January 31, 2013

John McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

RE: Proposed adoption of 22 NYCRR § 202.5(e), relating to redaction of personal identifying information in papers filed in civil matters.

Dear Mr. McConnell:

Thank you for accepting our comment upon the proposed adoption of 22 NYCRR § 202.5(e), we appreciate your consideration. Unfortunately, the New York State Trial Lawyers Association ("NYSTLA") cannot support this proposal in its present form. In the simplest of terms, this proposal places a disproportionate, unfair, and potentially crushing burden upon litigants and their counsel for the costs - in time, money and effort - to safeguard personal identifying information.

NYSTLA is a bar association made up of attorneys primarily representing litigants in personal injury, malpractice, discrimination, civil rights and consumer litigation. Our thousands of members – representing hundreds of thousands of individual clients – are overwhelmingly associated with small law offices, most often made up of between 1 and 5 attorneys. Our Association is committed to legitimate efforts to safeguard our clients' identities, and we oppose all forms of identity theft, overstepping of privacy bounds and breaches of confidentiality. Indeed, NYSTLA members consistently work to safeguard against these abuses for their clients in litigation virtually every day; we have many members whose stock-in-trade includes bringing lawsuits to enjoin and gain redress for such abuses. For these reasons we would like to share our response to this proposal.

This proposed rule would require the redaction of nine specific categories of confidential personal information from papers submitting to the court for filing, including social security numbers, dates of birth, mother's maiden name, driver's license numbers and employee identification numbers. While no specific explanation is provided for the exception of matrimonial and surrogate court filings from this rule's requirements, the apparent rationale is that personal information is often necessary for the proper prosecution of such cases.

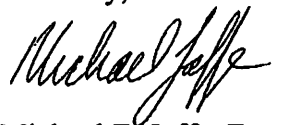
The same reasoning applies to an even greater extent in personal injury, malpractice, discrimination, civil rights and consumer litigation cases, where such confidential personal

information is central to the case itself. In fact, the types of confidential personal information identified in the proposed rule are ubiquitous in the types of records and materials which must be exchanged and filed with the court on a daily basis as a personal injury case progresses. The medical records, employment records, union records and benefits records which form the basis of any personal injury case are replete with multiple references to dates of birth, social security numbers, employment identification numbers and other forms of personal identifying information. Needless to say, these records were not created or controlled by the attorneys who now must *redline* them page by page to attempt compliance with this "one size fits all" Rule.

Redacting personal identifying information from even a modest medical record would require significant extra time and expense in light of this measure. In many cases, where opposition to even a *pro forma* motion requires the inclusion of the records from multiple hospitalizations, surgeries and other treatments, employment documentation and economic projections, literally hundreds of pages created by others with the protected information automatically entered at multiple locations will have to be manually redacted make even a good faith attempt to comply with this proposed rule. This will naturally drive up the costs of litigation, and require that cost to be passed along to the clients in some fashion - either in the form of charging this work as an expense against the file if outsourcing is required to reach compliance, or by simply making it less likely that an attorneys will be able to handle meritorious cases of modest value because the cost of redacting hundreds or thousands of pages of records becomes too high. The net result of this development will be an additional burden placed upon already injured, disabled or victimized people and their counsel to absorb the costs of redacting their own personal information gathered and retained by others for business purposes from all paperwork to be deposited in Court. This is manifestly unfair.

NYSTLA is sympathetic to the goal of safeguarding an individual's personal identifying information and we have suggestions to offer as to how the current system might be improved on this point. However, without additional exceptions for personal injury, malpractice, discrimination, civil rights and consumer litigation this proposal places an unreasonable burden on the representatives of those who own that information and will ultimately harm those seeking to exercise their rights through the court system. NYSTLA must therefore strongly recommend that this proposal be amended to exempt the types of cases outlined above.

Sincerely,



Michael E. Jaffe, Esq. President
New York State Trial Lawyers Association

New York State Bar Association
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Committee on Media Law

Comments on Proposed Amendment to 22 NYCRR § 202.5(e)

Media #2 January 21, 2013

NEW YORK STATE BAR ASSOCIATION, COMMITTEE ON MEDIA LAW

The Committee on Media Law of the New York State Bar Association (the "Committee") submits the following comments in opposition to the proposed amendment to 22 NYCRR § 202.5(e) (the "Amendment") that would require the redaction of various pieces of information from court filings and empower the courts to order filings to be sealed if such redactions are not made. In short, while the Amendment is motivated by legitimate concerns about the potential for identity theft, the scope of required redactions sweeps far too broadly and the Committee respectfully suggests that a more-targeted Amendment would attain the same goals without compromising the public's right to attend and understand court proceedings and the media's ability to inform the public about court proceedings and public records.

The Committee's primary objection to the Amendment is to the requirement that dates of birth be redacted as confidential information. The use of dates of birth, including month and day, is critical to the media's ability to distinguish between people with similar or identical names when reviewing public records including court files in order to produce accurate reporting and avoid misidentifications. Often dates of birth are the only indication of a party's age in the court records, and the age of a party is often highly relevant to coverage of cases. For example, when reporting on a personal-injury award, it is critical to know the age of the plaintiff to appreciate the nature of the award – a $10,000 award to a 20-year-old plaintiff for loss of future wages is obviously quite different that the same award to an 80-year-old plaintiff.

Moreover, individuals do not treat dates of birth as confidential information – they are provided in countless, routine interactions between members of the public, both socially and commercially. *See, e.g., Paul P. v. Farmer*, 227 F.3d 98, 106 (3d Cir. 2000) (recognizing that disclosure of dates of birth "does not implicate a privacy interest"). For example, people provide their dates of birth to the public through social media and also whenever they offer identification to complete a commercial transaction. In addition, dates of birth are available to the public through various public records, such as voting registration records. Finally, the Committee is aware of no evidence that links the availability of dates of birth directly to identity theft, without access to actual confidential information such as financial account numbers or social security numbers. Indeed, the New York data-breach law does not include dates of birth in its definition of private information. *See* N.Y. Gen. Bus. Law § 899-aa; *see also* Justin M. Schmidt, Note, RFID and Privacy: Living in Perfect Harmony, 34 Rutgers Computer & Tech. L.J. 247, 264 -272, n.115 (2007) ("Information such as names, age, birth dates, etc. is not PII because multiple people can have these information characteristics."). Put simply, the disclosure of dates of birth without other information does not present an identity-theft risk. *See Dayton Newspapers, Inc. v. Dep't of Veteran Affairs*, 257 F. Supp. 2d 988, 1005-06 (S.D. Ohio 2003) ("The VA does not discuss the date of birth issue in its Memoranda other than to lump it in with 'name' and 'social security number' and the like in its general classification of information that 'directly identifies' individuals. The Court does not

agree that dates of birth 'directly' identify individuals. On their own, dates of birth are practically irrelevant. Dates of birth are only helpful in identifying individuals where other identifying information is already known, and the date of birth can be used to narrow the choices.").

The Committee believes that birthdates (i.e., month and day) should not be included in the definition of "confidential personal information" in the proposed Amendment., but is aware that the New York State Bar Association in 2006 promulgated E-Filing Recommendations that called for limited redaction of birthdates in court filings. In the event that birthdates are not removed from the category of "confidential personal information" subject to complete redaction under the proposed Amendment, the Committee urges the adoption of partial redaction recommended by the New York State Bar Association, such as the redaction of the day, but not the month or year of birth.

Similarly, there is no basis to conclude that disclosure of mothers' maiden names without disclosure of actual sensitive information could facilitate identity theft. In addition, both dates of birth and family history (which would disclose a mother's maiden name) are commonly discussed in court papers, and mandatory redaction of that information would both raise practical issues and impair the public's constitutional right of access to those proceedings and records. Accordingly, the Committee strongly recommends that dates of birth and mothers' maiden names be removed from the Amendment should the Amendment be acted upon.

The Committee further objects to the requirement that the remaining numbers identified in the Amendment be redacted in their entirety. As the Commission on Public Access to Court Records found in its 2004 Report to the Chief Judge, social security numbers and financial account numbers need only be redacted in part to safeguard against identity theft.[1] Redacting all but the last four digits of such numbers, as is commonly done, is sufficient and the Committee recommends revising the Amendment accordingly. Allowing the inclusion of partial numbers would enhance the public's understanding of the records, for example by allowing readers to distinguish between different accounts being discussed in a filing in a fraud or corruption case involving numerous accounts. Indeed, the Amendment itself appreciates this concern by allowing inclusion of the last four digits of account numbers in certain cases, but there is no legitimate basis not to extend this requirement to all cases.

Finally, the Committee objects to the language in the Amendment that appears to empower courts to order the complete sealing of filings where the required redactions are not made. Such sealing would contravene Rule 216.1, which only allows for sealing as necessary to be effective but no broader, and the constitutional and common law rights of access, which similarly demand that sealing be no broader than necessary. The Committee proposes that, to the extent the Amendment is acted upon and the courts are advised to direct sealing where redactions are not made, the language be revised to empower courts to direct the clerk to redact the records or require that the filing party refile the records with the mandated redactions.

For these reasons, the Committee opposes the Amendment as worded and would propose the alternate wording discussed above if the Amendment is to go forward.[2]

Chair of the Committee: Lynn Oberlander, Esq.

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[1] The Commission on Public Access to Court Records also found that the month and day of birth could be redacted, leaving the year of birth unredacted. For the reasons provided *supra*, the Committee believes that month and day of birth also should be left unredacted.

[2] Victor A. Kovner did not participate in these Comments.

New York State Bar Association
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Committee on Civil Practice Law and Rules

Comments of the Committee re Confidentiality Redactions

CPLR #1 January 17, 2013

The Committee has approved the report of a sub-committee charged with reviewing the proposed amendment to 22 NYCRR §202.5, put forth by the Chief Administrative Judge's Advisory Committee on Civil Practice, to require redaction of certain information deemed confidential from documents submitted to the courts for filing. The process involved the review of proposals previously raised (for example, a proposed amendment to Rule 670.10.3, and the 2004 Report of the Commission on Public Access to Court Records ["Commission Report"]), as well as the existing Federal Rule of Civil Procedure 5.2, addressing this issue.

We state from the outset our recognition of and appreciation for the significant policy concerns against public dissemination of confidential information. We fully recognize the value in preventing our court system, with documents increasingly becoming available to the public through electronic access, from becoming a source for identity theft or other serious repercussions arising out of the filing, and, ergo, dissemination, of confidential, or personal and private information. We recognize as well the significant and oft-expressed countervailing policy favoring open access to non-privileged court files. We do not address these points at length because they have been addressed by the Advisory Committee on this occasion and in greater detail in the Commission Report.

However, we note and raise an additional concern which has had little expression in the past: the costs of the proposed redactions. Under the proposed rule, litigators filing documents, including exhibits annexed to summary judgment motions, would be faced with the Herculean task of painstakingly reviewing each and every page of each and every document to ascertain that no reference violative of the rule is included. This would certainly pertain to hospital records, bank records, letters, deposition transcripts and many other forms of documents regularly submitted. The result is not merely more work for lawyers, but translates directly into significant added expense to clients, not to mention additional delay in the filing of documents.

Also considered was the reality of public access to private information. Simply put, much of the information sought to be redacted from court files may be obtained at little or no cost from readily-available public access websites, or from alternative sources over which the courts have no control. A mother's maiden name, for example, may readily be accessed from, among other places, genealogical listings (e.g., Geni.com). Credit card numbers can be obtained through a credit rating check, and are in any event divulged to merchants ranging from major department stores (which may well seek to prevent dissemination) to "fly-by-night" discount stores (which may not).

The warrant for any rule imposing redaction must be measured not only by the wholly valid conceptual considerations of avoiding potential dissemination of confidential information through the Court system and yet retaining open access to non-confidential court records, but also by the costs to those filing documents, and the real benefits to be obtained in over-all confidentiality of the targeted information.

After due consideration, the majority of the Committee believes the proposed measure goes too far in its efforts to protect the targeted information, in that it is likely to come at too

great a sacrifice to the time and finances of litigants and with too small an ultimate benefit in practically preventing dissemination of such material.

The Committee would favor adoption of the terms of the Federal Rule FRCP 5.2, a more limited rule. Indeed, the existence of that rule itself supports our adoption of that rule for the State court system. For one, uniformity will ease the practical burden in compliance and help to avoid errors. Second, removal of state cases to federal court and remand by federal courts of cases to state courts could create additional obstacles if the redaction requirements differ significantly. While the redaction required by the federal rule is itself potentially extensive (example: every page of every hospital record contains the patient's social security number and date of birth), the limited categories of items required to be redacted renders compliance easier (through, e.g., paralegal assistants).

Although the dissenters believe the need for confidentiality overrides other consideration and would favor the proposed rule (indeed, would prefer to expand the list of documents), the majority of the Committee disfavors the rule, as stated. (We note that, in addition to the over-all analysis, many questions were raised concerning specific inclusions in or exclusions from the list, e.g., the need for secrecy of insurance policy numbers, the failure to include tax identification numbers, but in light of the Committee's position, we will not address those details.)

Person Who Prepared the memo: David B. Hamm, Esq.

Chair of the Committee: Robert P. Knapp III, Esq.

NEW YORK
CITY BAR

Comments of the New York City Bar Association on Proposed Rule for
Redaction of Personal Identifying Information

The New York City Bar ("City Bar")[1] greatly appreciates the opportunity to comment on the proposed adoption of 22 N.Y.C. R.R. §202.5(e), a rule aimed at preventing the unnecessary disclosure of personal identifying information in papers filed in civil matters (the "Proposed Rule").

The City Bar strongly supports the Proposed Rule, subject to the suggestions, comments and questions set forth below and indicated in the black-lined version of the Proposed Rule attached to this report as Exhibit "A". In particular, we applaud the Advisory Committee for proposing a court rule rather than a statutory amendment and for adopting a "closed' rather than open-ended definition of protected confidential personal information ("CPI"). We also commend the Advisory Committee for excluding Surrogate's Court cases and for excepting the last four digits of account numbers in consumer credit transaction cases.

1. The Proposed Rule Should Apply to Civil Court Proceedings.

The Advisory Committee comments to the Proposed Rule speak of amending Rule 202.5, which governs papers filed in the Supreme and County Courts. We assume a similar rule will be adopted for the New York City Civil Court, given that the majority of actions arising out of consumer credit transactions, which are the subject of subdivision (3) of the Proposed Rule, are filed in the Civil Court.

In this regard, however, the City Bar urges that the Proposed Rule should not serve to override or undercut the efficacy of Chief Clerk Memorandum 172 ("CCM-172"), issued by the

[1] This report was authored by the City Bar's Council on Judicial Administration and incorporates certain comments received from the City Bar's Civil Court Committee and Committee on Communications and Media Law.

Chief Clerk of the New York City Civil Court. CCM-172 requires the clerk to redact social security numbers from any document filed with the New York City Civil Court. The City Bar, therefore, recommends that the terms "court rule" and "administrative court directive" be added to the "as otherwise provided" language in subdivision (1) of the Proposed Rule, as is reflected in our black-line of the Proposed Rule.

2. Definition of Confidential Personal Information and Redaction Requirements.

Although the City Bar's Council on Judicial Administration's 2010[2] Report recommended allowing parties to file partially redacted CPI under certain circumstances without a court order, the City Bar is now prepared to support the Proposed Rule on this point. We recognize the Advisory Committee's concerns about subjectivity, potential ancillary litigation and that filing even partially redacted CPI can contribute to identity theft. Because the Proposed Rule gives courts discretion to permit unredacted or partially redacted filings of CPI for good cause, the City Bar believes there is a mechanism – though, admittedly, with some costs attached – for addressing the presumably rare case in which it is necessary to file unredacted partial CPI.

The City Bar, however, suggests deleting "a mother's maiden name" from the definition of CPI. In some segments of our community (notably those composed of persons of Latin American descent), it is common to use both the father's and mother's last name. This could lead to inadvertent violations of a rule that prohibits the use of a maiden name.

We suggest also that the terms "computer access information" and "electronic signature data" in the definition of CPI (bracketed in our mark-up of the Proposed Rule) are imprecise and should either be eliminated or clarified. For example, the former term could encompass a simple

[2] Report Recommending A New York State Court Rule Requiring That Sensitive Information Be Omitted Or Redacted From Documents Filed With Civil Courts, dated February 2, 2010.

instruction that users should log-on to a network by entering their user name and password. We are not certain what the latter term means.

The City Bar urges the Office of Court Administration ("OCA") to take the measures necessary to ensure that any sealing of documents containing CPI pursuant to the Proposed Rule be in accordance with the requirement of 22 NYCRR §216.1 that any sealing must be no broader than necessary to protect the threatened interest. The City Bar, therefore recommends that the Proposed Rule incorporate a direct reference to this requirement, as is shown in our black-line of the Proposed Rule.

Finally, the City Bar urges OCA to make special efforts to protect unrepresented and unsophisticated litigants from the risk of identity theft. These efforts could include

- The placement in the Clerk's offices of posters in English and other languages commonly spoken in New York City which explain the Proposed Rule, what redaction is and how to carry it out.
- Posting such explanatory information on OCA's website and on other websites, such as LawHelp.
- Issuance of an Advisory Notice to encourage judges to inform litigants about the risks of including unredacted CPI in court filings.

3. Waiver by a Party Filing His or Her Own CPI.

The City Bar recommends that the waiver provided for by subdivision (4) of the Proposed Rule should be limited to only the specific CPI filed unredacted and not under seal and that the waiver apply only to that case or proceeding. For example, if a litigant files papers that include his or her social security number, there is no reason that should also waive the protection of the Proposed Rule with respect to that person's bank account number. Similarly, there is no good reason for a person to be denied the protection of the Proposed Rule in a different case

merely because of what might have been an inadvertent disclosure in a previous case. Clearly, the risk of identity theft is heightened with each additional disclosure of a person's CPI.

We also suggest the inclusion of language in subdivision (4) of the Proposed Rule that allows for the retroactive cure of inadvertent waiver. A waiver is generally defined as the intentional relinquishment of a known right. Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y. 2d 966, 968 (1988). If a person (or his/her attorney) inadvertently files CPI, courts and court personnel should readily permit that information to be redacted to the extent reasonably practicable and "forgive" any mistaken "waiver."

We have incorporated recommended changes to subdivision (4) of the Proposed Rule that reflect these recommendations.

January 22, 2013

Exhibit A

§ 202.5 Papers Filed in Court

(e) Redaction of Personal Identifying Information. (1) Except in a matrimonial action or a proceeding in surrogate's court or as otherwise provided by law ~~or~~, court rule, court order or administrative court directive, and whether or not a sealing order is or has been sought, and where not waived under subdivision 4 of this section, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information means: (i) a social security number; (ii) a date of birth, except a person's year of birth; (iii) ~~a mother's maiden name; (iv)~~ a driver's license number or a non-driver photo identification card number; (~~viii~~iv) an employee identification number; (~~viiv~~v) a credit card number; (~~vii~~vi) an insurance or financial account number; or (~~viii~~vii) a computer password [or computer access information]; or (~~ix~~viii) [electronic signature data or] unique biometric data.

(2) The court sua sponte or on motion by any person may order a party to remove confidential personal information from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing confidential personal information in accordance with the requirement of 22 NYCRR §216.1 that any sealing must be no broader than necessary to protect the CPI; ~~rules promulgated by the chief administrator of the courts;~~ for good cause permit the inclusion of confidential personal information in papers; or determine that particular information in a particular action is not confidential.

(3) The redaction requirement does not apply to the last four digits of the relevant account number(s), if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one hundred five of the civil practice law and rules and in such an action in the event the defendant appears and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or confidential personal information by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other confidential personal information under seal in accordance with rules promulgated by the chief administrator of the courts.

(4) A party ~~waives the protection of this rule as to the party's~~ who files his or her own confidential personal ~~identifying~~ information ~~by filing it~~ without redaction and not under seal~~.~~ waives the protection of this rule as to that confidential personal information in the court proceeding at issue. Such a party may, however, seek the retroactive redaction or sealing of such information.

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

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January 17, 2013

Comments on Proposal to Adopt 22 NYCRR Section 202.5(e)

The New York County Lawyers' Association Supreme Court Committee reviewed the Office of Court Administration ("OCA") proposal regarding the adoption of 22 NYCRR Section 202.5(e) relating to the redaction of papers filed in civil matters at its meeting on January 8, 2013.[1]

The Committee voted 12-0, with 12 abstaining, in favor of adopting the new 22 NYCRR Section 202.5(e), as amended below, relating to the redaction of papers filed in civil matters.

The Committee was generally in favor of a court rule requiring redaction of certain personal information; however, the Committee was concerned about subdivision (4), stating that a party waives the protection of the rule if the party files papers containing his or her own personal information. Because it was unclear from the plain text of the proposed statute whether a motion to redact brought under subdivision (2) could be brought by a party who inadvertently disclosed his or her own personal information, the Committee voted to adopt the proposal with subdivision (4) amended to read, "Except as provided in subdivision (2), a party waives the protection of this rule as to the party's own personal identifying information by filing it without redaction and not under seal." Added text underlined.

With the proposed amendment, the Committee was in favor of the redaction rules.

The New York County Lawyers' Association Civil Court Practice Section reviewed this OCA proposal at its January 15, 2013 meeting. By a vote of 12-0, with one abstaining, the Section also voted to subscribe to the Supreme Court Committee's recommendations respecting OCA's proposal as to adopting a new section 22 NYCRR Section 202.5(e) – relating to redaction of personal identifying information in papers filed in civil matters – with the following additional recommendations of its own:

(1) the rules governing the Civil Court should be similarly amended, especially in light of the rule's exceptions for filings "in an action arising out of a consumer credit transaction," the vast majority of which are brought in Civil Court; and

(2) proposed Section 202.5(e) should be amended to state that it will not apply also to filings in actions or proceedings for custody, visitation or maintenance of a child, in addition to "matrimonial actions," as such filings all are sealed by the same statute, DRL Section 235.

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[1] The opinions expressed herein are solely those of the New York County Lawyers' Association Civil Court Practice Section and Supreme Court Committee. The views expressed herein have not been approved by the New York County Lawyers' Association Board of Directors and do not necessarily represent the views of the Board.

JAMES EDWARD PELZER
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j[redacted]

January 16, 2013

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: *Proposed adoption of 22 NYCRR 202.5(e) regarding omission or redaction of identifying information from documents filed in court*

Dear John:

I read with interest the proposal of the Chief Judge's Advisory Committee on Civil Practice to amend 22 NYCRR 202.5 to add a new subdivision (e) thereto requiring the omission or redaction of confidential identifying information from papers filed in court. Your memorandum of November 20, 2012, calls for comments on that proposal no later than January 22, 2013, and accordingly I have set down my thoughts regarding it in this letter. As you may remember, in my former position as Clerk of the Appellate Division, Second Department, I was long involved with the question of how to insure that potentially injurious confidential information was not included in court papers published on the Internet.

In February of 2004 the Chief Judge's Commission on Public Access to Court Records issued its report recommending that public court records be made available on the Internet to the same extent that they are available in the offices of the clerks of the courts in which they are filed. The Commission also recommended that certain confidential data be omitted from future filings to prevent identity theft and help guard the personal security of certain vulnerable classes of persons. Judge Prudenti, who was then Presiding Justice of the Second Department and a member of the Commission, directed me, as Clerk of the Court, to assist in the development of a pilot project to make the court's briefs available on the Internet. We knew that in the future an appellate rule would be necessary to insure that confidential data would not be included in filed briefs but for the moment the task was to see if previously filed briefs could be redacted to safely permit their publication on the Internet. Eugene Myers and I met with Ron Younkins and representatives from West Publishing to discuss the development redaction software to get that job done. In the following months the court's staff developed lists of the potentially harmful data and tested the software that West developed. The result was a stopgap program in which any brief that the software determined might contain confidential information would be removed from Internet publication. It was immediately obvious that the better solution was to insure that confidential information never made it into filed court documents in the first instance. Over the years that followed, I worked with Eugene Colon from your office and Rick Hogan from the office of records management, *inter alia*, to coordinate efforts on the development of rules requiring the omission of confidential data from papers filed in both the trial and appellate courts. On the day I retired I sent a draft of a proposed appellate rule of practice to Gene Colon

for his review and comment. Such an appellate rule on the subject has still not been adopted and implemented.

Since my retirement in August 2010 I have had the opportunity to participate as a member of several committees of the New York State Bar Association, including its Committee on the Civil Practice Law and Rules which considered the proposal to amend 22 NYCRR 202.5. I was on a sub-committee that vetted that proposal and I found myself to be the only member of that sub-committee in favor of its adoption. My colleagues on the sub-committee were strongly opposed to a rule that would force practitioners to undertake the time-consuming and costly task of redacting a multitude of different types of data from exhibits to filed court papers. Although the tenor of the discussion was decidedly against the adoption of any rule on the subject, at the least it was felt that if there were to be such a rule it should cover no more ground than Federal Rule of Civil Procedure 5.2(a) so that in the event that a New York civil suit were removed to a Federal court, the transferred papers would be in compliance with the Federal rule. The majority of the sub-committee recommended against the adoption of the proposal, suggesting that the omission or redaction rule (1) would impose a Herculean task upon filers, (2) is unnecessary because much of the same confidential data in court papers is available from other sources on the Internet, and (3) imposes costs that outweigh its benefits. I wrote a minority report in its favor concluding that (1) the "Herculean task" argument was not persuasive because several available computer programs offer robust redaction features that will make the job manageable, (2) the availability of some confidential data from other Internet sources should not be determinative because the object is to prevent confidential UCS data from being harvested by criminals and aggregated with other Internet data to put together all the information needed to facilitate identity theft, and (3) expenses could be contained and the cost-benefit analysis of removing confidential data from court papers ought to be for the client. Accordingly, I recommended approving the adoption of the amendment, albeit with some substantial modifications. The majority's views prevailed in the vote of the whole committee.

Because I think there is a real need for both trial court and appellate rules requiring the redaction of confidential information from documents filed in court I write to you separately to express my personal views on the proposed amendment to 22 NYCRR 202.5 which, I readily confess, have undergone some substantial changes as the result of my participation in the deliberations of the sub-committee of the NYSBA's Committee on the CPLR and subsequent discussions. As a former court official and custodian of records for which there was a strong demand for Internet publication I know that they often contain confidential information that can be damaging to litigants. Now as a practicing attorney I also find myself somewhat sympathetic to the argument that the time-consuming task of redacting exhibits, such as medical records, that may contain dates of birth, social security numbers, etc., on almost every page, will not only prove difficult but costly for litigants. So there ought to be some balance struck between requiring the omission or redaction of every sort of data the disclosure of which might enable identity theft or compromise the personal security of particularly vulnerable persons, and the need to make the task manageable and cost effective so that it will be willingly and accurately performed by the bar and self-represented litigants. In my opinion, that balance lies close to limiting the scope of the omission and redaction rule to the categories of data required to be omitted or redacted by FRCP 5.2(a).

The following paragraphs contain my recommendations for changes to the proposed rule:

(1) The caption of the new subdivision (e) should be altered. The language of paragraph one of subdivision (e) makes it clear that it pertains to the *omission* and/or redaction of certain

information from court documents. The caption of the subdivision should reflect that it concerns omission as well as redaction. Secondly, the draftspersons of the proposal appear to have concluded that that the omission or redaction of confidential information is needed only insofar as it may be used to identify live natural persons; hence the caption speaks of "*Personal* Identifying Information." Because criminals would be pleased to obtain confidential information that can be used to access the financial accounts of entities such as corporations, partnerships, trusts, estates, civic associations, etc., the aim of the rule to also protect against identity theft from entities should be clarified by changing the caption and body of the rule to refer simply to "confidential identifying information" rather than to "confidential *personal* identifying information.

(2) The papers in matrimonial actions are confidential by statute and may not be viewed by the general public in a clerk's office (Domestic Relations Law § 235). They will not be made available on the Internet and so the exclusion of such records from the ambit of the proposed rule makes sense. But the filings and proceedings in most Surrogate's Court proceedings are public and, except for those records sealed by law or court order, are open for public inspection (SCPA 2501[7], [8]). I question the need to exempt documents filed Surrogate's Court proceedings from the requirements of the rule, especially since trust and estate fiduciaries must of necessity open financial accounts. Data concerning those accounts could often find their way into filed documents and prove to be the target of identity thieves.

(3) The body of proposed 202.5(e) incorrectly refers to "*subdivision* 4 of this *section*." The section is 202.5, of which (e) is a subdivision and (4) is a paragraph. The usual hierarchy of the parts of statutes and rules is section, subdivision, paragraph, subparagraph, clause (Official 2012 Ed. New York Law Reports Style Manual § 3.1[b][1][b]).

(4) The items to be omitted or redacted from filed court papers should be stated in separate, indented subparagraphs of paragraph (1) of subdivision (e) to make them easier to read. The discussions in the NYSBA sub-committee that considered the present proposal led to the conclusion that its wording should only track the types of data required to be omitted or redacted from papers filed in Federal court under FRCP 5.2(a). My thoughts on this matter have evolved from an inclination to exclude almost anything that could conceivably be harmful to a belief that a shorter, more manageable list would elicit better acceptance and compliance from the bar. Such a short list should generally comport with the four proscribed data types of FRCP 5.2(a), namely, (i) taxpayer identification numbers (a data type that includes a social security number), (ii) the date of an individual's birth, (iii) the full name of a minor, and (iv) financial account numbers. Those were also the four data types that the Commission Public Access to Court Records recommended be omitted or redacted from filed court records (2004 Report of the Commission on Public Access to Court Records to the Chief Judge of the State of New York [hereinafter Commission Report] at 7-8).

(5) The sub-paragraphs listing the data types to be omitted or redacted should set forth an abbreviation scheme for those data types so that they can be referenced and described in filed documents if necessary. It may sometimes occur that one or more of the proscribed data elements are material and relevant to the prosecution or defense of an action or proceeding and that entirely omitting any reference to them will be impossible in the course of telling the client's story. In that case FRCP 5.2(a)(i)-(iv) and the Commission (see Commission Report at 7-8) provide established schemes for the abbreviation of the

various data elements that can be used in the text of pleadings, affidavits, affirmations and the like. However, the proposed rule does not. The statement of the Advisory Committee on Civil Practice in support of the proposed rule says that it "does not allow for the inclusion of 'limited or partial' confidential information and the Committee rejects this approach as too subjective, unnecessarily opening the door to ancillary litigation and possible disclosure of such information." I am persuaded that the approach taken in FRCP 5.2 and by the Commission in establishing an approved abbreviation scheme is appropriate, necessary, and carefully delineated and that it will not open the door to ancillary litigation.

(6) The present proposal lists nine different types of data that must be omitted or redacted. My recommendations for the consolidation, elimination, and/or expansion of the items on the list follows:

a. In subparagraph (i) of paragraph (1), which requires the omission or redaction of a social security number, the language should be expanded to include other forms of so-called "taxpayer identification numbers." This should be done for several reasons. First, a social security number (SSN) is merely one of the several types of taxpayer identification numbers (see http://www.irs.gov/Individuals/International-Taxpayers/Taxpayer-Identification-Numbers-(TIN)). Other commonly used types are the employer identification number (EIN), issued by the IRS to entities, and the individual taxpayer identification number (ITIN), which is available for certain nonresident and resident aliens, their spouses, and dependents who cannot get a social security number. The regulations issued to implement the 2001 USA Patriot Act § 326 require banks and other financial institutions to verify the identity of account holders (see, 31 CFR 103.121) and thereby prevent money laundering, terrorist funding, *and identity theft* (see, ATTUS Technologies, *Compliance Advisory Alert: USA PATRIOT Act section 326 Customer Identification Program*, at 2). To do this banks are required to collect, among other things, the taxpayer identification number of a new account holder. The result is that financial accounts are keyed to taxpayer identification numbers and the possession of such a number is a criminal's first step in the identity theft process. Second, the omission or redaction of taxpayer identification numbers from documents filed in Federal courts is required by FRCP 5.2(a). As the discussion between the members of the sub-committee made clear, there are enough state cases removed to the Federal courts that the state rules regarding omission and redaction should at least cover the categories of the data prohibited by the Federal rule, thereby obviating the need for another round of redaction when the papers are transferred from the state to the Federal courthouse.

b. A strong case has not been made for the inclusion of items (iii), a mother's maiden name; (iv), a driver's license number or a non-driver photo identification card number; and (v), an employee identification number. These three items are neither in FRCP 5.2(a) nor in recommendation 2 of the Commission Report. Although one can perhaps surmise that their omission or redaction from court papers might be somewhat helpful in deterring identity theft, they are not of the importance of a taxpayer identification number or financial account number and their inclusion would lengthen and complicate the omission and redaction task.

Many financial institutions utilize a security question other than a mother's maiden name to authenticate identity. A persuasive explanation is needed to justify their inclusion in the proposed rule.

c. Subparagraph (vi) of paragraph (1), which requires the omission or redaction of credit card numbers, should be expanded to include debit card numbers as well. Both identify financial accounts ripe for identity theft.

d. The types of data that are separately listed in proposed subparagraphs (vi) and (vii) should be consolidated into one. Financial account numbers can be seen as the general category type and credit and debit card numbers and insurance account numbers as sub-types of the former.

e. Subparagraph (viii) of paragraph (1), which requires the omission or redaction of computer passwords or computer access information, could be replaced by a somewhat expanded description of data that can be used to facilitate identity theft or the invasion of privacy via electronic devices, e.g., "a user id, password, personal identification number, or other data used to gain access to computers and electronic devices, financial accounts, electronic mail, or other secure data." Secure data can now be accessed on devices that people might not ordinarily think of as a computer, such as a bank ATM, a cell phone, a tablet, etc. Expansion of the list would eliminate any ambiguity in that regard. The argument that has been raised against inclusion of this subparagraph is simply that a person would have to be an awful nincompoop to write down his or her passwords, pin numbers, etc., and get them included in documents relevant to a court proceeding. So the subparagraph rarely would be needed. On balance, I'm persuaded that the subparagraph in question is not essential, but it's a close thing.

f. Subparagraph (ix) of paragraph (1) requires the omission or redaction of "electronic signature data or unique biometric data." I am not sure what the phrase "electronic signature data" is intended to cover. Does it require the omission or redaction of the image of the e-signature itself or something else, such as a password or code required to affix the e-signature to a document? Because I do not think this formulation provides adequate guidance to the bar as to what exactly must be omitted or removed, I'm against its inclusion in the proposed rule. It also seems to me that the term "unique biometric data" is simply too broad and indefinite to warrant its inclusion in the list. Medical records are often full of unique biometric data pertaining to the subject of the records. What must be redacted? On the other hand, biometric data such as fingerprints, retinal scans, facial recognition information, etc., are sometimes used to confirm identity and authorize access to secure locations or electronic records. If that is the reason for the inclusion of the term "biometric data" on the list, it ought to be in what was proposed as subparagraph (viii), something along the lines of "a user id, password, personal identification number, or *unique biometric* or other data used to gain access to computers and electronic devices, financial accounts, electronic mail, or other secure data."

g. A new subparagraph should be added proscribing the inclusion of "the name of an individual known to be a minor, other than the minor's initials" so as to add to the New York list all the data types proscribed by FRCP 5.2(a). The Commission on

Public Access to Court Records also recommended that "the names of minor children should be shortened to their initials" because such data presents a risk of potential harm to privacy and the personal security of individuals (Commission Report at 9).

(7) A revised and consolidated list of the data to be omitted or redacted from court papers might then be restated as follows:

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the date of an individual's birth, except the year thereof;

iii. the full name of an individual known to be a minor, except the minor's initials; and,

iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

(8) A new paragraph 2 should be added authorizing the submission of full information under seal and existing paragraphs (2) through (4) should be renumbered (3) through (5). It may occur that the full data that is required to be omitted or redacted from court papers will be material and necessary to the issues raised in the litigation and use of the abbreviated form in papers alone will be insufficient. The rule should provide that in that situation the parties or their attorneys may submit an affidavit or affirmation under seal, without the need for a motion for permission to do so, containing the full data that is referenced in the papers only in abbreviated form. If this suggestion were adopted, I am not sure that former paragraph (3), now renumbered (4) would continue to be necessary.

Notwithstanding the disapproval of the present proposal to amend 22 NYCRR 202.5 by my colleagues on the NYSBA's Committee on the CPLR and their disinclination to suggest ways in which it could be improved, I think such a rule has long been needed and that action should be taken now, not later. I hope you will pardon personally making so extensive a set of suggested revisions to the proposal of the Advisory Committee on Civil Practice but I've been involved with this project for many years, both within and without the court system, and have long considered it a bit of unfinished business that I'd like to see successfully concluded. A version of the proposed rule, which is marked with the changes I have suggested above and which generally conforms to FRCP 5.2(a) and recommendation 2 of the Commission Report, is attached.

As always I am,

Cordially and respectfully yours,

James Edward Pelzer

Enc.

§ 202.5 Papers Filed in Court

* * *

(e) Omission or Redaction of ~~Personal~~ Confidential Identifying Information. (1) Except in a matrimonial action ~~or a proceeding in surrogate's court~~ or as otherwise provided by law or court order and whether or not a sealing order is or has been sought, and where not waived under ~~subdivision~~ paragraph 45 of this ~~section~~subdivision, the parties shall omit or redact confidential ~~personal~~ identifying information in papers submitted to the court for filing. For purposes of this rule, confidential ~~personal~~ identifying information means: ~~(i) a social security number; (ii) a date of birth, except a person's year of birth; (iii) a mother's maiden name; (iv) a driver's license number or a non-driver photo identification card number; (v) an employee identification number; (vi) a credit card number; (vii) an insurance or financial account number; (viii) a computer password or computer access information or (ix) electronic signature data or unique biometric data.~~

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;
ii. the date of an individual's birth, except the year thereof;
iii. the full name of an individual known to be a minor, except the minor's initials; and
iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

(2) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full confidential identifying information described in subparagraphs (i) to (iv) of paragraph (1) of this subdivision is material and necessary to the adjudication of the action or proceeding before the court he or she may serve and file together with a paper in which such information has been set forth in abbreviated form a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears. Such confidential affidavit or affirmation shall be sealed and shall not be made available for public inspection.

(~~2~~3) The court sua sponte or on motion by any person may order a party to remove confidential ~~personal~~ identifying information from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing confidential ~~personal~~ identifying information in accordance with rules promulgated by the chief administrator of the courts; for good cause permit the inclusion of confidential ~~personal~~ identifying information in papers; or determine that particular information in a particular action is not confidential.

(~~3~~4) The redaction requirement does not apply to the last four digits of the relevant account number(s), if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one hundred five of the civil practice law and rules and in such an action in the event the defendant appears and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or confidential personal information by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other confidential personal information under seal in accordance with rules promulgated by the chief administrator of the courts.

(45) A party waives the protection of this rule as to the party's own personal identifying information by filing it without redaction and not under seal.

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January 17, 2013

VIA E-MAIL AND FEDEX

John W. McConnell, Esq.
Counsel, Office of Court Administration
22 Beaver Street, 11th Floor
New York, New York 10004

Re: Comments of Courthouse News Service On Proposed Adoption Of 22 NYCRR § 202.5(e) And Repeal of 22 NYCRR § 202.5-b(d)(3)(iii)

Dear Mr. McConnell:

Bryan Cave serves as general outside counsel to Courthouse News Service ("Courthouse News"). On behalf of Courthouse News, we respectfully submit these comments in response to the State of New York Unified Court System's ("Court System") November 20, 2012 invitations to comment on the proposed adoption of 22 NYCRR § 202.5(e) relating to redaction of personal identifying information in papers filed in civil matters, as well as the proposed repeal of 22 NYCRR § 202.5-b(d)(3)(iii) relating to e-filing of documents in "secure" status.

As discussed more fully below, Courthouse News strongly supports the proposed adoption of § 202.5(e) and repeal of § 202.5-b(d)(3)(iii). Both proposals strike the correct balance between maintaining protections for sensitive personal information while at the same time creating an environment where the press and public can obtain access to information about newly-filed civil actions in a timely manner. Not only would these proposals serve to preserve and enhance timely access to public court records – a fundamental aspect of a transparent and public court system – but they avoid the imposition of additional administrative burdens on court staff. They are also in accord with the practices already in place in the majority of state courts nationwide, as well as in the federal courts.

The balance of these comments are devoted to highlighting the importance of the issues addressed by the proposed rule changes. In addition, as noted below, Courthouse News respectfully suggests a minor technological adjustment that would greatly enhance the ability of the press to inform interested members of the public about the flow of new civil litigation in New York's courts.

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A. About Courthouse News Service

Courthouse News is a 22-year-old nationwide news service for lawyers and the news media. Founded in 1990, and with reporters now covering courts in all 50 states, Courthouse News is similar to other news wire services, such as the Associated Press, except that it focuses on civil lawsuits, from the date of filing through the appellate level. Courthouse News does not report on criminal or family law matters.

The majority of Courthouse News' more than 3,000 subscribers nationwide are lawyers and law firms, including virtually every major New York firm. Courthouse News' local subscribers are thus largely comprised of one of the Court System's most important constituencies: the New York Bar. In addition, other news outlets look to Courthouse News to provide them with information about newsworthy civil filings. Included among these subscribers are media outlets such as the *The Boston Globe*, *The Atlanta Journal-Constitution*, *Newsday*, the *Detroit Free Press*, the *Los Angeles Times*, and AOL/Huffington Post, all of which puts Courthouse News in a position similar to that of a pool reporter. In addition, a number of academic institutions and law schools also subscribe to Courthouse News' reports.

Courthouse News' core news publications are its new litigation reports, which are emailed to subscribers each evening and contain original, staff-written coverage of all significant new civil complaints filed in the court or courts covered by the report, ideally complaints filed earlier that same day. Consistent with its role as a news service, Courthouse News does not limit its reports to only high-profile cases. Instead, Courthouse News' reporters review the entire flow of new civil litigation. Although not all new complaints are significant enough to merit news coverage, Courthouse News' reports feature many more individual actions than would normally be found in a daily newspaper.

Courthouse News also has a web site (www.courthousenews.com), which features news reports and commentary about civil cases and appeals. The web site has a wide and growing readership, with an average of one million visitors each month for the last six months.

Courthouse News has followed the same path as innumerable news outlets in seeking to review the flow of new civil filings in a courthouse, a traditional source of news that journalists continue to cover when courts make those filings available without the hurdles of cost or delay. It is the comprehensive and timely nature of this coverage that makes it so useful to subscribers, i.e., the state's lawyers.

B. **Timely Press Access To Newly-Filed Civil Complaints Is A Critical Feature Of The Transparency Of The Court System, And Can Be Positively Or Negatively Affected By Procedural Rules Such As Those Under Consideration Here**

Courthouse News' primary interest, and the interest of many other press organizations with whom its reporters have worked side by side over the years in clerks' offices throughout the country, is in newly-filed civil complaints: the documents that mark the initiation of new and fundamentally public controversies. As recognized by the proposal to add 22 NYCRR § 202.5(e), the press has a

presumptive right of access to court records grounded in both the common law and the First Amendment, a right that extends to civil court records.[1] Not only is there a presumptive right of access, but this access must be timely. As many courts have recognized, even short delays in access are the functional equivalent of access denials.[2]

In the case of newly-filed civil complaints, which "underpin a civil action and give a ... court jurisdiction over a matter," delays in access "prevent the public from learning anything about [the] action – including its existence." *Standard Chartered Bank Int's v. Calvo*, 757 F. Supp. 2d 258, 260 (S.D.N.Y. 2010). Just as a reader of news looks for the most recent football scores, the latest swing in the stock market, or, most recently, the latest developments on the so-called "fiscal cliff," even a day's delay in access to a new civil complaint hurts the ability of legal and business community who may be affected by the lawsuit to react appropriately to it. More fundamentally, delays are contrary to basic principles of open government.[3]

In recognition of the important role that prompt access plays to the transparency of the judicial branch, major courts across the country have established procedures to ensure that members of the press can review new complaints on the same day they are filed, even if the court's administrative procedures associated with those complaints (e.g., manual docketing, checking to ensure procedural requirements have been met, etc.) are still underway.

Conversely, in those instances in which delays in access arise, the cause is almost always a change in

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[1] *E.g.*, *New York Civil Liberties Union v. New York City Transit Authority*, 652 F.3d 247, 258 (2d Cir. 2011) ("we have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records. ... Significantly, all other circuits that have considered the issue have come to the same conclusion."); *Nixon v. Warner Communications*, 435 U.S. 589, 597-98 (1978) (recognizing common law right "to inspect and copy public records and documents, including judicial records and documents"); *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D. 2d 1, 6-9, 711 N.Y.S.2d 419, 423-26 (1st Dept. 2000) (recognizing and discussing constitutional, common law, and New York statutory right of access to civil court records).

[2] Even short delays in access constitute "a total restraint on the public's first amendment right of access even though the restraint is limited in time, and are unconstitutional unless the strict test for denying access has been satisfied." *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983). *Accord, e.g.*, *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[i]n light of values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Service v. Jackson*, 2009 WL 2163609, *4-5 (S.D. Tex. 2009) ("24 to 72 hour delay in access is effectively an access denial and is, therefore, unconstitutional").

[3] As the courts have recognized, the "newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny." *Grove Fresh*, 24 F.3d at 897. Given the vast amount of information competing for its attention, it is only while new court actions are "still current news that the public's attention can be commanded." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), and this is even more true in today's 24-hour news cycle. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) ("the element of time is not unimportant if press coverage is to fulfill its traditional function of brining news to the public promptly"); *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (even "a 'minimal delay' in access ... unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure").

procedures that has somehow resulted in press access being put ***behind*** such tasks. In today's difficult economic environment, courts are often short-staffed, and as such these tasks understandably take time. Redaction requirements, if imposed on the clerk rather than, or in addition to, the filing party, can create delays for similar reasons.

The conversion from a paper to an electronic environment has, ironically, also been the source of some delays. For example, in many state courts around the country, e-filing has brought delays in access even where none occurred before. New York has so far been the exception to that rule, with e-filing and the accompanying remote access to new complaints online having resolved, at least in some courts, the delays that the press had previously been experiencing in attempting to access paper-filed complaints at the courthouse. Yet certain issues still remain, one of those being the current unavailability of "secure" status documents online (a matter that would be addressed by the repeal of 22 NYCRR § 202.5-(b)(d)(3)(iii)), and the second being a technological barriers to reviewing the flow of new filings into a particular court on a particular day, a matter discussed further below.

C. The Burden To Redact Is Appropriately Placed On The Filing Party

Courthouse News understands that the Court System's adoption of 22 NYCRR § 202.5(e) would clearly place the burden on the filing party to "omit or redact" confidential personal information. This approach to confidential information in court records – putting the onus for redactions on the filing party – is similar to the approach taken by the federal courts. Under Rule 5.2(a) of the Federal Rules of Civil Procedure, "in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number," a party or nonparty making the filing is required to redact sensitive personal information before making the filing.

It is also consistent with the practices used by the vast majority of state courts. Indeed, Courthouse News is aware of only ***two states*** in the nation that impose a requirement on their court staffs to ensure that proper redactions have been made: Florida and Ohio. Among the states where court staff does ***not*** perform such checks are California, Oregon, Washington, Arizona, Nevada, Utah, Idaho, Michigan, Illinois, Wisconsin, Colorado, Texas, Indiana, Louisiana, Alabama, Mississippi, Kentucky, Tennessee, North and South Carolina, Virginia, Pennsylvania, Delaware, and Massachusetts.

Florida, one of the two states that has gone in the opposite direction, is a case study in the many problems created by going the minority route of imposing an affirmative duty on court staff to double check the requirement already imposed on filing parties to redact confidential information. Not only did this requirement impose what clerks in that state widely view as a new source of liability, to say nothing of the huge added burden to the administrative duties of clerk's offices across the state – exacerbating workload problems already existing due to budget shortages – but press access to new civil complaints in Florida's courts took a nosedive, with major courts that had previously been providing same-day access to new filings now denying access to those new filings for days on end after they are filed. The result is that the press' ability to disseminate news about the entire flow of new

civil litigation into Florida's courts is substantially hampered, even though the vast majority of new civil complaints do *not* contain confidential information.

The Court System's proposed rule on redaction effectively avoids the problems Florida clerks' offices, and those members of the press corps trying to cover the Florida courts, are now facing. By clearly placing the responsibility for redaction of sensitive personal information on the filing party, there is no burden on the clerk to review filings for confidential information, and no delay between a complaint being filed and it becoming accessible to the public and press organizations such as Courthouse News, who are in turn equipped to provide timely information to interested members of the public about the flow of new business into New York's courts.

D. Repeal of "Secured" Status Would Improve Press Access To New Civil Court Filings

As with its adoption of a clear standard requiring redaction by the filing party, the Court System's proposed elimination of "secure" filing status will enhance press and public access to new civil filings.

As noted above, Courthouse News has historically had problems accessing paper-filed complaints in certain New York courthouses in a timely manner. The conversion to mandatory e-filing in some of those courts has gone a long way toward addressing those delays, since newly e-filed civil complaints are normally available for review online on the same day they are filed. The exception to this rule is "secure" complaints, which are not available online. Even though NYCRR § 202.5-b(d)(3)(iii) permits a party to file a document as "secure" only in certain circumstances where a document contains sensitive personal data, that rule seems to be routinely flouted, as documents are frequently filed as secure when they do not appear to contain any such information, and these properly public documents are much harder for the press to access. Respectfully, Courthouse News believes the better approach, and one that will protect truly sensitive information while creating the greatest level of transparency for court filings that do not contain such information, is to create clear redaction requirements for certain specified information while requiring all other portions of court documents to be fully available both at the courthouse and online unless the document has been ordered sealed pursuant to proper procedures – i.e., the approach that would be accomplished by the elimination of § 202.5-b(d)(3)(iii) in conjunction with the adoption of § 202.5(e).

E. Access To E-Filed Complaints Would Be Enhanced By Date Search Capability

In addition to the foregoing, Courthouse News respectfully offers one additional comment on the e-filing website itself. As noted, in the tradition followed by reporters on the courthouse beat through the decades, Courthouse News conducts a daily review of the entire flow of new civil litigation filed earlier that same day. However, this task is made significantly more difficult because the New York e-filing web site does not permit searching by date. Following a recent site update, searching must be done case-by-case, and requires frequent re-entry of a CAPTCHA code to differentiate between human- and computer-driven searches. As a result, the process of searching for and identifying new civil filings is cumbersome and time consuming.

Given these problems, Courthouse News respectfully requests that the Court System consider updating its e-filing website to include date range search capability, thereby reducing the need to enter CAPTCHA code. Allowing users to search by date would make the site exponentially more efficient, and would dramatically improve public access to fundamentally public records, while at the same time the remaining CAPTCHA code would still prevent automated bulk searches from adversely impacting the e-filing website.

Alternatively, another solution would be to allow members of the press corps to register for an account that would eliminate the use of CAPTCHA code altogether. Currently, only attorneys can register for an account on the e-filing website, but extending such access to the press would be consistent with the press' constitutional role in our society in reporting on the activities of public institutions.[4] By requiring the press to register for such accounts, the court could control the extent of its use, by, for example, cutting off accounts where computerized data mining was interfering with the web site. At the same time, though, the press could review the flow of new civil actions with much greater ease than is currently the case.

E. Conclusion

Courthouse News greatly appreciates the Court System's consideration of its views on the proposed rule changes and hopes it will find these comments to be helpful. Should there be any question regarding these comments, please do not hesitate to contact our offices.

Very truly yours,

Rachel Matteo-Boehm
On Behalf of Courthouse News Service

cc: Bill Girdner, Editor, Courthouse News Service
Adam Angione, Special Projects Editor, Courthouse News Service

[4] Recognizing the special role of the media as "surrogates for the public," the Supreme Court has noted in the context of courtroom proceedings that although "media representatives enjoy the same rights of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *accord, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.").

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January 18, 2013

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Unified Court System for the State of New York
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Re: Proposed Repeal of 22 NYCRR § 202.5-b(d)(3)(iii) and Adoption of 22 NYCRR § 202.5(e)

Dear Mr. McConnell:

On behalf of the Managing Attorneys and Clerks Association, Inc. (MACA, Inc.), we write in response to your invitation to comment on a proposed rule change and a rule adoption. Specifically, we urge that 22 NYCRR § 202.5-b(d)(3)(iii) permitting a party to e-file a document as "secure" be eliminated in its entirety and that 22 NYCRR § 202.5(e) providing for redaction of personal identifying information be adopted with slight modifications.

MACA, Inc. is an association of over 100 large, litigation based law firms and corporate legal departments. Our individual members are responsible for understanding the day to day operation of the various state and federal courts and the rules under which those courts operate particularly as those rules relate to electronic filing. A number of our members have served and continue to serve on court committees that deal with electronic filing issues and are often called upon to comment on practice and procedural issues.

Uniform Rule § 202.5-b(d)(3)(iii) permits a party to file a document electronically and mark it "secure," thereby limiting on-line access to the document to only the parties and the County Clerk. Under the rule, only documents containing information such as a social security number, account number or health information are allowed to be given a "secure" designation. Although

"on-line" access is limited, the document can be accessed by the public at computer terminals at the courthouse. We share the concerns of other commentators that marking the document "secure" could give an e-filer a false sense that access to the document is fully restricted to only the parties and the court, both on-line and at the courthouse. We also understand that some use this "secure" filing category inappropriately as a tool to limit on-line access to court documents that by law should be available to the general public. We believe these flawed aspects of the "secured" filing regimen outweigh its intended benefit of having all records of a case, including sealed filings, accessible on line to the parties and the court.

To the extent access to documents or information in these documents needs to be restricted, parties should obtain an order pursuant to 22 NYCRR § 202.5-b(k) prohibiting or restricting the filing of certain papers in an e-filed case or, in the appropriate case, should obtain a sealing order. See 22 NYCRR § 216.1. We thus believe that by eliminating Uniform Rule 202.5-b(d)(3)(iii) in its entirety (and adopting proposed Rule 202.5(e), see discussion below) parties' personal information will be better secured and the goal of free and open access to court documents will be fulfilled.

Proposed Rule § 202.5(e) sets forth a framework for maintaining the confidentiality of certain personal information. For the reasons set forth by the Advisory Committee on Civil Practice in its memorandum, we strongly favor the adoption of this rule with slight modifications. We can find no legitimate purpose having personal identifying information included in court filings. We believe the waiver provision found in subsection (e)(4) of the proposed rule should be eliminated, however, along with the reference to that provision in subparagraph 1 of the proposed rule. A party should not automatically be held to have waived the protection of this rule; we believe instead that the common law doctrine of waiver is better suited to govern operation of the rule when, for example, a party claims inadvertent disclosure or changed circumstances. In addition, the term "party" should be added to the first sentence in § 202.5(e)(2) to make clear that the rights afforded to "persons" under this rule are also available to a party. As amended this sentence should read: "(2) The court sua sponte or on motion by *any party* or person may order a party to remove confidential personal information from papers..."

We appreciate this opportunity to comment. We note that these proposals address only practice in the Supreme and County Courts. We believe that efforts should be made to make these rules uniform in the other courts in our State as well, including appellate, city and district courts.

Should you have any questions regarding our comments, please do not hesitate to contact the undersigned.

Respectfully submitted,

Henry J. Kennedy,
President

Timothy K. Beeken,
Chair, Rules Committee

To: John W. McConnell, Counsel, Unified Court System, New York State

From: Kim F. Trigoboff, Esq., Ann Pinciss Berman, Esq. and Tammy Lawlor, Esq.

Date: January 22, 2013

Re: Proposed Rules 22 NYCRR § 202.5(e), Relating to Redaction of Personal Identification

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In response to your Memorandum dated November 20, 2012, the proffered regulation, 22 NYCRR § 202.5(e), provides that except for Matrimonial and Surrogate's Court actions, certain confidential information shall be redacted, including:

i) a social security number;

ii) a date of birth, except a person's year of birth;

iii) a mother's maiden name;

iv) a driver's license or non-driver identification card;

v) an employee identification number;

vi) a credit card number;

vii) an insurance or financial account number;

viii) a computer password or computer access information;

ix) electronic signature data or unique biometric data.

A. Exemption of Matrimonial and Surrogate's Court Matters to Redaction Rules should be applied to Mental Hygiene Law Article 81 Guardianship Matters

Although not the focus of the following discussion, guardianship matters are exempt from e-filing requirements, and would not be affected by the proposed repeal of "secure" e-filing status. While Matrimonial and Surrogate's Court matters are exempt from the concurrently proposed redaction requirements, Article 81 Guardianship matters are not. This lack of exemption raises a number of issues of great concern to guardianship practitioners, due to the impact on guardianship proceedings, as well as the safety and welfare of Alleged Incapacitated Persons (AIPs), and those persons who may have been adjudicated as incapacitated (IPs).

The redaction rules as proposed are modeled on Rule 5.2 in the federal courts. However, neither Matrimonial, Surrogate's Court, nor Guardianship actions have equivalent federal statutes, but are rather state specific. All three types of actions relate to particular persons, involving the personal and property management of a couple's, a decedent's, or an individual's affairs. It appears to be inconsistent not to allow an exemption for Article 81Guardianship matters, similar to the exemption for Matrimonial, and Surrogate's Court matters, from the proposed redaction requirements noted above, even though it would appear that a similar rationale for exemption applies.

B. A Brief Overview of Mental Hygiene Law Article 81 Guardianship Proceedings

Mental Hygiene Law Article 81 (Article 81) guardianship proceedings are often brought by a petitioning family member, friend, or institution out of concern for an AIP's functional limitations that affect their ability to care for themselves and/or their property.

The Petition must allege sufficient facts concerning the AIP's inability to care for themselves (i.e., to handle activities of daily living, such as bathing, shopping, cleaning, laundry; to obtain medical or dental treatment; to be safely discharged to the community from a health care facility) or manage their property (to remain free from financial abuse; to pay rent and other bills; to manage assets) in order to reach a threshold for a judge to sign an Order to Show Cause.

In the Order to Show Cause, the Court appoints a Court Evaluator, who acts as the "eyes and ears" of the Court. The Court Evaluator investigates the allegations made in the petition, meets with the AIP, determines the AIP's need for counsel, gathers information about the assets available to the AIP, and places the information resulting from his or her investigation in a written report to the Court. Since many of the persons who are the subjects of Article 81 proceedings are elderly persons who wish to remain in their homes, or return to their homes, accurate and complete financial information is key to helping the Court determine whether there are enough resources to allow the AIP to remain in or return to the community. The Court Evaluator makes a recommendation as to whether, in his or her opinion, the AIP is, or is not, in need of a guardian of the person or property.

If the Court determines, after presentation of evidence by the Petitioner during a hearing, that there is sufficient evidence, apart from the report of the Court Evaluator, to show that the AIP is incapacitated, the Court will order that a guardian be appointed for the benefit of the AIP.

Typically, the appointed Guardian uses the Court Evaluator's report as a "road map" to identify problems, to know what assets need to be marshaled and/or located or recovered, and to assist the Guardian in caring for the (now adjudicated) Incapacitated Person (IP). The most important thing a guardian needs is account numbers. If the Court Evaluator has done a thorough job, the

Report generally contains somewhat detailed financial information, so that the Guardian does not have to conduct his or her own investigation from the beginning, but can pick up from where the Court Evaluator left off. This is especially important when an IP's assets need to be recovered or prevented from being removed from the State; time is of the essence.

C. Specific Concerns with Respect to the Proposed Redaction Guidelines

Accordingly, at least some of the items included in 22 NYCRR § 202.5(e) (i) through (ix) above, as proposed, are typically included in a Petitioner's initial petition, which by statute is served on the AIP and upon the Court Evaluator only. A petition often includes information such as the AIP's date of birth—item (ii); the mother's maiden name (if some family history is included in the petition)—item (iii); at least part of a credit card or other creditor account number, if the Petition details debts owed—item (vi); and bank and other financial account numbers, at least in part—item (vii), in order to make a threshold case for the need for the appointment of a Guardian of the Property.

Indeed, Mental Hygiene Law Article §81.07(a)(5) states the following with regard to the information that must be included in a petition for the appointment of a guardian: "if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management." In some cases it would not be possible to comply with the statute without referring to account numbers.

In 2004, the state legislature amended Mental Hygiene Law Section §81.07 (b)(3) and(4) with regard to the modifications involving service of a Notice of Proceeding. The legislature took steps to restrict confidential information included in the Petition, by allowing the Petition to be released only to the AIP and Court Evaluator. The changes to Article 81 prevented access to much of the private information by use of the Notice of Proceeding. ONLY the AIP and Court Evaluator receive a copy of the Petition; all other parties are not privy to such information without Court approval. The legislature enacted these amendments to ensure that the release of confidential information is monitored. Any further restrictions seem unnecessary, as the legislature would have modified the amendment to include further restrictions, if appropriate.

If the above types of information are not included in the Petition, as a result of the proposed redaction measures, the Court Evaluator would need to call the Petitioner to obtain such information, in order to complete his or her investigation. Knowing an AIP's full birthdate can be important to a Court Evaluator's obtaining additional information about the AIP's assets, and in determining eligibility for certain federal or other benefits, or addressing specific estate or

special needs planning issues. Certainly, in the process of obtaining a family history, a Court Evaluator might learn of a mother's maiden name and include it as a routine matter in the report submitted to the Court.

Of course, during the investigation itself, additional financial accounts or creditor accounts may be identified, discovered, protected from loss, recovered by taking immediate action, or identified as being subject to recovery. The requisite account or creditor information would also need to be included in the Court Evaluator's report to the Court, in the interests of full disclosure, even if only the last four digits are used to distinguish one account in the same institution from another, one creditor or debt from another, or one type of asset from another. However, it should be noted that, under the rules as currently proposed, use of the last four digits of an account in papers are allowed only consumer credit actions.

MHL §81.09(c)(5)(9) states the court evaluator is required to prepare a report which includes an answer to the following question: "ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated." It is not possible to cross examine a court evaluator's determination with regard to the nature and extent of the assets without account numbers. Determining the nature and extent of the assets is critical in a guardianship because, among other reasons, the Court uses that information to determine the size of any bond that a guardian is required to file.

If the proposed rules were to be adopted in their present form, especially without the ability to use the last four digits of an account number, the ability of a Petition to convey necessary and accurate information to the Court, the AIP, Court appointed counsel to the AIP, an appointed Temporary Guardian, and the Court Evaluator would be unnecessarily impeded. Without being able to communicate clearly about what assets might be at risk, the ability of the Court Evaluator to act quickly to preserve the assets of the AIP could be at risk. The efficiency of the Court Evaluator to properly report back to the Court would be hampered, and the utility of the Court Evaluator's report for the Guardian would be severely reduced. Investigations would take more time, as information that could be delivered efficiently in the Petition, or in the Court Evaluator's report, would need to be obtained separately in some other manner.

If there is a contested proceeding and there is controversy among cross petitioners about the nature and extent of the assets of an AIP, or whether assets were improperly removed from the accounts of an AIP, a trial could not be conducted without specific reference to account numbers. Since there is no discovery in guardianship proceedings without the permission of the Court, it is critical that parties be able to put this information in pleadings.

Furthermore, a newly appointed guardian is required to submit an Initial Report to the Court and the parties concerned with the welfare of the IP, which includes the health and living situation of the IP, as well as the status of newly marshaled, located, recovered, or to be recovered assets of

an IP. The proposed redaction rules would severely impede the flow of accurate and complete information to the Court, the Court Evaluator, Court appointed Counsel, an appointed Interim or Special Guardian, the IP, and the Court Examiner, as well as other parties concerned with the welfare of the IP. If a turnover proceeding is brought by a guardian pursuant to MHL sec 81.43 and it is alleged that assets were improperly taken from an AIP's account by a third party , whoever is being accused of improperly taking money should have the right to be told in a pleading the number of the account in question.

This does not even touch the issue of Article 81 guardianship accountings, which by definition, must give on an annual basis, a thorough and highly detailed picture of the finances of the Incapacitated Person, including full account numbers. Certainly when accountings are required in the context of Surrogate's Court, complete financial disclosure is also required of the fiduciary, including full account numbers. In Article 81 matters, such disclosure is required to promote accountability on the part of the guardian, who is a fiduciary, to assist in the prevention of possible fraud on the part of a guardian or guardians, and to provide a means of comparison between accountings from year to year.

More specifically, Mental Hygiene Law Article §81.31 (b)(7) requires that an Article 81 guardian's annual report be in the same form as that of a general guardian under the SCPA. The official form for the annual account of a general guardian under the SCPA asks for account numbers. See SCPA §1719. Consistent with the requirements of the SCPA, the current official form on the OCA web site for the annual accounting of an Article 81 guardian requests account numbers. Similarly, MHL§81.33 requires that intermediate and final accountings be in the same format as annual accountings. Therefore intermediate and final accountings must also comply with the requirements of the SCPA, and account numbers must be provided.

D. In Conclusion

In summary, given the above concerns, we believe that guardianship actions should be exempt from the proposed 22 NYCRR § 202.5(e) redaction rules.

As mentioned above, the state legislature already addressed, in its 2004 amendment to the Article 81 statute, the need to restrict certain information about the AIP among the parties, during the proceeding itself, by allowing only the Court Evaluator and the AIP to have access to the Petition which accompanies the Order to Show Cause, during the commencement of a guardianship proceeding. However, the Petition itself is still in the court file for review by the Court; short of sealing all Article 81 records, the Petition, Court Evaluator's report, and any accountings in those cases where a guardian is appointed on behalf of an IP, all become part of a record conceivably accessible to the general public.

Overall, there appears to be a tension between the need to adequately safeguard information personal to the IP from the general public, and the need for clear communication about this information among the Courts, the guardian and the Court Examiner, in order to efficiently and carefully safeguard the welfare and assets of those under the protection of the Courts via Article 81 Guardianship proceedings. In the case of guardianship actions, a general requirement for redaction severely and unnecessarily hampers court appointees from acting properly on behalf of an AIP or IP, and goes against the SCPA, as presently in effect, with respect to accountings. The foundational purpose of the guardianship statute, which is to provide important protections, under the supervision of the Court, for a person who may be or who has been determined to be incapacitated, would thereby be undermined.

To further address privacy concerns on behalf of respondents in guardianship proceedings, perhaps the openness of guardianship files to the public can be addressed in some other way, rather than imposing rules which make Guardianship proceedings more onerous, without providing any benefit to the AIP/IP, or by individual Court rules, which can take into account both judicial efficiency and the AIP/IP's need for privacy, in conjunction with access to guardianship records by the general public.

Please note that although the authors of this memorandum are active members of the Association of the City Bar of New York's Legal Problems of the Aging Committee, this memorandum reflects our views as individual practitioners in the field of guardianship. These are not the views of the Association of the City Bar of New York's Legal Problems of the Aging Committee, or any other committees on which we, as individual practitioners, may serve.

The authors also acknowledge with gratitude the contributions of Ira Salzman, Esq., a well-known guardianship practitioner, to this memorandum.

CARule202-5-ecomments - 22 NYCRR §202.5(e) Comment

From: Miles Zatkowsky <miles@dutcher-zatkowsky.com>
To: "OCARule202-5-ecomments@nycourts.gov" <OCARule202-5-ecomments@nycourts.gov>
Date: 2/6/2013 2:16 PM
Subject: 22 NYCRR §202.5(e) Comment

Dear Attorney John McConnell:

I am writing about proposed regulations which, in my opinion, would have a negative impact on guardianship proceedings. Unfortunately, the deadline to offer a comment is today, February 6, 2013. I only stumbled upon this rule in the last few weeks and sought input from my local colleagues in Rochester, NY and discovered that none were aware of the proposed new regulation or its impact.

As such, I offer my comments, and ask for an extension of the comment period so that bar association and their committees may have realistic time periods to review and address the proposed redaction rules. I would think that 90 days would be sufficient as many committees only meet every quarter.

While the reason to safeguard personal information to prevent identity theft is appropriate, the problems it presents in MHL Article 81 guardianship proceedings thwart the very spirit of such a proceeding.

This was proposed by OCA and I am unfamiliar with the process, but this came to my attention and it seems that it will negatively impact wither the AIP, due process and any opportunity to verify appropriateness of the accounting and financial transactions on behalf of the IP.

The proposed regulation 22 NYCRR §202.5(e) which provides that, except for Matrimonial and Surrogate's Court actions, certain confidential information shall be redacted, will have a negative impact on Article 81 guardianships:

i) social security number of AIP;
ii) date of birth, except for year of birth;
iii) insurance or financial account number.

There are other rules, but I focus on these three because the first two may be essential in identifying the AIP and securing information to protect the AIP. If this information were included in the Petition, the only participants served are the Court Evaluator and Attorney for AIP, in addition to the AIP himself or herself. All other interested parties get a Notice of Action, not the Petition. While the AIP may (particularly in a diminished state of capacity) leave the Petition in a vulnerable place, there are safeguards available. For example, in a hospital or medical facility, the nurse can keep the document in the patients medical record so visitors cannot view the Petition. If the AIP wishes to read it, it can be returned to the medical file afterwards.

The best safeguard may be prohibiting anyone other than counsel or the AIP him or herself from viewing the Petition in the clerk's office, similar to matrimonial matters.

Reviewing the court process, if a Court Evaluator is appointed, then he or she will be unable to verify any assets or even the date of birth of the AIP to review medical records during the course of the investigation.

During the hearing required by statute, cross examination of an interested party accused of financial abuse cannot be effectively had because there is no opportunity to review account statements if you cannot disclose the account numbers.

fi[redacted]

The Guardian is required to account annually. Without account numbers, how is the Court Examiner to verify accuracy?

These are issues which must be addressed. One simple solution seems to be to include Article 81 guardianships in the exceptions along with matrimonial and Surrogate Court proceedings.

Additionally, restricting access to the physical file in the clerk's office as in matrimonial takes the next step.

Thank you for your concern.

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January 18, 2013

Via E-Mail: OCARule202-5-bcomments@nycourts.gov

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver St.
New York, NY 10004

Re: Proposed repeal of 22 NYCRR §202.5-b(d)(3)(iii)

Dear Mr. McConnell:

I write to you regarding the OCA Rule 202.5-b(d)(3)(iii) proposal for which comments are being accepted through January 22, 2013.

The thrust of my concerns deal with Article 81 Guardianship proceedings and the applicability of this proposed rule to those proceedings.

I file approximately 30 petitions for the appointment of a Guardian per year. The petitions contain factual data of a very personal nature including but not limited to a person's medical condition and financial data. Most practitioners in the elder law field are aware of the sensitive nature of these proceedings and voluntarily redact data from these petitions.

Although I am Chair of the Brooklyn Bar Association Elder Law Committee and Co-Chair the Guardianship Sub-Committee of the New York State Bar Association, I write as an individual practitioner. My views are not the views of the Committees or Associations upon which I serve.

The sensitivity of the nature of these Guardianship proceedings require that the privacy of alleged incapacitated persons should be of tantamount concern to the court system.

It is for this reason that I request that Article 81 Guardianship proceedings should be exempt from the mandates of this proposed rule similar to Surrogate Court proceedings and Matrimonial proceedings.

Very truly yours,

ANTHONY J. LAMBERTI
AJL/vr

CARule202-5-bcomments - comment

From: Judith B Raskin <jbr@raskinmakofsky.com>
To: <OCARule202-5-bcomments@nycourts.gov>
Date: 2/1/2013 4:15 PM
Subject: comment

Comment on proposed repeal of NYCRR Sec. 202-5-b(d)(3)(iii).

As an attorney who has participated in numerous guardianship cases and represented petitioners, alleged incapacitated persons and acted as court evaluator, I support the Memo submitted on January 22, 2013 by Kim Trigoboff, Tammy Lawlor and Anne Pinciss Berman opposing the repeal of the above referenced section.

Judith Raskin

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*Certified Elder Law Attorney by the National Elder Law Foundation which is not affiliated with any governmental authority. Certification is not a requirementj for the practice of law in the State of New York and does not necessarily indicate greater competence than another attorney.

fi

CARule202-5-ecomments - Comments on 22 NYCRR sec. 202.5(e) relating to redaction of personal identifying information in civil matters

From: <AFine@monroecounty.gov>
To: <OCARule202-5-ecomments@nycourts.gov>
Date: 1/30/2013 7:21 PM
Subject: Comments on 22 NYCRR sec. 202.5(e) relating to redaction of personal identifying information in civil matters

Dear Mr. McConnell,

I was asked to forward to you comments I had previously submitted in November 2011 concerning the proposed new rule regarding redaction of personal identifying information in civil proceedings. I have done that, and I have submitted some new comments as well. I apologize for the delay in submitting the comments, as I did not know about the deadline. I am a special assistant public defender with the Monroe County Public Defender's Office, in charge of the Family Court bureau. My comments from 2011 are directed to the rule's impact if it were made applicable to Family Court proceedings, but I do understand that the rule currently is applicable only to civil proceedings in Supreme and County court, and exempts matrimonial actions.

With respect to the new rule and its application to civil proceedings in general, the list of information in new 22 NYCRR 202.5 (e) that must be omitted seems reasonable enough. There is other information that could have been included in the list--passport numbers for instance--but the enumerated list is a good start.

To me the more important question is how this rule will be be implemented on a day-to-day basis. It makes sense that the more likely the possibility that pleadings will be filed electronically and available for others to review electronically, then the more stringent the courts should be in making litigants file form pleadings. Lawyers and litigants should not be able to continue to file their own unique pleadings which may inadvertently contain the information the courts want omitted or redacted.

To put it another way, why not eliminate the risk of confidential information being disclosed electronically by not asking for the information in the first place? To this end, my hope is that OCA has plans to or has already developed form pleadings to take account of the new rule, and that OCA will assist lawyers and litigants to conform to the new rule by not giving them the option of filing a pleading that contains confidential information that will need to be omitted or redacted.

Education about the new rule will be an issue. Pro se litigants in particular will have no idea that there is a rule placing on them the burden of redacting confidential information, nor will they know that their failure to redact their own information means that they have essentially "waived" their own confidentiality. Again, not giving them the option to file pleadings containing information that must be omitted or redacted in the first place will alleviate this somewhat unfair burden.

But attorneys too will need education about the new rule, in conjunction with training on electronic filing and electronic availability of pleadings. I note that the comments optimistically presume that all attorneys by necessity will be aware of the risks associated with disclosure of confidential information. I am worried that attorneys will have no clue about the potential harm they might cause to their clients or an opposing party because of their failure to omit or redact confidential information from pleadings, exhibits or any other document that inadvertently contains a social security number, a birth date, or inexplicably (to me anyway) the mother's maiden name. Even the most thorough attorney in a busy law practice is bound to miss a stray bit of confidential information from time to time. Education on these issues is key. Training will also be needed to remind attorneys and pro se parties about redaction of confidential information from exhibits that may be attached to pleadings as I presume exhibits will also be accessible electronically as well.

Also, what does "redacting" mean? Is a clerk going to review the pleading before it is filed and point out to the attorney or litigant where it contains information subject to confidentiality and then hand them a black marker to black out the offending information? Will the attorney or litigant be expected to show up to court with marked up copies of pleadings and exhibits? The rule gives no guidance on this issue.

Given that electronic filing and electronic access to pleadings is the wave of the future, rules regarding confidentiality are of course necessary. This rule is a good start, but clearly this whole issue is a work in progress. I hope it is treated as such by the OCA.

Adele M. Fine, Esq.
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----- Forwarded by Adele Fine/PD/Monroe on 01/30/2013 12:18 PM -----

From: Adele Fine/PD/Monroe
To: "Nadia Gareeb" <gareebn@assembly.state.ny.us>,
Date: 11/29/2011 09:52 PM
Subject: [redacted]

Hello Ms. Gareeb,

Thank you for asking for my input on the proposed confidentiality legislation. I am not able to be at the meeting on Friday, and will not be in my office to participate in the hearing telephonically. I write to address your request for input insofar as it pertains to family court proceedings.

First, if the proposed legislation is intended to apply only to proceedings in supreme and county courts, then it should specifically say that. There is already in place a statutory and regulatory framework for protecting confidential information about litigants and children in family court proceedings in sections 166 of the Family Court Act and in 22 NYCRR 205.5. But the CPLR also applies to family court proceedings. The failure of this provision to specifically exclude family court proceedings, or to state explicitly that the provision applies only to supreme and county courts, will create ambiguity and confusion as to whether this legislation applies to family court proceedings.

The current process for regulating access to confidential information in family court uses a common sense approach to protect privacy, while allowing those who are entitled to the information to have access to it. The full identities of parties and children are necessary in family court papers. Children's initials (as proposed in the legislation) are not enough because children in the same family often have the same initials, and family court attorneys and judges must know the children's names to be able to keep the children straight in their minds as they deal with the facts in the cases. The full birth dates, not just birth years, of the parents and children are necessary. Disclosing birth year information only does not allow family court attorneys and judges to calculate exactly how old the children and parents are, or were when events in the past occurred. The gender of the parties and children is necessary (not addressed in the legislation), the addresses of the parties and children is necessary (not addressed in the legislation), the places the parties and children have lived in the past are necessary (not addressed in the legislation). All of this information is vital to jurisdiction and venue issues, and to all of the important substantive issues that determine the child's "best interests." Making attorneys and judges hunt for this information elsewhere would bog down an already slow family court system.

Currently, pursuant to 22 NYCRR 205.5, all of this information is available to a finite group of people set forth in the regulation, and none of it is available to anyone else. There is no issue of "redacting" confidential information. Either you are one of the people entitled to access to the information, or you are not. The practice of having to manually request a case file in writing, and to show ID before being allowed access to the information, provides further assurances of privacy. The system in general works.

Given the viability of the current system, there is no reason this proposed legislation should apply to family court proceedings, particularly if the legislation is designed with electronic filing in mind. The legislation does not go far enough to protect all of the sensitive information that of necessity must be disclosed in family court papers, but if all of the redaction that should occur with respect to family court papers were to occur, the papers would be rendered meaningless. Somewhere an "unredacted"

[redacted]

hard copy of the papers would have to be available so the attorneys, litigants and judges could actually read the sensitive material set forth in the papers. This would seem to defeat the purpose of electronic filing.

Furthermore, the legislation seems to be directed mainly at making attorneys who file papers on behalf of their clients responsible to redact confidential information. In family court, very few attorneys file papers. Most often pro se litigants file their own petitions, and are then assigned attorneys to represent them. Given this reality, I believe it would be much more likely that court staff would be the de facto enforcers of this confidentiality rule, since they would have to check the petitions for confidentiality violations and reject those that violate the rule.

If New York wanted to require electronic filing of all family court papers, to me the ideal system would operate like online access to a bank account. Those who are entitled to view all of the "account" information (i.e., the class of persons described in 22 NYCRR 205.5) would have the proper security clearances that would allow them access to all of the information in the filings. Those who did not possess the proper security clearances would not be granted any access to any of the " account" information.

The proposed legislation is laudable for many obvious reasons. But as to family court proceedings, it does too much and too little at the same time. The legislation should not apply to family court proceedings.

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