actually applied a more relaxed standard for sealing than did the State Court, perhaps because of the available method of filing particular papers under seal, many practitioners believed that in a commercial case, it was easier to obtain a sealing order in Federal Court than in State Court.

As the Advisory Council knows, the Chief Administrative Judge, with the approval of the Administrative Board, at the suggestion of the Advisory Council, has recently promulgated a new rule that takes advantage of the relatively new electronic filing system. The Rule establishes a uniform procedure that allows litigants to electronically file redacted versions of confidential documents pending a court determination as to whether those documents should be sealed, thereby eliminating the somewhat differing procedures previously employed by individual judges in keeping matters from public access pending that determination. However, the new rule does not address the substantive standards that govern sealing.

As Rule 216.1 has been interpreted by the courts, litigators in commercial cases have found it particularly difficult to place under seal many kinds of commercial information, even information that is not directly relied upon by the court or litigants and which is only marginally, or not at all, information of public interest. This includes such matters as price information, company information that is historical in nature, documents marked as “confidential” or

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<sup>1</sup> Moreover, the mechanics in the County Clerk’s office for filing papers under seal appear not to have been uniform. This writer recalls, almost 20 years ago, obtaining a sealing order and then walking a file to the sub-basement of 60 Centre Street and waiting for a clerk to open a large safe, into which I personally placed the sealed file.

“private,” and this holds true even when both sides to the litigation have asked for sealing. Aggravating this concern is the frequently-made observation that the New York courts are competing with arbitration and other forms of ADR that offer far greater protection of commercial information. In this writer’s experience, for this reason, many general counsels of corporations have cited arbitration as a more desirable forum and seek to include arbitration provisions in their contracts. As one in-house counsel said at a recent bar conference, “Just because someone decides to sue us in New York, why do we have to disclose significant business data that is of great interest to our competitors with whom we are not in a dispute?” Consistent with the Advisory Council’s role in suggesting ways of making our courts hospitable to commercial litigation, we ought to address this problem and offer a solution that promotes New York courts as a hospitable forum that, at the same time, identifies and respects the need to protect the legitimate public interest in access to information.

#### The Current Legal Environment:

As noted earlier, it has long been the policy of New York State to permit public access to court records and proceedings. This policy is rooted in both statute and case law.<sup>2</sup> However, for almost as long as the courts have been presumptively open to the public, New York’s legislature and courts have recognized that particular matters or proceedings could, and sometimes, should, be sealed.<sup>3</sup>

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<sup>2</sup> See, e.g., Jud. Law § 4 (requiring the “sittings of every court” within New York State to be public); Jud. Law § 255-b (requiring court docket-books to be “kept open” for search and examination by any person); Pub. Off. Law §§ 84-90 (setting forth Freedom of Information Law); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 310, 260 N.Y.S.2d 791, 796 (2d Dep’t 1965) (observing that “the general policy of our state” is “to make available to public inspection and access all records or other papers kept in a public office, at least where secrecy is not enjoined by statute or rule”) (internal quotations and citation omitted).

<sup>3</sup> See, e.g., Dom. Rel. Law § 235(1) (requiring court records in matrimonial actions or proceedings to be kept private); *Danziger v. Hearst Corp.*, 304 N.Y. 244, 248-49, 107 N.E.2d 62, 64 (1952) (noting that rules prohibiting public access to court records in matrimonial actions date back to at least 1847); *Application of Shipley*, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. Nassau Co. 1960) (ordering the

Section 216.1 of the Uniform Civil Rules for the Supreme Court and County Court has been the governing rule on sealing in New York for the last twenty-five years. This rule provides that:

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, “court records” shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

Since its adoption in 1991, Section 216.1 has been interpreted as a “stringent” standard for the sealing of court records.<sup>4</sup> The requirement that a court determine whether good cause has been shown means that there is no guarantee that a party’s sensitive documents and records will be withheld from public disclosure in a court file. Although this rule reflects the long-standing policies and practices in New York of favoring openness but permitting sealing under certain circumstances, Section 216.1 was adopted and designed to be stringent, to remedy the growing insistence by defendants in the late-1980s and early-1990s to seal records as a condition of

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sealing of file in proceeding involving infants and minors); *Tripp v. Knox*, 5 Misc. 2d 771, 165 N.Y.S.2d 660 (Sup. Ct. Albany Co. 1956) (ordering the sealing of plaintiff’s medical records in personal injury action); *Anonymous v. Arkwright*, 5 A.D.2d 790, 791, 170 N.Y.S.2d 535, 538 (2d Dep’t 1958) (directing the sealing of court records in proceeding to review contempt order); *Crain Commc’ns, Inc. v. Hughes*, 135 A.D.2d 351, 351, 521 N.Y.S.2d 244, 244-45 (1st Dep’t 1987) (holding that sealing may be necessary or appropriate to protect confidential trade information).

<sup>4</sup> See Com. Litig. in New York State Courts § 25:2 (Robert L. Haig ed., 4th ed. 2015); see also *Mosallem v. Berenson*, 76 A.D.3d 345, 349, 905 N.Y.S.2d 575, 579 (1st Dep’t 2010) (describing the movant’s burden under Section 216.1 as “substantial” and as requiring the demonstration of “compelling circumstances to justify restricting public access”).

settlement, especially in those cases that might prompt other plaintiffs to bring similar actions, such as where product liability or toxic torts are alleged.<sup>5</sup> The sealing of records in such cases was seen as problematic by the media because of the possibility that important information potentially necessary to protect the public health and welfare was being concealed.<sup>6</sup>

Although the good cause standard was initially criticized by some as being too general a concept and insufficient to provide guidance for courts making sealing determinations, courts have fashioned criteria in interpreting and applying the rule, including the following:

- i. whether the records at issue are of the type that are traditionally considered to be private;<sup>7</sup>
- ii. whether public disclosure of the records will cause competitive harm to a party;<sup>8</sup>
- iii. whether there is a legitimate public interest in the underlying subject matter of the litigation;<sup>9</sup>
- iv. whether a party seeks disclosure of the records for tactical purposes;<sup>10</sup> and

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<sup>5</sup> See Com. Litig. in New York State Courts § 25:4 (Robert L. Haig ed., 4th ed. 2015); *In re Estate of Hofmann*, 188 Misc. 2d 841, 847, 729 N.Y.S.2d 821, 826 (Surr. Ct. N.Y. Co. 2001), *aff'd*, 284 A.D.2d 92, 727 N.Y.S.2d 84 (1st Dep't 2001) ("One of the purposes of the codification of the anti-sealing rule was to curtail the disfavored practice where sealing became a condition of settlement and courts were not sufficiently protective of the public interest in the openness of court proceedings."); *Matter of Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 485-86, 601 N.Y.S.2d 267, 269 (1st Dep't 1993) ("In particular, concern had been widely expressed about the practice of sealing records of settlements in product liability and other tort actions where the information might alert other consumers to potential defects.").

<sup>6</sup> See Com. Litig. in New York State Courts § 25:4 (Robert L. Haig ed., 4th ed. 2015).

<sup>7</sup> See *id.* at §§ 25:5, 25:7.

<sup>8</sup> See Com. Litig. in New York State Courts §§ 25:5, 25:8 (Robert L. Haig ed., 4th ed. 2015); *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 502-03, 835 N.Y.S.2d 595, 598 (2d Dep't 2007) (holding that proprietary financial information could be sealed if the disclosure would harm the private corporation's competitive standing).

<sup>9</sup> See Com. Litig. in New York State Courts §§ 25:5, 25:9 (Robert L. Haig ed., 4th ed. 2015); *Mosallem*, 76 A.D.3d at 350, 905 N.Y.S.2d at 579 (analyzing the public's interest in the underlying issues of the lawsuit).

<sup>10</sup> See Com. Litig. in New York State Courts §§ 25:5, 25:10 (Robert L. Haig ed., 4th ed. 2015); *Feffer v. Goodkind, Wechsler, Labaton & Rudolf*, 152 Misc. 2d 812, 815, 578 N.Y.S.2d 802, 804 (Sup. Ct. N.Y.

v. the timing of the movant's request to seal.<sup>11</sup>

Of these factors, the one that may be most important to parties in the Commercial Division is whether the public disclosure of records will cause competitive harm. After Section 216.1 was first adopted, courts appeared to take a liberal approach when granting sealing motions to protect business information that did not concern the public interest.<sup>12</sup> However, in recent years, New York courts, including in the Commercial Division, have taken a more restrictive view when analyzing sealing motions brought on these or similar grounds.<sup>13</sup> Today, courts appear to give this factor no more weight than they do any of the other factors.

In this writer's view, there are two principal reasons why proprietary or sensitive business information should not be subject to such rigid applications of Section 216.1 in the Commercial Division. First, the concerns that gave rise to Section 216.1 do not generally arise in most Commercial Division cases. Cases involving business transactions, commercial real estate,

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Co. 1991) (granting motion to seal under Section 216.1 because, among other reasons, "the material may have been inserted into court documents for the sole purpose of extracting a settlement of the action").

<sup>11</sup> See Com. Litig. in New York State Courts §§ 25:5, 25:11 (Robert L. Haig ed., 4th ed. 2015); *Mosallem*, 76 A.D.3d at 351-52, 905 N.Y.S.2d at 580-81 (holding that a party's failure to "act with haste in moving to seal" documents that had been publicly filed two months earlier by adversary undermined its claim that the documents contained confidential business information).

<sup>12</sup> See Com. Litig. in New York State Courts § 25:8 (Robert L. Haig ed., 4th ed. 2015); *Dawson v. White & Case*, 184 A.D.2d 246, 247, 584 N.Y.S.2d 814, 815 (1st Dep't 1992) (affirming trial court's sealing of record where there was no "relevant public interest" in the financial information at issue); *Matter of Twentieth Century Fox Film Corp.*, 190 A.D.2d at 487-88, 601 N.Y.S.2d at 270 (reversing trial court's denial of sealing motion, and concluding that disclosure of details of contracts could compromise movant's relationship with competitors and other clients).

<sup>13</sup> See Com. Litig. in New York State Courts § 25:8 (Robert L. Haig ed., 4th ed. 2015); *Gryphon Domestic VI, LLC v. APP Intern. Fin. Co., B.V.*, 28 A.D.3d 322, 326, 814 N.Y.S.2d 110, 114 (1st Dep't 2006) (reversing trial court's sealing of financial documents because sealing "is not appropriate merely to protect the advantage that one side might have over the other in negotiating an agreement in a commercial dispute between sophisticated business entities"); *Mosallem*, 76 A.D.3d at 350-51, 905 N.Y.S.2d at 579-80 (concluding that business records marked "confidential" or "private" should not be sealed if they do not contain trade secrets or if they would not harm movant's present-day business).

internal affairs of business organizations, breach of contract or other commercial disputes do not affect the public health and welfare the way product liability and toxic tort cases may.<sup>14</sup>

Second, the disclosure of such proprietary or sensitive business information could harm a commercial entity's competitive standing. This had been recognized as a legitimate concern by New York courts long before the adoption of Section 216.1, and it is no less of a concern today.<sup>15</sup> Therefore, the sealing of proprietary or sensitive business information in commercial cases where there is little or no legitimate public interest involved, is a practice that should be recognized in the Commercial Division.

Recommendation:

A new Commercial Division rule should be promulgated as follows for cases in the Division (suggested addition underlined to show change from Uniform Civil Rule 216.1):

**Rule 11-h. Sealing of court records.**

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. Good cause may include the protection of proprietary or commercially sensitive information, including without limitation, (i) trade secrets, (ii) current or future business strategies, or (iii) other information that, if disclosed, is likely to cause economic injury or would otherwise be detrimental to the business of a party or third-party. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

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<sup>14</sup> *Matter of Twentieth Century Fox Film Corp.*, 190 A.D.2d at 485-86, 487, 601 N.Y.S.2d at 269, 270 (recognizing that "the type of proceeding, in and of itself, is an important factor which the court should take into account in determining whether the parties have established sufficient good cause to seal the records to overcome any public interest in their disclosure," the court concluded that the public does not have the same interest in a lawsuit involving business contracts with a child actor as it may in product liability and other tort actions).

<sup>15</sup> See, e.g., *New York Tel. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 56 N.Y.2d 213, 219-20, 451 N.Y.S.2d 679, 681 (1982) (holding that the public may be excluded when necessary or appropriate to protect confidential trade information); *Crain Commc'ns*, 135 A.D.2d at 351, 521 N.Y.S.2d at 244 ("The common law right to inspect and copy judicial records is not absolute, particularly where such records are a source of business information which might harm a litigant's competitive standing..."); see also *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312 (1978) (recognizing that courts have sealed "business information that might harm a litigant's competitive standing").

**(b) For purposes of this rule, “court records” shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).**

**This proposed Rule would give additional guidance to the trial courts and positively endorse the policy of selectively providing protection to sensitive information in commercial cases. The Rule would retain entirely the “good cause” requirement; consideration of the interests of the public as well as the parties; and notice and an opportunity to be heard when the Court deems it necessary or desirable. Enacting this Rule would be an important step in enhancing the appeal and competitive position of New York’s Commercial Division.**