

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

**COMMENTS ON THE PROPOSED NEW COMMERCIAL DIVISION RULE  
TO REVISE THE STANDARD FORM CONFIDENTIALITY ORDER**

The New York City Bar Association (the “City Bar”) is grateful for the opportunity to provide comments on the recent proposal by the Unified Court System’s Commercial Division Advisory Council (the “Advisory Council”) to amend the Standard Form Confidentiality Order (“SFO”) in use currently in the Commercial Division.

These comments reflect the input of the City Bar’s Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction (the “State Courts Committee”), Committee on Litigation and the Communications and Media Law Committee (the “Media Law Committee”).<sup>1</sup>

As noted by the Advisory Council, the SFO has become an “established staple” in Commercial Division practice since its release in 2007. In recent years, the State Courts Committee, the Media Law Committee and many others have discussed the need to revise or update various aspects of the SFO. Thus, the City Bar agrees that the SFO should be updated in light of the growth of electronic filing and other developments in New York State Court practice.

However, the City Bar believes that the SFO should be amended to include additional new language beyond the Advisory Council’s proposed revisions. We enclose a mark-up of the form that shows our proposed additions.<sup>2</sup>

Separately, we recommend certain revisions to the Advisory Council’s proposed new language. With respect to Paragraph 9 of the Advisory Council’s proposal, the issue for the Court at a hearing or trial is not what steps are “necessary to preserve the confidentiality of ... Confidential Information,” but rather whether the standard for sealing or excluding the public

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<sup>1</sup> The committees include practitioners, academics and judges, and the Council also includes chairs of other court-related committees of the City Bar. In addition to those signing this letter, the following individual members of the committees contributed to these comments: Ronald C. Minkoff, Amelia T.R. Starr, Amy Carlin, Michael P. Regan, Andrew M. Cali-Vasquez, Leah Friedman, Charles S. Sims and Jacob P. Goldstein.

<sup>2</sup> The Advisory Council’s proposed changes have been incorporated in the document with our proposed additions and revisions thereto shown in boldfaced, underlined type.

from the courtroom has been satisfied. Thus, we propose the following language for Paragraph 9:

**Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, the Party or non-party should consult with the Producing Party to determine whether the Producing Party objects to disclosure. If the Producing Party objects, then the Producing Party should bring a motion, which may be made in written form, or in oral form with the Court’s consent, seeking to seal the challenged Confidential Information pursuant to 22 NYCRR 216.1 or any other applicable rule or statute. No Confidential Information will be disclosed until the Court rules on the motion.**

With respect to the last sentence of Paragraph 10 of the Advisory Council’s proposal, we believe that the language should read “the Court **may in its discretion**, upon application, enter an order directing the witness’s compliance with the Stipulation.” We do not believe that judges should be required, in all cases, to direct non-parties to execute the agreement to be bound by the SFO. In individual cases, good reasons may exist not to compel a non-party to execute the agreement. We believe that the matter should be left to the discretion of the Justice presiding over the case.

Further, we recommend revising the language of Paragraph 12 of the Advisory Council’s proposal, as follows:

In Electronic Filing counties, Paragraph 12(c):

If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all **portions of** documents **found by the Court to merit sealing** are filed in accordance with the procedures that govern the filing of sealed documents on the NYSECF system.

In Counties without Electronic Filing, Paragraph 12(b):

In the event the motion to seal is granted, **all portions of** deposition transcripts, exhibits, answers to interrogatories, and other documents **found by the Court to merit sealing** shall be filed in sealed envelopes or other appropriate sealed ....

As currently proposed, the language set forth above from Paragraph 12 extends beyond the particular material that has been found by the Court to merit sealing. Thus, we believe that the additional language is required to ensure that the sealing of documents is narrowly tailored.

We hope our observations prove to be helpful. We stand ready to provide further comments upon request or to assist in any other way we can.

Council on Judicial Administration  
Steven M. Kayman, Chair

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

Committee on Litigation  
Cary B. Samowitz, Chair

Committee on Communications and Media Law  
Charles S. Sims, Chair

March 2016

Encl.

**PROPOSED AMENDMENTS TO SFO**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

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\_\_\_\_\_,  
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Plaintiff,  
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-against-  
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\_\_\_\_\_,  
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Defendant.  
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-----X

Index No. \_\_\_\_\_

***STIPULATION AND ORDER FOR  
THE PRODUCTION AND  
EXCHANGE OF CONFIDENTIAL  
INFORMATION***

This matter having come before the Court by stipulation of plaintiff, \_\_\_\_\_,  
and defendant, \_\_\_\_\_, (individually “Party” and collectively “Parties”) for the entry of a  
protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing  
of confidential and/or proprietary documents and information to be produced by either party and  
their respective counsel or by any non-party in the course of discovery in this matter to the extent  
set forth below; and the parties, by, between and among their respective counsel, having  
stipulated and agreed to the terms set forth herein, and good cause having been shown;  
IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery  
of documents and information that the Parties and, as appropriate, non-parties, agree merit  
confidential treatment (hereinafter the “**Documents**” or “**Testimony**”).
2. Any Party or, as appropriate, non-party, may designate Documents produced, or  
Testimony given, in connection with this action as “confidential,” either by notation on the  
document, statement on the record of the deposition, written advice to the respective undersigned

\* *Proposed additions and revisions shown in boldfaced, underlined type*

counsel for the parties hereto, or by other appropriate means.

3. As used herein:

- (a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain **personal information**, trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to **personal or privacy interests of that party**, the conduct of that Party’s or non-party’s business or the business of any of that Party’s or non-party’s customers or clients.
- (b) “Producing Party” shall mean the parties to this action and any non-parties producing “Confidential Information” in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.
- (c) “Receiving Party” shall mean the Party to this action and/or any non-party receiving “Confidential Information” in connection with depositions, document production, **subpoenas** or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material

within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall- continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

a. personnel of **the Parties** actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

b. counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

c. expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with

paragraph 7 hereof **and only to the extent necessary for them to furnish said services;**

d. the Court and court personnel **and any special master, referee, or mediator appointed by the Court;**

e. **neutral evaluator appointed by the Court or anyone else whom the Court deems appropriate upon such Court order;**

f. an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

g. **witnesses, including but not limited to** trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

h. any other person agreed to by the Producing Party.

6. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving Party shall provide the expert's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. **Any expert witness or consultant must execute the written agreement before being given access to Confidential Information.** Counsel for the Receiving Party obtaining the certificate **from such expert or consultant** shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied. **However, in the event that such expert or consultant ultimately provides evidence in the case, a copy of the certificate for such witness shall be supplied to counsel for the**

**other Parties.**

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, **the Party or non-party should consult with the Producing Party to determine whether the Producing Party objects to disclosure. If the Producing Party objects, then the Producing Party should bring a motion, which may be made in written form, or in oral form with the Court's consent, seeking to seal the challenged Confidential Information pursuant to 22 NYCRR 216.1 or any other applicable rule or statute. No Confidential Information will be disclosed until the Court rules on the motion.**

10. This Stipulation shall not preclude counsel for any Party from **showing any witness or** using during any deposition in this action any Documents or Testimony which has been designated as "Confidential Information" under the terms hereof. Any deposition **or other** witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. **If the witness is deposed, then at or before the deposition,** counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement



to be bound by this Stipulation, the Court **may in its discretion**, upon application, enter an order directing the witness's compliance with the Stipulation.

11. A Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

**[In Counties WITH Electronic Filing]**

12. (a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, pleading, brief, or memorandum on NYS**CEF** system in redacted form until the Court renders a decision on any motion to seal (the "Redacted Filing").

If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted filing with its corresponding unredacted version.

(b) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party's Confidential Information unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all **portions of documents found by the Court to merit sealing** are filed in accordance with the procedures that govern **the filing of sealed** documents on the NYS**CEF** system. If the Producing Party's timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduces, paraphrases or discloses any documents which have previously been designated by a party as comprising

or containing Confidential Information, shall identify such documents by the production number ascribed to them at the time of production.

**[In Counties WITHOUT Electronic Filing]**

12. (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a **copy of the pleading, brief or memorandum in redacted form (the “Redacted Filing”)** and a complete and unredacted version of the filing: (ii) filing a Redacted Filing with the court: and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information. If the Producing Party does not file a motion seal within the aforementioned three (3) day period, the Party (or, as appropriate, non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

(b) In the event the motion to seal is granted, all **portions of** deposition transcripts, exhibits, answers to interrogatories, and other documents **found by the Court to merit sealing** shall be filed in sealed envelopes or other appropriate **sealed** container on which shall be endorsed **with** the caption of this litigation, the words “CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION” as an

indication of the nature of the contents, and a statement in substantially the following form:

“This envelope, containing documents which are filed in this case by (name of **Party or as appropriate, non-party**), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court.”

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(c) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information produced by a Producing Party that is a non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party’s Confidential Information unredacted.

(d) All pleadings, briefs or memoranda which reproduces, paraphrases or discloses any documents which have previously been designated by a party as comprising or containing Confidential Information, shall identify such documents by the production number ascribed to them at the time of production.

13. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof **and shall use reasonable measures to store and maintain the information so as to prevent**

**unauthorized disclosure.**

14. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its “confidential” nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as “confidential” within a reasonable time following the discovery that the document or information has been produced without such designation.

15. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party’s right to object to the production or disclosure of other information in this action or in any other action.

**17. If, at any time, any Confidential Information is in the possession or custody of any Party, other than the Producing Party, who receives a subpoena or some other form of legal process from any court, federal or state regulatory or administrative body or agency, legislative body or other person or entity, the Party to whom the subpoena or request is directed shall, unless prohibited from doing so by law or regulation, promptly provide written notice to the Producing Party and/or to the Party who designated the information as Confidential Information, which notice shall include the date set for the production of the subpoenaed or requested information and a copy of the subpoena or request. Further, the Party to whom the subpoena or request is directed shall not disclose any Confidential Information in response thereto without first providing the Producing Party and/or the**

Party who designated the information as Confidential Information a reasonable period under the circumstances, but no more than seven (7) business days, to inform the subpoenaed Party either that it does not object to production of the information or that it will seek court protection to prevent the production, unless prohibited from doing so by law or regulation.

18. If the Producing Party and/or the Party who designated the information as Confidential Information responds that it will not seek court protection, then the subpoenaed Party may produce the information. If the Producing Party and/or the Party who designated the information as Confidential Information fails to provide the subpoenaed Party with a response as to whether it will object to production or seek court protection, the subpoenaed Party may produce the information, if possible after seven (7) business days following the subpoenaed Party's notice of the subpoena to the Producing Party and/or the Party who designated the information as Confidential Information. In this circumstance, if the Producing Party and/or the Party who designated the information as Confidential Information does not object within the relevant period, the Producing Party or the Party who designated the information as Confidential Information shall be deemed to have waived its right to object to production. The Party receiving the subpoena or process shall also inform the party seeking the Confidential Information that the information is governed by this Stipulation and that the Parties to this Stipulation intend to keep the information Confidential.

19. In, the event of an inadvertent disclosure of another Party's or non-party's designated Confidential document, communication or information, the Party making or

**aware of the inadvertent disclosure shall, upon learning of the disclosure: (i) promptly notify the person(s) to whom the disclosure was made that it contains Confidential Information subject to this Stipulation; (ii) promptly make all reasonable efforts to obtain the return of the document, communication or information and to prevent further dissemination of it; and (iii) within five (5) days (holidays and weekends included) notify the party that produced the Confidential Information of the identity of the person(s) to whom disclosure was made, the circumstances surrounding the disclosure, and the steps taken to prevent any use or further dissemination of it.**

**20.** This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

**21.** This Stipulation shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of any the Stipulation. The provisions of this Stipulation shall, absent prior written consent of **all Parties**, continue to be binding after the conclusion of this action.

**22.** Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the **authenticity or** admissibility in evidence of any facts or documents revealed in the course of disclosure.

**23.** Within sixty (60) days after the final termination of this litigation by settlement or

exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, In the event that any Receiving-Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matters.

**24.** This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a **anyone who is a signatory to the Stipulation** to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information, **or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law. Nothing herein shall affect any right that any person or party may have to move to unseal any documents previously ordered sealed by the court.**

**25.** **This Stipulation may be signed in counterpart originals, which, when fully executed, shall constitute a single original, and facsimile signatures shall be deemed original**



**signatures.**

[FIRM]

By: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
New York, New York \_\_\_\_\_

Tel.: \_\_\_\_\_

Attorneys for Plaintiff

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

SO ORDERED \_\_\_\_\_

J.S.C.

[FIRM]

By: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
New York, New York \_\_\_\_\_

Tel.: \_\_\_\_\_

Attorneys for Defendant

**EXHIBIT "A"**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X  
:  
\_\_\_\_\_,  
Plaintiff,  
:  
-against-  
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\_\_\_\_\_,  
Defendant.  
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-----X

Index No. \_\_\_\_\_

**AGREEMENT TO RESPECT  
CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, state that:

- 1. My address is \_\_\_\_\_.
- 2. My present employer is \_\_\_\_\_.
- 3. My present occupation or job description is \_\_\_\_\_

\_\_\_\_\_

4. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on \_\_\_\_\_.

- 5. I have carefully read and understand the provisions of the Stipulation.
- 6. I will comply with all of the provisions of the Stipulation.
- 7. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to

me.

8. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

9. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: \_\_\_\_\_