NEW YORK CITY BAR

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COMMENTS ON PROPOSED RULE FOR REDACTION OF CONFIDENTIAL PERSONAL INFORMATION IN PAPERS FILED IN NEW YORK CITY CIVIL COURT AND OTHER LOWER COURTS THROUGHOUT THE STATE

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. §208.4 (b), a rule aimed at preventing the unnecessary disclosure of confidential personal information in papers filed in civil matters (the "Proposed Rule") in the New York City Civil Court. These comments are focused on 208.4(b), amending the rules of the New York City Civil Court, but may also be relevant to the parallel rules contained in this same rulemaking proposal for lower courts outside of New York City (District Courts, etc.).

The City Bar's Council on Judicial Administration, in a report released in 2010,[2] recommended allowing the filing of partially redacted Confidential Personal Information ("CPI") under certain circumstances. In 2013 and 2014, the Office of Court Administration's ("OCA") proposed rules governing the redaction of CPI in Supreme and County Courts. The City Bar strongly supported those proposals, with some recommendations. At that time, the City Bar urged OCA to extend the CPI rules to the New York City Civil Court. We commend OCA for proposing to extend the CPI rule to the Civil Court. The City Bar supports the Proposed Rule, subject to the suggestions and comments set forth below.[3]

OCA's public notice invites comments regarding "whether there are specific factors that should be take into consideration in adopting and implementing appropriate redaction provisions for each court, for different types of action and proceedings, and for self-represented litigants." The New York City Civil Court is characterized by a large volume of cases to collect consumer debts.[4] Over 30% of the Civil Court docket consists of consumer credit cases which, require at least partial disclosure of financial accounts. The Court is also characterized by the large

[1] This report was authored by the City Bar's Council on Judicial Administration and Civil Court Committee.

[2] *See* Comments of the New York City Bar on Proposed Rule for Redaction of Confidential Personal Information, dated January 28, 2014 and attached hereto as Exhibit A.

[3] For additional background and statements in support of the rule please refer to, Exhibit A. Some of the City Bar's suggested revisions to Rule 202.5(e) were incorporated into the final Supreme and County Court rule and are reflected in 208.4(b).

[4] This type of case is formally defined in section (4) of the Proposed Rule as 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."

numbers of *pro se* litigants – particularly in housing and consumer debt cases. Civil Court also hears name-change petitions. These comments address how the CPI rule should be modified to better meet the needs of the actions, proceedings and people that populate New York City Civil Court – and, likely, its sister courts throughout the state.

1. THE LIMITED EXCEPTION FOR CONSUMER DEBT CASES IS NEEDED, AND THE RULE SHOULD BE MODIFIED TO ALLOW FURTHER DISCLOSURE BECAUSE ACCOUNT IDENTIFICATION IS MATERIAL IN CONSUMER DEBT CASES

As we said in our 2014 Comments, the majority of actions arising out of consumer credit transactions, which are the subject of subdivisions (1)(iv) and (4) of the Proposed Rule, are filed in the Civil Court. Although the Rule generally requires redaction of financial account numbers, such as credit card account numbers, section (4) allows the last four digits of the account number to be disclosed in court papers. This is an important exception to the redaction rule because an account number is needed to identify the specific debt that is the subject of the lawsuit and determine whether the named defendant is responsible for the debt. Disclosure of the last four digits of the account number will help defendants to verify debts that are legitimately owed. Many consumers today have several credit cards and can have more than one issued by the same bank. Moreover, account numbers change when banks merge or when they acquire business from other entities.

Partial disclosure of an account number in consumer debt cases is also important for avoiding error. In the experience of our members who practice in this area, the number of errors made in consumer debt cases is significant. Not only do debt buyers purchase large portfolios of defaulted credit card and other consumer debt, but the purchasers often re-sell the debt. There are cases of mistaken identity (suing someone with the same name as the debtor) or even suing upon a debt that was already paid (often, when another debt buyer owned the account). In this regard, the rule explicitly provides a means to allow full disclosure of the account number or CPI either *in camera* or under seal, when the defendant denies responsibility for an account. The provision, however, is one-sided. It specifies that if the defendant denies responsibility for the account, "the **plaintiff** may...amend his pleading...." [Emphasis added.] There is no provision to allow a defendant to provide CPI when it would help to resolve the issue of responsibility for the account.

In addition, there are times when a defendant may want a full financial account number to appear in a public court document. When a defendant's responsibility for a debt is resolved by court order, judgment or stipulation, the defendant should leave court with proof that the debt is no longer in default. To prove to a credit reporting agency that a debt is not in default, a defendant would need an official court document with the full account number.

While reducing the risk of identity theft, which is the purpose of the Proposed Rule, is a laudable goal, the damage that can be caused to a consumer if the plaintiff has sued the wrong person or sued on the wrong account can be profound. When a credit card account is in default, the creditor closes the account well before the creditor or its successor commences a collection lawsuit. Thus, the accounts sued on are no longer active accounts, and the account numbers

cannot be used to incur new charges. If, however, the debt is invalid, it can cause lasting damage to a person's credit, employment, and housing prospects.

To accommodate the needs of defendants in actions arising from consumer credit transactions for full disclosure of financial account numbers, the rule should be modified to allow disclosure upon consent of the defendant. As currently drafted, the Rule would allow a defendant to obtain inclusion a full CPI only by making a motion to the court. *Proposed* Rule 208.4(b)(2) and (3). Most defendants in consumer cases are *pro se* and, often, quite unsophisticated. It would impose a serious burden to require such defendants to make a motion to allow inclusion of CPI. Thus, a provision allowing disclosure upon consent of the defendant should be written into the rule.

2. PROPOSED RULE 202.4(B) SHOULD BE APPLIED CONSISTENT WITH EXISTING CCM-172 REGARDING THE REDACTION OF SOCIAL SECURITY NUMBERS

Under section (1)(i), all but the last four digits of a social security number must be redacted from a court paper. The New York City Civil Court has a well-established requirement that its clerks redact social security numbers from court papers. Chief Clerk Memorandum 172 ("CCM-172"), issued by the Chief Clerk of the New York City Civil Court. CCM-172 specifies that when a paper presented for filing contains a social security number, the clerk "[u]sing a black marker cover the numbers completely." In this regard the City Bar urges that the Proposed Rule not serve to override or undercut the efficacy of CCM-172. Particularly because of the high numbers of *pro se* litigants, it should be clear that the Clerk may still accept papers with full social security numbers for filing, but should redact all but the last four digits of the number.

3. FULL BIRTH DATES AND MINORS' FULL NAMES MUST BE DISCLOSED ON NAME CHANGE APPLICATIONS

The Proposed Rule requires the redaction of an individual's date of birth, except for the year, and redaction of a minor's full name, except for initials. This requirement would impede the hearing of name change applications in the name change part. Specifically, complete birth dates are currently required as judges must compare various identifying documents to be sure that the birth date on the documents matches, especially because people often have different names (or variations of a name) listed on their documents and the date of birth is the only consistent identifier. Such information is necessary with regard to both adults and minors. More problematic is the language stating that a minor's full name may not appear on a court document. This requirement would be impossible in the name change process, as the child's full name needs to appear in order for the court, the parties, and the public to understand the name the child wishes to use. (Both the current name and proposed new name are listed in the caption.) The child's address is usually waived for publication of the name change, but typically the new name of the child will appear in the publication.

4. SUGGESTIONS TO ASSIST *PRO SE* LITIGANTS

Finally, the City Bar urges OCA to make special efforts to protect unrepresented and unsophisticated litigants from the risk of identity theft and to assist them in complying with the new redaction rule. 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.

- Training of court personnel in the clerk's office and in the courtrooms to explain the rule to litigants.

- Issuance of an Advisory Notice to encourage judges to inform litigants about the risks of including unredacted CPI in court filings but also to provide guidance on the minimal disclosure necessary when material to the case.

July 2015

Mobilizing for Justice Since 1963

MFY LEGAL SERVICES INCORPORATED

Via email to: rulecomments@nycourts.gov

July 27, 2015

John W. McConnell
State of New York
Unified Court System
25 Beaver St.
New York, NY 10004

Re: Proposed Adoption of new rule requiring redaction of confidential personal information in papers filed in civil matters in the New York City Civil Court, District Courts, City Courts Outside New York City, and Town and Village Justice Courts.

Dear Mr. McConnell,

MFY Legal Services, Inc. (MFY) submits this letter regarding the Office of Court Administration's proposed rule regarding redaction of confidential personal information. MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for over 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice, counsel, and representation to more than 10,000 New Yorkers each year. The attorneys in MFY's Consumer Rights Project (CRP) defend and advise low-income consumers sued in New York City Civil Court and participate regularly in the CLARO consumer debt clinics in the New York City Civil Courts.

We write to support and reiterate the submitted comments by the New York City Bar on the "Proposed Rule for Redaction of Confidential Personal Information in Papers Filed in New York City Civil Court and Other Lower Courts Throughout the State" (attached). In particular, we strongly reiterate the Bar's recommendation that the rule be modified to allow the disclosure of a

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full account number when agreed to by a defendant, which is particularly important for credit reporting purposes. We also support the Bar's suggestion that clerks be permitted to continue to redact social security numbers that are submitted for filing, in compliance with CCM-172. And finally, in light of the high numbers of pro se litigants who appear in Civil Court, we support the Bar's suggestion for the court to implement procedures and take proactive steps to ensure that all litigants, clerks, and judges are aware of and understand this new rule.

Thank you for the opportunity to comment on this new rule. If you have any questions or if would like to discuss the rule further, please feel free to contact us.

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[redacted]

From: J. Kelley Nevling, Jr. <knevling@llf-law.com>
Sent: Friday, May 29, 2015 4:03 PM
To: rulecomments
Subject: RE: Redaction

Thank you for sending me the proposed rule governing redactions in lower courts.

The proposed redaction rule defines "CPI" (the information that must be redacted) to include, inter alia, a taxpayer identification number, such as a social security number or EIN, "except for the last four digits," and various other kinds of sensitive financial information, such as a bank account number, credit card or debit card number, brokerage account number, etc., "except for the last four digits or letters" (I left out the "thereofs" because they are unnecessary. Only a lawyer could love them. Is there really any ambiguity as to "whereof" you are speaking?).

In my view the exception for the last four digits is not a good idea. The last four digits are routinely used for identification purposes, and so making them public defeats the purpose of the rule.

Maybe it is okay to make public the last two digits, but I'd prefer to see a rule that precluded any disclosure at all in publicly filed documents.

This is a particularly serious problem with respect to Social Security numbers. From what I have read, a sophisticated identity thief can figure out all but the last four digits of your Social Security number pretty easily. Until 2011, the first three digits reflected the location of the Social Security Office that issued the card, usually the one nearest to the place where you were born. My brother, my sister and I were born in the same town, so the first two digits of our SSNs are identical. The first three digits of my brother's and my sister's SSNs, born six years apart, are identical. So people who have stolen a lot of SSNs can usually deduce what the first three digits of your SSN will be if they know when (within a few years) and where you were born. I think that maybe you can even buy this information on the internet, if you know where to shop.

The fourth and fifth digits were until 2011 assigned in a certain sequence: odd numbers from 01 to 09, then even numbers from 10 to 98, then even numbers from 02 to 08, then odd numbers from 11 to 99. But if an identity thief has the last four digits of your SSN and can deduce the first three digits, how long do you think it takes a computer to try all of the possibilities for the missing two digits? Maybe a couple of minutes? So disclosing the last four of your SSN creates a significant risk of identity theft.

Don't take my word for it, though. Ask experts on identity theft, maybe at banks or credit card companies. Let's see what they say.

Credit card numbers are not as much at risk, because they have fifteen or sixteen digits that are not assigned according to a formula. The first number denotes the type of card – "3" for American Express, "4" for a Visa card and "5" for a MasterCard – but maybe after that the numbers are more random. Still, my credit card company routinely gives me access to my financial information after I've called in and entered my last four digits.

By the way, the rule should also require redaction of Medicare numbers. A person's Medicare number is the same as his or her Social Security number, plus a letter, so this is a big loophole in the proposed rule.

I might also note that the first sentence of subsection (4) of the proposed rule is redundant, since you have already excluded that last four digits or letters from the definition of CPI. This is not a serious flaw in the proposed rule, though. It is just sloppy drafting.

I know a little about the protection of confidential information as a result of my experience in representing banks in federal cases involving attempts by judgment creditors of foreign countries to execute on funds held in blocked bank accounts. In most of these cases, the banks have sought a protective order in order to preserve the financial privacy of their customers. The federal courts have generally been willing to enter orders to the effect that information such as bank account numbers and the identity of parties to bank accounts or to wire transfers or other transactions should be redacted from publicly filed documents, that the banks should be allowed to file such information under seal, that the information filed under seal should be disclosed to any judgment creditor, his or her attorneys, court personnel, expert witnesses and certain other persons, once they have agreed to be bound by the protective order (court personnel, of course, need not sign such an agreement), and that information about a particular bank account, wire transfer or other transaction can be disclosed to any person who is or is believed to be a party to, or have an interest in, the account, transfer or transaction. This works pretty well in practice, and it provides much better protection against identity theft than your proposed rule. Of course, I must admit that some judges have refused to enter such orders and have instead insisted that everything in such cases be made a matter of public record except for the information protected by Rule 5.2 of the Federal Rules of Civil Procedure.

Subsection (4) of the proposed rule indicates that you are open to having sensitive information filed under seal. All I am suggesting is that the rule should provide that all of the digits of sensitive numbers must be filed under seal when their inclusion in court papers proves necessary.

Actually, a simpler approach than the one you have taken in subsection (4) would be to provide that if the defendant in a consumer credit case or collection case appears and denies responsibility for an account, the plaintiff must provide the account number in question to the defendant in response to a suitable discovery request, and may do so without a discovery request at any time. That limits the disclosure to one person. If the defendant then continues to deny responsibility for the account, the plaintiff should be allowed to disclose the number to the court and court personnel in documents filed under seal, and to disclose that information to jurors, expert witnesses, other witnesses and other persons as authorized by the Court in its discretion, subject to such restrictions as the Court may impose.

The state court system seems to be gun-shy about allowing documents to be filed under seal, and with good reason. It is important that the American system of justice should be open to public scrutiny. Such scrutiny, however, need not apply to people's social security numbers, credit card numbers, bank account numbers, etc. There is absolutely no danger that the filing of such information under seal will undermine the public's right to know. Cessante ratione legis, cessat ipse lex.

If you would like, I could provide you with sample sealing and protective orders that you could use as drafting models to create a standard form. There is, for instance, a carefully negotiated protective order in the Levin case, 09 Civ. 5900 (S.D.N.Y.), although it was amended twice before we arrived at a formulation that everyone could agree to.

Now, if you follow my suggestions, the rule for Civil Courts in NYC will not be precisely parallel to Rule 202.5. But what matters more – to do it the same way or to get it right? A foolish consistency is the hobgoblin of little minds, said Ralph Waldo Emerson. And, of course, Rule 202.5 could be changed as well. Kelley

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From: rulecomments [mailto:rulecomments@nycourts.gov]
Sent: Friday, May 29, 2015 11:18 AM
To: J. Kelley Nevling, Jr.
Subject: RE: Redaction

Dear Mr. Nevling:
Thank you for taking the time to comment on this proposal. Attached for your reference is the proposed redaction rule.

From: J. Kelley Nevling, Jr. [mailto:knevling@llf-law.com]
Sent: Thursday, May 28, 2015 2:56 PM
To: rulecomments
Subject: Redaction

I gather that there is a proposed rule requiring redaction of certain personal information in Civil Court.

I believe that it is a bad idea to have a rule that calls for the redaction of all but the last four digits of one's Social Security number or credit card. Every time I call one of my credit card companies (I have eight credit cards), I am asked for the last four digits of my Social, as a way of identifying me. Making that information public is therefore very dangerous. Credit card companies also often use the last four digits of one's credit card to identify callers. Why do you need to make public any of the digits of an SSN or credit card number? If there is some reason for that, why would not the last two digits suffice? Your proposed rule does not offer adequate protection from identity theft.

It seems to me that the better procedure is to refer to bank accounts and credit cards as "Account A," "Credit Card X," etc., and then to provide for the filing of an Appendix to a court paper, under seal, that identifies the account number in question, in those very rare cases where such information is required. Certainly it is never necessary to identify account numbers in a pleading. Maybe in a turnover motion in a judgment enforcement proceeding, or on a summary judgment motion in an action to assert ownership of funds held in joint name in a bank account, or in a bankruptcy filing where the debtor must list all assets, but that can be dealt with by filing under seal. Kelley

J. Kelley Nevling, Jr.

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[redacted]

From: Rogers, Susan (Law) <srogers@law.nyc.gov>
Sent: Wednesday, July 15, 2015 1:03 PM
To: rulecomments
Subject: Amendments of 22 NYCRR 202.5(e) and 202.16

I completely agree to the amendments of 22 NYCRR 202.5(e) and 202.16. It's wonderful that personal information is now being protected on a more serious level from unscrupulous persons and the laws for infringing upon this personal information should be implemented to assure the punishment will fit the crime and ignorance of the law is still no excuse for violating these laws.