



NEW JERSEY STATE BAR ASSOCIATION

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February 17, 2023

Hon. Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625

Re: Proposed Amendments to R. 1:38

Dear Judge Grant:

The New Jersey State Bar Association appreciates the recent implementation by the Judiciary of amendments to R. 1:38-3(a) shielding medical, psychiatric, psychological and alcohol and drug dependence reports and evaluations from public access. The Association supported this rule change, noting that such documents contain personal, sensitive information and should be kept confidential unless a court orders otherwise.

Similarly, the NJSBA believes that much of the information contained in Family Part records is personal and sensitive and should be shielded from public access. The Association has raised this issue previously and renews its request once again that further action be considered to keep Family Part records confidential. This is particularly important with the increased use of e-Courts, its ease of accessibility and the prevalence of cyber-attacks against government agencies and the legal industry.

Family Part records are unique from other court records because they often bring to light "family secrets" that may be important to the litigation but need not be revealed to the rest of the world. This is particularly compelling when children are involved in the litigation and they must live, attend school, and interact with the rest of that world while the litigation is ongoing and after it is concluded. While actual records of certain financial, medical and domestic violence information are currently excluded from public access, many times some of that information is contained in routine filings not currently shielded, such as the pleadings and various motion papers. The issues that arise in trying to navigate through redaction and motions to seal records in the Family Part are illustrated in the attached article by NJSBA Family Law Section member Lizanne J. Ceconi, entitled *Public Access & Confidentiality of Family Part Records*.

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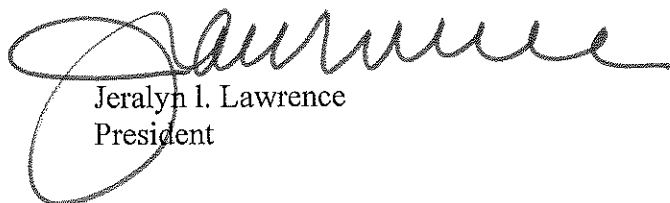
To fully protect against disclosure of sensitive information that is routinely contained in Family Part filings, like a child's mental and physical health or special needs, a parent's income and work history, alleged spousal abuse or infidelity, the NJSBA proposes further amendments to Rule 1:38 as contained in the attached.

As individuals become more savvy internet users and cull more and more information about others from public documents available online, the need for certain aspects of a family's life and dynamics to be kept confidential is greater and greater. The NJSBA recognizes the importance of transparency, but it also recognizes the importance of privacy to the real people involved in litigation they likely wish they weren't involved in, like a child struggling through a parent's divorce, and parents trying their best to navigate a path forward following the breakdown of their relationship.

Again, we urge the Court to once again consider the attached important amendment to R. 1:38 and take action to shield Family Part records from public access.

Thank you for your consideration.

Respectfully,



Jeralyn I. Lawrence
President

cc: Timothy F. McGoughran, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

Proposed Changes to Rule 1:38

Submitted by the New Jersey State Bar Association

All Family Part pleadings, Affidavits, Certifications, Case Information Statements, Findings of Fact, Conclusions of Law, Judgments of Divorce, Orders, both *pendent lite* and final, written Agreements, Memoranda of Understanding, including any attachments thereto, shall not be distributed to any person except a party to the litigation or the attorney or counsel of a party, except by order of the court, upon a showing of good cause.

To demonstrate good cause, the disclosure must have a public purpose that outweighs the privacy interests of the parties, their minor children or other persons whose information appears of record.

Any person seeking disclosure must file a Motion pursuant to Rules 1:6-2 and 5:5-4 with notice to the parties and all persons whose information appears of record. The notice must specify the information and/or documentation being sought, the reason for seeking such information, and an explanation for why the information being sought cannot be obtained from a less intrusive means.

In granting the application for disclosure, the court must make findings and specify the good cause shown for such disclosure. If good cause is shown, the court shall order the release of only that information necessary to address the purpose for which the information is sought and shall have the power to limit the scope of the disclosure of the information being released to ensure that said information is only used for the purpose in which it is needed based on good cause shown.

PUBLIC ACCESS & CONFIDENTIALITY OF FAMILY COURT RECORDS

By: Lizanne J. Ceconi, Esq.¹

Our family court records are predominantly open to the public in accordance with New Jersey Court Rule 1:38. While limited exceptions do exist under the rule, it still does not offer fully comprehensive protection to the families who find themselves engaged in litigation. In July 2009, the Supreme Court of New Jersey revised Rule 1:38 by rewriting and modifying the framework of the public access doctrine under the former Rule 1:38. The amended rule fundamentally altered its predecessor's framework, as it presumes all court records are open for public access only to the exclusion of those records contained in its exclusive list of thirty-eight (38) exceptions listed in Rule 1:38-3 (court records) or Rule 1:38-5 (administrative records). The rule was constructed to provide practitioners with a sweeping, single point of reference, in turn facilitating a simpler method to ascertain which records are confidential and are available to the public – without need to reference a myriad of sources of law. The vast majority of exempted records (30 out of 38) pertain to family matters and criminal matters. In effect, the revamped rule removes the struggles associated with a "balancing of the interests" test to determine when certain records should be made available for public inspection, because a presumption of openness applies unless the type of record is explicitly referenced within the list of exceptions.

The notion of public access to court records is deeply rooted in the concept that trials are public events. In an attempt to harmonize the competing interests between public access rights and individual privacy rights, courts frequently address the basic rationales that support an open judicial process. Primarily, a policy endorsing public

¹ The author wishes to acknowledge and thank Elissa W. LeVine, Esq. for her assistance in preparing this article.

access guarantees that court proceedings are fair, which in turn enhances confidence in the judiciary and limits the prospect of public attack which may undermine judicial autonomy. Public access further allows citizens to monitor and scrutinize court proceedings, imposing judicial accountability to ensure appropriate judicial performance. Open access also promotes public education about the functions and processes of the judiciary in its decision-making capacities.

Two significant departures from the precursor rule to the amended rule involve the mandatory redaction of confidential personal identifiers ("CPIs") and the sealing procedure. Parties are now required to redact CPIs from any documents submitted to the court, including Social Security numbers, driver's license numbers, vehicle plate numbers, insurance policy numbers, active financial account numbers, and active credit card numbers. More significantly, the amended rule explicitly establishes a standard for sealing court records by codifying the test of good cause.² The rule also addresses the procedure for the unsealing of court records by way of motion, and places the burden on the non-movant to prove that good cause to continue sealing the record still exists.

However, there still exists a gap, as the rule does not include an enforcement provision for attorneys and parties who fail to redact personal identifiers. Proper compliance with this obligation becomes especially crucial as the court continues to implement guidelines and policies to govern the dissemination of information online. Because of the potentially vast audience and their ability to easily view court documents

² N.J. Ct. R. 1:38-11(a)-(b). The Rule defines good cause as when "(1) disclosure will likely cause a clearly defined and serious injury to any person or entity; and (2) the person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38." N.J. Ct. R. 1:38-11(b).

on the internet, the inadvertent release of confidential information, such as a Social Security number or an active financial account number, could have devastating and long-lasting repercussions for a litigant.

Another potential consequence of the amended rule is the possibility of increased litigation, particularly in the form of motions to seal records. Conceivably, parties worried about safeguarding their information from public viewership, particularly with the increase of documents being filed online, will barrage the courts with requests for orders to seal. Even with the existing redaction requirements, the classification of CPIs is quite constrained, leaving delicate, sensitive, and/or embarrassing information to fall outside the purview of the redaction requirements. In the past, less accessible means of obtaining court records mitigated the need for enhanced protections beyond the intermittent sealing orders requested for particularly sensitive data. Now, as the reach of the internet encroaches on prior levels of obscurity, parties are left to pursue alternate mechanisms to protect information that was previously more hidden from public inspection.

The question remains then whether the amendments to the rule have gone far enough. The narrative shifts once a self-represented litigant or adversary attaches a confidential or protected document to a court filing, thereby entering it into the court record. Because Rule 1:38-2(a)(1) provides an absolute and unfettered right of access to the attachments associated with pleadings, motions and briefs, the problem of public access stands to persist. Parties simply cannot rely on the fact that, for example, a protective order was issued under Rule 4:10-3 to shield those protected documents that had been exchanged in the course of litigation.

The belief then is that the previous amendments do not go far enough in addressing concerns of privacy. Rule 1:38 should be further amended as follows:

Proposed Court Rule and/or Legislation

All Family Part pleadings, Affidavits, Certifications, Case Information Statements, Findings of Fact, Conclusions of law, Judgments of Divorce, Orders, both *pendente lite* and final, written Agreements, Memoranda of Understanding including any attachments thereto shall not be distributed to any person except a party to the litigation or the attorney or counsel of a party, except by order of the court upon showing of good cause.

To demonstrate good cause, the disclosure must have a public purpose that outweighs the privacy interests of the parties, their minor children or other persons whose information appears of record.

Any person seeking disclosure must file a Motion pursuant to Rules 1:6-2 and 5:5-4 with notice to the parties and all persons whose information appears of record. The notice must specify the information and/or documentation being sought, the reason(s) for seeking such information, the materiality of the information being sought, and an explanation why the information being sought cannot be obtained from less intrusive means.

In granting the application for disclosure, the court must make findings and specify the good cause shown for such disclosure. If good cause is shown, the court shall order the release of only that information necessary to address the purpose for which the information is sought and shall have the power to limit the scope of the disclosure of the information being released to ensure that said information is only used for the purpose in which it is needed based on good cause shown.

This proposal would be the most pragmatic and feasible means of ensuring family part litigants receive the protections needed to avoid excessive intrusion into their personal lives. As it is currently configured, our family part motion practice requires litigants to communicate in great detail the most intimate aspects of their lives. Parties should have license to be extremely candid and transparent with the court without concern that their personal dealings will be exposed to the public. Family matters before the court include many private issues, including but not limited to details about support, custody and equitable distribution, which often times require a recitation of the fitness of

the parties, the needs of the children, the past and present economic circumstances of the family, the medical conditions of the parties and their children, a narrative explaining the Case Information Statement, and various other personal information. Even though Rule 1:38-3(a) provides that if documents deemed to be confidential are attached to non-confidential documents, the attachments remain confidential, it is hard to imagine this rule would be properly, consistently and effectively administered to ensure the privacy rights recognized in the rule.

It is crucial to further expand the confidentiality of family part pleadings as a result of the recent expansion of e-filing and internet access to the courts, which make distribution and dissemination of matters in the Family Part more accessible to the public than ever before. Hypothetically, with e-filing and access to records over the internet, children would be able to access their parents' divorces. Neighbors, classmates and school personnel would be able to read about the most personal aspects of someone's life for purely prurient and voyeuristic reasons. Prospective employers would be able to access past earnings, marital history, net worth and medical history. Mere allegations of spousal abuse, mental illness, drug addiction or infidelity could wreak havoc on a person's prospective employment and ability to move on with his/her life post-divorce.

As amended, and as indicated above, Rule 1:38 replaced "the common law 'balancing of interests' test with an absolute right of access to all non-exempt court and administrative records." New Jersey Supreme Court, *Report of the New Jersey Supreme Court Special Committee on Public Access to Court Records*, §1.1.1 (Nov. 29, 2007). Rule 1:38-11 also codified the "good cause" standard referenced in Rule 1:2-1 to permit

a court to seal court records only if certain criteria are met. The rule provides in pertinent part:

(a) Information in a court record may be sealed by court order for good cause as defined in this section. The moving party shall bear the burden of proving by a preponderance of the evidence that good cause exists.

(b) Good cause to seal a record shall exist when:

(1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and

(2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38.

Rule 1:38-11, therefore, clearly imposes a more rigorous standard for sealing records than existed before its adoption. A party seeking to seal a record must now show by a preponderance of the evidence that (1) disclosure of the agreement's terms will likely cause a serious and defined injury, and (2) the party's privacy interests substantially outweigh the presumption that court records are to be open for inspection. Further, Rule 1:38-11 did not eliminate the requirement that a party seeking to seal a record must demonstrate with specificity the need for secrecy for each document sought to be sealed. Hammock by Hammock v. Hoffmann-Laroche, 142 N.J. 356, 381-82 (1995). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id.

In the case of Smith v. Smith, 379 N.J. Super. 447 (Ch. Div. 2005) the court – prior to the rule's amendment - ruled against third parties to a matrimonial action who sought to seal the record of their daughter's matrimonial proceedings. In that case, the third parties had serious concerns that the defendant's allegedly false portrayal of them – as heavy drinkers who were unfit to serve as role-models to their grandchildren – would be repeatedly echoed outside of the courtroom, in turn potentially interfering with their

business, charitable, and social relationships. Ultimately, Judge Sabatino, then a trial court judge and now elevated as an Interim Justice to the New Jersey Supreme Court, found that, on balance, the personal interests divulged by the third parties did not suffice to overcome the strong presumption of open judicial proceedings. In fact, the Smith court's research "has not disclosed a single published case since 1992 that found 'good cause' for closure in a New Jersey divorce action." Id. at 454.

Judge Sabatino, however, stated the following:

The day may come, and perhaps it will be soon, when all courthouse filings are routinely harvested in data banks and instantly transmitted around the world via the internet. Electronic filing is rapidly becoming the norm in Federal Court and our state courts are not far behind. The digital storage of such filings may well make them far easier to retrieve by outsiders. It is not hard to imagine that each scurrilous allegation contained in some court filing could eventually turn up in a "Google search". Such broadcasted diatribe has the capacity to defame not only celebrities and public officials, but also average citizens whose backgrounds could be researched on the World Wide Web by prospective employers, business associates, loan officers, government regulators, social clubs, and perhaps even would-be Saturday night dates. Those looming technological developments may warrant the judiciary to reconsider prospectively, the current balance of interest in favor of open court proceedings. Smith v. Smith, Id. at 458-459.

The court also noted that selective sealing of court files would impose significant administrative burdens on judiciary staff. Such burdens could be quite cumbersome depending upon the nature of the sealing request and the extent of redactions needed. In addition to the strain on judiciary staff created by sealing and redacting records, there would need to be a feasible and consistent protocol from county to county for how the

rule is implemented, particularly insofar as how records are requested and disseminated – a formality which, at present, does not exist. A recent, informal poll of county protocols in New Jersey further illustrates the complications and lack of uniformity with how Rule 1:38 has been implemented. For some counties, a request can be made by JEDS or written correspondence for review by a Family Division Manager who then would task staff with redaction of the file. In others, a request for access to a file (sealed or unsealed) must be made in writing and approved by the Presiding Judge of the Family Part, but must be reviewed in the courthouse and may not be distributed (arguably limiting circulation to those within a certain proximity of that county). Some counties did not have a clear procedure in place as a result of turnover of personnel. None of the counties polled could respond with a clear procedure for who specifically would handle redaction of a file, oversight of the redactions, how an individual tasked with redacting documents would know what to exclude, or what particular information should or would be redacted.

The time predicted by Judge Sabatino has come to pass and accordingly, must be addressed in a way that protects children, Family Part litigants and all those third parties involved in their lives. For these reasons, the protections afforded family part litigants should be further advanced to prevent harm through unwanted disclosure. With a lofty standard for sealing records in conjunction with threats of public exposure becoming more imminent with documents filed online, two consequences are probable. First, parties may fail to make a fully accurate and complete record in a self-help attempt to preserve privacy. This raises due process concerns about the right to a fair trial when a party is faced with a choice between candor and privacy. Second, parties with more plentiful resources may turn to private forums (i.e. Alternate Dispute Resolution) to settle

matters. Arguably this may alleviate our already overburdened court systems, however it is inimical to the rule's core objective: the integrity and transparency of our judicial system. If a fallout of the current rule is that it encourages the use of private resolution because individuals fear the courts can adequately protect their information, confidence in the judiciary is diminished. This can be curtailed by implementing the proposed change to Rule 1:38.

About the Authors:

Lizanne J. Ceconi, Esq. is a Partner and Chair of the Family Law Department at Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC (JW). She was formerly a Founding Member and Managing Partner of Ceconi & Cheifetz, LLC before merging with JW on January 1, 2023. She devotes her practice to complex matrimonial and family law matters through litigation, mediation, and arbitration. Fittingly, Ms. Ceconi was previously selected to testify before the New Jersey Supreme Court on the issue of confidentiality of family law pleadings in the Family Division.

Elissa W. LeVine, Esq. is an associate at Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC. Elissa focuses her practice on all aspects of family and matrimonial law, including divorce proceedings and post-divorce matters, custody/visitation, alimony, child support, division of assets, prenuptial agreements, adoption, and domestic violence. In her previous capacity as a law clerk to the Honorable David B. Katz, Presiding Judge of the Essex County Family Part, and to two Essex County Assignment Judges – the Honorable Sallyanne Floria and the Honorable Sheila Venable – she oversaw many requests for records and Motions to Seal Records.