

The logo for the New York City Bar, featuring the words "NEW YORK" and "CITY BAR" in a bold, serif font, centered between two thick black horizontal bars.

COMMENTS OF THE NEW YORK CITY BAR ON PROPOSED RULE FOR REDACTION OF CONFIDENTIAL PERSONAL 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 confidential personal information in papers filed in civil matters (the “Proposed Rule”).

The City Bar strongly supports the Proposed Rule, subject to the suggestions and comments 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 matrimonial and Surrogate’s Court cases and for excepting the last four digits of account numbers in consumer credit transaction cases.

The City Bar’s Council on Judicial Administration, in a report released in 2010,² recommended allowing the filing of partially redacted CPI under certain circumstances and also suggested that a statement of purpose be included in the rule. The City Bar believes that promulgation of a rule sooner rather than later is important and is therefore prepared to support the Proposed Rule, even though it omits these provisions. We suggest, however, that the Office of Court Administration (“OCA”) consider those provisions for a potential future amendment, depending on experience with the Proposed Rule when implemented. The rule proposed in our 2010 report is attached as Exhibit “B” for ease of reference.

1. THE PROPOSED RULE SHOULD APPLY TO CIVIL COURT PROCEEDINGS

Although the Advisory Committee comments to the Proposed Rule speak of “Civil Proceedings,” Rule 202.5 only 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 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.

¹ This report was authored by the City Bar’s Council on Judicial Administration.

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.

2. EDITORIAL SUGGESTIONS

Our black-line of the Proposed Rule contains certain suggested edits to enhance clarity and for the sake of consistency. These include consistent and capitalized use of the term “Confidential Personal Information” and the addition of the word “Omission” to the title of the rule since its body permits parties to “omit” CPI as an alternative to redacting.

3. DEFINITION OF CONFIDENTIAL PERSONAL INFORMATION

The City Bar appreciates the Advisory Committee’s desire to have the Proposed Rule be as consistent as possible with the redaction requirements of section 500.5 of the Rules of the Court of Appeals. We believe, however, that the practicalities of trial level practice and filing volumes require a somewhat more narrow definition of CPI than might have been deemed appropriate for Court of Appeals filings.

In that connection, we certainly concur with the Advisory Committee’s recommendation that e-mail addresses not be included in the definition of CPI. E-mails are simply too often attached to civil filings for a redaction requirement to be practical. For much the same reasons, the City Bar also believes four other categories of information that are now included in the Proposed Rule’s definition of CPI should be eliminated. These are “names of employers,” “exact street addresses,” “telephone numbers” and “names of children’s schools”.

Requiring parties to omit the names of employers and names of children’s schools seems both unnecessary and problematic. First, the name of an employer is not a unique identifier and does not seem especially prone to identity theft abuse. We can also foresee many situations in which the name of an employer is highly relevant to a civil filing – most obviously in employment cases where the employer is named as a party. Likewise, so long as the names of minor children are redacted from the filings, we see little justification for the wholesale redaction of school names since the child’s identity is protected. We can also foresee situations where such information will be relevant to a civil filing without posing a threat of identity theft or other abuse.

Admittedly, exact street addresses and telephone numbers present closer cases. But we are concerned that there are just too many situations in which such information is relevant to a civil pleading or in which such information is part of an email or other document attached to a filing and redaction would be a serious burden. Indeed, read literally, even the addresses and phone numbers of counsel for the parties would have to be redacted under the Proposed Rule, as now framed (of course, we recognize that is not the intent). Possible compromises include requiring redaction only for exact street addresses and telephone numbers of natural persons or including only home and/or cellular phone numbers in the definition of CPI. On balance, however, we favor omitting these terms entirely from the CPI definition.

Our final suggestion on the CPI definition is to delete the catch-all: “other information that would identify a person whose identity should not be revealed (e.g., victim of a sex crime).” While we understand the desirability of keeping such information confidential, we are concerned that the open-ended nature of this provision undermines the goals of specificity and certainty,

which underlie the decision to adopt a “closed” definition of CPI in the first place.³ We also believe that information concerning, for instance, the victim of a sex crime is protected under other laws and rules and/or as a matter of prosecutorial policy.

4. OTHER SUGGESTIONS

With regard to sealing of documents, 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 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 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.

January 28, 2014

³ Issuance of a rule that does not include an “other information” category could be accompanied by the establishment of a committee to monitor implementation of the rule with regard to the need to add or eliminate specific categories of CPI and possibly recommend further rule-making.

Exhibit A

Proposal

§ 202.5 Papers Filed in Court

(e) Omission or Redaction of Confidential Personal-Identifying Information. (1) Except in a matrimonial action or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law or as otherwise provided by rule or law or court order and whether or not a sealing order is or has been sought, 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~~Confidential Personal Information means: (i) social security numbers; (ii) taxpayer identification numbers; (iii) financial account numbers; (iv) full dates of birth; or ~~(v) exact street addresses;~~ (vi) telephone numbers; ~~(vii)~~ (v) names of minor children; ~~(viii) names of children's schools;~~ (ix) names of employers or (x) other information that would identify a person whose identity should not be revealed (e.g., victim of a sex crime).

(2) The court *sua sponte* or on motion by any person may order a party to remove ~~confidential personal information~~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~~Confidential Personal Information in accordance with ~~rules promulgated by the chief administrator of the courts~~the requirement of 22 NYCRR § 216.1 that any sealing be no broader than necessary to protect CPI; for good cause permit the inclusion of ~~confidential personal information~~Confidential Personal Information in papers; may order a party to file an unredacted copy under seal for *in camera* review 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~~other 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~~Confidential Personal Information under seal in accordance with rules promulgated by the chief administrator of the courts.

Exhibit B

§ 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)~~(v) an employee identification number; ~~(vii)~~(v) a credit card number; ~~(vi)~~(v) 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.



Committee on Civil Practice Law and Rules

Comments of the NYSBA CPLR Committee re Confidentiality Redactions

CPLR #7

February 4, 2014

The Committee has reviewed the latest 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 (Memorandum dated November 22, 2013). The Committee had previously issued Report No. 1 (dated January 17, 2013) with respect to OCA Advisory Committee Proposed Rule Published for Comment, dated November 20, 2012, after careful consideration of that proposal as well as proposals raised by others (for example, a proposed amendment to Rule 670.10.3, Rules adopted by the New York Court of Appeals and the 2004 Report of the Commission on Public Access to Court Records ["Commission Report"]). After due consideration, our Committee recommended that New York model its rule on Federal Rule of Civil Procedure 5.2, addressing this issue.

Then on May 6, 2013, Seymour W. James, Jr. Esq., then-President of the New York State Bar Association, wrote to Mr. McConnell as follows:

This topic [redaction of confidential information from court filings] 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.

A copy of Mr. James' letter is submitted herewith, with all attachments thereto, including this Committee's January 17, 2013 comments to OCA.

Then on November 22, 2013 the OCA filed its latest proposed rules on this subject. These now add an exception for "a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law" -- but require redaction of more types of "confidential" information than did the 2012 proposal.

Unfortunately, the concerns we raised in our prior Report are heightened, rather than alleviated, by the most recent proposal. Although we fully appreciate the concern underlying the proposal, to prevent untoward dissemination of confidential personal information, we must reiterate significant countervailing concerns which continue to have scant recognition or appreciation: the costs and ultimate ineffectiveness of the proposed redactions.

The costs involved are dramatic. 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 an additional burden for lawyers, but translates directly into significant added expense to clients, not to mention additional delay in the filing of documents.

The most recent proposal adds several new categories of information that are deemed "confidential" and thus must be redacted. Among the information proposed to be restricted are

“exact street address” (Proposed 202.5[e][1][v]), telephone numbers (Proposed 202.5[e][1][vi]), names of minor children (Proposed 202.5[e][1][vii]), names of “children’s schools” (Proposed 202.5[e][1][vii]), and “names of employers” (Proposed 202.5[e][1][ix]).

None of this information is truly confidential and is the kind of information that can be obtained at little or no cost from public records, phone directories, readily-available public access websites, or from alternative sources over which the courts have no control. Likewise, the names of children and where they attend school is known to the entire school system, including teachers and fellow students, and the name of one’s employer is typically not secret or confidential.

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 while 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. The information that would have to be redacted from court filed documents is not the kind of information that leads to identity theft.

The redactions that would be required under this rule would mandate removal of information that is important and relevant. For example, an address is frequently included in papers, often appearing on the summons, the affidavits of service and the final judgment. If an address is omitted from an affidavit of service, then the defendant (who may have only learned of the action when his or her accounts are frozen) cannot ascertain where the papers were served based on the court file. If an address of a defendant is omitted from a judgment, there is no way, from the court file, to determine if an individual who has the same name as the judgment debtor, is the judgment debtor. The name of an employer, where it appears in a court

document, is usually imperative to understanding the document. If a summons omits the phone number of the filing attorney (literally required under the proposed rule), the defendant or his counsel cannot even contact plaintiff's counsel.

If papers were redacted in the manner that would be required under this rule, there would not only be substantial burden and expense, but litigation papers would be replete with inappropriate redactions and not easily understood. While the Committee understands the need to prevent identify theft, the proposed rule goes far beyond that purpose and runs counter to the public policy of open court proceedings.

The Committee understands that the revised proposal seeks to conform to the recent Court of Appeals rule. While the Committee supports uniformity, it believes that the Court of Appeals should adopt a rule similar to Fed. Rule Civ. P. 5.2 (and the Committee notes that the federal Courts of Appeals rely on Fed. Rule Civ. P. 5.2). In any event filings in the Court of Appeals are relatively rare; the burden that would be placed on redacting a record at that level would affect relatively few cases, and parties generally understand that there are additional burdens when appearing before the New York Court of Appeals.¹ The Committee notes that the Court of Appeals rule was adopted without the opportunity for public comment. Applying these additional categories statewide, in the view of the Committee, makes no sense.

After due consideration, the Committee respectfully submits that the newly-proposed measure goes too far, in that it is likely to come at too great a sacrifice to the time and finances of litigants, requires inappropriate redactions and runs counter to the concept of open court proceedings.

¹ Ironically, section 500.5(d) of the Court of Appeals Rules could make it more difficult for the judges to determine if recusal is warranted by eliminating identifying information about parties who are individuals with names familiar to a judge. This runs counter to the extensive disclosure required of corporate parties set forth in section 500.1(f) of the Court of Appeals Rules to address recusal where corporations are involved.

The Committee continues to favor adoption of the terms of the Federal Rule FRCP 5.2, a more limited rule, with provisions permitting the Court, in the exercise of discretion in particular matters, to provide for redaction of additional information. (The new rule could still include the exceptions set forth in §202.5(e)(1) of the November 22, 2013 proposal, including those for “a matrimonial action or a proceeding in surrogate’s court, or a proceeding pursuant to article 81 of the mental hygiene law”) Indeed, the existence of the federal rule itself supports our adoption of that rule as the generally applicable 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). Other than labeling the Federal rule “limited,” no adequate explanation is given in the proposal as to why “New York [should] lead the way” in financially and temporally burdening those using its judicial system by forcing them to redact additional information.

Persons Who Prepared the memo: David B. Hamm, Esq. and Paul H. Aloe, Esq.

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

2013



**New York State
Association of County Clerks**

MEMORANDUM

January 24, 2014

To: Office of Court Administration
Via email (<mailto:OCARule202-5-ecomments@nycourts.gov>)

From: Elizabeth Larkin
President, NYSACC
Cortland County Clerk

CC: New York State County Clerks Association
Via Email (nyscountyclerks@nysac.us)

Re: Revised proposed adoption of 22 NYCRR 202.5(e) of the Uniform Rules for Supreme and County Court, relating to redaction of confidential personal information in papers filed in civil matters.

After review, the New York State Association of County Clerks supports the proposed revised court rule as presented.

✓ . /

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January 27, 2014

John W. McConnell, Esq.
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25 Beaver St, 11th Fl
New York, NY 10004

E-mail Address- OCARule202-5-ecomments@nycourts.gov

RE: Comment to Proposed Rule 202.5- Redaction of filed papers

Dear Mr. McConnell

Please have this letter constitute my comment and analysis related to the proposed Rule 22 NYCRR 202.5.

I am an attorney who primarily represents credit unions and medical service providers in the collection of consumer debts. I have been practicing for 24 years, and have experience relative to identification issues in both pre-Judgment and post-Judgment matters. My comment basically addresses the proposed redaction of date of birth and address information.

Full dates of birth- this information is relevant to confirm the identity of a person served. We usually forward papers for service in the Buffalo area to the Sheriff's Department. To confirm identity, the Sheriff is usually successful obtaining the actual date of birth of the individual served. All process servers are also encouraged (and actually required by CPLR 306) to obtain dates of birth or approximate ages of the recipient of papers. This promotes certainty and reliability. The Affidavit of Service is required to be filed in Court. If there is any question as to the propriety of service, the Defendant, Defendant's attorney, and/or Court personnel can and should be able to readily refer to the filed Affidavit to obtain information as to the identity of the person served.

In addition to age information on the Affidavit of Service, we also place date of birth information on a Civil Warrant. The Warrant is often required due to the failure of a Defendant or witness to comply with a Subpoena after being ordered to do so by the Court. Again, the date of birth information confirms that the Court and Sheriff are aware of the identity of the individual subject to the Warrant.

Exact street addresses similar to the above are not included on judgments, street addresses
information on judgments has proven to be almost essential for 3rd parties to confirm the identity of
the judgment debtor, especially when the judgment debtor is a corporation. The address of the
se Defendant, the address is also listed on the Affidavit of Mailing relative to any Motion filed in
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WILLIAM ILECKI

Exact street addresses- similar to my analysis relative to process service and enforcement of subpoenas, the street address is essential to confirm identification and propriety of service. For *pro se* Defendants, the address is also listed on the Affidavit of Mailing relative to any Motion filed in Court.

Additionally, since social security numbers are not included on Judgments, street address information on Judgments has proven to be almost essential for 3rd-parties to confirm the identity of a Judgment-Debtor, especially when the Debtor may have a common name. This applies to 3rd parties determining credit scoring or credit granting, as well as title clearance for potential Judgment liens.

The Defendant's address is also currently included on the Summons to confirm the correct identity of the Defendant subject to the action, and also to confirm the proper venue, especially in consumer credit transactions. The Plaintiff's address is often required to be disclosed pursuant to CPLR 305.

Thank you for your attention. If requested, I would welcome the opportunity to further assist in your consideration of any proposed modifications.

Very truly yours

CHIARI & ILECKI, LLP



WILLIAM ILECKI

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January 26, 2014

OCARule202-5-ecomments@nycourts.gov

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 1004

Dear Counsel:

I am an attorney practicing before the courts of this State now for over thirty years. Please accept my comments respecting the Advisory Committee on Civil Practice's revised amendment of 22 NYCRR Section 202.5(e), relating to the redaction of confidential personal information ("CPI") in papers filed in civil matters.

I first note that, in a previous round of public comment, the New York County Lawyers' Association Civil Practice Section recommended that the rules governing the Civil Court should be similarly amended for filings "in ... action[s] arising out of a consumer credit transaction," the vast majority of which are brought in Civil Court. However, the Advisory Committee's revised redaction proposal does not address this recommendation.

Accordingly, I respectfully submit that the rules governing papers filed in the Civil Court also should be identically amended to require that certain personal identifying information be redacted prior to filing.

Respectfully submitted,

/s/ Mitchell B. Nisonoff
Mitchell B. Nisonoff

From: Robert Akerman <robert.akerman@gmail.com>
To: "OCARule202-5-ecomments@nycourts.gov" <OCARule202-5-ecomments@nycourts.gov>
Date: 11/29/2013 7:37 AM
Subject: Rule 202-5 comment

I highly recommend implementation of this new rule as it would surely act as a safeguard and reduce instances of identity theft. In this day and age any protection afforded to an individual is more than welcome and necessary.

Robert Akerman