University at Buffalo
Clinical Legal Education
School of Law

NYCLU
NEW YORK CIVIL LIBERTIES UNION

KNIGHT FIRST AMENDMENT INSTITUTE
at Columbia University

May 19, 2017

John M. Domurad
Chief Deputy
James T. Foley U.S. Courthouse
445 Broadway
Albany, NY 12207

RE: Proposed Amendment to Local Rule 83.13 regarding sealing in civil cases

Dear Mr. Domurad,

We write on behalf of the Civil Liberties and Transparency Clinic at the University at Buffalo School of Law, the New York Civil Liberties Union, and the Knight First Amendment Institute at Columbia University to propose an amendment to Northern District of New York Local Rule 83.13 (the "Rule"), which governs the sealing of documents in civil cases.[1] The Rule, as currently written and implemented, appears to violate Second Circuit case law governing the public's First Amendment right of access to judicial documents.

In this letter, we set out the applicable law and analyze the Rule and the Court's implementation of it.[2] We also propose amendments to bring the Rule into compliance with

[1] Local Rule 83.13 currently provides:

> (a) Cases may be sealed in their entirety, or only as to certain parties or documents, when they are initiated, or at various stages of the proceedings. The Court may on its own motion enter an order directing that a document, party or entire case be sealed. A party seeking to have a document, party or entire case sealed shall submit an application, under seal, setting forth the reason(s) why the document, party or entire case should be sealed, together with a proposed order for the assigned judge's approval. The proposed order shall include language in the "ORDERED" paragraph stating the referenced document(s) to be sealed and should include the phrase "including this sealing order." Upon the assigned judge's approval of the sealing order, the Clerk shall seal the document(s) and the sealing order. A complaint presented for filing with a motion to seal and a proposed order shall be treated as a sealed case, pending approval of the proposed order. Once the Court seals a document or case, it shall remain under seal until a subsequent order, upon the Court's own motion (under subsection (b) of this Rule or otherwise) or in response to the motion of a party, is entered directing that the document or case be unsealed.
>
> (b) Pleadings and other papers filed under seal in civil actions shall remain under seal for sixty (60) days following final disposition of the action, i.e., final disposition of the action includes any time allowed by the federal rules to file an appeal in a civil matter, and, if an appeal is filed, sixty (60) days from the date of the filing of the mandate if the action was not remanded for further proceedings. After that time, the Court [Table of Contents] 71 [X: ADR & General Provisions] will unseal all sealed documents and place them in the case record unless, upon motion of a party, the district judge or magistrate judge orders that the pleading or other document remain under seal or be returned to the filing party. If the case is fully electronic, documents that have been unsealed may be uploaded to CM/ECF where they would be available for public viewing.

[2] We assessed the Court's implementation of the rule by examining a sample of the court's cases. *See* Exhibit A (summarizing our findings). We selected the sample by searching for civil dockets that contain the word "seal" (or variations thereof), from among cases that were filed during the month of January in 2010, 2014, and 2017. In addition, we searched dockets that contained the words "sealed complaint" resulting in a range of cases from 2004 through 2012. We manually reviewed the resulting dockets to identify civil cases in which documents had in fact been sealed. This produced a sample set of 29 cases.

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governing law and to provide clear guidance to the bench and bar regarding the standards and procedures that govern the sealing of judicial documents in civil cases.[3] Our proposed amendments are informed by our review of the sealing rules of all 94 federal district courts. *See* Exhibit B (providing the text of all such rules).

* * *

This Court's discretion to seal records is limited by both the First Amendment and the common law rights of access to judicial documents. *See Lugosch v. Pyramid Co. of Onondaga County*, 435 F.3d 110, 119-20 (2d Cir. 2006). Both sources of law guarantee the public a qualified right of access to documents filed in court. As the Second Circuit has held, a "[f]inding that a document is a 'judicial document' triggers a presumption of public access, and requires a court to make specific, rigorous findings before sealing the document or otherwise denying public access." *Newsday LLC v. County of Nassau*, 730 F.3d 156, 167 n.15 (2d Cir. 2013).

To determine whether the First Amendment right of access applies to particular judicial documents, the Second Circuit employs two tests. "The first approach considers experience and logic': that is, 'whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question.'" *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (quoting *Lugosch*, 435 F.3d at 120). "'The second approach considers the extent to which the judicial documents are derived from or are a necessary corollary of the capacity to attend the relevant proceedings.'" *Id.*

Under these tests, the Second Circuit has held that essentially all substantive filings are subject to the First Amendment right of access including, for example, docket sheets, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), complaints, *Bernstein*, 814 F.3d at 139, pre-trial motion papers in criminal cases, *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987), documents submitted in support of summary judgment, *Lugosch*, 435 F.3d at 124, compliance reports filed pursuant to a settlement agreement, *United States v. Erie County*, 763 F.3d 235, 237 (2d. Cir. 2014), and Criminal Justice Act forms, *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989). The common law right of access to judicial documents is arguably more expansive, covering any "filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'" *Bernstein*, 814 F.3d at 139 (quoting *Lugosch*, 435 F.3d at 119).

Because sealing denies access guaranteed by the First Amendment and common law, courts may seal judicial documents only upon satisfying strict substantive and procedural requirements. Below, we identify the substantive and procedural requirements established by the Second Circuit and explain how the Rule and practice in this Court appear to fall short.

[3] We propose amendments only to the Court's rules regarding sealing in *civil* cases. We note, however, that the Court's sealing rule in criminal matters, Local Rule 13.1, is identical to the Rule in civil matters, 83.13(a). We have the same concerns regarding the procedural and substantive requirements that govern sealing in criminal cases because the First Amendment standards that apply in that context are identical to those that apply in civil cases. *See Lugosch v. Pyramid Co. of Onondaga County*, 435 F.3d 110, 120 n.4 (2d Cir. 2005). Accordingly, if the Court adopts the amendments we propose here, the Court may wish to consider similar amendments to its criminal rules.

I. Substantive Requirements to Seal Judicial Documents

The First Amendment sets a very high bar for courts to deny public access to judicial documents. A court may seal a judicial document only if it determines that sealing is "essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 119 (internal quotation omitted). The Second Circuit instructs that "'[b]road and general findings' and 'conclusory assertion[s]' are insufficient to justify deprivation of public access" under this test. *Bernstein*, 845 F.3d 145-46 (quoting *Erie County*, 763 F.3d at 243). The common law right of access also imposes a significant limit on the power to seal judicial documents. Common law requires a court to determine the "weight to be given the presumption of access" by examining "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts" and then to "balance competing considerations against it." *Lugosch*, 435 F.3d at 119-20 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049-50 (2d Cir. 1995)).

In addition, the case law establishes that any sealing of judicial documents must be narrowly tailored both in scope and duration. *See United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008); *United States v. Strevell*, No. 05-cr-477, 2009 WL 577910, at *6-7 (N.D.N.Y. Mar. 4, 2009). Courts may seal only those portions of a judicial document necessary to serve the interests that justify the seal, and they must require that a redacted version be made public. *Aref*, 533 F.3d at 83 ("[W]e reinforce the requirement that district courts avoid sealing judicial documents in their entirety unless necessary."). Courts must also specify a time limit on sealing orders whenever possible. *Strevell*, 2009 WL 577910, at *6-7.

This Court's sealing rules should reflect these substantive requirements. We are concerned, however, that the Rule may violate—or at least not require compliance with—these governing standards. The Rule currently contains no mention at all of the substantive requirements that govern sealing. The Rule does not specify: (1) that judicial documents may be sealed only where essential to serve higher values; (2) that only those portions of judicial documents that must be sealed to serve those interests may be sealed; or (3) that sealing must be narrowly tailored in duration. Instead, the Rule merely states that the Court has the authority to seal records and prescribes certain procedures for moving the Court to do so. Unlike the rules in many other federal district courts, the Rule fails to notify parties seeking to seal records that they bear a significant burden to justify sealing. *See* Exhibit B.[4]

In addition, our review of a sample of the Court's cases revealed instances of sealing without apparent satisfaction of these strict substantive requirements. For example, we discovered instances in which the Court sealed judicial documents simply on consent of the parties, without any determination that any party had satisfied the strict substantive requirements for sealing. We also discovered very few instances in which the Court sealed only parts of a document or in which the Court imposed a limit on the duration of a sealing order. The amendments that we propose would include the applicable standards in the Rule, thereby making the substantive requirements clear to parties and the Court.

[4] The following U.S. district courts, among others, specify that the party seeking to seal records bears the burden to justify sealing under governing standards: District of Connecticut, Central District of California, Southern District of Indiana, Middle District of Florida, District of Montana, Southern District of Utah, and the District of South Carolina.

It is worth noting that Section (b) of Local Rule 83.13 does currently specify a general limit on the duration of sealing orders. It requires that sealed documents be unsealed 60 days following the conclusion of the case unless a party moves to maintain the seal. This provision serves as a valuable backstop where the Court has not otherwise narrowly tailored a sealing order by imposing a time limit. *See Strevell*, 2009 WL 577910, at *6-7. Unfortunately, our review of a sample of this Court's cases indicates that this provision is simply not followed. We did not identify a single case in which judicial documents were unsealed automatically 60 days after final disposition, as the Rule requires. To the contrary, we found that documents have remained sealed in cases that have long since concluded. Indeed, we even found two cases in which documents appear to remain under seal (or, at least, unavailable on PACER) despite a court order issued long after the conclusion of the case specifically directing that documents be unsealed.[5] We have proposed amendments to strengthen this provision of the Rule by clarifying how the 60-day limit should be enforced by the Court and the Clerk's office.

II. Procedural Requirements to Seal Judicial Documents

The First Amendment also imposes procedural requirements that must be satisfied prior to the sealing of judicial documents. The Rule and practices in this Court appear to violate these procedural requirements in three ways.

1. Public Filing of Sealing Applications and Orders

The Second Circuit requires that a party's motion to seal judicial documents, and any resulting sealing order, be filed publicly unless the Court finds it appropriate to order otherwise. *See United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) ("Leave of court may be sought to file the text of the motion to seal . . . under seal pending a disposition of the motion by the district court . . . . [T]he district court may of course continue the sealing of the motion papers in aid of an order sealing . . . and may, *where appropriate*, put the contents of its decision under seal." (emphasis added)); *In re Herald*, 734 F.2d 93, 102 (2d Cir. 1984) ("The motion [to seal] itself may be filed under seal, *when appropriate*, by leave of court, but the publicly maintained docket entries should reflect . . . the disposition of the motion." (emphasis added)).

The Rule violates that requirement. Local Rule 83.13(a) states, in relevant part:

> A party seeking to have a document, party[,] or entire case sealed shall submit an application, under seal, setting forth the reason(s) why the document, party[,] or entire case should be sealed, together with a proposed order for the assigned judge's approval. The proposed order shall include the phrase "including this sealing order." Upon the assigned judge's approval of the sealing order, the Clerk shall seal the document(s) and the sealing order.

On its face, the Rule mandates sealing of both the application to seal and the sealing order as a matter of course, whenever a sealing order is approved. This contravenes Second Circuit case law, which requires a case-by-case determination of whether it is proper to seal such material. Further, our review of the sealing rules of all 94 federal district courts reveals that this Court is the only one that requires sealing orders to be sealed as a matter of course. *See* Exhibit B.

[5] *See Travelers Indem. Co. of Am. v. King*, No. 5:05-cv-00681; *Sealed Plaintiff v. Sealed Defendant #1*, No. 5:08-cv-00474.

Our research suggests that sealing orders in this Court are often sealed automatically under Rule 83.13(a), despite governing Second Circuit precedent requiring otherwise. *See* Exhibit A. By contrast, we found no consistent sealing practice with respect to applications to seal, despite the Rule's requirement that all such applications be filed under seal. In the cases we reviewed, it appears that the decision not to seal applications generally reflected the moving party's choice not to file under seal in the first place, rather than any judicial consideration of whether sealing was appropriate.

In order to reconcile the Court's practice with binding law, the amendments we propose require sealing orders and applications to be made public, unless the Court makes a specific determination that it is necessary to seal any portion thereof.

2. Public On-the-Record Findings in Support of Sealing Orders

The Second Circuit also requires that any determination to seal be justified by "specific, on-the-record findings that sealing is necessary to preserve higher values and [that] the sealing order is narrowly tailored to achieve that aim." *Haller*, 837 F.2d at 87. The Court generally must make these findings public, although "such findings may be made under seal *when necessary*." *Id.* (quoting *In re Herald*, 734 F.2d at 100) (emphasis added).

We are concerned the Rule violates these requirements in two ways. First, the Rule seems to permit sealing absent on-the-record findings that sealing is necessary and narrowly tailored. The Rule directs parties to submit proposed sealing orders to the Court "for the assigned judge's approval," and then directs the Court simply to approve or reject the proposed order. The Rule does not require parties seeking sealing to include proposed findings; nor does it require judges to make independent findings prior to sealing judicial documents. To the extent judges sign proposed orders absent "specific, on-the-record" findings, the Court is sealing documents in contravention of binding law.

Second, to the extent judges make findings in support of a sealing order, the Rule does not require them to be made public, as governing law demands. In fact, because the Rule always requires sealing applications and orders to be sealed, any findings will be kept secret as a matter of course if they are included in the sealing order.

Our review of the Court's dockets confirmed that, in most cases where sealing is granted, there are no findings available on the public record. The amendments we propose explicitly require the Court to make specific, on-the-record findings and to make those findings public to the greatest extent possible, thereby providing clear guidance to the Court that is consistent with the governing law.

3. Public Notice of Sealing

The Second Circuit has held that the First Amendment requires adequate notice to the public that a document or case has been filed under seal. *See United States v. Alcantara*, 396 F.3d 189, 192 (2d Cir. 2005). In particular, the Second Circuit instructs that, whenever a sealing motion is filed, the docket should generally "reflect that the motion was filed . . . the time and place of any hearing on the motion . . . and the fact of courtroom closure." *Application of the Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984). Moreover, "[e]ntries on the docket should be made promptly, normally on the day the pertinent event occurs." *Id.* Likewise, if an entire case is sealed, there should be public notice that the case exists. *The Hartford Courant Co. v. Pellegrino*,

380 F.3d 83 (2d Cir. 2004); *see also Haller*, 837 F.2d at 87 ("[E]xcept in extraordinary circumstances the public [must] have a means of learning that a closure or sealing order has been proposed or issued."). Notice is necessary in order to give interested members of the public the opportunity to assert their rights of access under the First Amendment and common law.

The Rule does not address the issue of notice, and it is difficult to determine whether dockets in the district are providing the required notice in practice. While we were able to identify many dockets that mention a "seal" or "sealing," there is no simple way to determine whether sealing orders have been issued in other cases without clear public notice.[6] In order to ensure compliance with governing case law, the amendments we propose include a provision codifying the obligation to provide notice.

4. Consistent Procedures for Sealing Applications

Our review of a sample of cases from the Court's docket suggests that other aspects of the procedures for sealing documents in this district are inconsistent. In some cases, for example, parties applied for sealing by filing a formal motion. In other cases, parties applied by filing an informal letter or simply submitting a stipulation on consent of the parties. These inconsistencies suggest that the Rule should be amended to better instruct parties, attorneys, and judges about the required form and content of sealing applications. The amendments we propose clarify what a party is required to submit as part of an application to seal.

III. Proposed Amendments to Local Rule 83.13

In order to correct these problems, we propose the revisions to Local Rule 83.13 set forth below. Because the changes are substantial, we propose a new rule to replace subsection 83.13(a) in its entirety as well as certain amendments to the existing text of subsection 83.13(b). In drafting this proposal, we have endeavored to craft the simplest and clearest articulation of the requirements for sealing. Our proposal is also based in large part on the District of Connecticut's local rule on sealing, which reflects governing Second Circuit case law and has already been approved by the Judicial Council of the Circuit.

If the Court prefers to preserve as much of the current Rule as possible, we would be happy to provide the Court with an alternative proposal that offers piecemeal edits to the current Rule. Such amendments could certainly bring the Rule into compliance with governing law, although the resulting text is likely to be more cumbersome and less clear than the revision proposed here.

<u>In place of Local Rule 83.13(a), substitute the following:</u>

(a) In all civil cases, sealing of cases or judicial documents shall be governed by the following rules:

1. No judicial document shall be filed under seal, except upon order of the Court.

[6] We did find that in some cases a docket entry describing a document that was filed under seal did not itself indicate that the docket was sealed. Instead, the fact that the document was sealed was apparent only when we clicked through to attempt to obtain the electronic document and received a notice indicating that that the document was not available. This suggests that the Court may lack a consistent practice for labelling docket entries that refer to sealed judicial documents.

2. Any order sealing a judicial document or an entire case shall include specific, on-the-record findings demonstrating that sealing is supported by clear and compelling reasons and is narrowly tailored to serve those reasons.[7] No document shall be sealed by mere stipulation of the parties.[8]

3. In determining whether a sealing order is narrowly tailored, the Court shall consider whether the reasons for sealing could be served through the sealing of only a portion of the case or document or through a seal of limited duration. Whenever the Court orders only a portion of a document sealed, a version of the document shall be filed on the public docket with only the sealed portion(s) redacted.

4. A judge may seal a Court order, including an order to seal documents and the related findings, only when sealing a Court order meets the standard for sealing a judicial document provided in paragraphs 2 and 3 of this subsection.[9]

5. A party seeking to have a judicial document or entire case sealed shall submit an application to the Court establishing that sealing meets the standard for sealing a judicial document provided in paragraphs 2 and 3 of this subsection.[10]

6. The moving party shall submit a proposed order with the application to seal, which shall identify the particular documents or portions thereof sought to be sealed or otherwise specify in detail the scope of the seal, including whether the party seeks to seal any portion of the application to seal or proposed sealing order. The moving party may include, in its proposed order or in a separate document, proposed findings demonstrating that sealing meets the standard for sealing a judicial document provided in paragraphs 2 and 3 of this subsection.[11]

7. No portion of an application to seal and supporting documents, including the proposed order, shall be filed under seal unless the party seeks to seal those documents, or portions thereof, and establishes that such sealing meets the standard for sealing a judicial document provided in paragraphs 2 and 3 of this subsection. If the party seeks to seal the application and supporting documents, or any portion thereof, the documents may be filed under seal in the first instance and may remain under seal until the Court adjudicates the application. Thereafter, the documents shall be unsealed, unless the Court orders that the documents, or portions thereof, shall be sealed because the

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[7] This provision is taken directly from the District of Connecticut Local Rule 5(e)(3). Note that this text is substantially similar to the language of the Northern and Southern District of Mississippi Local Rule 79.

[8] This provision is taken directly from the District of Connecticut Local Rule 5(e)(3). Note that this text is substantially similar to provisions of Central District of California Local Rule 141(a), and Northern and Southern District of Mississippi Local Rule 79.

[9] This provision is similar to District of Connecticut Local Rule 5(e)(3).

[10] This provision is similar to District of Connecticut Local Rule 5(e)(3).

[11] This provision is a formulation of the Second Circuit rule from *Haller*, 837 F.2d at 87 and District of Connecticut Local Rule 5(e)(3).

sealing meets the standard for sealing a judicial document provided in paragraphs 2 and 3 of this subsection.

8. All sealing orders and applications to seal shall be entered on the Court's docket. The documents sought to be sealed shall be entered on the docket using the same title of the pleading or description of the documents used in the motion to seal. Pursuant to a Court order supported by a particularized showing of good cause, a filing or document may be entered on the docket simply as "Sealed Document" or "Sealed Motion." The existence of any case sealed in its entirety shall be reflected on public dockets by use of the notation: "Sealed Case."[12]

Amend subsection (b) of Local Rule 83.13, as follows (additions in red and underlined, deletions ~~struck out~~):

(b) Pleadings and other papers sealed by the Court in civil actions shall remain under seal for the duration of sealing ordered by the Court or, where not specified, for sixty (60) days following final disposition of the action, i.e., final disposition of the action includes any time allowed by the federal rules to file an appeal in a civil matter, and, if an appeal is filed, sixty (60) days from the date of the filing of the mandate, if the action was not remanded for further proceedings. After that time, the Court ~~will~~ shall unseal all sealed documents and place them on the record unless, upon motion of a party, the district judge orders that the pleading or other document remain under seal ~~or be returned to the filing party~~.[13]

1. The Clerk shall, in every case where a document has been sealed and where the duration of the seal is not otherwise specified by Court order, notify the parties 30 days after final disposition of the action that, in the absence of further motion, all sealed documents will be unsealed pursuant to this rule.

2. If no motion is filed, the Clerk shall promptly unseal such records upon the expiration of the sixty (60) day period following final disposition of the action.[14]

3. If the case is fully electronic, documents that have been unsealed shall be uploaded to CM/ECF where they would be available for public viewing.

We suggest that, to facilitate the unsealing requirements of subsection (b) of the revised rule, the Court direct the Clerk to explore and settle upon a manner in which to track all sealed

[12] All but the first sentence of this paragraph is taken directly from the District of Connecticut Local Rule 5(e)(2) and 5(e)(5).

[13] Copies of judicial documents should be kept by the Court, rather than being returned to the parties. Returning documents to parties without retaining a copy frustrates the public's First Amendment and common law rights of access to judicial documents by putting such documents beyond the reach of the court and, therefore, beyond the reach of a motion to unseal. A document filed in court that is subject to the public's right of access remains subject to that right even after the case ends. *See, e.g.*, *FDIC v. Ernst & Ernst*, 677 F.2d 230, 231-32 (2d Cir. 1982) (third party intervened to challenge stipulated confidentiality order two years after settlement). Returning documents to parties without retaning a copy amounts, in effect, to a denial of the public's right of access without any judicial determination that the right does not apply or has been overcome.

[14] A similar provision appears in the Eastern District of Pennsylvania's Local Rule 51.5(c).

cases and filings in the district and to make that list electronically available to the public. For instance, the Clerk may wish to consider establishing a special docket that compiles all sealing orders entered in civil cases and notes their expiration dates, analogous to the special docket that the Court has established to compile sealing orders over arrest warrants and court orders authorizing investigative activities. *See In re Sealing Order(s) for Public Filing*, No. 5:17-sp-02017; *In re Sealing Order(s) for Public Filing*, No. 5:16-sp-02016; *In re Sealing Order(s) for Public Filing*, No. 5:15-sp-02015.

We believe these proposed changes would bring the Court's sealing rule into compliance with governing law. These rules would also provide members of the bar with greater clarity regarding the procedures and standards governing sealing motions. We would be happy to discuss the substance of this proposal, provide further information, or answer any questions as you consider these proposed amendments. Thank you for your time and attention to this matter.

Respectfully submitted,

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