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December 20, 2016

VIA FAX (212) 428-2160
John W. McConnell
State of New York
Unified Court System
25 Beaver Street
New York, NY 10004

Re: *Proposed Commercial Division Rule 11-h*

Dear Mr. McConnell:

The Advisory Committee on Civil Practice approves the proposed Commercial Division Rule 11-h.

Since 1991, Uniform Rule 216.1 which was proposed by this Committee has authorized the sealing of information upon a showing of "good cause." As discussed in the Commercial Division Advisory Council's Memorandum, the Rule was enacted in light of a particular concern that information generated in litigation related to defective products (or other information related to public health or safety) should presumptively be available to the public. The Rule directs judges, in evaluating "good cause," to consider the interest of the public as well as the parties. The Rule also advises judges that, when appropriate, it should allow other interested parties to be heard on the issue of the proposed sealing.

New York has implemented an affirmative policy of encouraging disputes to be litigated within our court system, where possible, rather than in competing states such as Delaware or in arbitration. As the Memorandum observes, many in-house counsel have eschewed litigating in New York State, when other options exist, because of concerns about revelation of competitive, commercial information which is of no legitimate interest to the public when weighed against the private interests of the litigants.

The proposed new Commercial Division Rule is identical to Uniform Rule 216.1, except that it would provide, for the benefit of judges and the parties, examples of the kind of information that might be considered in ruling upon an application for sealing. The Rule retains the requirements that the court consider the public interest and, where appropriate, provide the opportunity for outside parties to be heard.

The Advisory Committee believes that similar language, but broader in scope to deal with the myriad kinds of cases that courts outside the Commercial Division consider, may be appropriate for Rule 216.1 as well. The Committee therefore may recommend similar changes to Rule 216.1 in the future.

Sincerely,

George F. Carpinello

GFC:ssc

cc: via email:

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December 9, 2016

VIA ELECTRONIC MAIL
(rulecomments@nycourts.gov)

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Re: Proposed Rule of the Commercial Division to Address the Sealing of Court Records – Public Comment by NYSBA's Committee on Media Law

Dear Mr. McConnell:

Introduction

As the Chair of the New York State Bar Association's Committee on Media Law, (the "Committee"),[1] I write respectfully to register the Committee's objections to proposed new Rule 11-h of the Rules of the Commercial Division (22 NYCRR § 202.70[g], the "Proposed Rule") proffered by the Commercial Division Advisory Council addressing the sealing of court records. The Proposed Rule seeks to amend Rule 216.1(a) of the Uniform Rules for Trial Courts in New York, which codified the public's common law right of access to court records, by adding the second sentence highlighted below:

> (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

[1] The positions taken in this report are solely those of the Committee on Media Law. They do not represent the positions of the New York State Bar Association unless and until adopted by the Association's Executive Committee or House of Delegates.

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.

(Emphasis supplied)

The Committee is concerned that the Proposed Rule would interfere with the public's constitutional, common law and statutory rights of access to records relevant to the judicial process in New York State, and thereby impede the public's corresponding right to be fully and fairly informed about matters of legitimate public interest. The press's ability to keep the public informed is premised in large part on open access to the court system and on its ability to examine and report on judicial documents. The Proposed Rule would to a significant extent extinguish or abridge that access, and prevent the press from carrying out its important responsibility of reporting on proceedings in an important branch of this State's courts.

As set forth more fully below, the Proposed Rule is both unnecessary and overbroad – unnecessary, because the protection it apparently intends to provide to trade secrets, business strategies, and genuinely proprietary commercial information is already well established in New York case law, and overbroad because its new language threatens to permit the expansive sealing of court records merely when the parties believe (or are willing to assert) that publicity may prove embarrassing or unwelcome to a party litigating in the Commercial Division. More specifically, the vague terminology "likely to cause economic injury" and "detrimental to the business of a party or third-party" potentially encompasses a wide array of information presented to a court that requires transparency rather than secrecy – including information that would tarnish a company's image, or diminish its market share or corporate earnings, because of poor management or unlawful business practices. Needless to say, a mere desire to preserve corporate reputation is insufficient to justify the drastic remedy of sealing judicial documents in the absence of a clearly articulated, non-conjectural and legitimate business reason establishing competitive harm.

The First Amendment Protects the Public's Right of Access to Court Records In the Commercial Division

As a threshold – but fundamental – point, the First Amendment protects the public's right of access to court records in New York State.[2] *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6, 711 N.Y.S.2d 419, 423-24 (1st Dep't 2000); *Doe v. New York Univ.*, 6 Misc.3d 866, 877, 786 N.Y.S.2d 892, 901 (Sup. Ct. N.Y. Cnty., 2004). Courts in this State have repeatedly recognized that the public's constitutional right of access includes court records maintained in connection with judicial proceedings that themselves implicate the right of access. *People v. Burton*, 189 A.D.2d 532, 535, 597 N.Y.S.2d 488, 491 (3d Dep't 1993) (Levine, J.) ("To the extent that the documents were submitted in connection with contested motions, the hearing of which were or would be accessible to the news media and the public, a qualified First Amendment right of access to them would also apply."); *see also Mancheski v. Gabelli Grp. Cap. Partners*, 39 A.D.3d 499, 501, 835 N.Y.S. 2d 595, 597 (2d Dep't. 2007); *Danco Laboratories v. Chemical Works of Gedeon Richter*, 274 A.D.2d at 6, 711 N.Y.S.2d at

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[2] The public's presumptive right of access is premised on "the common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). This broad right of access "is no quirk of history." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). Instead, as the U.S. Supreme Court has observed, openness allows "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." *Globe Newspaper Co.*, 457 U.S. at 606.

423-24; *Matter of Glens Falls Newspapers, Inc. v. Berke*, 206 A.D.2d 668, 668, 614 N.Y.S.2d 628, 629 (3d Dep't 1994); *Doe v. New York Univ.*, 6 Misc.3d at 876-77, 786 N.Y.S.2d at 901 (right of press and public to access judicial records is protected by First Amendment).

The sealing of court records is prohibited under the First Amendment without specific, on-the-record factual findings demonstrating that (1) nondisclosure is essential to preserve a compelling interest; (2) no less restrictive alternative to sealing will protect the asserted interest; (3) the requested sealing will be effective in protecting the interest at issue; and (4) any order limiting public access is drawn as narrowly as possible. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14, 15 (1986); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006); *Danco Laboratories*, 274 A.D.2d at 6, 711 N.Y.S.2d at 423; *Doe*, 6 Misc.3d at 876, 786 N.Y.S.2d at 901. These stringent requirements, which the proponent of sealing must satisfy in all instances, cannot be displaced or overridden by the Proposed Rule. *See, e.g., Matter of New York Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987) ("Obviously, a statute cannot override a constitutional right.") (footnote omitted) (held, federal law imposing secrecy on wiretap information included in motion papers is subject to First Amendment public access requirements). Their application is elaborated below.

(1) Sealing Requires a Document-by-Document Showing that Disclosure Would Result in Concrete and Specific Harm.

A party seeking to deny access must present specific reasons supporting the existence of a *compelling interest*. *Press-Enterprise Co. v. Superior Court*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion."). The Committee is concerned that judicial documents would be cordoned off from public scrutiny under the Proposed Rule based on claims that disclosure would be commercially injurious so as to protect improperly confidential business information:

> [T]he natural desire of parties [is] to shield prejudicial information contained in judicial records from competitors and the public. This desire, however, cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.

Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983).

In order to justify sealing on the basis that court records submitted to the Commercial Division contain proprietary commercial or financial information, parties have the burden of proving, "on a document-by-document basis," that disclosure would cause a "clearly defined and serious injury." *Joint Stock Society v. UDV North America, Inc.*, 104 F.Supp.2d 390, 397 (D. Del. 2000). *See also In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 44 (C.D. Cal. 1984) (hereinafter "*Petroleum Products*") ("defendants [have not] carried the burden of showing that a substantial and a specific harm to their competitive positions would result if the documents were disclosed"); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 167 (3d Cir. 1993). The requisite proof must rise to the level of "a serious risk of competitive injury." *Joint Stock Society*, 104 F.Supp.2d at 403. It must consist of "specific evidence showing how release of [sealed] materials would result in competitive harm *at this time* . . ." *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) (emphasis supplied); *Petroleum Products*, 101 F.R.D. at 40 ("It is

quite likely that most of the other sealed documents have lost their character as commercially sensitive due to the passage of time.").

Conclusory designations or the mere labeling of documents as a source of purported "economic injury" or "detrimental" business impact as seemingly authorized by the Proposed Rule are plainly insufficient to satisfy this standard. *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) ("a naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal"), *cert. denied sub nom. CityTrust v. Joy*, 460 U.S. 1051 (1983); *Petroleum Products*, 101 F.R.D. at 44 ("I further admonish the defendants that their conclusory statements regarding commercial sensitivity made thus far in connection with the instant motions to declassify will not suffice to establish that there is a significant and specific need for continued protection.").

(2) **The "Narrow Tailoring" Requirement.**

In addition, any sealing of court records in the Commercial Division must satisfy the First Amendment requirement that any limitation on public access must be "narrowly tailored." *Danco Laboratories,* 274 A.D.2d at 6, 711 N.Y.S.2d at 423 ("any order denying access must be narrowly tailored to serve compelling objectives"); *Doe*, 6 Misc.3d at 876, 786 N.Y.S.2d at 901 (same). The constitutional obligation to minimize restrictions on the right of access requires a specific determination of whether the information presented warrants the extraordinary remedy of sealing. *Associated Press v. US. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983). A failure to consider less draconian methods of protecting whatever confidentiality interests may be asserted by parties or non-parties under the Proposed Rule would violate the requisite "narrow tailoring" of restraints on freedom of the press.

(3) **Redaction is a Mandatory Alternative to Extensive Sealing.**

In the event of a determination, based on specific factual findings with respect to individual documents (*Mancheski v. Gabelli Grp. Cap. Partners*, 39 A.D.3d at 502, 835 N.Y.S.2d at 598), that court records include information not properly subject to disclosure,[3] the Commercial Division is constitutionally required to consider the redaction of such information as an alternative to the wholesale sealing of pleadings, affidavits, exhibits and memoranda of law.

> [I]n view of the public importance of the underlying dispute, the order was overbroad and violates our well-established judicial regard for ensuring public access to nonconfidential court records. Rather, disclosure with appropriate redaction would have more discretely accomplished the protective as well as informational ends of the parties.

Danco Laboratories, 274 A.D.2d at 5-6; 711 N.Y.S.2d at 423. *See also People v. Burton*, 189 A.D.2d at 536, 597 N.Y.S.2d at 491 ("a trial court must also consider less drastic alternatives to sealing the records which would adequately serve the competing interests"); *Matter of New York Times Co.*, 828 F.2d at 116 (redaction of suppression motion papers, "as opposed to wholesale sealing," is required); *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) ("*Amodeo I*")

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[3] The Committee has no objection to the redaction of personal data – *i.e.*, social security and bank account numbers, home address listings, telephone numbers, names of minor children, *etc.* – or other legitimately confidential business information, such as contract price terms or current marketing plans, the disclosure of which would result in demonstrable competitive harm.

("[I]t is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document.").

On its face, the Proposed Rule exists in considerable tension with this requirement to the extent it contemplates the withholding of sweeping portions of judicial documents when reasonable alternatives to nondisclosure are available to protect any legitimate interests the parties may assert in avoiding "economic injury" or "detrimental" business impacts. *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("[T]he public's right to inspect judicial records may not be evaded by a wholesale sealing of court papers. Instead, the district court must be sensitive to the rights of the public in determining whether any particular document, or class of documents, is appropriately filed under seal.").

The Commercial Division's Rulings May Not Be Based On Secret Documents

The deficiencies inherent in the Proposed Rule are underscored by the decision in *Joy v. North*, *supra*, where the district court had erroneously prohibited public dissemination of a Special Litigation Committee Report which recommended that a shareholder derivative suit be dropped. The Second Circuit cogently explained the reasons that the presumption of public access required disclosure of the Report, which had been filed under seal as an exhibit to defendants' summary judgment motion:

> At the adjudication stage, however, very different considerations apply. ***An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny. We simply do not understand the argument that derivative actions may be routinely dismissed on the basis of secret documents.*** We cannot say what the effect on investor confidence would be if special litigation committees were routinely allowed to do their work in the dark of night. We believe, however, that confidence in the administration of justice would be severely weakened. Indeed, any other rule might well create serious constitutional issues.

692 F.2d at 893 (emphasis supplied).

Similarly, the Committee "simply do[es] not understand" the position that litigation in the Commercial Division may be conducted "on the basis of secret documents" (*id.*) because disclosure is purportedly "likely to cause economic injury" or might be "detrimental" to the business interests of a party or third party. Allowing rulings in the Commercial Division to issue on the basis of records sealed without a concrete and particularized showing that public disclosure will cause competitive harm would "create serious constitutional issues" that would cause "confidence in the administration of justice [to] be severely weakened." *Id.*

Any notion that submissions to the Commercial Division may be sealed merely on the basis of their *characterization* as a potential source of economic harm or detriment to business activities devalues the public's First Amendment right of access to judicial documents. For the reasons capsulized by a federal district court, the Proposed Rule ignores that illegitimate sealing undermines the integrity of the civil adjudication process:

> Whenever Court documents are sealed, this is done at the expense of truth. The parties and their privies are fully familiar with what took place in the action, and for reasons of their own, desire to refrain from sharing that information with the public. This Court is maintained at great public

> cost to resolve issues of the sort presented in civil litigation. Persons do not have to litigate, and indeed they are free to resolve their matters without the assistance of the Court by private mediation, arbitration or otherwise. Once having sought the aid of the Court to adjudicate issues, it seems unwarranted to suggest that their use of the public Court system should be suppressed and kept secret from others, including the taxpayers who paid for it, and might find the Court's work of interest.

Johns v. IBM Corp., 361 F.Supp.2d 184, 192 (S.D.N.Y. 2005).

The same can certainly be said here with respect to cases venued in the Commercial Division. As noted by the *Johns v. IBM Corp.* court, if the parties to a commercial dispute want to preserve the confidentiality of their business dealings in all circumstances, they can easily resort to confidential private arbitration of their disputes. If, instead, they commence an action in the Commercial Division, they must accept the transparency resulting from that choice. By authorizing the potentially pervasive sealing of court records under amorphous standards that encompass an array of illegitimate or pretextual reasons for denying public access, the Proposed Rule refuses to recognize that New York's court system is a public forum, paid for with public dollars for significant public purposes, and not a private forum where wealthy, sophisticated and powerful parties may scrap among themselves in secret. Rather, the courts are owned by the people and, absent extraordinary circumstances, when parties avail themselves of this State's court system, they must submit to the scrutiny of that very same public. In short, ostensibly to compete with arbitration and other forms of ADR,[4] the Commercial Division may not be allowed to conduct its proceedings in a manner resembling those traditionally private forums by sacrificing the openness and accountability that promote public confidence and trust in the administration of justice.

The "Good Cause" Requirement In Current Rule 216.1 Protects Against Disclosure of Trade Secrets and Proprietary Business Information that Would Result in Competitive Harm Upon Disclosure

Rule 216.1 of the Uniform Rules for Trial Courts "was enacted largely in response to a concern that, in cases in which the parties were in agreement to seal the records, courts were not sufficiently taking into account the public interest and exercising their discretion to override the parties' wishes." *In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 485-86, 601 N.Y.S.2d 267, 268-69 (1st Dep't 1993); *Mancheski v. Gabelli Grp. Cap. Partners*, 39 A.D.3d at 501, 835 N.Y.S.2d at 597. The rule's passage "did not effect a change in the law, which has

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[4] *See* Commercial Division Advisory Council's Memorandum (the "Memorandum"), at p. 8 ("Enacting this Rule would be an important step in enhancing the appeal and competitive position of New York's Commercial Division."). The suggestion that the Proposed Rule's more lenient path to sealing would allow the New York Commercial Division to be more competitive with other court systems – such as the Delaware Chancery Court – is of no moment. *See* Jason Grant, *Court Offers Rule on Sealing Commercial Division Cases*, N.Y.L.J., Oct. 14, 2016. As a starting point, a party seeking confidential treatment of a court record in Delaware Chancery Court must overcome a "powerful presumption of public access" and "must demonstrate that the particularized harm from public disclosure . . . clearly outweighs the public interest in access to [c]ourt records." *Sequoia Presidential Yacht Grp. LLC v. FE Partners LLC*, 2013 Del. Ch. LEXIS 178, *5-7 (Del. Ch. July 15, 2013) (citations omitted). Further, there is no support whatsoever in the public access jurisprudence of Delaware or any other jurisdiction, for that matter, that parties may contest commercial disputes out of the public eye in the hope of drawing more business litigation into a state's courts. The First Amendment and public interest in open courts have never allowed the sealing of court records for this pseudo-economic reason, which is a complete non-starter.

always favored public disclosure of court records." *Twentieth Century Fox Film Corp.*, 190 A.D.2d at 485, 601 N.Y.S.2d at 269. It would be ironic, among other things, if adoption of the Proposed Rule negated the purpose animating Rule 216.1's enactment in the first instance.

Current Rule 216.1 embodies a presumption of openness by establishing that "where good cause has not been demonstrated, the records should not be sealed." *Coopersmith v. Gold*, 156 Misc.2d 594, 605, 594 N.Y.S.2d 521, 529 (Sup. Ct. Rockland Cnty., 1992). When reviewing a motion to seal pursuant to Rule 216.1, a court must independently balance the public and the private interests at issue.[5] *Danco Laboratories*, 274 A.D.2d at 8, 711 N.Y.S.2d at 424-25. In this strict analysis, the burden remains with the party requesting the extraordinary step of sealing to demonstrate that "good cause" exists for keeping judicial documents under seal. *Id.*; *Coopersmith*, 156 Misc.2d at 606, 594 N.Y.S.2d at 530. A party seeking to overcome the strong presumption of openness and to foreclose access to judicial records must conclusively demonstrate that secrecy is required in the circumstances of the particular case. Stated another way, a finding of "good cause" requires that the party seeking to seal the record show "compelling circumstances." *Coopersmith*, 156 Misc.2d at 606, 594 N.Y.S.2d at 530; *Mancheski*, 39 A.D.3d at 502, 835 N.Y.S.2d at 598; *Mosallem v. Berenson*, 76 A.D.3d 345, 349, 905 N.Y.S.2d 575, 579 (1st Dep't 2010). Further, and as with the First Amendment, "redaction is a viable option, predicated upon the required level of need." *Danco Laboratories*, 274 A.D.2d at 8, 711 N.Y.S.2d at 425.

Rule 216.1(a) protects litigants from the disclosure of court records containing trade secrets as well as "current or future business strategies" and "proprietary financial information" that would result in competitive harm. *Mancheski*, 39 A.D.3d at 503, 835 N.Y.S.2d at 598; *Crain Commc'ns, Inc. v. Hughes*, 135 A.D.2d 351, 351, 521 N.Y.S.2d 244, 244-45 (1st Dep't 1987) (sealing may be necessary to protect confidential trade information); *Danco Laboratories,* 274 A.D.2d at 8, 711 N.Y.S.2d at 426; *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d at 1180 ("legitimate trade secrets" are "a recognized exception to the right of public access to judicial records"). Notably, good cause does not exist where the information is "historical in nature" and disclosure would not compromise a company's "current business strategies." *Mancheski*, 39 A.D.3d at 503, 835 N.Y.S.2d at 598.

(1) The Desire to Avoid Adverse Publicity or Embarrassment Does Not Constitute "Good Cause" For Sealing Judicial Documents In the Commercial Division.

Whatever sensitivity parties or non-parties may have to adverse publicity does not, as a matter of law, constitute "good cause" to seal court records in the Commercial Division.[6] New York

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[5] Although public access to judicial documents under Rule 216.1 is a matter of judicial discretion (*Mancheski*, 39 A.D.3d at 502, 835 N.Y.S. at 598), the exercise of that discretion is extremely limited under the requisite balancing analysis: "[A]lthough a trial court's determination to deny enforcement of the common-law right of access in a given case is considered a discretionary decision, it rarely involves credibility determinations and, thus, is fully subject to review on appeal as to whether the sealing court properly identified and weighed all relevant factors." *People v. Burton*, 189 A.D.2d at 536 (citations omitted). Further, and as discussed below in the text, "[i]n exercising its discretionary power to control and seal records, a court should 'weigh the interests of the public, which are presumptively paramount, against those advanced by the parties.' " *In re "Agent Orange" Prod Liability Litig.*, 98 F .R.D. at 545 (citation omitted).

[6] "The possibility of 'adverse publicity' in and of itself does not justify sealing . . . . Every lawsuit has the potential for creating some adverse or otherwise unwanted publicity for the parties involved. It is simply one of the costs attendant to the filing of an action." *Vassiliades v. Israely*, 714 F.Supp. 604, 606 (D. Conn. 1989).

State's rule may be simply stated: "embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records." *Doe v. New York Univ.*, 6 Misc.3d at 878, 786 N.Y.S.2d at 902. As the Chair of the Advisory Committee on Civil Practice that drafted Rule 216.1 emphasized, "[b]ecause court files are presumptively open, a claim based on a general desire for privacy or protection of reputation should not suffice to seal the record." Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 54 ALBANY L. REV. 93, 101 (1989) (hereinafter "*The New York Approach*"). If courts could legitimately consider that interest when deciding whether to seal judicial proceedings, the result would be "routine, indiscriminate sealing of civil court records" – an outcome that is clearly "disfavored in New York." *See John C. v. Martha A.*, 156 Misc.2d 222, 231, 592 N.Y.S.2d 229, 235 (N.Y. Civ. Ct., 1992). As a federal district court has emphasized, the public interest in access to the courts far outweighs a party's "concern of negative reaction on his business dealings from the instant lawsuit. If such a rationale were sufficient to block access to court files, the vast majority of lawsuits before this Court would be closed to view." *General Media, Inc. v. Shooker*, No. 97 Civ. 510, 1998 WL 401530 at *12 (S.D.N.Y. July 16, 1998).

The new language of the Proposed Rule supports the suspicion that, through the expedient of hypothesized "economic injury" or alleged "detriment[s]" – whatever that may mean – to business interests, parties or non-parties may seek to avoid adverse publicity anticipated from the public disclosure of dubious management decisions, embarrassing or unlawful business practices, and corporate misconduct or transgressions as may be reflected in a variety of submissions to the Commercial Division. They should not be permitted to conceal this information from the public.

> [W]hile the disclosure of the [sealed] materials may prove somewhat embarrassing for the defendants, they are not likely to suffer a competitive injury from the dissemination of this information. As previously explained, these documents discuss only questionable business tactics, not actual strategic or economic plans.

Joint Stock Society v. UDV North America, 104 F.Supp.2d at 404.

Again, the law is clear that the concealment of court records to avoid potential embarrassment to parties or non-parties, or to shroud corporate misconduct in secrecy, does not amount to "good cause." *See Joy v. North*, 692 F.2d at 894. ("The argument that disclosure of poor management is so harmful as to justify keeping the Report under seal proves too much since it is a claim which grows stronger with the degree of misconduct."); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988) (rejecting sealing of "confidential business information" where the "commercial interest stems primarily from a desire to preserve corporate reputation"); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) ("The presumption of openness plus the policy interest in protecting unsuspecting people from investing in [company] in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment."); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179 ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."); *Republic of the Philippines v. Westinghouse Elec. Co.*, 949 F.2d at 663 (where "the company's public image . . . is at stake" that is "not enough to rebut the presumption of access").

If a sealing request is narrowly focused on a company's current marketing strategy the disclosure of which would place it at a competitive disadvantage, that is one thing. If a sealing request is

based on a company's desire to keep allegations of accounting fraud or deceptive business practices out of the public limelight in order to avoid a decline in its stock price, or a loss of market share through customer attrition, or calls from financial reporters, that is another thing altogether. Established case law provides protection in the former example, as it should. The law does not extend protection to the latter, as it should not. New York Courts applying Rule 216.1(a)'s "good cause" requirement have capably recognized the difference between the two situations, and there is no reason to think they will be unable to do so in the future without need of the language added to the Proposed Rule, which blurs the distinction.

(2) **The Public Interest Involved Supports Access to Commercial Division Court Records Pertaining to Both Public and Private Corporations.**

It cannot be gainsaid that the public has an interest in monitoring proceedings conducted in this State's courts, an "essential feature of democratic control" which provides the public with a more complete understanding of the judicial system and a better understanding of its fairness. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*"). This interest – which promotes public confidence "in the conscientiousness, reasonableness, [and] honesty of judicial proceedings," *id.* – is at the core of the presumption of public access to court records established under the First Amendment and Rule 216.1(a), and exists in every judicial proceeding independent of press coverage of a particular case. *Twentieth Century Fox Film Corp.*, 190 A.D.2d at 486, 601 N.Y.S.2d at 269 ("There is no question that there is a general public interest in disclosure of court records or that that interest is a factor when a court is deciding whether to grant a motion to seal pursuant to section 216.1.").

> The public interest in access to the court records addressed in these cases does not turn on how titillating a story is, how many newspapers a company sells, how many articles are published about a story, or how many members of the public come forward to express their personal interest in learning more details about it. The presumption of access exists because the citizens are entitled to observe, monitor, understand and critique their courts – even in the most mundane of cases that excite no media interest – because what transpires within our courtrooms belongs to our citizens in a fundamental way. This is why we require not just a showing of some possible reason to justify closure of the court to the public but a showing of a compelling one.

California v. Safeway, Inc., 355 F.Supp.2d 1121, 1125 (C.D. Cal. 2005).

Although it is not the public's burden to demonstrate any particular interest in a case – the presumptive right of access reflects the public's interest in observing the conduct of *all* judicial proceedings – there is, in fact, particularly strong public interest in cases docketed in the Commercial Division, which not infrequently implicate issues pertaining to corporate governance and regulatory compliance, the oversight and administration of capital markets, and significant transactional and contractual matters. Thus, the Committee takes serious exception to the claim at page 7 in the Commercial Division Advisory Council's Memorandum in support of the Proposed Rule that "there is little or no legitimate public interest" in these and other types of cases because they may involve the "internal affairs of business organizations." To the contrary, the public has a powerful interest in having access to the judicial documents informing the Commercial Division's rulings in the proceedings before it, whether they involve public or private corporations.

Neither the Constitution nor Rule 216.1 permits litigation conducted in this State's courts to be converted into a private fiefdom for the rich and powerful merely because the issues in the case do not involve a public corporation. In *Lugosch v. Pyramid Co.*, 435 F.3d at 113, the underlying lawsuit giving rise to the sealed motion papers at issue involved claims brought by minority shareholders as plaintiffs against a privately held company controlled by the defendant. The Second Circuit squarely rejected the argument that the public interest in what the defendant characterized as a private "dispute among business partners" "was not likely to add weight to [the] presumption of access." *Id.* at 123 n.5 (internal quotations omitted). To the extent this same argument implicitly props up the Proposed Rule, it is untenable and should be rejected out of hand. There is no valid reason for restricting public access because private corporations are involved.

> The public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute, about which secrecy, then, may well prove the greater detriment to the public.

Danco Laboratories, 274 A.D.2d at 7, 711 N.Y.S.2d at 424 (citations omitted). *See also Doe*, 6 Misc.3d at 875, 786 N.Y.S.2d at 900 (same); Carpinello, *The New York Approach*, 54 ALBANY L. REV. at 101 (under Rule 216.1 "courts should balance the parties' articulated reasons for sealing against both the public's general right of access and the importance of the matters contained in the case file").

Simply put, where the parties have availed themselves of New York State's court system in order to resolve their dispute, "the public's right to know both the process and outcome of litigation outweighs the parties' desire to keep their business secret." *John C. v. Martha A.*, 156 Misc.2d at 231, 592 N.Y.S.2d at 235 (N.Y. Civ. Ct., 1992); *see also, e.g., In re Conservatorship of Brownstone*, 191 A.D.2d 167, 168, 594 N.Y.S.2d 31, 31 (1st Dep't 1993) (reversing denial of motion to unseal documents); *Bittner v. Cummings*, 188 A.D.2d 504, 506, 591 N.Y.S.2d 429,431 (2d Dep't 1992) (affirming denial of motion to seal record).

Conclusion

In the final analysis, a potential restriction on public access to court records in the Commercial Division as may be authorized by the broad, vague and unwarranted new language reflected in the Proposed Rule would inevitably reduce the trust and respect fostered by an open judicial process, and would be antithetical to virtually everything that the U.S. Supreme Court and the New York Court of Appeals have ever said about the values of open judicial proceedings and the correlative rights of public access thereto. If the people in this State are prohibited from understanding the Commercial Division's decision-making in the cases it adjudicates, its authority (and credibility) are likely to be diminished. The perception of judicial integrity is enhanced when court records are readily accessible to, not secreted away from, the public. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers v. Virginia*, 448 U.S. at 572; *see also Werfel v. Fitzgerald*, 23 A.D.2d 306, 312, 260 N.Y.S.2d 791, 798 (2d Dep't 1965). ("The objective of the true administration of justice is best served by the exposure of filed papers to public examination; and the fear of uneven disposition of cases is dissipated when secrecy is banished."). The Committee respectfully urges the Office of Court Administration to be mindful of these core constitutional principles and the vitally important public access values they serve in considering the Proposed Rule which, if enacted, could prevent reportage concerning commercial disputes in the Commercial Division which have

significant implications for its citizens, who deserve and are entitled to be fully and accurately informed about proceedings in this State's court system.

On behalf of the Committee, thank you for the Office of Court Administration's consideration of the foregoing concerns in connection with the Proposed Rule.

Respectfully submitted,
/s/
Sandra S. Baron, Esq.
Chair, NYSBA Committee on Media Law

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REPORT BY THE COMMUNICATIONS AND MEDIA LAW COMMITTEE, COUNCIL ON JUDICIAL ADMINISTRATION, LITIGATION COMMITTEE AND STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

COMMENTS ON THE OFFICE OF COURT ADMINISTRATION'S PROPOSED RULE OF THE COMMERCIAL DIVISION ADDRESSING THE SEALING OF COURT RECORDS

The New York City Bar Association is grateful for the opportunity to provide comments on proposed Rule 11-h of the Rules of the Commercial Division, addressing the sealing of court records.

The City Bar supports the Commercial Division Advisory Council's objective of promoting New York's Commercial Division as a forum of choice for the resolution of commercial disputes. The City Bar also recognizes that the protection of sensitive business information is a significant concern of many commercial litigants, especially as electronic discovery has increased the scope and volume of parties' discovery disclosures and electronic filing and docketing provide easier public access to court filings. Nevertheless, the City Bar does not view proposed Rule 11-h as a suitable response to the concerns and objectives articulated by the Advisory Council.

As an initial matter, we note that fundamental public interests are necessarily implicated by any proposal that is designed to promote, or would otherwise lead to, increased sealing of court records. The Advisory Council recognizes that the New York State Judiciary Law generally provides for court proceedings and records to be open to the public. The City Bar substantially agrees with the analysis set forth in the New York State Bar Association's letter to OCA addressing the proposed rule and emphasizing the importance of the public's right of access to court records under the First Amendment and common law.[1]

Sealing involves rights "of a constitutional dimension," and is permitted in New York courts only upon a showing of "good cause."[2] A court may find good cause to seal judicial

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[1] Attached as Appendix A.

[2] *See Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep't 2006); *see also* 22 NYCRR § 216.1.

records, for example, where a litigant demonstrates that disclosure is likely to reveal trade secrets or otherwise subject the litigant to competitive harm.[3] The court must also consider the public's interest in disclosure of the material at issue and draw any sealing order as narrowly as possible.[4] The good-cause standard for sealing is properly a demanding one, and it is doubtful that the showing required of the proponent of sealing and the corresponding analysis required of the court could be relaxed as a result of any rule that simply "highlight[s] and clarif[ies]" particular factors upon which a court may find good cause for sealing.

The rule proposed by the Advisory Council, however, appears to go well beyond mere emphasis of established good-cause factors. In broadly identifying "the protection of proprietary or commercially sensitive information" as grounds for a court to find "good cause" for sealing, the rule would expand the good cause standard beyond the bounds set by judicial precedent. For example, were the proposed rule adopted, documents that reveal questionable recruiting practices or inequitable employee benefit policies might be subject to sealing, even if they reveal no financial information, trade secrets, or business strategies, because they could prove "detrimental to" an entity's business. The City Bar views this expansion of the good-cause standard under the proposed rule as unwarranted and likely to cause confusion among courts and litigants. Indeed, the vast majority of cases adjudicated in the Commercial Division – and perhaps the bulk of individual documents that must be filed in such cases – arguably involve "commercially sensitive information" and could potentially be subject to sealing under the proposed rule.

In addition to broadening the grounds upon which "good cause" for sealing may be found, the proposed rule may also impermissibly relieve the proponent of sealing from an obligation to demonstrate why competitive harm is likely to result from disclosure of a document. The Advisory Council's memorandum suggests that litigants should be granted more leeway to file under seal documents that they expect would be of little or no public interest[5] and would not be "directly relied upon by the court or litigants" (including "company information that is historical in nature" and "documents marked as 'confidential' or 'private'"), especially when both plaintiff and defendant favor sealing. The City Bar recognizes that such documents

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[3] *See, e.g., Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 502-03 (2d Dep't 2007) (affirming order sealing documents pursuant to 22 NYCRR § 216.1(a) where disclosure could have impinged upon third parties' privacy rights and harmed private corporation's competitive standing).

[4] *See Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dep't 2000) ("[A]ny order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access."); *see also SYNCORA Guarantee Inc. v. Alinda Capital Partners LLC*, No. 651258/2012, 2016 N.Y. Misc. LEXIS 938, at *4 (Sup. Ct. N.Y. Cnty. Mar. 22, 2016) ("A trial court must also consider less drastic alternatives to sealing the records which would adequately serve the competing interests.") (quoting *People v. Burton*, 189 A.D.2d 532, 536 (3d Dep't 1993)).

[5] In addition to considering the public's fundamental interests in access to court proceedings and filings, New York courts consider the specific interests that the public may have in a particular document which a litigant wishes to be sealed. The City Bar does not agree with the Advisory Council that, as a general proposition, the public interest in disclosure is likely to be minimal in "[c]ases involving business transactions, commercial real estate, internal affairs of business organizations, breach of contract, or other commercial disputes." Nor does the case cited by the Advisory Council support such a conclusion (*see In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 601 N.Y.S.2d 267 (1st Dep't 1993) (reversing Surrogate's Court's order denying requests to seal contracts of child actor in approval proceedings pursuant to the New York Arts and Cultural Affairs Law, based in part upon petitioner company's showing of competitive harm and respondents' argument that disclosure of contract details would likely invite harassment and "subject the infant to potential dangers")).

may warrant sealing in many cases but views sealing *solely* on the basis of the parties' consent or assessment of a document's marginal relevance to the issues before the court as contrary to established statutory and common-law principles. While the question of whether to seal records is left to the discretion of the trial court, "to be exercised in light of the relevant facts and circumstances of the particular case,"[6] a court's finding of good cause must be based upon a concrete showing that disclosure will cause harm. Documents submitted to the lower court in connection with motions are, and should be, presumptively open to the public.

The City Bar also questions whether it is appropriate for the Commercial Division to adopt a variant of the rule addressing and altering the *substantive standards* that govern sealing. Given that judicial precedent interpreting Rule 216.1 is applicable to all New York State trial courts, including the Commercial Division, the creation of new standards for the Commercial Division would likely lead to confusion and controversy in other trial courts. Courts and parties litigating commercial cases that fall below the monetary threshold for the Commercial Division or are commenced in judicial districts that lack a commercial division may mistakenly assume that competitive harm or the protection of trade secrets are not grounds for sealing, or should be given less weight, in non-commercial parts. It might be hoped and expected that courts adjudicating such cases would apply the standards articulated in the proposed Commercial Division rule in such cases, and perhaps many would do so. Conversely, it would not be desirable for a court to apply such principles to enshroud troubling disclosures in a tort case or a breach of contract suit concerning a defective product – yet the proposed rule articulates no limitation regarding the types of cases to which it might apply.

Although the City Bar views the proposed sealing rule as problematic, we believe that certain alternative courses of action could significantly enhance the protection of sensitive and proprietary information for commercial litigants. First, as the New York State Bar Association explains in its commentary to the proposed rule, the selective redaction of proprietary or confidential material from court filings – as distinct from wholesale sealing – would serve in many cases to protect litigants' sensitive information while maintaining public access to court filings. This less-restrictive alternative to wholesale sealing might be undertaken pursuant to a stipulation executed between the parties and so-ordered by the court.

The City Bar also observes that defendants and non-party participants typically do not choose the forum in which a dispute is litigated, but parties who do choose arbitral tribunals for the privacy they afford often lose such protection when they seek confirmation of an arbitral award in New York state courts. The City Bar believes that greater flexibility to confirm arbitral awards under seal (or with selective redactions, when such a measure would adequately protect privacy) warrants exploration.

While the promulgation of new rules has in many instances enhanced the efficiency, equity, and attractiveness of the Commercial Division and other New York State trial courts, proposals for the Commercial Division that build upon existing rules and common-law principles may be most effectively formulated as "appendices" to the Rules of the Commercial Division.

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[6] *In the Matter of Crain Communications, Inc. v. Hughes*, 135 A.D.2d 351, 351 (1st Dep't 1987), *aff'd*, 74 N.Y.2d 626 (1989).

For example, Appendix A to the rules, Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties," sets forth clear and concise guidelines that address many of the electronic discovery issues that litigants will encounter in a typical Commercial Division case. An appendix of guidelines for determining the scope of a reasonable confidentiality stipulation and protective order might allow the Commercial Division to provide parties with more thorough guidance regarding the protection of proprietary information and would comport with Advisory Council's goal to "promote New York courts as a hospitable forum" for litigants.

We hope our observations prove to be helpful and stand ready to provide further comments upon request.

Thank you for your consideration.

Communications & Media Law Committee
Charles S. Sims, Chair

Council on Judicial Administration
Carolyn E. Demarest, Chair

Litigation Committee
Barbara L. Seniawski, Chair

State Courts of Superior Jurisdiction Committee
Adrienne B. Koch, Chair

December 2016

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

December 15, 2016

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

Proposed Commercial Division Rule 11-h

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the proposal to add a new Commercial Division Rule 11-h, published October 12, 2016. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of over 120 large, litigation based law firms and corporate legal departments. Our members' positions within their respective firms and companies and concomitant responsibilities afford them a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the standards for and procedures relating to filing papers under seal in the courts of the State of New York.

We oppose the adoption of Commercial Division Rule 11-h. Part of what the proposed rule is intended to accomplish already is provided for under case law. The proposed rule otherwise would purport to overrule existing case law, which we believe would have uncertain legal effect and therefore likely would compound litigation over sealing orders and diminish the attractiveness of New York courts as a forum for the

resolution of international business disputes. If the standards for sealing commercial information nevertheless are to be expanded by rule-making, it should be done by amendment of Uniform Rule 216.1 rather than by adopting a new Commercial Division rule. We also urge that any new or amended rule concerning sealed filings should be adopted only following consideration of input from the Statewide E-Filing Coordinator as to the workability of such new procedure within the limitations of the NYSCEF system and related courthouse operations.

Proposed Commercial Division Rule 11-h repeats verbatim the language of Uniform Rule 216.1, and adds a sentence to subsection (a) expressly to provide that protection of proprietary or commercially sensitive information may provide good cause for sealing court records. That additional sentence specifies that such information includes "(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 a third party." Trade secrets and competitively sensitive, confidential business strategies already qualify for sealing under current case law. The third category, however, contradicts New York case law holding that a mere business disadvantage, without more, is not grounds for sealing. *See, e.g., Gryphon Domestic VI, LLC v. APP Int'l Finance Co.*, 28 A.D.3d 322, 325-26 (1st Dep't 2006) (holding that preserving a commercial party's negotiating advantage is not good cause to seal).

Courts weighing requests to seal are evaluating them in the context of constitutional and New York statutory law that generally require public access to court records. *Id.*, 28 A.D.3d at 324. While the legislature has the power to overrule the case law by statute (subject to constitutional constraints), it is unclear whether the Administrative Board of the Courts similarly can overrule substantive case law through the issuance of a court rule. With its legal effect thus uncertain, we expect that adoption of proposed Commercial Division Rule 11-h would lead to litigation over the validity of sealing orders issued pursuant to its provision for the protection of information that would merely be detrimental to a business, and do little to advance New York's attractiveness as a forum for international business disputes.

If the Administrative Board of the Courts concludes that it does have rule-making authority to change the standards for sealing court records, then we believe proceeding by amendment of Uniform Rule 216.1 would be superior to adding a new Commercial Division rule. The need to protect proprietary and commercially sensitive information is not so different in cases that respectively exceed and fall short of the Commercial Division's monetary threshold by a few thousand dollars. Indeed, the proposed rule would support different treatment of commercially sensitive information in a $105,000 case assigned to the Commercial Division in Kings County and in a $495,000 case that is ineligible for the Commercial Division in New York County, a mile away. The eligibility of the information for sealing should not be dependent upon which branch of the court

hears each case, but rather should be a function of the information in question and the facts and circumstances relevant to the request to seal. Amending Rule 216.1 would make clear that a commercial litigant need not meet the various criteria for assignment to the Commercial Division to qualify for the protection of such information under seal.

Making the change to Rule 216.1 rather than in a new Commercial Division rule also would serve the additional purpose of avoiding unnecessary proliferation of court rules. In our collective experience, the more a court system simplifies its rules the more attractive it becomes to litigators and litigants alike. Multiple layers of rules and requirements are a fact of life for New York State court practitioners, with the CPLR and other statutes that govern court procedure, the Chief Judge's Rules, the Uniform Rules, county-specific rules, judge-specific rules, and case-specific orders at play in any given action. We believe this state of affairs, as well as the risk that procedure and its sources become overly convoluted, together mandate that rules generally should be simplified and rationalized and that further proliferation of rules should be minimized, where practicable.

Additionally, we urge that no change to rules governing the sealing of court records should be made without obtaining an assessment by the Statewide E-Filing Coordinator of the capability of NYSCEF to effectuate the rules (including any new functionality that might need to be developed) and, further, of any related additional procedures for litigants, the County Clerks and other court personnel responsible for effectuating the sealing process. Our collective experiences trying to harmonize requirements imposed by the recently adopted Commercial Division Rule 11-g with existing NYSCEF functionality and courthouse procedures show that the risk of adopting a rule that the court system cannot implement efficiently is very real when the underlying courthouse and NYSCEF logistics are not taken into account.

* * *

Again, we are grateful for the opportunity to comment on the proposed Commercial Division Rule 11-h, and look forward to helping achieve successful implementation of whatever approach the court system chooses to adopt. Should you have questions or would like further elaboration on any of the foregoing, please contact Owen Wallace at OWallace@ebglaw.com and/or Tim Beeken at tkbeeken@debevoise.com.

Respectfully submitted,

s/Owen G. Wallace
Owen G, Wallace, Esq.
MACA Rules Committee Chair
Managing Attorney, Director of Legal Support Services
Epstein Becker Green

s/Timothy K. Beeken
Timothy K. Beeken, Esq.
MACA President
Counsel & Managing Attorney
Debevoise & Plimpton LLP

From: jennifer@gordonjuengstlaw.com
Sent: Friday, December 30, 2016 3:56 PM
To: rulecomments
Subject: Proposed rule on sealing court records

Categories:

I apologize that this comment was not submitted by Dec. 15, 2016. The NYLJ front page article on the potential 2017 changes to the Commercial Div. rules appeared yesterday, December 29, 2016. I hope my comment will be considered.

I object to the proposed language for Rule 11-h (a) (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.

Contrary to the drafter's contention, this language does not give additional guidance to the trial courts. I urge the Administrative Board to at least leave out subd. (a)(iii). The drafter argues that since most commercial division cases involving business transactions, commercial real estate, internal business disputes and breach of contract issue do not involve public health and welfare like product liability and toxic tort matters, a more lenient standard should be applied to those seeking to seal records especially where "competitive harm" may be the result to the litigant in the event of public disclosure.

However, as many judges and attorneys know, very often the allegations in these commercial matters also involve fraud and other bad acts which are a substantial concern to the public despite the fact they arise in the context of private transactions. Although the rule directs courts to consider the interests of the public, the public may be at a disadvantage unless an intervenor, such as the press or media, bring public interest matters to the courts attention and succeed in being given an opportunity to be heard.

In expanding the factors for the court to assess to include a vague standard ("information ... likely to cause economic injury or would otherwise be detrimental to the business of a party or third-party"), the drafter is suggesting that courts should give more weight to the concept of "competitive harm" than to the constitutional presumption that the public is entitled to access to judicial proceedings and court records. There is no basis - or at least none has been demonstrated by the drafter - for undermining a constitutional presumption in favor of public access.

The current rule at 22 NYCRR 216.1[a], together with current statutory law and case law interpreting the rules is sufficient.

I agree with the stated goal of striving to make the courts more hospitable to commercial litigants. I am not so sure the judges sitting in the commercial parts are too eager to receive even more cases given the current caseloads However, if it's ease of sealing records that commercial litigants want, they always have the option of contracting for the right to arbitrate prior to litigation or obtaining an agreement to arbitrate after suit is commenced. The ability to protect business privacy cannot be compared to the privacy rights of individuals involved in matrimonial, family disputes, or health issues where the consequences of disclosure are personal and warrant higher protection and the public has no legitimate concern. Neither can business privacy (with the recognized exceptions of trade secrets, business strategies and the like) be compared to the necessary secrecy of grand jury proceedings in criminal matters.

In sum, there is no demonstrated need to alter the current rule which the courts are fully capable of interpreting on a case by case basis so as to protect the balance between public access and business litigants right to bar public access.

Sincerely,
Jennifer A. Juengst

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Memorandum

To: John W. McConnell

From: Mark C. Zauderer

Date: January 17, 2017

Re: Proposed Rule of the Commercial Division to Address the Sealing of Court Records – Response by the Commercial Division Advisory Council to Public Comments

We have reviewed the thoughtful submissions of the Committee on Media Law of the New York State Bar Association, dated December 9, 2016; the New York City Bar Association, dated December, 2016; the Advisory Committee on Civil Practice to the Chief Administrative Judge (letter dated December 20, 2016 from George F. Carpinello); and the Managing Attorneys and Clerks Association, dated December 15, 2016; and the e-mail from Jennifer A. Juengst, Esq. dated December 30, 2016. The following is our response.

First, we would note that the Advisory Committee on Civil Practice, which in 1991 recommended the current Rule 216.1 governing sealing, is fully supportive of our proposal. As Mr. Carpinello, the Advisory Committee's Chair, notes in his December 20, 2016 letter:

> "The proposed new Commercial Division Rule is identical to Uniform Rule 216.1, except that it would provide, for the benefit of judges and the parties, examples of the kind of information that might be considered in ruling upon an application for sealing. The Rule retains the requirements that the court consider the public interest and, where appropriate, provide the opportunity for outside parties to be heard."

Reflecting the views of the Advisory Committee, Mr. Carpinello then recommends that similar language addressing other kinds of cases be considered and incorporated in Rule 216.1. He concludes, "The Committee therefore may recommend similar changes to Rule 216.1 in the future." We note that the Managing Attorneys and Clerks Association, while not in favor of the

rule, supports its enactment by way of amendment of Uniform Rule 216.1, if the concept is to be implemented at all.

The Commercial Division Advisory Council has no objection to expansion of the concept as suggested by Mr. Carpinello. The reason the Council limited its own recommendation to a rule for the Commercial Division only is that we view our charge, or "jurisdiction," as generally limited to making recommendations for the Commercial Division. As Mr. Carpinello suggests, it may be advisable for the rationale underlying our proposed Commercial Division rule to be embodied in parallel changes to Rule 216.1. However, promulgation of our proposed rule ought not be delayed pending future consideration of such changes. Moreover, practical experience in the Commercial Division with our proposed rule may provide useful guidance to those considering a change to Rule 216.1.

Second, we note that none of the submissions objecting to the proposal questions the basic premise that sealing may be appropriate in particular circumstances, where "good cause" is shown. In fact, the New York City Bar Association, referring to documents that litigants may wish to file under seal, affirmatively states that, "The City Bar recognizes that such documents may warrant sealing in many cases ...". Taken together, the core objection of the several groups is that the proposed rule would substantively change the standard employed by courts in determining whether there is "good cause" for sealing, a determination which is governed by standards set out in existing case law. We think this is a complete misapprehension of both the intent and likely effect of the proposed rule.

The proposed rule is designed simply to focus the court on examples of cases that *may* be appropriate for consideration of sealing of specific material – which is entirely consistent with case law. The proposed rule, neither explicitly or implicitly, suggests a change in the "good

cause" standard. And as noted in our original supporting Memorandum, the proposed rule expressly incorporates the existing requirement that the Court consider the interest of the public as well as the parties, and that, where appropriate, it afford other interested persons the opportunity to be heard on the sealing application.

Third, some of the objection to the proposed rule is based on the observation that it would be anomalous to have one rule apply to a commercial case outside of the Commercial Division and another within the Division. See, e.g. submission of the Managing Attorneys and Clerks Association. However, there is no functional difference between the two rules. Any judge overseeing a commercial case outside the Commercial Division is perfectly free to consider a sealing application in light of the new proposed rule, which does not alter the substantive standards to be applied. As noted earlier, our Commercial Division Advisory Council limited its proposal to cases within the Commercial Division only because we viewed that as setting the boundaries of our work.

Finally, we note that one objection is based on the unsupported presumption that seeking sealing "permits litigation conducted in this State's courts to be converted into a private fiefdom for the rich and powerful." (NYSBA Committee on Media Law letter dated December 9, 2016, penultimate page). In our experience, much of the litigation in the various sites of the Commercial Division within the State involves disputes of small businesses and individuals in commercial transactions. In fact, many lawyers litigating cases in the Commercial Division rarely, if ever, represent large corporations. Moreover, the same objector largely overlooks the

fact that sealing applications rarely, if ever, involve attempts to litigate a whole case under seal. Rather, the applicant makes a narrow request to support a particularized showing of good cause.[1]

In conclusion, we believe that the objections are misplaced because they misperceive both the intent and likely effect of the proposed rule. The rule would provide important and needed guidance to judges and litigants of the kinds of matters for which sealing might be considered, provided the appropriate standards are met. As discussed in detail in our supporting Memorandum, promulgation of this rule would be an important step in furthering the objective of attracting commercial litigants to the New York courts.

[1] By way of contrast, as we noted in our supporting Memorandum, notwithstanding a general policy of open courts, the law expressly directs the sealing of entire case files in certain instances, such as in divorce proceedings. Certainly, many of those proceedings are of public interest, yet they are protected from public disclosure.