

# Legislation Report

## COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 64

June 20, 2001

S. 1066

By: Senator DeFrancisco

A. 7513

By: M. of A. Sweeney

Senate Committee: Codes

Assembly Committee: Codes

Effective Date: 30 days after it shall have become a law

**AN ACT** to amend the civil practice law and rules, in relation to protective orders and the sunshine in disclosure act

**LAW AND SECTIONS REFERRED TO:** Subdivision (a) of section 3103 of the civil practice law and rules

### **REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW & RULES (#19)**

#### **THE BILL IS DISAPPROVED**

This bill would enact in New York the so-called "Sunshine in Disclosure Act," which would (1) prohibit the court from entering any order that has the purpose or effect of concealing a "public hazard" or information concerning same, (2) render void and unenforceable any confidentiality or settlement agreement whose purpose or effect conceals a public hazard or information concerning same, and (3) render void and unenforceable any agreement or contract whose purpose or effect conceals information concerning a settlement or resolution of a claim or action against a public entity.

Although the proposed rule permits the court (for "good cause shown") to prevent disclosure of previously undisclosed materials or information, including trade secrets, even in these instances the court is required to order disclosure of information "which may be useful to members of the public in protecting themselves from injury which may result from a public hazard."

We disapprove of this bill because (a) existing New York rules and regulations provide safeguards against inappropriate closure or protective agreements; (b) the proposal's absolutist approach is ill-advised, in light of countervailing public policy considerations, including effectuating prompt non-litigious exchange of discovery and the promotion of settlements; and (c) the language employed in key definitions renders the prohibition so

broad as to virtually disallow any closure or protective order in any tort action or settlement.

First, New York now has established rules and regulations governing protective orders and the sealing of Court records. In the discovery context, CPLR 3103(a) grants discretion to the Court to either grant or deny protective orders limiting disclosure or conditioning discovery on confidentiality, taking into consideration all relevant factors (compare *Krygier v. Airweld, Inc.*, 176 A.D.2d 701 [2d Dept. 1991] with *Bristol, Litynski, Wojcik, P.C. v. Town of Queensbury*, 166 A.D.2d 772 [3rd Dept. 1990]). As for settlement agreements, Uniform Rule 216.1 (22 N.Y.C.R.R. §216.1) already requires that “good cause” be shown for the sealing of records, in the determination of which the Court is required to “consider the interests of the public as well as of the parties.” A review of the reported cases involving Uniform Rule 216.1 demonstrates that the courts have rigorously observed the duty to balance the needs of the parties and the public at large. The effect of the proposed bill would be to eliminate the flexibility provided by the established law.

There are, furthermore, significant public policy considerations warranting rejection of an inflexible public dissemination mandate, certainly one drafted as broadly as this bill. While there is a broad policy supporting public access to court proceedings (*Danco Laboratories, Ltd. V. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1 [1st Dept. 2000]), there is no right to the public to dissemination of materials obtained during the course of discovery in an action (*Seattle-Times Co. v. Rhinehart*, 467 U.S. 20, 31-36 [1984]; *Westchester Rockland Newspapers v. Marbach*, 66 A.D. 2d 335 [2d Dept. 1979]; *Scollo v. Good Samaritan Hospital*, 175 A.D.2d 278 [2d Dept. 1991]). The purpose of disclosure in civil litigation is to insure the integrity of the judicial process, not to disclose information that would otherwise remain private.

Although information disclosed in the course of an action may be subject to exceptions from certain recognized privileges (including those for trade secrets) because of the overriding need in a particular case, an automatic right to public dissemination of such information does not follow. An injured plaintiff, for example, whose doctor-patient privilege is overcome by the waiver attendant to the institution of suit for recovery of damages, should not be foreclosed from preventing or curtailing dissemination of the details of his or her injury upon settlement of that action. Public policy favors privacy rights (*Seattle Times Co. v. Rhinehart*, 467 U.S. at 35-36). Similarly, while the proposed rule prohibits confidentiality agreements by government agencies, there may be a legitimate need for confidentiality in certain contracts or settlement agreements involving public bodies.

Beyond that, protective orders that limit public disclosure: (a) tend to substantially reduce litigation over the extent and breadth of discovery requests (see, *Hualde v. Otis Elevator Co.*, 235 A.D.2d 269, 270 [1st Dept. 1997]), (b) often render unnecessary document-by-document review and redaction of trade secret information, thus speeding the discovery process (see *Camenos v. F.W. Woolworth Corp.*, 233 A.D.2d 212 [1st Dept. 1996]); and (c) tend to encourage settlements, where a defendant’s interest in avoiding the misuse or

out-of-context use of certain documents in other litigation may tip the balance in favor of an out-of-court disposition. What is more, protective orders may well prevent other potential plaintiffs similarly situated from tailoring their testimony in their own actions in light of information obtained through discovery proceedings in prior actions (see, e.g., *Wind v. Eli Lilly & Co.*, 164 A.D.2d 885, 887 [2d Dept. 1990]; *Altesman v. Eli Lilly & Co.*, 164 A.D.2d 876, 877 [2d Dept. 1990]).

This Bill purports to serve the public good by making these policy considerations subservient to the need to make available “information about an alleged public hazard” (proposed §3142[b]). However, the definition of “public hazard” as “any instrumentality [including a person] . . . that has caused or is likely to cause an injury,” coupled with the definition of the “confidentiality agreements” which would be banned as including agreements restricting dissemination of information “about an *alleged* public hazard” (emphasis supplied), essentially excludes a sealing order in any tort action, which necessarily involves allegations that some person or thing caused injury. The proposed rule also embraces information involving plaintiffs who are alleged to have been comparatively negligent (and thus to have caused injury in part) and for that reason will now be unprotectable. Instead of the flexibility provided by CPLR 3103(a) and Uniform Rule §216.1, the proposed statute would inexorably mandate disclosure and nullify confidentiality agreements or similar orders in any tort action under all circumstances.

On balance, public policy considerations warrant retention of the flexible approach reflected in current statutory and regulatory provisions and, accordingly, rejection of the proposed statute.

For the foregoing reasons, this bill is **DISAPPROVED**.

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