University at Buffalo
Clinical Legal Education
School of Law

NYCLU
NEW YORK CIVIL LIBERTIES UNION

KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

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

RE: Comments on 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 comment on the proposed amendment to Local Rule 83.13 regarding sealing in civil cases ("Proposed Rule"). As you may recall, we submitted a proposal to amend this rule, and we welcome the Court's effort to address the concerns raised in our submission. Among other things, the proposed rule would require that applications to seal satisfy the governing legal standards on sealing, and it would prevent the routine sealing—mandated by the rule currently in effect—of applications and proposed sealing orders. We strongly support these changes for the reasons given in our original proposal.[1]

After reviewing the proposal carefully, we have four remaining concerns that could be addressed with minor modifications to the proposed text. These modifications would ensure that the amended text is fully compliant with governing Second Circuit law and would also make the amended rule as effective as possible. Below, we describe each concern and propose a narrow textual amendment (**in bold and underlined text**) to the Proposed Rule designed to address it.

1. Requiring a Specified Duration for Sealing Orders.

In our original comments, we noted that a critical loophole in this Court's sealing practices is the failure to enforce limits on the duration of sealing orders, or to reexamine indefinite seals at appropriate intervals. The current version of Rule 83.13(b) partially addresses that issue by requiring that sealed material be unsealed automatically 60 days after final disposition of the case. Although we found that the provision is not enforced, it theoretically acts as a backstop to prevent sealing orders from persisting even after the rationale for sealing has expired. The Court's proposed amendment to the Rule would do away with that backstop without any substitute to address the problem of indefinite sealing. It would not, for example, explicitly require the parties or the Court to specify the duration of a sealing order, or create a backstop to replace the 60-day provision. As a result, the Proposed Rule does not explicitly address the

[1] Our original proposal is available for download here: https://buffalo.box.com/v/Sealing-Rule-Proposal.

problem we documented of sealing orders being routinely issued without any durational limit, such that they routinely persist long after their rationales have expired.

Accordingly, we recommend that the Court amend the Proposed Rule to require any party seeking sealing to propose a duration in its application to the Court. The duration could be specified as a defined period of time, by an end date, or by reference to a future litigation event or other change in circumstances that would obviate the need for sealing. In cases where a court determines that the need for sealing will not foreseeably lapse, the sealing order should state that the material should remain sealed only so long as the proffered justification continues to exist.

This amendment would also ensure that the Proposed Rule conforms with case law in the Second Circuit holding that any sealing of judicial documents must be narrowly tailored both in scope and duration. *See United States v. Strevell*, No. 05-cr-477, 2009 WL 577910, at *6-7 (N.D.N.Y. Mar. 4, 2009); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (describing narrow tailoring requirement); *United States v. Moten*, 582 F. 2d 654 (2d Cir. 1978) (requiring a durational limit on sealing of *in camera* proceeding at criminal trial.

Specifically, we suggest the following addition to Proposed Rule 83.13(a):

> **Proposed Rule 83.13(a):** A party seeking to have a document, a portion of a document, a party or an entire case sealed shall submit bears the burden of filing an application setting forth the reason(s) that the referenced material should be sealed under the governing legal standard. . . . The application shall also attach a proposed order (which shall not be filed under seal unless the Court deems doing so to be appropriate) containing specific findings justifying the sealing under the governing legal standard for the assigned judge's approval. The proposed order shall include an "ORDERED" paragraph stating the referenced material to be sealed **and the proposed duration of the sealing order**. . . .

2. Ensuring Unsealing When A Sealing Order Expires.

To ensure that sealed materials are in fact unsealed once their justification lapses, we further propose that the amended rule require the party seeking sealing to notify the Clerk and the Court when a sealing order has expired or is no longer required. The existing version of Rule 83.13(b) contains a 60-day sunset provision, mentioned above, meant to trigger unsealing by the Clerk. We are concerned that, absent that provision or a comparable one as well as a mechanism to give it effect, sealing orders will persist long after their durations or justifications expire. To address that concern, we recommend that the Court amend the Proposed Rule to require that the party who sought sealing notify the Clerk and the Court when records should be unsealed. This will help to ensure that cases and documents do not needlessly and improperly remain under seal beyond the period narrowly tailored to the purpose of sealing, as specified in the sealing order. To this end, we recommend the addition of one sentence to Proposed Rule 83.13(c):

> **Proposed Rule 83.13(c):** Once the Court seals a document, a portion of a document, a party or an entire case, the material shall remain under

> seal for the duration of the sealing order or until a subsequent order is entered directing that the sealed material be unsealed. **The party seeking sealing must promptly notify the Clerk and the Court upon the expiration of the sealing period or when sealing is no longer justified.** A party or third-party seeking unsealing must do so by motion on notice.[2]

3. Requiring that Sealing Orders Be Publicly Docketed.

We recommend that the Proposed Rule explicitly require that sealing orders be filed publicly, unless otherwise appropriate. As written, the Proposed Rule directs the public filing of only *proposed* orders. *See* Proposed Rule § 83.13(b) (stating that proposed order "shall not be filed under seal unless the Court deems doing so to be appropriate."). There is no explicit requirement that approved sealing orders be filed publicly. However, as we noted on page 4 of our original proposal to the Court, governing case law requires that sealing orders generally be made public. *See In re Herald*, 734 F.2d 93, 102-3 (2d Cir. 1984). We therefore recommend adding the following clause to Proposed Rule 83.13(b):

> **Proposed Rule 83.13(b):** Upon the assigned judge's approval of the sealing order, **the sealing order shall be filed on the public docket (unless the Court deems sealing all or a portion of it to be appropriate), and** the redacted or sealed document shall be filed as directed by the Clerk. . . .

4. Guaranteeing an Independent Judicial Determination of the Need for Sealing.

Finally, we propose a small change to the Proposed Rule to make it explicit that the Court, when considering an application to seal, must make an independent determination that sealing is

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[2] In addition to this change to the Proposed Rule, we further suggest that the Court direct the Clerk to create and implement a system that will ensure that records are in fact unsealed whenever a sealing order has expired or is no longer justified. One possibility, for example, would be for the Clerk to record, within a centralized system, the expiration date of every sealing order that specifies a date certain. The Clerk would then automatically unseal records on the expiration date, perhaps after providing notice to the parties in advance of that date that the sealed items will be placed on the public docket absent a motion to extend sealing.

In order to address the common circumstance where the duration of a sealing order is not necessarily tied to a date certain, but instead contingent upon the occurrence of some event or other change in circumstances, the Court could facilitate unsealing by creating a public compilation of sealing orders that includes, at a minimum, the name and docket number of the case, a description of the sealed items, and the duration or justification for the seal as specified in the sealing order. This compilation would allow members of the public more easily to intercede if it appears that sealing is no longer justified. In some cases, it may suffice for a member of the public simply to bring it to the attention of the Clerk and Court that a sealing order, by its own terms, appears to have lapsed. This may obviate the need for a formal motion on notice. A public compilation of sealing orders would also allow parties who have obtained a sealing order to quickly review such orders and thereby facilitate compliance with the requirement that they notify the Clerk when records should no longer be sealed. As we noted at pages 8-9 of our original proposal, this Court has established an analogous practice of compiling sealing orders with respect to applications for 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.

warranted under the governing legal standard. As currently written, the Proposed Rule states that the party seeking sealing must submit a proposed order (including findings of fact) for the assigned judge's approval. We propose to make it explicit that, before granting the sealing order, the Court must independently endorse the proposed findings and determine that sealing is warranted.

This modification should ensure that sealing orders are justified by "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 120 (internal quotation omitted). As a practical matter, this modification should also prevent documents or cases from being sealed solely based on the parties' stipulation/consent by ensuring that the Court makes an independent determination.[3] We therefore recommend the following text be added to the Proposed Rule:

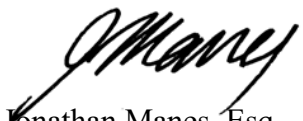
> **Proposed Rule 83.13(a):** . . . The application shall also attach, together with a proposed order (which shall not be filed under seal unless the Court deems doing so to be appropriate) containing specific **proposed** findings justifying the sealing under the governing legal standard for the assigned judge's approval **if the assigned judge independently makes findings of fact that warrant sealing under the governing legal standard.** The proposed order shall include an "ORDERED" paragraph . . . .

* * *

We support the Court's effort to refine its rule on sealing in civil cases and believe that these additional minor changes would bring the Proposed Rule more clearly into compliance with governing law and would limit ambiguity about how the rule is to be administered. We would be happy to discuss these suggestions or to address any questions that arise therefrom. We thank the Court and the Clerk's office for the time and care with which they have approached these proposed amendments to Rule 83.13, and for your consideration of our additional proposed modifications. We very much hope that a revised Rule 83.13 will be approved by the Board of Judges and come into force in the New Year.

[3] As noted in our original proposal (at pages 3 and 6, and Exhibit B), our review of a sample of cases from this Court revealed a number of instances where sealing had been authorized based solely on the consent of the parties.

Respectfully submitted,



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