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May 6, 2013

John W. McConnell, Esq.
Counsel
Unified Court System
25 Beaver Street
New York, New York 10004

Re: Comments on Proposed Amendments to Rule 202.5 of the Uniform Rules for Trial Courts

Dear Mr. McConnell:

I am writing with regard to your request for comments on the proposed amendments to Rule 202.5 with respect to redaction of confidential information from court filings. At its April 5, 2013 meeting, our Executive Committee received a report from the Committee on Courts of Appellate Jurisdiction, urging that one uniform set of rules be adopted to govern the redaction of such information; as set forth in the enclosed report, the committee expressed concerns that different levels of the court system might adopt inconsistent rules, resulting in increased time and expense and documents being presented in records to appellate courts that differ from the documents that were presented to the trial courts. After that presentation, the Executive Committee appointed a Working Group of three of its members to review prior Association work to determine whether a specific redaction rule should be recommended. The Working Group's report to the Executive Committee also is enclosed.

This topic was discussed at length in a conference call meeting of the Executive Committee earlier this week. Concerns were expressed that specialized proceedings might require special redaction rules; examples of such proceedings are those under Mental Hygiene Law Article 81 and those under CPLR Article 77 with respect to inter vivos trusts. The attached letter from Anthony Enea, chair of our Elder Law Section, outlines these concerns. As a result, it is the position of our Association that we support uniformity of redaction rules among the courts as a general rule; however, any such rules must take into account the potential need for special rules to govern certain types of proceedings.

I hope that these comments are of assistance. Please do not hesitate to contact me if we can provide any additional information.

Sincerely yours,

Seymour W. James, Jr.

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COMMITTEE ON COURTS OF APPELLATE JURISDICTION

RECOMMENDATION FOR UNIFORM RULES GOVERNING OMISSION AND REDACTION OF SENSITIVE INFORMATION FROM COURT FILINGS

March 25, 2013

The Committee on Courts of Appellate Jurisdiction recommends that the New York State Bar Association urge the adoption of one uniform set of rules governing the omission or redaction of sensitive or confidential information for all civil and criminal cases, applicable in the trial courts and in the appellate courts.

In recent years the expansion of e-filing programs and the scanning of appellate records and briefs have resulted in a trove of electronic documents that are now available on the Internet. Two recent court system initiatives regarding the omission or redaction of sensitive or confidential information from such documents have raised serious concerns among the Committee's members.

First, in November 2012 the Office of Court Administration called for public comment on a proposal by the Chief Administrative Judge's Advisory Committee on Civil Practice to add a new subdivision (e) to 22 NYCRR 202.5, governing omission and redaction of "personal identifying information" from papers filed in civil cases in the Supreme and County Courts. The comment period was to close on January 22, 2013, but was extended to May 7, 2013.

Second, on January 10, 2013, before the comment period on the OCA Advisory Committee's proposed trial court rule closed, the Court of Appeals adopted amendments to § 500.5 of its rules, governing omission and redaction of "confidential and sensitive material" from papers filed in that court. The Court of Appeals rule became effective on February 1, 2013.

The separate approaches taken by the OCA Advisory Committee and by the Court of Appeals differ significantly. For example, the OCA proposal lists nine categories of sensitive data, among which are insurance or financial account numbers, computer password or computer access information, and electronic signature or unique biometric data. However, not all these types of information are listed in the Court of Appeals rule, which requires the omission of all "sensitive material" including but not limited to eleven types of information, such as the names of children and their schools, and the names of employers.

The OCA proposal and Court of Appeals rule are inconsistent with one another as well as with more limited kinds of information specified in Federal Rule of Civil Procedure 5.2(a) and recommended in the 2004 report of Chief Judge Kaye's Commission on Public Access to Court Records. When the Commission recommended that court case records that are filed or maintained in electronic form should be made available to the public on the Internet to the same extent that paper records are available to the public at the courthouse, it recognized that court records can contain information that, if disclosed on the Internet, could be accessed and used for identity theft to the injury of the persons who are the subject of those records. The Commission therefore recommended that a limited class of sensitive or confidential data be omitted or redacted from documents filed in the courts.

At least six entities are empowered to make redaction rules concerning state court records: the Chief Administrative Judge for the trial courts, the four Departments of the Appellate Division for themselves and the Appellate Terms, and the Court of Appeals. Many stakeholders' work will be affected by these rules: judges and justices, the clerks and court system personnel who must accept documents for filing and check them for compliance, the attorneys and litigants who must make the omissions and redactions and pay significant costs of compliance, and court records managers and information technology personnel who will make e-filed or scanned documents available to the public on the Internet.

Inconsistent rules at each level of the court system will result in needless work and expense for all stakeholders and will mean that documents presented in records to appellate courts will often differ from the documents that were presented to the trial courts. Furthermore, requiring the omission or redaction of an open-ended category of "sensitive data" or an extensive defined list of sensitive items will prove extraordinarily burdensome and expensive for attorneys and litigants.

For these reasons, we urge the New York State Bar Association to adopt the position that there should be one set of rules governing omissions and redactions of confidential and sensitive material from court records, applicable to both civil and criminal matters, in all the courts of the Unified Court System. Such uniform rules should be limited in scope and adopted after all stakeholder groups have the opportunity for consultation and comment. Because more and more un-redacted, e-filed court documents are going on the Internet daily, we urge that steps to develop such uniform rules be taken with due alacrity.

Summaries of the divergent proposed and existing rules governing omission and redaction of confidential and sensitive information are provided in the following pages.

The OCA Advisory Committee on Civil Practice Proposal to Add a New Subdivision (e) to 22 NYCRR 202.5

The Chief Administrative Judge's Advisory Committee on Civil Practice has recently proposed amendment of 22 NYCRR § 202.5 (Uniform Civil Rules for Supreme and County Court), requiring redaction of confidential personal information prior to filing papers in civil matters. The comment period on the proposed rule expires May 7, 2013. The OCA Advisory Committee proposed these rules after observing that court papers increasingly are accessed on the internet, personal identifying information is of growing interest to identity thieves, and practitioners are aware of federal and state laws limiting disclosure of sensitive personal data. It noted that New York lacks court rules specifically addressing protection of sensitive personal information in civil court papers.

The Committee's proposal defines "confidential personal information" by using a closed list and expressly excepts matrimonial actions and Surrogate's Court proceedings from the rule's purview. The proposed rule places responsibility for compliance on the parties, requiring that they "omit or redact" the following "confidential" personal information:

(1) a social security number;

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

(3) a mother's maiden name;

(4) a driver's license number or a non-driver photo identification card number;

(5) an employee identification number;

(6) a credit card number;

(7) an insurance or financial account number;

(8) a computer password or computer access information or

(9) electronic signature data or unique biometric data.

New York Court of Appeals
Rule 500.5

The Court of Appeals recently adopted rules regarding the omission or redaction of "confidential" and "sensitive" information, effective February 1, 2013. Section 500.5 of the Court's rules now provide that, to the extent possible, confidential information subject to a statutory proscription against publication shall be omitted or redacted from public documents, and where such information must be included and cannot be redacted, the cover of the document filed shall clearly indicate that it contains confidential material.

Under subdivision (d), the Court's new rules also require omission or redaction of other "sensitive material":

> To the extent possible, sensitive material, even if it is not subject to a statutory proscription against publication, shall be omitted or redacted from public documents. Information of this type includes, but is not limited to:
>
> (1) social security numbers,
>
> (2) taxpayer identification numbers,
>
> (3) financial account numbers;
>
> (4) full dates of birth;
>
> (5) exact street addresses;
>
> (6) e-mail addresses;
>
> (7) telephone numbers;
>
> (8) names of minor children;
>
> (9) names of children's schools;
>
> (10) names of employers;
>
> (11) other information that would identify a person whose identity should not be revealed (e.g., a victim of a sex crime).

Recommendations of the Commission
on Public Access to Court Records (2004)

In 2002 former Chief Judge Judith Kaye appointed a Commission on Public Access to Court Records to examine the sometimes competing interests of privacy and open access to information in court case files. The Commission issued its report in February 2004 recommending that "[p]ublic court case records in electronic form should be made available to the public by the Uniform Court System remotely over the Internet" to the same extent that paper records are available to the public at the courthouse. The Commission observed, however, that in light of the potential for harm to privacy interests and the personal security of individuals who are involved in judicial proceedings that may be occasioned by public disclosure of certain narrow categories of information, such information should not be referred to in court papers and therefore should not become public without leave of court.

Accordingly, the Commission recommended that no public court case records, whether in paper or electronic form, should include social security numbers, financial account numbers, names of minor children, and full birth dates of minor children—similar to the four categories of confidential data set forth in FRCP 5.2(a). It therefore recommended that, without leave of court, no public court case records whether in paper or electronic form, should include the following information:

(1) Social Security numbers

(2) financial account numbers

(3) names of minor children

(4) full birth dates of any individual

It further recommended that to the extent that these identifiers are referenced in court filings, Social Security numbers should be shortened to their last four digits; financial account numbers should be shortened to their last four digits; the names of minor children should be shortened to their initials; and birth dates should be shortened to include only the year of birth. Finally, it recommended that the responsibility for ensuring compliance with these recommendations should lie with the filing attorneys or self-represented litigants.

(In addition, it recommended that the Uniform Court System determine how to protect at risk individuals such as victims of domestic violence and stalking from being identified and located by use of their home and work phone numbers and addresses in public court records.)

Federal Rule of Civil Procedure 5.2(a):
Privacy Protection for Filings Made in the Federal Courts

FRCP 5.2 provides:

(a) REDACTED FILINGS. Unless the court orders otherwise, 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 may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding:

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §2241, 2254, or 2255.

(c) LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIAL-SECURITY APPEALS AND IMMIGRATION CASES. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record:

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) PROTECTIVE ORDERS. For good cause, the court may by order in a case:

(1) require redaction of additional information: or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

To: NYSBA Executive Committee

From: EC Working Group on Redaction of Confidential Information in Court Filings

Date: April 15, 2013

Re: Redaction of confidential information in court filings

Introduction

On April 5, 2013, the Executive Committee approved the Report and Recommendations of the Committee on Courts of Appellate Jurisdiction in support of a uniform set of rules governing the redaction of sensitive or confidential information in documents filed with courts throughout New York's Unified Court System. In connection with the Executive Committee's action, President Seymour James designated David P. Miranda to lead a Working Group to examine and make a recommendation regarding issues relating to the substantive provisions of rules governing the redaction of information from court filings. The Working Group consists of Executive Committee members David P. Miranda, Thomas E. Myers, and Sharon Stern Gerstman; NYSBA Director of Government Relations Ronald F. Kennedy serves as staff liaison. The Working Group was directed by President James to make a recommendation for Executive Committee approval for the purpose of submitting comments on the

substance of such rules, on or before May 7, 2013, the deadline for submission of comments regarding proposed amendments to Rule 202.5 of the Uniform Rules for the New York State Trial Courts. (A copy of the proposed Rule is attached hereto.)

Recommendation

Having examined prior relevant Association policy, and the current position of the NYSBA CPLR Committee on this issue, the working group recommends that NYSBA submit a statement in support of a redaction policy that is consistent with FRCP 5.2 already in place in federal courts. This position is consistent with the NYSBA CPLR Committee's recommendations and with the Executive Committee's position of April 5, 2013 in support of a uniform set of rules governing the redaction of sensitive or confidential information. The recommended NYSBA position is as follows:

NYSBA recommends that the Office of Court Administration in its proposed revision to Rule 202.5 of the Uniform Rules for the New York State Trial Courts adopt the terms of Federal Rule FRCP 5.2, balancing the protection of privacy interests with open access to our courts. A consistent policy throughout the courts in New York will ease the practical burden of

compliance and help to avoid errors. Further, 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. The redaction required by the federal rule is as follows:

FRCP 5.2:

(a) REDACTED FILINGS. Unless the court orders otherwise, 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 may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

Background

NYSBA recognizes and appreciates 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 dissemination, of confidential, or personal and private information. We recognize as well the important countervailing policy favoring open access to non-privileged court files.

In 2007, the House of Delegates approved the report of the Task Force on Electronic Filing. Recommendations regarding E-Filing in New York Courts were set forth in Section IX of the Report. Item "A.11" of Section IX ("Recommendations Applicable to All Courts of Original Jurisdiction"), states:

> 11. All e-filed documents should be accessible to the public, subject to certain limitations.
>
> a. Cases which are sealed should continue to be accessible only to the court, parties and counsel of record.
>
> b. Users should be required to partially redact personal data such as Social Security numbers, date of birth, etc. from all documents. If such information is necessary to a case or controversy, the document should be filed under seal.
>
> c. E-Fliers may designate that a document includes inherently sensitive subject matter. Documents with such a designation should not be available from remote locations to anyone other than the parties and counsel of record, but should be available at the courthouse. Such a designation should be

subject to review by the assigned judge upon the application of any person.

During the 2011-2012 legislative session, the Office of Court Administration (OCA) promoted S.4580, a bill to amend the civil practice law and rules, in relation to confidentiality in papers filed in civil proceedings. (A copy of S.4580 is attached hereto). The Committee on CPLR submitted a Memorandum in Opposition the bill. The substance of the Committee's Memorandum is below:

> This is a measure introduced at the request of the Chief Administrative Judge upon the recommendation of her Advisory Committee on Civil Practice. The purpose is to protect privacy, by preventing the filing of un-redacted documents that contain personal information. Although well-intentioned, and while the State Bar has endorsed privacy protections similar to those applicable to electronic filings in federal court, the terms used in this bill are so broad as to render the measure entirely unacceptable.
>
> The definition of the material that must be redacted ("any information that *may be used* to violate the privacy or to unlawfully reveal or assume the identity of an individual, *or used in a manner that is otherwise prohibited by state or federal law*, including but not limited to...," emphasis added) is overly broad and vague. It also presumes (a) that the term "violate the privacy" has a universal definition, so that all will know what information "may" cause such a violation; (b) that attorneys are fully knowledgeable concerning identity theft so as to recognize the information that "may" enable it; and (c) that attorneys are fully familiar with all state and federal laws, and therefore know what information "may" be used to transgress any of them.
>
> The impact of such broadly used prohibitory terms should not be underestimated. They would make it virtually impossible to use a transcript of deposition as an exhibit to a motion. They would exponentially increase the costs, time and effort of all litigation practice, as attorneys plow through motion papers to make sure they do not reveal others' information, and to make sure that others did not reveal their clients' information. Motion practice to strike various portions of documents filed by an adversary would become a commonplace addition to already burgeoning motion practice. In addition, assembling a complete record on appeal,

> including the trial transcript, would be fraught with the danger of violating the new statute.
>
> Thus, wholly aside from questions concerning the perceived need to protect from revelation some of the specific types of information identified in the bill (e.g., telephone numbers), which are often readily ascertainable from public sources, the broad language used necessitates our disapproval of the bill. Many on the Committee would prefer implementation of a privacy measure that tracks Fed. R. Civ. P. 5.2, which is quite specific and adequately addresses the privacy protection generally found to be necessary and sufficient.

Subsequent to issuing the above Memorandum, Committee members Robert Knapp, David Hamm, and Paul Aloe met with OCA Advisory Committee Chair George Carpinello and OCA Staff Counsel Holly Lutz, to discuss the OCA's S.4580. During that meeting Mr. Carpinello stated that the Advisory Committee would not continue to promote legislation on this topic, but would instead recommend that OCA propose a court rule covering the redaction of confidential information from court filings. Further, Mr. Carpinello indicated that the scope of such a rule would be narrower than S.4580.

In November 2012 the Office of Court Administration called for public comment on a proposal by the Advisory Committee to add a new subdivision (e) to 22 NYCRR 202.5, governing omission and redaction of "personal identifying information" from papers filed in civil cases in Supreme and County Courts. The comment period was closed on January 22, 2013, but later it was extended to May 7, 2013.

On January 17, 2013, the Committee on CPLR submitted to OCA the following comments:

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.)

STATE OF NEW YORK

4580

2011-2012 Regular Sessions

IN SENATE

April 12, 2011

Introduced by Sen. BONACIC -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to confidentiality in papers filed in civil proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil practice law and rules is amended by adding a new rule 2103-b to read as follows:

Rule 2103-b. Confidentiality in civil proceedings. 1. Except in a matrimonial action or as otherwise provided by law or court order and whether or not a sealing order is or has been sought, in a civil proceeding the parties shall redact or keep confidential personal identifying information contained in papers submitted to the court for filing.

2. For the purpose of this rule, "personal identifying information" means any information that may be used to violate the privacy or to unlawfully reveal or assume the identity of an individual, or used in a manner that is otherwise prohibited by state or federal law, including but not limited to a social security number, telephone number, date of birth, driver's license number, non-driver photo identification card number, employee identification number, mother's maiden name, insurance or financial account number, demand deposit account number, savings account number, credit card number or computer password information, electronic signature data or unique biometric data such as a fingerprint, voice print, retinal image or iris image, or medical procedure, diagnosis or billing codes.

3. The court, in response to a motion or on its own motion, may order a party who filed or is submitting a paper to the court for filing to remove personal identifying information from a paper and resubmit a paper with such information redacted or, in accordance with rules promulgated by the chief administrator of the courts, order the clerk to seal the paper, or a portion thereof, containing personal identifying information.

§ 2. This act shall take effect immediately and it shall apply to actions pending on such effective date or commenced on or after such

effective date.

BILL NUMBER: S4580

SPONSOR: BONACIC

TITLE OF BILL:

An act to amend the civil practice law and rules, in relation to confidentiality in papers filed in civil proceedings

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of her Advisory Committee on Civil Practice.

We recommend adoption of a new CPLR rule 2103-b to address privacy concerns in the filing of papers in civil proceedings. There are frequent cases with filed papers involving myriad sensitive personal identifying information including, but not limited to, social security numbers and other numerical identifiers which, if revealed, would violate the privacy of individuals. This measure would further the protection of that information as the court system enters the electronic age, courthouse papers are increasingly accessed by internet services and personal information is of increasing interest to identity thieves.

Generally, personal information is increasingly subject to protection by law (see Public Officers Law §96-a (g) (eff. Jan. 1,2010; added L. 2008, c. 279) and General Business Law §399-dd (6) (eff. Jan. 3, 2009; added L. 2008, c. 279)). However, in New York, court papers are presumptively public once filed with the county clerk or the clerk of court. Court records are presumptively open. See, e.g., Nixon v Warner Communications, 435 U.S. 539 (1978); Danco Laboratories, Ltd. v Chemical Workers of Dedeon Richter, Ltd., 274 A.D.2d 1 (1st Dept. 2000).

Currently, however, there are no statutes addressing generally the protection of the privacy and confidentiality of sensitive personal information in civil court papers. There are certain specific statutes which do address particular information and certain information may be presumptively sealed by statute. Compare, e.g., Mental Health Information - N.Y. Mental Hygiene Law §33.14 (Sealing of records pertaining to treatment for mental illness) with HIV Information - N.Y. Public Health Law §2785 (Court authorization for disclosure of confidential HIV related information)).

This measure would cover only New York's Supreme and County Courts. It defines "personal identifying information" broadly and clearly provides that the rule applies "except as otherwise provided by law or order". Moreover, it expressly excepts matrimonial actions from the purview of the rule. This measure places the responsibility of compliance squarely on the parties in a matter and adopts a mandatory requirement that "the parties shall redact" personal identifying information. The measure omits "address" information from the rule under the rationale that address information is required in many papers and judgments in civil actions. The measure does not allow the inclusion of "limited or partial" sensitive information (e.g., use of the last four digits of a social security number) and we reject this approach as too subjective, unnecessarily opening the door to ancillary litigation and possible disclosure of such information.

The measure makes clear that the court has, sua sponte or in response to a motion, discretion to order redaction or sealing under the Rule 216.1 (22 NYCRR §216.1) standard. Also, in drafting this measure, we have rejected a "good cause shown" standard by which the court might vary the provisions of the rule, and, rather, leaves within the sound discretion of the court the authority to so order a remedy as it deems necessary. In addition, the measure expressly provides that the court has discretion to order redaction and replacement of information in papers filed previous to enactment of the measure and if the court deems it necessary, under the standard of rule 216.1, to order the offending document sealed. Further, the proposal allows the court to "look back" in the case and order redaction of papers already filed in a pending action upon motion or sua sponte.

In developing this measure, we recognize the important report by the Subcommittee on Electronic Court Records, Council on Judicial Administration, New York City Bar Association, entitled "Report Recommending a New York State Court Rule Requiring That Sensitive Personal Information be Omitted or Redacted From Documents Filed with Civil Courts" (February 2, 2010) and the work of the Civil Court Committee, New York City Bar Association.

This measure would have no fiscal impact on the State. It would take effect immediately.

2011 Legislative History: None. New proposal.

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

By email: OCARule202-5-ecomments@nycourts.gov

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

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

Dear Mr. McConnell

I am the Chair of the Elder Law Section of the New York State Bar Association (the "Section") and I am writing on its behalf to comment on the above proposed regulation. The Section applauds the efforts of the Office of Court Administration to help insure the continuing confidentiality of the personal information of litigants. One only needs to open almost any day's newspaper to see the damage that improper access to such information can cause. However, the Section is concerned about the impact that this proposed regulation would have in the context of guardianship proceedings brought pursuant to Article 81 of the Mental Hygiene Law. We are therefore proposing two modifications to the regulation that we believe are necessary in the context of that statute but still consistent with the important goal of the

proposed regulation.

The first modification that the Section proposes is as follows. The Section proposes that the following additional language be added to the regulation.

> In all proceedings brought pursuant to Article 81 of the Mental Hygiene Law, the redaction requirement does not apply to: the last four digits of an insurance or financial account number including, but, not limited to insurance policies, bank accounts, any stock or financial accounts, annuities, and retirement accounts; the last four digits of a social security number; the maiden name of the mother of an alleged incapacitated person; or the maiden name of the mother an incapacitated person. In addition, a guardian appointed pursuant to Article 81 of the Mental Hygiene Law who is charged with property management shall be permitted to include complete insurance and financial account numbers in annual reports, intermediate reports and final reports

The reasons that the section is proposing the addition of this paragraph to the regulation are as follows.

1. The last four digits of account numbers are necessary so that the amount of assets can be verified, accounts which have been subject to abuse can be properly identified and the court examiner's report can be subject to cross examination. One of the key issues in most guardianship proceedings is identifying the nature and extent of the assets of the alleged incapacitated person. Among other reasons, this information is necessary so that the court can set the amount of the bond of the guardian. Without at least the last four digits of account numbers it may be difficult for the court to clarify the nature and extent of the assets. If there are allegations of financial abuse then the accounts which have been subject to abuse need to be identified with specificity. Finally, the court evaluator is required by Mental Hygiene Law section 81.09(c)(5)(ix) to investigate the nature and extent of the assets of an alleged incapacitated person. Without at least the last four digits of account numbers it will not be possible to cross examine the court evaluator about his or her conclusions.
2. The last four digits of social security numbers are often necessary to obtain a TRO on bank accounts. In financial abuse cases it is often

necessary to obtain restraining orders on bank accounts. This is sometimes difficult without at least the last four digits of a social security number.

3. The Mental Hygiene Law often requires that the maiden name of an alleged incapacitated person be pleaded. The name of the mother of an alleged incapacitated person must be pleaded in a guardianship proceeding if the mother of the alleged incapacitated person is alive. See Mental Hygiene Law section 81.07(g)(1). If the mother is using her maiden name the petitioner must be able to use it. In addition, sometimes the mother of an incapacitated person brings a guardianship proceeding for her own child. She obviously needs to be able to use her own name even if she is using her maiden name. In addition, the name of the mother of an incapacitated person who is alive will normally appear in documents submitted after the appointment of a guardian because a parent is normally given notice of all future proceedings. See Mental Hygiene Law section 81.16(c)(3).

4. At the moment, the Mental Hygiene Law requires that complete insurance and financial account numbers be included in initial reports, annual reports and final reports. Under Mental Hygiene Law section 81.31(b)(7), an annual report must contain all of the information required in the account of a general guardian of an infant's property under the Surrogate's Court Procedure Act. Mental Hygiene Law section 81.33(a)-(b) imports the annual reporting requirements into the statute which governs intermediate and final reports. Therefore all accountings in Article 81 proceedings except the initial report must contain the information that is required in an accounting of a general guardian of an infant under the Surrogate's Court Procedure Act. Section 207.40 of the Surrogate's Court rules requires that accounting parties provide all the information that is required on official court forms. The official court forms for the accounts of general guardians ask for account numbers. See this link. http://www.nycourts.gov/forms/surrogates/guardianship.shtml. In order to eliminate the requirement for account numbers in Article 81 guardianship reports, the official Surrogate's Court forms for guardian accountings would have to be changed. The Section would support a rule that permitted the use of the last four digits of insurance and financial account numbers in

Surrogate's Court guardianship accountings. We note that the current form for an Article 81 guardians' annual report on the web site of the Office of Court Administration specifically requires account numbers. See this link. http://www.nycourts.gov/ad3/Examiner/AnnualReportGuardian11-10.pdf

The second change that the section proposes is a clarification. We propose that subparagraph (e)(vii) be modified to read as follows "an insurance or financial account number including, but, not limited to insurance policies, bank accounts, any stock or financial accounts, annuities, and retirement accounts." We believe that this change is appropriate to insure that the term financial account is read as broadly as possible.

Finally, we note that this new regulation would apply to trust accountings under CPLR article 77. This statute is not used frequently but nevertheless, the regulation would create an anomaly. There would be one set of rules for trust accountings in the Surrogate's Court, where these rules would not apply, and another set of rules for substantially identical proceedings in the Supreme Court.

On behalf of the Section I would like to thank you for undertaking this initiative and for considering these comments.

Very truly yours

Anthony Enea
Chair, Elder Law Section
New York State Bar
Association

Supplemental comments on proposed adoption of 22 NYCRR § 202.5(e), relating to redaction of confidential personal information in papers filed in civil matters

May 7, 2013

The New York City Bar Association submitted comments in January on the proposed rule governing redaction of personal confidential information in court papers filed in civil matters. We now write to call attention to the impact of the proposed rule regarding guardianship matters under Article 81 of the Mental Hygiene Law. As we describe below, there is need in these filings to provide extensive confidential personal information (CPI), and the requirement of redaction would impede how those most involved in the guardianships fulfill their responsibilities. As the concerns are similar to those in matrimonial matters, for which special considerations are already acknowledged as necessary regarding CPI and court file access, special considerations also are necessary in guardianship proceedings[1]

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 Alleged Incapacitated Person's (AIP) functional limitations that affect their ability to care for themselves and/or their property. The Guardianship 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 needs a guardian of the person or property.

[1] These comments are submitted by the Association's Committee on Legal Problems of the Aging.

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). If the Court Evaluator has done a thorough job, the Report generally contains detailed financial information vital to the Guardian's ability to safeguard and marshal assets. This is especially important when an IP's assets need to be recovered or prevented from being removed from the State; that is when time is of the essence.

It appears that the proposed rule would require redaction of the aforementioned financial information.

Concerns with Respect to the Proposed Redaction Guidelines

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 rule without referring to account numbers.

By statute, the Petition is released only to the AIP and Court Evaluator. However, under the proposed rule, if the financial and other required information is redacted from the Petition, the Court Evaluator would need to contact the Petitioner to obtain such information and complete his or her investigation. In addition, during the investigation itself, additional financial accounts or creditor accounts may be identified, 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 and can be crucial for, among other things, cross examination and determining the amount of the Guardian's bond.

In addition, attention must be paid to Article 81 guardianship accountings, which must give on an annual basis, a thorough and highly detailed picture of the finances of the Incapacitated Person, including 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, and to provide a means of comparison between accountings from year to year.

If the proposed rule were to be adopted in its present form, Article 81 proceedings would be in many respects impeded. 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 could be hampered, and the utility of the Court Evaluator's report for the Guardian could be reduced. Investigations would take more time and, in contested matters, a trial could not be conducted in a timely manner. On the other hand, we agree that the extensive CPI that is generated in these proceedings must be protected.

In Conclusion

Guardianship proceedings, by their nature, raise similar concerns to matrimonial matters, for which there already is special treatment for CPI and court file access. Hopefully, the concerns raised in guardianship proceedings can be accommodated by court rule, but in any event access to CPI in guardianship proceedings should be limited to appropriate parties. We are happy to work with you to further address this important issue.

OCARule202-5-ecomments - Rule 202-5

From: <AKaplow@[redacted]
To: <OCARule202-5-ecomments@nycourts.gov>
Date: 3/11/2013 1:39 PM
Subject: Rule 202-5

Notwithstanding that such records are sealed, really there out not be a blanket exemption (exception) for matrimonial actions. While birth dates and social security numbers may be needed for support purposes there is no reason to require such information at all - if there is no support to be provided. (That is neither maintenance nor child support.) Moreover, ever where support is awarded - there is no need - and ought be no needed - to include this information on almost every single document filed and certainly not in the judgment - the one document which a litigant may well have to provide to others to effect change of name, etc. Indeed, given the concern re: identify theft, perhaps all the needed information should be required to be set forth in but one submission e.g. the plaintiff's affidavit (if uncontested) or in a separate affidavit of plaintiff if contested. There seems to be no reason to plaster addresses, social security numbers, birth dates on complaints, parties affidavits, findings, conclusions, judgments, etc. Alicia Kaplow

Supreme Court
of the
State of New York

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THOMAS P. ALIOTTA
JUSTICE

May 3, 2013

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

Re: Proposed Rule 22 NYCRR §202.5(e)

Dear Mr. McConnell:

I write on behalf of the Guardianship Advisory Committee ("GAC"). We appreciate the opportunity to comment on the proposed adoption of 22 NYCRR §202.5(e) ("Proposed Redaction Rule"). The GAC reviewed and discussed the proposal at its meeting on April 16, 2013.

The Guardianship Advisory Committee serves as a permanent source of advice and expertise to the Chief Administrative Judge concerning guardianship and Mental Hygiene Law Article 81 matters in the courts. Its membership is comprised of judges, non-judicial court personnel, and members of the private and not-for-profit bar. The following summarizes the consensus of opinion among the members of the GAC.

The GAC firmly believes that Article 81 guardianships should be exempted from the ambit of the Proposed Redaction Rule, as are matrimonial and Surrogate's Court matters, but only if a uniform means is provided – either by court rule or statutory amendment – to safeguard and ensure the confidentiality of personal information necessarily and routinely disclosed in Mental Hygiene Law Article 81 filings.

While the GAC concurs with the previously submitted comments that a general redaction requirement would prevent the flow of necessary and relevant information to court appointees and parties to Article 81 guardianship proceedings,[1] the GAC notes that papers filed in Article

[1] *See* Memorandum submitted by Kim F. Trigoboff, Esq., Ann Pinciss Berman, Esq., and Tammy Lawlor, Esq., dated January 22, 2013; Submission of Miles Zatkowsky, dated February 6, 2013.

81 guardianship proceedings are not uniformly afforded the same confidentiality protection provided to papers filed in matrimonial proceedings. In matrimonial proceedings, court records are unavailable to non-parties except by order of the court [DRL § 235(1)]. In contrast, under existing law, Article 81 guardianship court records may be sealed only upon the court's written finding of good cause [MHL § 81.14(b); 22 NYCRR § 216.1].

If papers filed in Article 81 proceedings are exempted from the redaction requirement, the information contained in those filings would be fully accessible to the public unless and until the court takes action, either *sua sponte* or on motion. Such unfettered access would present a grave, untenable exploitation risk to a highly vulnerable population, especially between the time when papers are first filed and the guardian is commissioned to act, which in some cases can be many months.[2] Further, the rationale for limiting access to matrimonial files – the highly personal and private nature of the information disclosed in those files[3] – equally applies to guardianship files, which should be afforded no less protection.

Thank you for providing this opportunity to comment. Should you have any questions regarding our comments, please do hesitate to contact me.

Respectfully submitted,

Hon. Thomas P. Aliotta
Chair, Guardianship Advisory Committee

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[2]Incapacitated persons are particularly vulnerable to exploitation by those with access to confidential personal information. The Vera Institute Guardianship Project has encountered several such instances. In one instance, the son of an institutionalized elderly woman delivered to her at the facility--after the guardianship hearing and before the final order was signed--several large checks made payable to himself, with a note demanding her immediate signature. In another instance, the "girlfriend" of an elderly man with dementia rushed to several banks demanding withdrawal of all funds on account using a suspicious Power of Attorney. While these abuses were perpetrated by individuals who had access to confidential personal information by virtue of their relationship with the incapacitated person; unlimited public access to confidential personal information in Article 81 files heightens the risk of exploitation.

[3]"The policy behind the rule is that matrimonial matters can involve painful, even embarrassing details, which the parties should have a right to keep private. Absent some overriding importance to the persons who would have access to the file, that privacy should be respected." Practice Commentaries to DRL § 235.1.

BEFORE
THE ADMINISTRATIVE BOARD OF THE COURTS
NEW YORK STATE UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004

TO: John W. McConnell
Counsel

COMMENTS OF INN WORLD NEWS, INC. ON THE PROPOSED ADOPTION OF 22 NYCRR § 202.5(E), RELATING TO REDACTION OF CONFIDENTIAL PERSONAL INFORMATION IN PAPERS FILED IN CIVIL MATTERS.

INN World Report, Inc. ("INN"), a 501c3 broadcast news and research organization, herewith submits its Comments related to the proposals of The Administrative Board of the New York State Courts ("Administrative Board") to adopt amendments to 22 NYCRR ¶ 202.5(E), relating to the redaction of confidential personal information in papers filed in civil matters.

As the result of its recent involvement in a document sealing matter, INN is concerned that necessary language be included in the Administrative Board's amendments to clarify that bank loan documents due to their very nature should not be classified as confidential and proprietary under applicable sealing rules. Further, INN requests that language be included to require a public hearing whenever a matter involving a sealing request is disputed by the parties to the subject litigation in order to assure that interested members of the general public and the press be given the opportunity to attend the hearing in order to assure protection of free speech rights.

Background

INN is headquartered at 56 Walker Street in TriBeCa, and holds a long term lease from 56 Walker LLC, the owner of the premises. As a leaseholder, INN has since 2010 been involved in a foreclosure suit brought against 56 Walker LLC in the New York Supreme Court in Manhattan by MB Financial Bank of Chicago, the principal subsidiary of MB Financial, Inc (MBFI, NASDAQ). 56 Walker LLC has countered that the original mortgage loan as issued by Broadway Bank (also of Chicago) was fraudulent as the product of a Ponzi Scheme, and that MB Bank has not offered any valid proof that it holds the 56 Walker LLC collateral via a valid assignment from the FDIC.

Last July, MB Bank placed on public file with the US Courts' document service (PACER) in an unrelated federal case the control list of collateral files of the 450 loans that the bank maintains it purchased from Broadway Bank in April 2010. 56 Walker LLC subsequently discovered that its collateral file was not included in the list. In reaction, MB Bank directed its attorneys to seek a sealing order in the 56 Walker foreclosure action to remove copy of the full collateral list that had been filed by 56 Walker LLC. The MB lawyers made a phone call to the court, representing the list to contain "highly confidential" and "proprietary" information and asked that the list be sealed. On leaning of the contact with the Court, attorneys for 56 Walker LLC responded, requesting to have an opportunity to be heard. However, the sealing order was signed before a proceeding was scheduled by the Court.

56 Walker LLC informed the Court that the Collateral List was neither "highly confidential" nor "proprietary," based on the following:

1) While personal bank account information is deemed confidential and proprietary under applicable sealing rules, bank loan information is not.

2) The Collateral List as originally assembled and maintained by Broadway Bank was not identified as a confidential document.

3) The Collateral List contains the names of borrowers, loan numbers and amounts and related information on 450 Broadway Bank loans dated prior to November 2009 and therefore is out of date.

4) The Collateral List information on the 450 bank loans became inoperable and non functional immediately upon the closing of Broadway Bank in April 2010.

5) Following and the transfer of the 450 loans from Broadway Bank to MB Bank, the loan information was superseded as MB bank changed all loan numbers to coincide with its system, and made whatever other changes in the list information it deemed necessary and appropriate.

6) The Collateral List was publicly posted by MB Bank in July 2012 on the PACER system and the Collateral List remained on the system until May 2013, without any complaints by the borrowers or any other incidents.

7) Most of the information concerning the real estate and consumer loans on the Collateral List is publicly available from other sources, including county clerks' offices where collateral documents and UCC filings are generally made.

INN would have argued in open court against the request of MB Bank to seal of the bank account information, citing the above facts, if it had been given the opportunity.

Unfortunately, a scheduled hearing was cancelled and therefore the sealing order was adopted without public hearing. To date, MB Bank has provided no explanation why it has sought to conceal the borrowers' names as included on the subject Collateral List.

Request For Rule Amendment and/or Clarification

INN, based on its own experience outlined above, requests that the language of 22 NYCRR ¶ 202.5(E) be amended to state that information which consists of bank loan data, including names of borrowers, loan numbers, loan amounts, and originating bank, should not be classified as "highly confidential," "confidential," and/or "proprietary," and therefore should not be available for sealing under applicable court rules and policies. The presumption should be that bank loan information presented in civil trials should be available for public access. Lists of bank loans do not contain confidential personal information of the type that can be required to be sealed and/or redacted under court orders filed in civil matters.

Request for Procedural Safeguards

Again based on its recent experience, INN requests that the procedural requirements for the sealing of documents in civil matters by New York Courts be amended to require public hearings prior to the adoption of any sealing orders to provide the general public and the press the opportunity to participate in the proceeding.

Conclusion

INN thanks the Administrative Board for the opportunity to participate in this proceeding to adopt amendments to 22 NYCRR ¶ 202.5(E), relating to the redaction of confidential personal information in papers filed in civil matters.

Dated: May 7, 2013

Respectfully submitted,

INN World Report, Inc.
56 Walker Street
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By *Thomas J. Goodman*

Thomas J. Goodman
Its Attorney